Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION RECORD OF THE PRIVACY COMMISSIONER OF CANADA

(pursuant to Rules 109 and 369 of the *Federal Courts Rules*)

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Respondent

NOTICE OF MOTION

TAKE NOTICE that the Privacy Commissioner of Canada will make a motion to the Court in writing pursuant to Rule 369 of the *Federal Courts Rules*.

THE MOTION IS FOR:

1. An Order, pursuant to Rule 109 of the *Federal Courts Rules*, for leave to intervene in these proceedings.

2. Such further relief as counsel may request and as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. Under Rule 109 of the *Federal Courts Rules*, the Court may, on motion, grant leave to any person to intervene in a proceeding.

2. In this application, the Applicant seeks judicial review of a decision of the Canadian Transportation Agency ("CTA") not to disclose certain information to the Applicant in response to the Applicant's request to view documents obtained by the CTA in a particular adjudicative proceeding. The Applicant challenges the CTA's reliance on the *Privacy Act* in refusing to disclose the information at issue and asserts that the CTA did not comply with the open court principle.

3. This application raises questions of law regarding the interpretation of various provisions in the *Privacy Act* as well as the interaction between the application of the *Privacy Act* and the open court principle.

4. The Privacy Commissioner of Canada has direct knowledge, experience and expertise in interpreting and applying the *Privacy Act*, which would assist the Court.

5. The Privacy Commissioner of Canada seeks to intervene in this application to assist the Court in the determination of the legal issues raised in this application.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Affidavit of Patricia Kosseim, sworn October 14, 2014; and

2. Such other material as counsel may advise and this Honourable Court permit.

DATED at Gatineau, Quebec this 16th day of October, 2014.

JENNIFER SELIGY
Office of the Privacy Commissioner of Canada
Counsel for the Proposed Intervener, Privacy Commissioner of Canada

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

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- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF PATRICIA KOSSEIM

I, **PATRICIA KOSSEIM**, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Senior General Counsel and Director General, Legal Services, Policy, Research, and Technology Analysis Branch of the Office of the Privacy Commissioner of Canada. I report directly to the Privacy Commissioner of Canada (the "Privacy Commissioner" or the "Commissioner").

2. In this capacity, I have personal knowledge of the matters to which I depose, except where I have relied on the information of others, which information I believe to be true.

Overview

3. This application will consider the rights of the public, pursuant to the open court principle, to view information provided to the Canadian Transportation Agency

("CTA") in the course of its adjudicative proceedings. In the context of this application, this Court is asked to examine, *inter alia*, the interaction between the *Privacy Act* and the open court principle, including the potential application of various provisions of the *Privacy Act* to the CTA's disclosure of personal information obtained during adjudicative proceedings.

4. The Privacy Commissioner seeks to intervene to assist the Court in regard to the proper interpretation and application of the *Privacy Act* in relation to the issues raised in this application and the policy considerations informing the interpretation and administration of this *Act*.

5. The *Privacy Act* is one of the Privacy Commissioner's "home statutes". The Commissioner has particular experience and expertise applying this statute, which can assist the Court. The Commissioner also has day-to-day experience regarding the legal and practical interplay between the *Privacy Act* and the open court principle in respect of federal administrative tribunal proceedings and decisions. The Court's decision will impact the legal obligations of other institutions subject to the *Privacy Act* and the legal framework the Privacy Commissioner applies when he carries out his mandate to oversee compliance with the *Privacy Act*.

The Privacy Commissioner of Canada

6. Daniel Therrien is the Privacy Commissioner of Canada. The Privacy Commissioner of Canada is an independent officer of Parliament appointed by the Governor in Council pursuant to subsection 53(1) of the *Privacy Act*.

7. The Privacy Commissioner's mandate is to ensure compliance with the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). The Commissioner's broad mission is to protect and promote the privacy rights of Canadians.

8. Among other duties, the Privacy Commissioner has the responsibility to investigate complaints under section 29 of the *Privacy Act.* He may also, at his discretion, carry out investigations to ensure compliance with sections 4 to 8 of the *Privacy Act*.

The Privacy Commissioner's Expertise

9. The Privacy Commissioner has significant experience and expertise in interpreting and applying the specific provisions of the *Privacy Act* at issue in this application.

10. In investigating complaints under the *Privacy Act*, the Privacy Commissioner often has to consider the interaction between the *Privacy Act* and other laws and legal principles that may regulate the collection, use, and disclosure of personal information.

11. The Privacy Commissioner has investigated numerous complaints from individuals regarding the disclosure of personal information by federal administrative tribunals via the Internet. In this context, the Privacy Commissioner has had to consider the application of the *Privacy Act* to these tribunals as wells as the interaction between administrative tribunals' statutory obligations under the *Privacy Act* and other legislation and their need to comply with the open court principle.

12. In carrying out his duties, the Privacy Commissioner also regularly undertakes research activities and prepares publications with respect to a myriad of privacy-related matters. Among other things, the Office of the Privacy Commissioner has developed guidelines regarding the electronic disclosure of personal information in the decisions of administrative tribunals. In particular, the guidelines address issues relating to balancing privacy obligations with the open court principle.

13. Accordingly, the Privacy Commissioner has experience and expertise with respect to the legal issues at the heart of this application that will be of assistance to the Court.

14. The Privacy Commissioner has regularly participated as an intervener in proceedings involving the interpretation of his constituent legislation.

15. The Privacy Commissioner has been granted the right to fully participate in every court application in which the Privacy Commissioner has sought this right, including in numerous matters before the Supreme Court of Canada. For example, the Privacy Commissioner intervened in the matter of *A.B. v. Bragg Communications Inc.*, [2012] 2 SCR 567, 2012 SCC 46, which dealt with the balance between the open court principle and an individual's privacy rights.

16. In each of these matters, the Privacy Commissioner was permitted to make representations both orally and in writing.

The Privacy Commissioner's Particular Interest in this Application

17. Among the issues raised in this application, the Court has been asked to address the following:

    i) Whether personal information provided to the CTA in the course of

adjudicative proceedings is "publicly available" information within the meaning of subsection 69(2) of the *Privacy Act* and therefore not subject to the limitations on disclosure set out in section 8 of the *Privacy Act*.

ii) Whether personal information provided to the CTA in the course of adjudicative proceedings may be disclosed by the CTA without consent, in accordance with one or more of the exceptions to the requirement of consent set out in paragraphs 8(2)(a), 8(2)(b), or 8(2)(m) of the *Privacy Act*.

iii) Whether, in light of the open court principle, any limit imposed by the *Privacy Act* on the rights of the public to view information provided to the CTA in the course of adjudicative proceedings would be inconsistent with subsection 2(b) of the *Canadian Charter of Rights and Freedoms*.

18. This application raises a number of important legal issues that have yet to be fully addressed by the Court. The decision of this Court will likely set a significant precedent and thereby form the foundation for future analysis and interpretation of issues relating to the proper interpretation of provisions allowing for the disclosure of personal information by administrative tribunals.

19. These matters fall squarely within the Privacy Commissioner's mandate, experience, and expertise under the *Privacy Act*. The Court's assessment of the various provisions of the *Privacy Act* and how the *Privacy Act* interacts with the open court principle will directly impact the legal obligations of federal government institutions subject to the *Privacy Act*. It will also impact the legal framework that the Privacy Commissioner applies when he discharges his mandate to oversee compliance with the *Privacy Act*.

20. Accordingly, the issues raised in this application are important not only in the specific factual context raised in this case, but more generally to situations that are likely to arise in different circumstances in the future.

21. I believe that the Privacy Commissioner's intervention will be of assistance to the Court in determining the legal issues in this application. The Commissioner's submissions will offer a different perspective from those of the other parties and will be grounded in the Privacy Commissioner's mission to protect and promote the privacy rights of Canadians and his Office's extensive experience in privacy-related issues.

22. The Privacy Commissioner does not seek to file additional affidavit evidence nor does he intend to participate in cross-examinations, if any, on the affidavits filed by the parties. The Privacy Commissioner is content to be bound by the Record before the Court.

23. If granted leave to intervene, the Privacy Commissioner intends to limit his submissions to the legal issues related to the facts as presented by the parties. He will not make submissions with regard to the factual determinations to be made by the Court based on the affidavit evidence tendered by the parties.

24. The Privacy Commissioner will not request any particular disposition of the application and will not support the position of any particular party. The Privacy Commissioner will not seek costs and asks that he not be liable for costs to any other party.

25. I make this affidavit in support of the Privacy Commissioner's motion seeking an order granting leave to intervene in these proceedings as permitted by Rule 109 of the *Federal Court Rules*.

Sworn before me at the City of Gatineau, in the Province of Quebec this 14th day of October, 2014.	)	
A Commissioner, etc.	)	Patricia Kosseim

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

WRITTEN REPRESENTATIONS

I – THE NATURE OF THIS MOTION

1. This is a motion for an Order granting the Privacy Commissioner of Canada (the "Privacy Commissioner" or the "Commissioner") leave to intervene in these proceedings as permitted by Rule 109 of the *Federal Court Rules*.

II - FACTS

2. The Privacy Commissioner is an independent officer of Parliament appointed pursuant to subsection 53(1) of the *Privacy Act* by the Governor in Council[1].

3. The Privacy Commissioner's statutory mandate is to oversee compliance with the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act*

1 Affidavit of Patricia Kosseim, Tab 2, para. 6.

("PIPEDA"). His broad mission is to protect and promote the privacy rights of Canadians[2].

4. Among his other duties, the Privacy Commissioner has the responsibility to investigate complaints under section 29 of the *Privacy Act*. He may also, at his discretion, carry out investigations to ensure compliance with sections 4 to 8 of the *Privacy Act*[3].

5. At issue in this application is the Canadian Transportation Agency's (the "CTA") decision not to disclose certain information to the Applicant in response to the Applicant's request to view documents presented to the CTA in a particular adjudicative proceeding[4].

6. Among other things, the Applicant challenges the CTA's reliance on the *Privacy Act* to refuse to disclose the information at issue and asserts that the *Privacy Act* does not trump the open court principle[5].

7. Among the issues raised in this application, the Court has been asked to address the following:

   i. Whether personal information provided to the CTA in the course of adjudicative proceedings is "publicly available" information within the meaning of subsection 69(2) of the *Privacy Act* and therefore not subject to the limitations on disclosure set out in section 8 of the *Privacy Act*.

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2 Affidavit of Patricia Kosseim, Tab 2, para. 7; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, Tab 5-C.

3 Affidavit of Patricia Kosseim, Tab 2, para. 8; *Privacy Act*, R.S.C. 1985, c. P-21, ss. 29 and 37, Tab 5-A.

4 Applicant's Notice of Application, at paras. (a) and (b).

5 Applicant's Notice of Application, at paras. 25-30.

ii. Whether personal information provided to the CTA in the course of adjudicative proceedings may be disclosed by the CTA without consent, in accordance with one or more of the exceptions to the requirement of consent set out in subsections 8(2)(a), 8(2)(b), or 8(2)(m) of the *Privacy Act*.

iii. Whether, in light of the open court principle, any limit imposed by the *Privacy Act* on the rights of the public to view information provided to the CTA in the course of adjudicative proceedings would be inconsistent with subsection 2(b) of the *Canadian Charter of Rights and Freedoms*.

8. The Privacy Commissioner's intervention in the application will assist the Court with the determination of the legal issues at the core of this application by reason of his expertise and the different perspective he will bring from that of the other parties. This perspective is uniquely grounded in the Commissioner's mission to protect and promote the privacy rights of Canadians.

III - SUBMISSIONS

Jurisdiction to grant party status in this Application

9. Rule 109 of the *Federal Court Rules* allows the Court to grant leave to intervene in any proceeding.

10. The fundamental question to be determined on a motion for intervention under Rule 109 is whether the participation of the proposed intervener will assist the Court in determining a factual or legal issue related to the proceeding[6].

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6 *Apotex Inc. v. Canada (Minister of Health)*, [2000] F.C.J. No. 248 (QL) (F.C.T.D.), at para. 11, Tab 5-D.

11. Factors that the Court may consider on a motion to intervene include[7]:

    a. Is the proposed Intervener directly affected by the outcome?
    b. Is there a justiciable issue and a veritable public interest?
    c. Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
    d. Is the position of the proposed Intervener adequately defended by one of the parties to the case?
    e. Are the interests of justice better served by the intervention of the proposed party?
    f. Can the Court hear and decide the cause on its merits without the proposed intervener?

12. Not all the factors listed above need be met by a proposed intervener; the Court has the inherent authority to allow an intervention on terms and conditions which it deems appropriate in the circumstances[8].

13. The Privacy Commissioner has an interest in this appeal because the Court is being asked to interpret the *Privacy Act*, one of the Privacy Commissioner's "home statutes".

14. In deciding this application, the Court will have to interpret several provisions in the *Privacy Act*. The Court will have to address the application of the *Privacy Act* to a quasi-judicial body and the interaction between the *Privacy Act*, other legislation,

7 *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [2000] F.C.J. 220 (QL) (F.C.A.), at para. 8, Tab 5-E.

8 *Boutique Jacob Inc. v. Paintainer Ltd.*, [2006] F.C.J. 1947 (QL) (F.C.A.), at para. 21, Tab 5-F.

and the open court principle. These matters fall squarely within the Privacy Commissioner's mandate, experience, and expertise under the *Privacy Act*[9].

15. The Court's assessment of these issues will directly impact the legal obligations of federal government institutions subject to the *Privacy Act*. It will also impact the legal framework that the Privacy Commissioner applies when he discharges his mandate to oversee compliance with the *Privacy Act*[10].

16. The Privacy Commissioner will address this appeal from the perspective of a national privacy and data protection advocate who receives and investigates complaints across Canada.

17. The Privacy Commissioner thus offers the Court a unique vantage point on the issues before it. The Commissioner brings first-hand knowledge of how to address the interaction of *Privacy Act* with the open court principle in the context of administrative tribunal proceedings, based on practical experience assessing these issues in the context of complaint investigations. As a result, the Privacy Commissioner will bring a different perspective from the other parties.

18. The Privacy Commissioner does not seek to file additional affidavit evidence nor does he intend to participate in the cross-examinations, if any, on the affidavits filed by the parties. The Privacy Commissioner is content to be bound by the Record before the Court.

19. The Privacy Commissioner intends to limit his submissions to the legal issues and will not make submissions with regard to the factual determinations to be made by the Court based on the affidavit evidence tendered by the parties.

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9 Affidavit of Patricia Kosseim, at paras. 9-13, Tab 2.

10 Affidavit of Patricia Kosseim, at para. 19, Tab 2.

The Special Status of the Privacy Commissioner to Intervene

20. The Federal Court has held that the function and responsibilities of the Privacy Commissioner give the Commissioner special status to intervene in judicial proceedings involving the application of the Commissioner's constituent legislation.

21. In a case decided under PIPEDA, the Federal Court stated[11]:

> The Privacy Commissioner is not required to satisfy the rather stringent requirements set out in Rule 109 of the *Federal Courts Rules* in order to be granted leave to participate in proceedings involving the interpretation or application of the *PIPED Act*. The function and responsibilities of the Privacy Commissioner under the *PIPED Act* give [him] special status to intervene in judicial proceedings, particularly when the issues raised are significant and could set a precedent.

22. The Courts have uniformly granted the Privacy Commissioner the right to participate in applications under *PIPEDA* and the *Privacy Act*.

23. The Privacy Commissioner has a long history of responsible interventions, including in several matters before the Supreme Court of Canada[12].

24. In each of these cases, the Privacy Commissioner was permitted, in accordance with the usual approach to granting intervener status to the Commissioner, to make representations on the merits of the Application, both orally and in writing.

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11 *Breithaupt and Fournier v. MacFarlane and Calm Air International Ltd*. (October 24, 2005), Toronto T-2061-04 (F.C.T.D.) (Order of Prothonotary Lafreniere), page 3, Tab 5-G.

12 See for example: *Andrew Gordon Wakeling v. Attorney General of Canada on behalf of the United States of America, et al*., SCC Case Number 35072 (case involving the interplay between specific provisions of the *Criminal Code* and the *Privacy Act* in relation to international information-sharing), *Bernard v. Canada (Attorney General),* 2014 SCC 13 (CanLII) (whether the employer's disclosure of employee home addresses and phone numbers without consent to the union is permitted as a "consistent use" under the *Privacy Act*), and *A.B. v. Bragg Communications Inc*., [2012] 2 SCR 567, 2012 SCC 46 (CanLII) (balance between open court principle and the right of a child victim of cyberbullying to sue anonymously).

IV - ORDER SOUGHT

25. The Privacy Commissioner respectfully requests:

a. an Order that the Privacy Commissioner of Canada be granted leave to intervene in these proceedings;

b. an Order that the Privacy Commissioner be granted permission to file a Memorandum of Fact and Law thirty (30) days after the Respondent files its Memorandum of Fact and Law and to make oral representations at the hearing of these proceedings; and

c. such further relief as counsel may request and this Honourable Court deems just.

All of which is respectfully submitted this 16th day of October, 2014.

JENNIFER SELIGY
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Counsel for the Proposed Intervener, Privacy Commissioner of Canada

STATUTES

TAB	
5-A	*Privacy Act,* R.S.C. 1985, c. P-21, sections 4 to 8, 29, 37, 53(1), 69(2).
5-B	*The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 2(b).

AUTHORITIES

TAB	
5-C	*Lavigne v. Canada (Office of the Commissioner of Official Languages),* [2002] 2 S.C.R. 773, 2002 SCC 53.
5-D	*Apotex Inc. v. Canada (Minister of Health)*, [2000] F.C.J. No. 248 (QL) (F.C.T.D.).
5-E	*Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.,* [2000] F.C.J. 220 (QL) (F.C.A.).
5-F	*Boutique Jacob Inc. v. Paintainer Ltd.,* [2006] F.C.J. 1947 (QL) (F.C.A.).
5-G	*Breithaupt and Fournier v. MacFarlane and Calm Air International Ltd.* (October 24, 2005), Toronto T-2061-04 (F.C.T.D.) (Order of Prothonotary Lafrenière).
Listed only as a reference	
	Andrew Gordon Wakeling v. Attorney General of Canada on behalf of the United States of America, et al., SCC Case Number 35072.
	Bernard v. Canada (Attorney General), 2014 SCC 13 (CanLII).
	A.B. v. Bragg Communications Inc., [2012] 2 SCR 567, 2012 SCC 46 (CanLII).

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

DRAFT ORDER

UPON the written motion of the Privacy Commissioner of Canada made pursuant to Rule 369 of the *Federal Court Rules* for leave to intervene in these proceedings as permitted by Rule 109;

UPON considering the motion record of the Privacy Commissioner of Canada and the representations of the Applicant and the Respondent in response thereto;

THIS COURT ORDERS THAT:

1. The Privacy Commissioner of Canada shall be granted leave to intervene in these proceedings.

2. The Privacy Commissioner shall be granted permission to file a Memorandum of Fact and Law thirty (30) days after the Respondent files its Memorandum of Fact and Law and to make oral representations at the hearing of these proceedings.

____
Justice of the Federal Court

***Privacy Act,* R.S.C. 1985, c. P-21, sections 4 to 8, 29, 37, 53(1), 69(2).**

COLLECTION, RETENTION AND DISPOSAL OF PERSONAL INFORMATION

Collection of personal information

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

Personal information to be collected directly

5. (1) A government institution shall, wherever possible, collect personal information that is intended to be used for an administrative purpose directly from the individual to whom it relates except where the individual authorizes otherwise or where personal information may be disclosed to the institution under subsection 8(2).

Individual to be informed of purpose

(2) A government institution shall inform any individual from whom the institution collects personal information about the individual of the purpose for which the information is being collected.

Exception

(3) Subsections (1) and (2) do not apply where compliance therewith might

(a) result in the collection of inaccurate information; or

(b) defeat the purpose or prejudice the use for which information is collected.

***Loi sur la protection des renseignements personnels*, LRC 1985, c P-21, articles 4 to 8, 29, 37, 53(1), 69(2).**

COLLECTE, CONSERVATION ET RETRAIT DES RENSEIGNEMENTS PERSONNELS

Collecte des renseignements personnels

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

Origine des renseignements personnels

5. (1) Une institution fédérale est tenue de recueillir auprès de l'individu lui-même, chaque fois que possible, les renseignements personnels destinés à des fins administratives le concernant, sauf autorisation contraire de l'individu ou autres cas d'autorisation prévus au paragraphe 8(2).

Mise au courant de l'intéressé

(2) Une institution fédérale est tenue d'informer l'individu auprès de qui elle recueille des renseignements personnels le concernant des fins auxquelles ils sont destinés.

Exceptions

(3) Les paragraphes (1) et (2) ne s'appliquent pas dans les cas où leur observation risquerait :

a) soit d'avoir pour résultat la collecte de renseignements inexacts;

Retention of personal information used for an administrative purpose

6. (1) Personal information that has been used by a government institution for an administrative purpose shall be retained by the institution for such period of time after it is so used as may be prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the information.

Accuracy of personal information

(2) A government institution shall take all reasonable steps to ensure that personal information that is used for an administrative purpose by the institution is as accurate, up-to-date and complete as possible.

Disposal of personal information

(3) A government institution shall dispose of personal information under the control of the institution in accordance with the regulations and in accordance with any directives or guidelines issued by the designated minister in relation to the disposal of that information.

PROTECTION OF PERSONAL INFORMATION

Use of personal information

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

b) soit de contrarier les fins ou de compromettre l'usage auxquels les renseignements sont destinés.

Conservation des renseignements personnels utilisés à des fins administratives

6. (1) Les renseignements personnels utilisés par une institution fédérale à des fins administratives doivent être conservés après usage par l'institution pendant une période, déterminée par règlement, suffisamment longue pour permettre à l'individu qu'ils concernent d'exercer son droit d'accès à ces renseignements.

Exactitude des renseignements

(2) Une institution fédérale est tenue de veiller, dans la mesure du possible, à ce que les renseignements personnels qu'elle utilise à des fins administratives soient à jour, exacts et complets.

Retrait des renseignements personnels

(3) Une institution fédérale procède au retrait des renseignements personnels qui relèvent d'elle conformément aux règlements et aux instructions ou directives applicables du ministre désigné.

PROTECTION DES RENSEIGNEMENTS PERSONNELS

Usage des renseignements personnels

7. À défaut du consentement de l'individu concerné, les renseignements personnels relevant d'une institution fédérale ne peuvent servir à celle-ci :

(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or	a) qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins;
(b) for a purpose for which the information may be disclosed to the institution under subsection 8(2).	b) qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).
Disclosure of personal information	**Communication des renseignements personnels**
8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.	**8.** (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.
Where personal information may be disclosed	Cas d'autorisation
(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	(2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
(a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;	a) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;
(b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;	b) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;
(c) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;	c) communication exigée par subpoena, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de renseignements;
(d) to the Attorney General of Canada for use in legal proceedings involving the	

Crown in right of Canada or the Government of Canada; (e) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed; (f) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation — as defined in subsection 2(1) of the First Nations Jurisdiction over Education in British Columbia Act —, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation; (g) to a member of Parliament for the purpose of assisting the individual to whom the information relates in resolving a problem; (h) to officers or employees of the institution for internal audit purposes, or to the office of the Comptroller General or any other person or body specified in the regulations for audit purposes; (i) to the Library and Archives of Canada for archival purposes;	d) communication au procureur général du Canada pour usage dans des poursuites judiciaires intéressant la Couronne du chef du Canada ou le gouvernement fédéral; e) communication à un organisme d'enquête déterminé par règlement et qui en fait la demande par écrit, en vue de faire respecter des lois fédérales ou provinciales ou pour la tenue d'enquêtes licites, pourvu que la demande précise les fins auxquelles les renseignements sont destinés et la nature des renseignements demandés; f) communication aux termes d'accords ou d'ententes conclus d'une part entre le gouvernement du Canada ou l'un de ses organismes et, d'autre part, le gouvernement d'une province ou d'un État étranger, une organisation internationale d'États ou de gouvernements, le conseil de la première nation de Westbank, le conseil de la première nation participante — au sens du paragraphe 2(1) de la Loi sur la compétence des premières nations en matière d'éducation en Colombie-Britannique — ou l'un de leurs organismes, en vue de l'application des lois ou pour la tenue d'enquêtes licites; g) communication à un parlementaire fédéral en vue d'aider l'individu concerné par les renseignements à résoudre un problème; h) communication pour vérification interne au personnel de l'institution ou pour vérification comptable au bureau du contrôleur général ou à toute personne ou tout organisme déterminé par règlement;

(j) to any person or body for research or statistical purposes if the head of the government institution (i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and (ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates; (k) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada; (l) to any government institution for the purpose of locating an individual in order to collect a debt owing to Her Majesty in right of Canada by that individual or make a payment owing to that individual by Her Majesty in right of Canada; and (m) for any purpose where, in the opinion of the head of the institution, (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or (ii) disclosure would clearly benefit the individual to whom the information relates.	i) communication à Bibliothèque et Archives du Canada pour dépôt; j) communication à toute personne ou à tout organisme, pour des travaux de recherche ou de statistique, pourvu que soient réalisées les deux conditions suivantes : (i) le responsable de l'institution est convaincu que les fins auxquelles les renseignements sont communiqués ne peuvent être normalement atteintes que si les renseignements sont donnés sous une forme qui permette d'identifier l'individu qu'ils concernent, (ii) la personne ou l'organisme s'engagent par écrit auprès du responsable de l'institution à s'abstenir de toute communication ultérieure des renseignements tant que leur forme risque vraisemblablement de permettre l'identification de l'individu qu'ils concernent; k) communication à tout gouvernement autochtone, association d'autochtones, bande d'Indiens, institution fédérale ou subdivision de celle-ci, ou à leur représentant, en vue de l'établissement des droits des peuples autochtones ou du règlement de leurs griefs; l) communication à toute institution fédérale en vue de joindre un débiteur ou un créancier de Sa Majesté du chef du Canada et de recouvrer ou d'acquitter la créance; m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :

Personal information disclosed by Library and Archives of Canada (3) Subject to any other Act of Parliament, personal information under the custody or control of the Library and Archives of Canada that has been transferred there by a government institution for historical or archival purposes may be disclosed in accordance with the regulations to any person or body for research or statistical purposes. Copies of requests under paragraph (2)(e) to be retained (4) The head of a government institution shall retain a copy of every request received by the government institution under paragraph (2)(e) for such period of time as may be prescribed by regulation, shall keep a record of any information disclosed pursuant to the request for such period of time as may be prescribed by regulation and shall, on the request of the Privacy Commissioner, make those copies and records available to the Privacy Commissioner. Notice of disclosure under paragraph (2)(m) (5) The head of a government institution shall notify the Privacy Commissioner in writing of any disclosure of personal information under paragraph (2)(m) prior to the disclosure where reasonably practicable or in any other case forthwith on the disclosure, and the Privacy Commissioner may, if the Commissioner deems it appropriate, notify the individual to whom the information relates of the disclosure.	(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée, (ii) l'individu concerné en tirerait un avantage certain. Communication par Bibliothèque et Archives du Canada (3) Sous réserve des autres lois fédérales, les renseignements personnels qui relèvent de Bibliothèque et Archives du Canada et qui y ont été versés pour dépôt ou à des fins historiques par une institution fédérale peuvent être communiqués conformément aux règlements pour des travaux de recherche ou de statistique. Copie des demandes faites en vertu de l'al. (2)e) (4) Le responsable d'une institution fédérale conserve, pendant la période prévue par les règlements, une copie des demandes reçues par l'institution en vertu de l'alinéa (2)e) ainsi qu'une mention des renseignements communiqués et, sur demande, met cette copie et cette mention à la disposition du Commissaire à la protection de la vie privée. Avis de communication dans le cas de l'al. (2)m) (5) Dans le cas prévu à l'alinéa (2)m), le responsable de l'institution fédérale concernée donne un préavis écrit de la communication des renseignements personnels au Commissaire à la protection de la vie privée si les circonstances le justifient; sinon, il en avise par écrit le Commissaire immédiatement après la communication. La décision de mettre au courant

	l’individu concerné est laissée à l’appréciation du Commissaire.
Definition of “Indian band” (6) In paragraph (2)(k), “Indian band” means	Définition de « bande d’Indiens » (6) L’expression « bande d’Indiens » à l’alinéa (2)k) désigne :
(a) a band, as defined in the Indian Act;	a) soit une bande au sens de la Loi sur les Indiens;
(b) a band, as defined in the Cree-Naskapi (of Quebec) Act, chapter 18 of the Statutes of Canada, 1984;	b) soit une bande au sens de la Loi sur les Cris et les Naskapis du Québec, chapitre 18 des Statuts du Canada de 1984;
(c) the Band, as defined in the Sechelt Indian Band Self-Government Act, chapter 27 of the Statutes of Canada, 1986; or	c) soit la bande au sens de la Loi sur l’autonomie gouvernementale de la bande indienne sechelte, chapitre 27 des Statuts du Canada de 1986;
(d) a first nation named in Schedule II to the Yukon First Nations Self-Government Act.	d) la première nation dont le nom figure à l’annexe II de la Loi sur l’autonomie gouvernementale des premières nations du Yukon.
Definition of “aboriginal government” (7) The expression “aboriginal government” in paragraph (2)(k) means	Définition de « gouvernement autochtone » (7) L’expression « gouvernement autoch-tone » à l’alinéa (2)k) s’entend :
(a) Nisga’a Government, as defined in the Nisga’a Final Agreement given effect by the Nisga’a Final Agreement Act;	a) du gouvernement nisga’a, au sens de l’Accord définitif nisga’a mis en vigueur par la Loi sur l’Accord définitif nisga’a;
(b) the council of the Westbank First Nation;	b) du conseil de la première nation de Westbank;
(c) the Tlicho Government, as defined in section 2 of the Tlicho Land Claims and Self-Government Act;	c) du gouvernement tlicho, au sens de l’article 2 de la Loi sur les revendications territoriales et l’autonomie gouvernementale du peuple tlicho;
(d) the Nunatsiavut Government, as defined in section 2 of the Labrador Inuit Land Claims Agreement Act;	d) du gouvernement nunatsiavut, au sens de l’article 2 de la Loi sur l’Accord sur les revendications territoriales des Inuit du Labrador;
(e) the council of a participating First Nation as defined in subsection 2(1) of the First Nations Jurisdiction over Education in British Columbia Act;	
(f) the Tsawwassen Government, as defined in subsection 2(2) of the	

Tsawwassen First Nation Final Agreement Act; (g) a Maanulth Government, within the meaning of subsection 2(2) of the Maanulth First Nations Final Agreement Act; or (h) Sioux Valley Dakota Oyate Government, within the meaning of subsection 2(2) of the Sioux Valley Dakota Nation Governance Act. Definition of “council of the Westbank First Nation” (8) The expression “council of the Westbank First Nation” in paragraphs (2)(f) and (7)(b) means the council, as defined in the Westbank First Nation Self-Government Agreement given effect by the Westbank First Nation Self-Government Act.	e) du conseil de la première nation participante, au sens du paragraphe 2(1) de la Loi sur la compétence des premières nations en matière d’éducation en Colombie-Britannique; f) du gouvernement tsawwassen, au sens du paragraphe 2(2) de la Loi sur l’accord définitif concernant la Première Nation de Tsawwassen; g) de tout gouvernement maanulth, au sens du paragraphe 2(2) de la Loi sur l’accord définitif concernant les premières nations maanulthes; h) du gouvernement de l’oyate dakota de Sioux Valley, au sens du paragraphe 2(2) de la Loi sur la gouvernance de la nation dakota de Sioux Valley. Définition de « conseil de la première nation de Westbank » (8) L’expression « conseil de la première nation de Westbank » aux alinéas (2)f) et (7)b) s’entend du conseil au sens de l’Accord d’autonomie gouvernementale de la première nation de Westbank mis en vigueur par la Loi sur l’autonomie gouvernementale de la première nation de Westbank.
COMPLAINTS **Receipt and investigation of complaints** **29.** (1) Subject to this Act, the Privacy Commissioner shall receive and investigate complaints (a) from individuals who allege that personal information about themselves	**PLAINTES** **Réception des plaintes et enquêtes** **29.** (1) Sous réserve des autres dispositions de la présente loi, le Commissaire à la protection de la vie privée reçoit les plaintes et fait enquête sur les plaintes :

held by a government institution has been used or disclosed otherwise than in accordance with section 7 or 8;	a) déposées par des individus qui prétendent que des renseignements personnels les concernant et détenus par une institution fédérale ont été utilisés ou communiqués contrairement aux articles 7 ou 8;
(b) from individuals who have been refused access to personal information requested under subsection 12(1);	b) déposées par des individus qui se sont vu refuser la communication de renseignements personnels, demandés en vertu du paragraphe 12(1);
(c) from individuals who allege that they are not being accorded the rights to which they are entitled under subsection 12(2) or that corrections of personal information requested under paragraph 12(2)(a) are being refused without justification;	c) déposées par des individus qui se prétendent lésés des droits que leur accorde le paragraphe 12(2) ou qui considèrent comme non fondé le refus d’effectuer les corrections demandées en vertu de l’alinéa 12(2)a);
(d) from individuals who have requested access to personal information in respect of which a time limit has been extended pursuant to section 15 where they consider the extension unreasonable;	d) déposées par des individus qui ont demandé des renseignements personnels dont les délais de communication ont été prorogés en vertu de l’article 15 et qui considèrent la prorogation comme abusive;
(e) from individuals who have not been given access to personal information in the official language requested by the individuals under subsection 17(2);	e) déposées par des individus qui n’ont pas reçu communication de renseignements personnels dans la langue officielle qu’ils ont demandée en vertu du paragraphe 17(2);
(e.1) from individuals who have not been given access to personal information in an alternative format pursuant to a request made under subsection 17(3);	e.1) déposées par des individus qui n’ont pas reçu communication des renseignements personnels sur un support de substitution en application du paragraphe 17(3);
(f) from individuals who have been required to pay a fee that they consider inappropriate;	f) déposées par des individus qui considèrent comme contre-indiqué le versement exigé en vertu des règlements;
(g) in respect of the index referred to in subsection 11(1); or	g) portant sur le répertoire visé au paragraphe 11(1);
(h) in respect of any other matter relating to (i) the collection, retention or disposal of personal information by a government institution,	

(ii) the use or disclosure of personal information under the control of a government institution, or (iii) requesting or obtaining access under subsection 12(1) to personal information.	h) portant sur toute autre question relative à : (i) la collecte, la conservation ou le retrait par une institution fédérale des renseignements personnels, (ii) l'usage ou la communication des renseignements personnels qui relèvent d'une institution fédérale, (iii) la demande ou l'obtention de renseignements personnels en vertu du paragraphe l2(1).
Complaints submitted on behalf of complainants (2) Nothing in this Act precludes the Privacy Commissioner from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorized by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorized.	Entremise de représentants (2) Le Commissaire à la protection de la vie privée peut recevoir les plaintes visées au paragraphe (1) par l'intermédiaire d'un représentant du plaignant. Dans les autres articles de la présente loi, les dispositions qui concernent le plaignant concernent également son représentant.
Privacy Commissioner may initiate complaint (3) Where the Privacy Commissioner is satisfied that there are reasonable grounds to investigate a matter under this Act, the Commissioner may initiate a complaint in respect thereof.	Plaintes émanant du Commissaire (3) Le Commissaire à la protection de la vie privée peut lui-même prendre l'initiative d'une plainte s'il a des motifs raisonnables de croire qu'une enquête devrait être menée sur une question relative à l'application de la présente loi.
REVIEW OF COMPLIANCE WITH SECTIONS 4 TO 8	**CONTRÔLE D'APPLICATION DES ARTICLES 4 À 8**
Investigation in respect of sections 4 to 8 **37.** (1) The Privacy Commissioner may, from time to time at the discretion of the Commissioner, carry out investigations in respect of personal information under	**Enquêtes** **37.** (1) Pour le contrôle d'application des articles 4 à 8, le Commissaire à la protection de la vie privée peut, à son appréciation, tenir des enquêtes quant aux renseignements personnels qui relèvent des institutions fédérales.

the control of government institutions to ensure compliance with sections 4 to 8.	
Sections 31 to 34 apply	Application des art. 31 à 34
(2) Sections 31 to 34 apply, where appropriate and with such modifications as the circumstances require, in respect of investigations carried out under subsection (1).	(2) Les articles 31 à 34 s'appliquent, si c'est indiqué et compte tenu des adaptations de circonstance, aux enquêtes menées en vertu du paragraphe (1).
Report of findings and recommendations	Rapport des conclusions et recommandations du Commissaire
(3) If, following an investigation under subsection (1), the Privacy Commissioner considers that a government institution has not complied with sections 4 to 8, the Commissioner shall provide the head of the institution with a report containing the findings of the investigation and any recommendations that the Commissioner considers appropriate.	(3) Le Commissaire à la protection de la vie privée, s'il considère à l'issue de son enquête qu'une institution fédérale n'a pas appliqué les articles 4 à 8, adresse au responsable de l'institution un rapport où il présente ses conclusions ainsi que les recommandations qu'il juge indiquées.
Reports to be included in annual or special reports	Incorporation des rapports
(4) Any report made by the Privacy Commissioner under subsection (3) may be included in a report made pursuant to section 38 or 39.	(4) Les rapports établis par le Commissaire à la protection de la vie privée en vertu du paragraphe (3) peuvent être incorporés dans les rapports prévus aux articles 38 ou 39.
Privacy Commissioner	**COMMISSAIRE À LA PROTECTION DE LA VIE PRIVÉE**
Appointment	**Nomination**
53. (1) The Governor in Council shall, by commission under the Great Seal, appoint a Privacy Commissioner after consultation with the leader of every recognized party in the Senate and House of Commons and approval of the appointment by resolution of the Senate and House of Commons.	**53.** (1) Le gouverneur en conseil nomme le Commissaire à la protection de la vie privée par commission sous le grand sceau, après consultation du chef de chacun des partis reconnus au Sénat et à la Chambre des communes et approbation par résolution du Sénat et de la Chambre des communes.

EXCLUSIONS	EXCLUSIONS
Sections 7 and 8 do not apply to certain information	**Non-application des art. 7 et 8**
69. (2) Sections 7 and 8 do not apply to personal information that is publicly available.	**69.** (2) Les articles 7 et 8 ne s’appliquent pas aux renseignements personnels auxquels le public a accès.

The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 2(b).	**Loi constitutionnelle de 1982 (R-U), constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11, art. 2(b)**
Fundamental freedoms 2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.	Libertés fondamentales 2. Chacun a les libertés fondamentales suivantes : a) liberté de conscience et de religion; b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication; c) liberté de réunion pacifique; d) liberté d'association.

The Commissioner of Official Languages *Appellant/Respondent on cross-appeal*

v.

Robert Lavigne *Respondent/Appellant on cross-appeal*

and

The Privacy Commissioner of Canada *Intervener*

Indexed as: Lavigne *v.* Canada (Office of the Commissioner of Official Languages)

Neutral citation: 2002 SCC 53.

File No.: 28188.

2002: January 17; 2002: June 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Privacy — Access to personal information — Exceptions — Right of access under Privacy Act to information collected in private in investigation conducted under Official Languages Act — Commissioner of Official Languages disclosing to complainant only part of personal information concerning him obtained during investigation — Whether exception to right of access provided for in s. 22(1)(b) of Privacy Act applies to Commissioner's investigations that have concluded — If so, whether Commissioner has established that disclosure of personal information requested could reasonably be expected to be injurious to conduct of investigations — Whether request for disclosure made under Privacy Act can cover information other than personal information — Privacy Act, R.S.C. 1985, c. P-21, ss. 12(1), 22, 47 — Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.), ss. 60, 72, 73.

Le Commissaire aux langues officielles *Appelant/Intimé au pourvoi incident*

c.

Robert Lavigne *Intimé/Appelant au pourvoi incident*

et

Le Commissaire à la protection de la vie privée du Canada *Intervenant*

Répertorié : Lavigne *c.* Canada (Commissariat aux langues officielles)

Référence neutre : 2002 CSC 53.

N° du greffe : 28188.

2002 : 17 janvier; 2002 : 20 juin.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Renseignements personnels — Accès aux renseignements personnels — Exceptions — Droit d'accès en vertu de la Loi sur la protection des renseignements personnels aux renseignements recueillis sous le sceau de la confidentialité dans une enquête menée en application de la Loi sur les langues officielles — Commissaire aux langues officielles communiquant en partie seulement au plaignant les renseignements personnels le concernant obtenus lors de l'enquête — L'exception au droit d'accès prévue à l'art. 22(1)b) de la Loi sur la protection des renseignements personnels s'applique-t-elle aux enquêtes du Commissaire qui sont terminées? — Dans l'affirmative, le Commissaire a-t-il réussi à établir que la divulgation des renseignements personnels demandés risquait vraisemblablement de nuire au déroulement de ses enquêtes? — Une demande de communication faite en vertu de la Loi sur la protection des renseignements personnels peut-elle viser des renseignements autres que personnels? — Loi sur la protection des renseignements personnels, L.R.C. 1985, ch. P-21, art. 12(1), 22, 47 — Loi sur les langues officielles, L.R.C. 1985, ch. 31 (4e suppl.), art. 60, 72, 73.

2002 SCC 53 (CanLII)

Official languages — Complaints and investigations — Private nature of investigations conducted by Commissioner of Official Languages — Information obtained in investigations collected in private — Complainant making request under Privacy Act for disclosure of personal information collected in files on complaints he had made to Commissioner of Official Languages — Reconciliation of Privacy Act with Commissioner's right to keep investigations confidential and private — Privacy Act, R.S.C. 1985, c. P-21, ss. 12(1), 22, 47 — Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.), ss. 60, 72, 73.

The respondent, a federal public servant, filed complaints with the Commissioner of Official Languages ("COL") alleging that his rights in respect of language of work, and employment and promotion opportunities, had been violated. In conducting their investigation the investigators working for the Office of the Commissioner of Official Languages ("OCOL") encountered problems because certain employees were reluctant to give information, fearing reprisals by the respondent. The investigators gave assurances that the interviews would remain confidential within the limits prescribed by the *Official Languages Act* ("OLA"). The investigation report concluded that the complaints were well founded and submitted recommendations to the Department concerned, which agreed to implement them.

While those proceedings were going on, the respondent made a request to the COL, under s. 12 of the *Privacy Act* ("PA"), for disclosure of the personal information contained in the files on the complaints he had made. A copy of this information was sent to the respondent, except for the portions which were withheld under the exemption set out in s. 22(1)(*b*) PA. That provision gives the COL the power to refuse access to information requested "the disclosure of which could reasonably be expected to be injurious to . . . the conduct of lawful investigations". Several other requests by the respondent were refused. He filed a complaint with the Privacy Commissioner ("PC") and following a process of mediation, a number of witnesses who had been questioned agreed to a copy of the personal information contained in the notes of the OCOL investigators being given to the respondent. The PC ruled that the personal information contained in the testimony of the other people questioned, for which consent to disclosure had not been obtained, had been properly exempted from disclosure under s. 22(1)(*b*) PA. The respondent then brought an application for judicial review of the COL's decision refusing to disclose the

Langues officielles — Plaintes et enquêtes — Secret des enquêtes menées par le Commissaire aux langues officielles — Renseignements obtenus lors des enquêtes recueillis sous le sceau de la confidentialité — Demande d'un plaignant en vertu de la Loi sur la protection des renseignements personnels pour obtenir la divulgation des renseignements personnels recueillis dans les dossiers des plaintes qu'il avait déposées auprès du Commissaire aux langues officielles — Conciliation de la Loi sur la protection des renseignements personnels et le droit du Commissaire de maintenir confidentielles et secrètes les enquêtes — Loi sur la protection des renseignements personnels, L.R.C. 1985, ch. P-21, art. 12(1), 22, 47 — Loi sur les langues officielles, L.R.C. 1985, ch. 31 (4e suppl.), art. 60, 72, 73.

L'intimé, un fonctionnaire fédéral, dépose auprès du Commissaire aux langues officielles (« CLO ») des plaintes alléguant violation de ses droits touchant la langue de travail et les possibilités d'emploi et de promotion. Au cours de leur enquête, les enquêteurs du Commissariat aux langues officielles se heurtent à des difficultés puisque, craignant des représailles de la part de l'intimé, certains employés hésitent à fournir des renseignements. Les enquêteurs donnent l'assurance que les entrevues demeureront confidentielles dans les limites prévues par la *Loi sur les langues officielles* (« LLO »). Le rapport d'enquête conclut au bien-fondé des plaintes et fait des recommandations au ministère visé, lequel convient d'y donner suite.

Parallèlement à ces procédures, l'intimé présente au CLO, en vertu de l'art. 12 de la *Loi sur la protection des renseignements personnels* (« LPRP »), une demande de communication des renseignements personnels contenus dans les dossiers des plaintes qu'il avait déposées. Une copie de ces renseignements est envoyée à l'intimé, sauf les parties retenues en raison de l'exclusion prévue à l'al. 22(1)*b*) LPRP. Cette disposition confère au CLO le pouvoir de refuser l'accès aux renseignements demandés si « la divulgation risquerait vraisemblablement de nuire [. . .] au déroulement d'enquêtes licites ». Plusieurs autres demandes de l'intimé sont refusées. Il dépose une plainte auprès du Commissaire à la protection de la vie privée (« CPVP ») et à la suite d'un processus de médiation, plusieurs témoins interrogés consentent à ce que l'intimé obtienne une copie des renseignements personnels contenus dans les notes des enquêteurs du Commissariat aux langues officielles. Le CPVP statue que, à défaut du consentement des autres personnes interrogées, les renseignements personnels contenus dans leurs témoignages avaient été exclus à bon droit de la communication en vertu de l'al. 22(1)*b*) LPRP.

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information requested. The dispute relates to the personal information concerning the respondent as well as non-personal information contained in the interview notes of the OCOL investigators. In the case of the personal information, the respondent's request relates only to the notes of the interview with his supervisor. The Federal Court, Trial Division ordered disclosure of the personal information requested by the respondent. The respondent was denied disclosure of the non-personal information. The Federal Court of Appeal affirmed that decision. The issue on the main appeal is whether, pursuant to s. 22(1)(*b*) PA, disclosure of the personal information requested by the respondent could reasonably be expected to be injurious to the conduct of lawful investigations by the COL. The issue on the cross-appeal is whether the respondent is entitled to information other than personal information.

Held: The main appeal and the cross-appeal should be dismissed.

This case concerns the application of the OLA and the PA in relation to each other. The provisions at issue must therefore be reconciled and read together. Parliament has made it plain that the PA applies to the OCOL. However, the PA, including the power provided in s. 22(1)(*b*), must be applied to the OCOL in a manner consistent with the objective of the OLA of promoting equality of status of the two official languages of Canada and guaranteeing minority language groups the right to use the language of their choice within federal institutions and with the unique context in which the COL's investigations, the private and confidential nature of which is important, are conducted. The participation of witnesses and complainants is central to the effectiveness of the Act. If Parliament had not enacted the provisions requiring that investigations be conducted in private and be kept confidential to protect them, it might have been difficult to achieve the objectives of the OLA. This confidentiality is not absolute, however, given the limits imposed by ss. 72, 73 and 74 OLA and the PA. When a request for disclosure of information is made under the PA, the COL may refuse access to the information requested under s. 22(1)(*b*) PA. That provision allows the exception to disclosure to be used once an investigation is over. Neither the definition of the word "investigation" in s. 22(3) nor the wording of s. 22(1)(*b*) should be interpreted as restricting the scope of the word "investigation" to investigations that are underway, those that are about to commence or specific investigations. There is therefore no justification for limiting the scope of that provision. The non-disclosure of personal information provided in s. 22(1)(*b*), however,

L'intimé intente alors un recours en révision judiciaire de la décision du CLO lui refusant la communication des renseignements demandés. La contestation vise les renseignements personnels concernant l'intimé ainsi que les renseignements non personnels contenus dans les notes d'entrevue des enquêteurs du Commissariat aux langues officielles. En ce qui concerne les renseignements personnels, la demande de l'intimé ne porte que sur les notes relatives à l'entrevue de sa superviseure. La Section de première instance de la Cour fédérale ordonne la divulgation des renseignements personnels demandés par l'intimé. Pour ce qui est de l'information non personnelle, elle lui est refusée. La Cour d'appel fédérale confirme cette décision. Le pourvoi principal vise à déterminer si, aux termes de l'al. 22(1)*b*) LPRP, la divulgation des renseignements personnels demandés par l'intimé risquerait vraisemblablement de nuire au déroulement d'enquêtes licites menées par le CLO. Le pourvoi incident soulève la question de savoir si l'intimé a droit aux renseignements autres que personnels.

Arrêt : Le pourvoi principal et le pourvoi incident sont rejetés.

Le litige porte sur l'application de la LLO et de la LPRP en regard l'une de l'autre. Les dispositions en jeu doivent donc être conciliées et lues ensemble. Le législateur a en effet clairement indiqué que la LPRP s'applique au Commissariat aux langues officielles. Cette application, y compris l'exercice du pouvoir prévu à l'al. 22(1)*b*) LPRP, doit se faire cependant dans le respect des objectifs de la LLO de promouvoir le statut d'égalité des deux langues officielles au Canada et d'assurer aux minorités linguistiques le droit d'utiliser la langue de leur choix au sein des institutions fédérales, et du contexte particulier des enquêtes du CLO, dont le caractère secret et confidentiel est un élément important. La participation des témoins et des plaignants est au cœur même de l'efficacité de la loi. Si le législateur n'avait pas prévu de dispositions imposant le secret et la confidentialité pour les protéger, les objectifs de la LLO pourraient difficilement être atteints. Cette confidentialité n'est toutefois pas absolue vu les limites imposées par les art. 72, 73 et 74 LLO et la LPRP. Lors d'une demande de communication de renseignements en vertu de la LPRP, le CLO peut refuser l'accès aux renseignements demandés en vertu de l'al. 22(1)*b*) LPRP. Cette disposition permet d'invoquer l'exclusion pour ce qui est de la divulgation une fois l'enquête close. Ni la définition du mot « enquête » apparaissant au par. 22(3) ni le libellé de l'al. 22(1)*b*) ne doivent s'interpréter comme restreignant la portée du mot « enquête » aux seules enquêtes en cours, à celles sur le point de commencer ou encore à des enquêtes précises. Il n'est donc pas justifié de limiter la portée de cette disposition. La non-divulgation des renseignements

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is authorized only where disclosure "could reasonably be expected" to be injurious to investigations. There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure. Confidentiality of personal information must only be protected where justified by the facts and its purpose must be to enhance compliance with the law. A refusal to ensure confidentiality may sometimes create difficulties for the investigators, but may also promote frankness and protect the integrity of the investigation process. The COL has an obligation to be sensitive to the differences in situations, and he must exercise his discretion accordingly.

In this case, it cannot reasonably be concluded from the COL's statements that disclosure of the interview notes that are the subject of the judicial review application could reasonably be expected to be injurious to the conduct of his future investigations. The COL has not established, as required by s. 47 PA, that his discretion was properly exercised. His decision must be based on real grounds that are connected to the specific case in issue. The evidence filed by the COL shows instead that his decision not to disclose the personal information requested was based on the fact that the person interviewed had not consented to disclosure, and does not establish what risk of injury to his investigations the latter might cause. Rather than showing the harmful consequences of disclosing the interview notes on future investigations, an attempt was made to prove, generally, that if investigations were not confidential this could compromise their conduct, without establishing specific circumstances from which it could reasonably be concluded that disclosure could be expected to be injurious. Even if permission is given to disclose the interview notes in this case, that still does not mean that access to personal information must always be given. It will still be possible for investigations to be confidential and private, but the right to confidentiality and privacy will be qualified by the limitations imposed by the PA and the OLA. The COL must exercise his discretion based on the facts of each specific case. In this case, the COL has not shown that it is reasonable to maintain confidentiality.

With respect to the cross-appeal, the respondent cannot obtain disclosure of information other than personal information since his request is based on s. 12(1) PA, which provides that only personal information may be disclosed.

Cases Cited

Referred to: *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)* (1997), 140

personnels prévue à l'al. 22(1)*b*) n'est toutefois autorisée que s'il existe un risque « vraisemblable » que la divulgation nuise à l'enquête. Il faut qu'il y ait un lien clair et direct entre la divulgation d'une information donnée et le préjudice allégué. La non-divulgation ne doit pas avoir pour seul objectif de faciliter le travail de l'organisme en question et doit se justifier par un vécu professionnel. La confidentialité des renseignements personnels ne doit être protégée que lorsque les faits le justifient et doit avoir pour but de favoriser le respect de la loi. Le refus d'assurer la confidentialité peut parfois créer des difficultés aux enquêteurs, mais peut aussi inciter à la franchise et protéger l'intégrité du processus d'enquête. Le CLO a l'obligation d'être sensible aux différences de situations et il doit actualiser l'application de son pouvoir.

En l'espèce, les affirmations du CLO ne permettent pas raisonnablement de conclure que la divulgation des notes d'entrevue visées par le recours en révision judiciaire risquerait vraisemblablement de nuire à ses enquêtes futures. Le CLO n'a pas fait la preuve, comme le prévoit l'art. 47 LPRP, du bien-fondé de l'exercice de son pouvoir discrétionnaire. Sa décision doit être basée sur des motifs réels et liés au cas précis à l'étude. La preuve déposée par le CLO démontre plutôt que sa décision de ne pas divulguer les renseignements personnels demandés s'appuie sur l'absence de consentement à la divulgation de la personne interviewée et n'établit pas le risque de préjudice que celle-ci pourrait causer à ses enquêtes. Au lieu de démontrer les conséquences néfastes de la divulgation des notes d'entrevue sur les enquêtes futures, on a tenté de faire une preuve générale que l'absence de confidentialité des enquêtes risquerait de compromettre leur bonne marche, sans établir des circonstances particulières permettant de conclure raisonnablement à la vraisemblance du préjudice. Or, l'autorisation de divulguer les notes d'entrevue dans ce cas-ci ne veut pas dire pour autant que les renseignements personnels soient toujours accessibles. La confidentialité et le caractère secret des enquêtes seront encore possibles, mais le droit à la confidentialité et au secret est nuancé par les limites imposées par la LPRP et la LLO. Le CLO doit exercer son pouvoir discrétionnaire en fonction de chaque cas spécifique. En l'espèce, le CLO n'a pas démontré qu'il est raisonnable de maintenir la confidentialité.

Quant au pourvoi incident, l'intimé ne peut obtenir la divulgation d'informations autres que des renseignements personnels puisque sa demande est fondée sur le par. 12(1) LPRP qui prévoit que seuls les renseignements personnels peuvent être communiqués.

Jurisprudence

Arrêts mentionnés : *Canada (Commissaire à l'information) c. Canada (Commission de l'immigration*

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F.T.R. 140; *Rubin v. Canada (Minister of Transport)*, [1998] 2 F.C. 430; *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373; *Rogers v. Canada (Correctional Service)*, [2001] 2 F.C. 586; *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, [1996] 3 F.C. 609; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Osolin*, [1993] 4 S.C.R. 595; *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551; *Reyes v. Secretary of State* (1984), 9 Admin. L.R. 296; *British Columbia Development Corp. v. Friedmann*, [1984] 2 S.C.R. 447; *St. Peter's Evangelical Lutheran Church, Ottawa v. City of Ottawa*, [1982] 2 S.C.R. 616.

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et du statut de réfugié), [1997] A.C.F. n° 1812 (QL); *Rubin c. Canada (Ministre des Transports)*, [1998] 2 C.F. 430; *Ruby c. Canada (Solliciteur général)*, [2000] 3 C.F. 589; *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *R. c. Beaulac*, [1999] 1 R.C.S. 768; *Canada (Procureur général) c. Viola*, [1991] 1 C.F. 373; *Rogers c. Canada (Service correctionnel)*, [2001] 2 C.F. 586; *Canada (Commissaire à la protection de la vie privée) c. Canada (Conseil des relations du travail)*, [1996] 3 C.F. 609; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403; *R. c. Osolin*, [1993] 4 R.C.S. 595; *Canada (Commissaire à l'information) c. Canada (Solliciteur général)*, [1988] 3 C.F. 551; *Reyes c. Canada (Secrétariat d'État)*, [1984] A.C.F. n° 1135 (QL); *British Columbia Development Corp. c. Friedmann*, [1984] 2 R.C.S. 447; *Église luthérienne évangélique St. Peter d'Ottawa c. Ville d'Ottawa*, [1982] 2 R.C.S. 616.

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APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal (2000), 261 N.R. 19, [2000] F.C.J. No. 1412 (QL), affirming a decision of the Trial Division (1998), 157 F.T.R. 15, [1998] F.C.J. No. 1527 (QL). Appeal and cross-appeal dismissed.

POURVOI PRINCIPAL et POURVOI INCIDENT contre un arrêt de la Cour d'appel fédérale (2000), 261 N.R. 19, [2000] A.C.F. n° 1412 (QL), qui a confirmé une décision de la Section de première instance (1998), 157 F.T.R. 15, [1998] A.C.F. n° 1527 (QL). Pourvoi principal et pourvoi incident rejetés.

Barbara A. McIsaac, *Q.C.*, *Johane Tremblay* and *Gregory S. Tzemenakis*, for the appellant/respondent on the cross-appeal.

Robert Lavigne, on his own behalf.

Dougald E. Brown and *Steven Welchner*, for the intervener.

Barbara A. McIsaac, *c.r.*, *Johane Tremblay* et *Gregory S. Tzemenakis*, pour l'appelant/intimé au pourvoi incident.

Robert Lavigne, en personne.

Dougald E. Brown et *Steven Welchner*, pour l'intervenant.

English version of the judgment of the Court delivered by

Le jugement de la Cour a été rendu par

GONTHIER J. —

I. Introduction

1 This case involves the application of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), and the *Privacy Act*, R.S.C. 1985, c. P-21, in relation to each other, and at issue is the right of access to personal information collected in private in an investigation conducted under the *Official Languages Act*. More precisely, we must decide whether disclosure of the personal information requested by the respondent could reasonably be expected to be injurious to the conduct of lawful investigations by the Commissioner of Official Languages.

II. Facts

2 The respondent, Robert Lavigne, worked in the Montreal office of the Department of National

LE JUGE GONTHIER —

I. Introduction

Le litige porte sur l'application de la *Loi sur les langues officielles*, L.R.C. 1985, ch. 31 (4e suppl.), et de la *Loi sur la protection des renseignements personnels*, L.R.C. 1985, ch. P-21, en regard l'une de l'autre et vise le droit d'accès aux renseignements personnels recueillis sous le sceau de la confidentialité dans une enquête menée sous le régime de la *Loi sur les langues officielles*. Plus précisément, il nous faut décider si la divulgation des renseignements personnels demandés par l'intimé risquerait vraisemblablement de nuire au déroulement d'enquêtes licites menées par le Commissaire aux langues officielles.

II. Les faits

L'intimé, Robert Lavigne, travaillait au bureau de Montréal du ministère de la Santé nationale

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Health and Welfare (now the Department of Human Resources Development Canada ("the Department")). Between November 1992 and March 1993 he filed four complaints with the Commissioner of Official Languages ("the Commissioner") alleging that his rights in respect of language of work, and employment and promotion opportunities, had been violated. The respondent complained that he had been forced to use French.

et du Bien-être social (à présent le ministère du Développement des ressources humaines Canada (« le ministère »)). Entre novembre 1992 et mars 1993, il a déposé auprès du Commissaire aux langues officielles (« le commissaire ») quatre plaintes alléguant violation de ses droits touchant la langue de travail et les possibilités d'emploi et de promotion. L'intimé se plaignait d'être forcé d'utiliser le français.

3

In the course of their investigation, the investigators working for the Office of the Commissioner of Official Languages questioned some 25 employees of the Department, including the respondent, his immediate supervisor and some of his co-workers, as well as managers and other employees. The investigators encountered problems in conducting their investigation because a number of Department employees were reluctant to give information, fearing reprisals by the respondent. In those instances, the investigators explained the role and mandate of the Commissioner as an ombudsman, and the private nature of the investigations. They gave assurances that the interviews would remain confidential within the limits of ss. 72, 73 and 74 of the *Official Languages Act*.

Dans le cadre de leur enquête, les enquêteurs du Commissariat aux langues officielles interrogent quelque 25 employés du ministère, y compris l'intimé, sa superviseure immédiate et quelques-uns de ses collègues de travail ainsi que des gestionnaires et d'autres employés. Les enquêteurs se heurtent à des difficultés au cours de leur enquête, parce qu'un certain nombre d'employés du ministère sont réticents à fournir des renseignements, craignant des représailles de la part de l'intimé. Les enquêteurs expliquent alors le rôle et la mission du commissaire à titre d'ombudsman et le caractère secret des enquêtes. Ils donnent l'assurance que les entrevues demeureront confidentielles dans les limites des art. 72, 73 et 74 de la *Loi sur les langues officielles*.

4

After the interviews were conducted, the investigation report concluded that the respondent's four complaints were well founded and made five recommendations to the Department. The Department did not question the Commissioner's findings, and agreed to implement the recommendations.

À la suite des entrevues, le rapport d'enquête conclut au bien-fondé des quatre plaintes de l'intimé et fait cinq recommandations au ministère. Celui-ci ne met pas en doute les conclusions du commissaire et convient d'y donner suite.

5

After the Commissioner's report was submitted, the respondent applied to the Federal Court, Trial Division for a remedy from the Department under Part X of the *Official Languages Act*. The Federal Court, being of the opinion that an application under that Part is a proceeding *de novo*, based its decision on the evidence submitted in affidavit form, and not on the evidence contained in the Commissioner's investigation files. The affidavits included those of France Doyon, Jacqueline Dubé and Normand Chartrand. The respondent had an opportunity to cross-examine the Department's witnesses, including those three individuals, but did not do so. On October 30, 1996, the Federal Court (whose

À la suite du rapport du commissaire, l'intimé s'adresse à la Section de première instance de la Cour fédérale pour obtenir réparation du ministère en vertu de la partie X de la *Loi sur les langues officielles*. Considérant qu'une demande en vertu de cette partie est une procédure *de novo*, la Cour fédérale fonde sa décision sur la preuve par affidavits et non sur la preuve contenue dans les dossiers d'enquête du commissaire. Parmi les affidavits se trouvent ceux de France Doyon, Jacqueline Dubé et Normand Chartrand. L'intimé avait la possibilité de contre-interroger les témoins du ministère, y compris ces trois personnes, mais ne s'en est pas prévalu. Le 30 octobre 1996, la Cour fédérale (dont

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decision was affirmed on appeal (1998), 228 N.R. 124) ordered the Department to pay the respondent $3,000 in damages and to write him a letter of apology: [1997] 1 F.C. 305.

la décision a été confirmée par la suite en appel (1998), 228 N.R. 124) a ordonné au ministère de verser à l'intimé le montant de 3 000 $ à titre de dommages-intérêts et de lui écrire une lettre d'excuse : [1997] 1 C.F. 305.

6 On July 7, 1993, while those proceedings were going on, the respondent made an initial request to the Commissioner for disclosure of the personal information contained in the files on the complaints he had made to him. On September 10, 1993, a copy of this information was sent to the respondent, except for the portions which were withheld under the exemption set out in s. 22(1)(*b*) of the *Privacy Act*, *inter alia*. Several additional requests for information were subsequently submitted to the Commissioner, but they were denied.

Parallèlement à ces procédures, le 7 juillet 1993, l'intimé présente au commissaire une première demande de communication des renseignements personnels contenus dans les dossiers des plaintes qu'il avait déposées auprès de celui-ci. Le 10 septembre 1993, une copie de ces renseignements est envoyée à l'intimé, sauf les parties retenues en raison de l'exclusion prévue à l'al. 22(1)*b*) de la *Loi sur la protection des renseignements personnels*. Plusieurs autres demandes de renseignements sont présentées au commissaire par la suite, mais sont refusées.

7 In September 1994, the respondent filed a complaint with the Privacy Commissioner, who launched an investigation in the course of which he attempted to settle the respondent's complaints by mediation. Through this process, a number of witnesses who had been questioned by the Commissioner's representatives agreed to a copy of the personal information contained in the investigators' notes being given to the respondent. However, the testimony of 10 other individuals was not covered by the settlement agreement, either because they could not be located or because they had denied or not responded to the request. On April 25, 1997, the Privacy Commissioner ruled that the personal information contained in the testimony of those 10 people, for which consent to disclosure had not been obtained, had been properly exempted from disclosure under s. 22(1)(*b*) of the *Privacy Act*.

En septembre 1994, l'intimé dépose une plainte auprès du Commissaire à la protection de la vie privée et celui-ci ouvre une enquête au cours de laquelle il tente de régler les plaintes de l'intimé par la médiation. Par la suite, plusieurs témoins interrogés par les représentants du commissaire consentent à ce que l'intimé obtienne une copie des renseignements personnels contenus dans les notes des enquêteurs. Toutefois, les témoignages de 10 autres personnes demeurent exclus de cette entente à l'amiable soit parce qu'elles n'ont pu être retrouvées, soit parce qu'elles ont refusé ou n'ont pas répondu à la demande. Le 25 avril 1997, le Commissaire à la protection de la vie privée statue que, à défaut du consentement de ces 10 personnes, les renseignements personnels contenus dans leurs témoignages avaient été exclus à bon droit de la communication en vertu de l'al. 22(1)*b*) de la *Loi sur la protection des renseignements personnels*.

8 Following the proceedings before the Privacy Commissioner, the Commissioner again refused to disclose certain personal information to the respondent. The respondent then brought an application for judicial review of the Commissioner's decision. The documents originally in issue in his application to the Federal Court are the complete notes taken by the investigators in the Office of

À la suite de ces procédures devant le Commissaire à la protection de la vie privée, le commissaire maintient son refus de communiquer certains renseignements personnels à l'intimé. Celui-ci intente alors un recours en révision judiciaire de la décision du commissaire. Les documents visés à l'origine dans son recours devant la Cour fédérale sont les notes complètes des enquêteurs du

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the Commissioner of Official Languages during the interviews held with the following people: the district manager of the Montreal office, Normand Chartrand; the respondent's immediate supervisor, Jacqueline Dubé; and the regional coordinator of official languages, France Doyon. Normand Chartrand and France Doyon subsequently agreed to disclosure by the Commissioner of the personal information concerning the respondent in the notes of their interviews. The dispute therefore relates to the personal information contained in the notes of the interview with Ms. Dubé and the notes relating to these three individuals that do not contain any personal information about the respondent.

Commissariat aux langues officielles prises au cours des entrevues menées auprès des personnes suivantes : le directeur de district du bureau de Montréal, Normand Chartrand, la superviseure immédiate de l'intimé, Jacqueline Dubé, et la coordinatrice régionale des langues officielles, France Doyon. Normand Chartrand et France Doyon ont par la suite consenti à la divulgation par le commissaire des renseignements personnels concernant l'intimé qui se trouvent dans les notes de leurs entrevues. La contestation porte donc sur les renseignements personnels contenus dans les notes d'entrevue avec Mme Dubé ainsi que les notes se rapportant à ces trois personnes mais ne renfermant aucun renseignement personnel sur l'intimé.

9

The Federal Court, Trial Division and the Federal Court of Appeal set aside the Commissioner's decision in part and ordered disclosure of the personal information requested. The respondent was denied disclosure of the non-personal information. It is those decisions that are the subject of these appeals.

La Section de première instance de la Cour fédérale et la Cour d'appel fédérale ont infirmé en partie la décision du commissaire et ordonné la divulgation des renseignements personnels demandés. Pour ce qui est de l'information non personnelle, elle lui est refusée. Ces décisions font l'objet du présent pourvoi.

10

In the main appeal, the appellant is seeking to have the decision of the Federal Court of Appeal ordering him to disclose the personal information he holds set aside. In the cross-appeal, the respondent is seeking to have all of the relevant information (whether or not it is personal information) disclosed by the Commissioner.

Dans l'appel principal, l'appelant se pourvoit contre la décision de la Cour d'appel fédérale lui ordonnant de divulguer des renseignements personnels qu'il détient. Dans l'appel incident, l'intimé demande que le commissaire divulgue l'ensemble des informations pertinentes (qu'il s'agisse de renseignements personnels ou non).

III. Relevant Statutory Provisions

III. Les dispositions législatives pertinentes

11

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

Loi sur la protection des renseignements personnels, L.R.C. 1985, ch. P-21

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

3. . . .

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

. . .

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

3. . . .

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

. . .

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

. . .

12. (1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of the *Immigration Act* has a right to and shall, on request, be given access to

(*a*) any personal information about the individual contained in a personal information bank; and

(*b*) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.

22. (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)

. . .

(*b*) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,

(ii) that would reveal the identity of a confidential source of information, or

(iii) that was obtained or prepared in the course of an investigation; or

. . .

41. Any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

47. In any proceedings before the Court arising from an application under section 41, 42 or 43, the burden of

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

. . .

12. (1) Sous réserve des autres dispositions de la présente loi, tout citoyen canadien et tout résident permanent, au sens de la *Loi sur l'immigration*, a le droit de se faire communiquer sur demande :

a) les renseignements personnels le concernant et versés dans un fichier de renseignements personnels;

b) les autres renseignements personnels le concernant et relevant d'une institution fédérale, dans la mesure où il peut fournir sur leur localisation des indications suffisamment précises pour que l'institution fédérale puisse les retrouver sans problèmes sérieux.

22. (1) Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) :

. . .

b) soit dont la divulgation risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois fédérales ou provinciales ou au déroulement d'enquêtes licites, notamment :

(i) des renseignements relatifs à l'existence ou à la nature d'une enquête déterminée,

(ii) des renseignements qui permettraient de remonter à une source de renseignements confidentielle,

(iii) des renseignements obtenus ou préparés au cours d'une enquête;

. . .

41. L'individu qui s'est vu refuser communication de renseignements personnels demandés en vertu du paragraphe 12(1) et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à la protection de la vie privée peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 35(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

47. Dans les procédures découlant des recours prévus aux articles 41, 42 ou 43, la charge d'établir le bien-fondé

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establishing that the head of a government institution is authorized to refuse to disclose personal information requested under subsection 12(1) or that a file should be included in a personal information bank designated as an exempt bank under section 18 shall be on the government institution concerned.

du refus de communication de renseignements personnels ou le bien-fondé du versement de certains dossiers dans un fichier inconsultable classé comme tel en vertu de l'article 18 incombe à l'institution fédérale concernée.

49. Where the head of a government institution refuses to disclose personal information requested under subsection 12(1) on the basis of section 20 or 21 or paragraph 22(1)(*b*) or (*c*) or 24(*a*), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the personal information, order the head of the institution to disclose the personal information, subject to such conditions as the Court deems appropriate, to the individual who requested access thereto, or shall make such other order as the Court deems appropriate.

49. Dans les cas où le refus de communication des renseignements personnels s'appuyait sur les articles 20 ou 21 ou sur les alinéas 22(1)*b*) ou *c*) ou 24*a*), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relèvent les renseignements d'en donner communication à l'individu qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.)

Loi sur les langues officielles, L.R.C. 1985, ch. 31 (4e suppl.)

60. (1) Every investigation by the Commissioner under this Act shall be conducted in private.

60. (1) Les enquêtes menées par le commissaire sont secrètes.

(2) It is not necessary for the Commissioner to hold any hearing and no person is entitled as of right to be heard by the Commissioner, but if at any time during the course of an investigation it appears to the Commissioner that there may be sufficient grounds to make a report or recommendation that may adversely affect any individual or any federal institution, the Commissioner shall, before completing the investigation, take every reasonable measure to give to that individual or institution a full and ample opportunity to answer any adverse allegation or criticism, and to be assisted or represented by counsel for that purpose.

(2) Le commissaire n'est pas obligé de tenir d'audience, et nul n'est en droit d'exiger d'être entendu par lui. Toutefois, si au cours de l'enquête, il estime qu'il peut y avoir des motifs suffisants pour faire un rapport ou une recommandation susceptibles de nuire à un particulier ou à une institution fédérale, il prend, avant de clore l'enquête, les mesures indiquées pour leur donner toute possibilité de répondre aux critiques dont ils font l'objet et, à cette fin, de se faire représenter par un avocat.

72. Subject to this Act, the Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act.

72. Sous réserve des autres dispositions de la présente loi, le commissaire et les personnes agissant en son nom ou sous son autorité sont tenus au secret en ce qui concerne les renseignements dont ils prennent connaissance dans l'exercice des attributions que leur confère la présente loi.

73. The Commissioner may disclose or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information

(*a*) that, in the opinion of the Commissioner, is necessary to carry out an investigation under this Act; or

(*b*) in the course of proceedings before the Federal Court under Part X or an appeal therefrom.

73. Le commissaire peut communiquer ou autoriser les personnes agissant en son nom ou sous son autorité à communiquer :

a) les renseignements qui, à son avis, sont nécessaires pour mener ses enquêtes;

b) des renseignements, soit lors d'un recours formé devant la Cour fédérale aux termes de la partie X, soit lors de l'appel de la décision rendue en l'occurrence.

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74. The Commissioner or any person acting on behalf or under the direction of the Commissioner is not a compellable witness, in respect of any matter coming to the knowledge of the Commissioner or that person as a result of performing any duties or functions under this Act during an investigation, in any proceedings other than proceedings before the Federal Court under Part X or an appeal therefrom.

74. En ce qui concerne les questions venues à leur connaissance au cours d'une enquête, dans l'exercice de leurs attributions, le commissaire et les personnes qui agissent en son nom ou sous son autorité ont qualité pour témoigner, mais ne peuvent y être contraints que lors des circonstances visées à l'alinéa 73*b*).

IV. Decisions of the Lower Courts

A. *Federal Court, Trial Division* (1998), 157 F.T.R. 15

12 Dubé J. allowed the application for judicial review of the Commissioner's decision. Section 2 of the *Privacy Act* provides, *inter alia*, that the purpose of the Act is to extend the present laws of Canada that provide individuals with a right of access to personal information about themselves. Consequently, in the opinion of Dubé J., disclosure is the rule and withholding is the exception. Section 22(1)(*b*) of the *Privacy Act* is an exception to the general rule and accordingly must be narrowly construed. It provides a limited exemption relating solely to investigations that are underway or about to begin, and not future investigations. Being of the view that the investigation was over, Dubé J. concluded that s. 22(1)(*b*) did not apply.

13 In addition, Dubé J. concluded that the Commissioner had not established that the disclosure of the personal information could reasonably be expected to be injurious to the conduct of its investigations (*Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)* (1997), 140 F.T.R. 140). Promises of confidentiality are not essential because the Commissioner has the power to issue *subpoenas*.

14 Under s. 49 of the *Privacy Act*, Dubé J. ordered the appellant to disclose the "personal information" requested by the respondent. However, the *Privacy Act* does not entitle the respondent to require the disclosure of information other than "personal information".

IV. Les décisions des juridictions inférieures

A. *La Section de première instance de la Cour fédérale* (1998), 157 F.T.R. 15

Le juge Dubé accueille la demande de révision judiciaire de la décision du commissaire. L'article 2 de la *Loi sur la protection des renseignements personnels* prévoit, entre autres, que cette loi a pour objet de compléter la législation canadienne en matière de droit d'accès des individus aux renseignements personnels qui les concernent. Par conséquent, selon le juge de la Cour fédérale, la divulgation est la règle et la rétention est l'exception. L'alinéa 22(1)*b*) de la *Loi sur la protection des renseignements personnels* constitue une exception à la règle générale et doit, par conséquent, être interprété restrictivement. Il énonce une exclusion restreinte qui concerne seulement des enquêtes en cours ou sur le point de commencer et non des enquêtes futures. Considérant que l'enquête est close, le juge Dubé conclut que l'al. 22(1)*b*) ne s'applique pas.

De plus, le juge Dubé conclut que le commissaire n'a pas réussi à établir que la communication des renseignements personnels risquerait vraisemblablement de nuire au déroulement de ses enquêtes (*Canada (Commissaire à l'information) c. Canada (Commission de l'immigration et du statut de réfugié)*, [1997] A.C.F. n° 1812 (QL) (1re inst.)). Les promesses de confidentialité ne sont pas nécessaires, car le commissaire a le pouvoir de décerner des citations à comparaître.

En vertu de l'art. 49 de la *Loi sur la protection des renseignements personnels*, le juge Dubé ordonne à l'appelant de divulguer les « renseignements personnels » demandés par l'intimé. Toutefois, la *Loi sur la protection des renseignements personnels* ne confère aucun droit à l'intimé d'exiger la divulgation d'informations autres que les « renseignements personnels ».

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B. *Federal Court of Appeal* (2000), 261 N.R. 19

Sharlow J.A., on behalf of the court, affirmed the decision of Dubé J. and dismissed the appeal. The Federal Court of Appeal was also of the opinion that s. 22(1)(*b*) of the *Privacy Act* does not apply to protect the information that the Commissioner collected in the course of an investigation, once the investigation has concluded (*Rubin v. Canada (Minister of Transport)*, [1998] 2 F.C. 430; *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589; *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, *supra*).

Sharlow J.A. also rejected the appellant's argument that Dubé J. had failed to consider whether disclosure could reasonably be expected to be injurious to the enforcement of any law of Canada, within the meaning of s. 22(1)(*b*) of the *Privacy Act*. In the opinion of Sharlow J.A., the evidence in the record was not capable of supporting such a conclusion. It established, at most, the possibility that witnesses may be reluctant to cooperate in an investigation unless they have an absolute assurance of secrecy. Sharlow J.A. upheld Dubé J.'s decision ordering the appellant to disclose the "personal information" requested by the respondent.

The Federal Court of Appeal also dismissed the cross-appeal on the ground that a request under the *Privacy Act* may be made only to obtain personal information.

V. Issues

A. *Main Appeal*

1. Did the Federal Court of Appeal err in concluding that the Commissioner may not rely on s. 22(1)(*b*) of the *Privacy Act* to refuse to disclose personal information that was collected in the course of an investigation conducted under the *Official Languages Act*, when the Commissioner's investigation has concluded?

B. *Cour d'appel fédérale* (2000), 261 N.R. 19

15 Le juge Sharlow, au nom de la cour, confirme la décision du juge Dubé et rejette l'appel. La Cour d'appel fédérale est aussi d'avis que l'al. 22(1)*b*) de la *Loi sur la protection des renseignements personnels* ne s'applique pas de façon à protéger les renseignements que le commissaire recueille au cours d'une enquête, une fois que celle-ci est terminée (*Rubin c. Canada (Ministre des Transports)*, [1998] 2 C.F. 430; *Ruby c. Canada (Solliciteur général)*, [2000] 3 C.F. 589; *Canada (Commissaire à l'information) c. Canada (Commission de l'immigration et du statut de réfugié)*, précité).

16 Par ailleurs, le juge Sharlow rejette l'argument de l'appelant selon lequel le juge Dubé a omis d'évaluer si la divulgation risquait vraisemblablement de nuire aux activités destinées à faire respecter les lois fédérales, d'après l'al. 22(1)*b*) de la *Loi sur la protection des renseignements personnels*. Selon le juge Sharlow, la preuve au dossier ne peut étayer pareille conclusion. Elle démontre, tout au plus, que certains témoins seront réticents à collaborer à l'enquête sans une assurance absolue de confidentialité. Le juge Sharlow confirme la décision du juge Dubé ordonnant à l'appelant de divulguer les « renseignements personnels » demandés par l'intimé.

17 La Cour d'appel fédérale a également rejeté l'appel incident au motif qu'une demande en vertu de la *Loi sur la protection des renseignements personnels* n'est possible que pour obtenir des renseignements personnels.

V. Questions en litige

A. *Pourvoi principal*

18

1. La Cour d'appel fédérale a-t-elle fait erreur en concluant que le commissaire ne peut invoquer l'al. 22(1)*b*) de la *Loi sur la protection des renseignements personnels* pour refuser de communiquer des renseignements personnels qui ont été recueillis au cours d'une enquête menée en application de la *Loi sur les langues officielles*, lorsque l'enquête du commissaire est terminée?

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2. Did the Federal Court of Appeal err in concluding that there were no reasonable grounds for the Commissioner's refusal?

2. La Cour d'appel fédérale a-t-elle fait erreur en concluant que le refus du commissaire n'était pas fondé sur des motifs raisonnables?

B. *Cross-Appeal*

B. *Pourvoi incident*

19 Did the Federal Court of Appeal err in concluding that the respondent was not entitled to information other than personal information?

La Cour d'appel fédérale a-t-elle fait erreur en concluant que l'intimé n'a pas droit aux renseignements autres que personnels?

VI. Analysis

VI. Analyse

A. *Applicable Legislation*

A. *Les lois applicables*

20 The issue in this case is the application of the *Official Languages Act* and the *Privacy Act* in relation to each other. What we must first do is to ascertain the purpose and scope of the two Acts, and analyse the respective roles of the two Commissioners. It will then be possible, having regard to those general principles, to consider the statutory provisions on which the parties rely.

Le litige porte sur l'application de la *Loi sur les langues officielles* et de la *Loi sur la protection des renseignements personnels* en regard l'une de l'autre. Dans un premier temps, on doit en cerner l'objet et la portée et analyser le rôle respectif des deux commissaires. C'est à la lumière de ces principes généraux qu'il sera possible, par la suite, de traiter des dispositions invoquées par les parties.

21 The *Official Languages Act* is a significant legislative response to the obligation imposed by the Constitution of Canada in respect of bilingualism in Canada. The preamble to the Act refers expressly to the duties set out in the Constitution. It cites the equality of status of English and French as to their use in the institutions of the Parliament and government of Canada and the guarantee of full and equal access in both languages to Parliament and to the laws of Canada and the courts. In addition, the preamble states that the Constitution provides for guarantees relating to the right of any member of the public to communicate with and receive services from any institution of the Parliament or government of Canada in English and French. The fact that the *Official Languages Act* is a legislative measure taken in order to fulfil the constitutional duty in respect of bilingualism is not in doubt.

La *Loi sur les langues officielles* est une réponse législative importante à l'obligation imposée par la Constitution canadienne en matière de bilinguisme au Canada. Son préambule fait expressément référence aux obligations linguistiques prévues par la Constitution. Il rappelle le statut d'égalité quant à l'usage du français et de l'anglais dans les institutions du Parlement et du gouvernement du Canada de même que l'universalité d'accès dans ces deux langues au Parlement et à ses lois ainsi qu'aux tribunaux. De plus, le préambule mentionne que la Constitution offre des garanties quant au droit du public d'utiliser le français et l'anglais dans leurs communications avec les institutions du Parlement et du gouvernement du Canada ou pour en recevoir les services. Il ne fait donc aucun doute que la *Loi sur les langues officielles* est une mesure législative prise dans le but de répondre à l'obligation constitutionnelle en matière de bilinguisme.

22 Section 2 of the *Official Languages Act* sets out the purpose of the Act:

L'article 2 de la *Loi sur les langues officielles* en énonce la mission :

2. The purpose of this Act is to

(*a*) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all fed-

2. La présente loi a pour objet :

a) d'assurer le respect du français et de l'anglais à titre de langues officielles du Canada, leur égalité de statut et l'égalité de droits et privilèges quant à leur usage dans

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eral institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;

(*b*) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and

(*c*) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

Those objectives are extremely important, in that the promotion of both official languages is essential to Canada's development. As this Court said in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 744:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

The *Official Languages Act* is more than just a statement of principles. It imposes practical requirements on federal institutions, as Bastarache J. wrote in *R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 24:

> The idea that s. 16(3) of the *Charter*, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the *Jones* case, *supra*, limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time. Section 2 of the *Official Languages Act* has the same effect with regard to rights recognized under that Act. This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State; see *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 412; *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1038; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 73; *Mahe*, *supra*, at p. 365. It also means that

les institutions fédérales, notamment en ce qui touche les débats et travaux du Parlement, les actes législatifs et autres, l'administration de la justice, les communications avec le public et la prestation des services, ainsi que la mise en œuvre des objectifs de ces institutions;

b) d'appuyer le développement des minorités francophones et anglophones et, d'une façon générale, de favoriser, au sein de la société canadienne, la progression vers l'égalité de statut et d'usage du français et de l'anglais;

c) de préciser les pouvoirs et les obligations des institutions fédérales en matière de langues officielles.

Ces objectifs sont fort importants, car la promotion des deux langues officielles est essentielle au bon développement du Canada. Comme le disait notre Cour dans le *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, p. 744 :

> L'importance des droits en matière linguistique est fondée sur le rôle essentiel que joue la langue dans l'existence, le développement et la dignité de l'être humain. C'est par le langage que nous pouvons former des concepts, structurer et ordonner le monde autour de nous. Le langage constitue le pont entre l'isolement et la collectivité, qui permet aux êtres humains de délimiter les droits et obligations qu'ils ont les uns envers les autres, et ainsi, de vivre en société.

La *Loi sur les langues officielles* va au-delà d'un énoncé de principes. Elle impose des exigences pratiques aux institutions fédérales, comme le mentionne le juge Bastarache dans l'affaire *R. c. Beaulac*, [1999] 1 R.C.S. 768, par. 24 :

> L'idée que le par. 16(3) de la *Charte*, qui a officialisé la notion de progression vers l'égalité des langues officielles du Canada exprimée dans l'arrêt *Jones*, précité, limite la portée du par. 16(1) doit également être rejetée. Ce paragraphe confirme l'égalité réelle des droits linguistiques constitutionnels qui existent à un moment donné. L'article 2 de la *Loi sur les langues officielles* a le même effet quant aux droits reconnus en vertu de cette loi. Ce principe d'égalité réelle a une signification. Il signifie notamment que les droits linguistiques de nature institutionnelle exigent des mesures gouvernementales pour leur mise en œuvre et créent, en conséquence, des obligations pour l'État; voir *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, à la p. 412; *Haig c. Canada*, [1993] 2 R.C.S. 995, à la p. 1038; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, au par. 73; *Mahe*, précité, à

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the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation. [Emphasis added.]

23 The importance of these objectives and of the constitutional values embodied in the *Official Languages Act* gives the latter a special status in the Canadian legal framework. Its quasi-constitutional status has been recognized by the Canadian courts. For instance, in *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373, at p. 386 (see also *Rogers v. Canada (Correctional Service)*, [2001] 2 F.C. 586 (T.D.), at pp. 602-3), the Federal Court of Appeal said:

> The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms*, it follows the rules of interpretation of that Charter as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it." [Emphasis added.]

The Federal Court was correct to recognize the special status of the *Official Languages Act*. The constitutional roots of that Act, and its crucial role in relation to bilingualism, justify that interpretation.

24 The *Privacy Act* is also fundamental in the Canadian legal system. It has two major objectives. Its aims are, first, to protect personal information held by government institutions, and second, to provide individuals with a right of access to personal information about themselves (s. 2). Obviously, it is the second objective that is in issue in these appeals. Until 1983, the core elements of the legal guarantees of the confidentiality of personal information were set out in Part IV of the *Canadian Human Rights*

la p. 365. Il signifie également que l'exercice de droits linguistiques ne doit pas être considéré comme exceptionnel, ni comme une sorte de réponse à une demande d'accommodement. [Je souligne.]

L'importance de ces objectifs de même que les valeurs constitutionnelles incarnées par la *Loi sur les langues officielles* confèrent à celle-ci un statut privilégié dans l'ordre juridique canadien. Son statut quasi-constitutionnel est reconnu par les tribunaux canadiens. Ainsi, la Cour d'appel fédérale s'exprimait de la façon suivante dans *Canada (Procureur général) c. Viola*, [1991] 1 C.F. 373, p. 386 (voir également *Rogers c. Canada (Service correctionnel)*, [2001] 2 C.F. 586 (1re inst.), p. 602-603) :

> La *Loi sur les langues officielles* de 1988 n'est pas une loi ordinaire. Elle reflète à la fois la Constitution du pays et le compromis social et politique dont il est issu. Dans la mesure où elle est l'expression exacte de la reconnaissance des langues officielles inscrite aux paragraphes 16(1) et 16(3) de la *Charte canadienne des droits et libertés*, elle obéira aux règles d'interprétation de cette Charte telles qu'elles ont été définies par la Cour suprême du Canada. Dans la mesure, par ailleurs, où elle constitue un prolongement des droits et garanties reconnus dans la Charte, et de par son préambule, de par son objet défini en son article 2, de par sa primauté sur les autres lois établies en son paragraphe 82(1), elle fait partie de cette catégorie privilégiée de lois dites quasi-constitutionnelles qui expriment « certains objectifs fondamentaux de notre société » et qui doivent être interprétées « de manière à promouvoir les considérations de politique générale qui (les) sous-tendent. » [Je souligne.]

C'est à juste titre que la Cour fédérale a reconnu le statut privilégié de la *Loi sur les langues officielles*. Les racines constitutionnelles de cette loi de même que son rôle primordial en matière de bilinguisme justifient une telle interprétation.

La *Loi sur la protection des renseignements personnels* est également une loi fondamentale du système juridique canadien. Elle a deux objectifs importants. Elle vise, premièrement, à protéger les renseignements personnels relevant des institutions fédérales et, deuxièmement, à assurer le droit d'accès des individus aux renseignements personnels qui les concernent (art. 2). Le présent pourvoi s'intéresse évidemment à l'analyse du deuxième objectif. Jusqu'en 1983, c'était la

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Act, S.C. 1976-77, c. 33. Part IV of the *Canadian Human Rights Act* was repealed (S.C. 1980-81-82-83, c. 111 (Sch. IV, s. 3)) and replaced by the *Privacy Act* (S.C. 1980-81-82-83, c. 111, Sch. II). In view of the quasi-constitutional mission of that Act, the courts have recognized its special nature. In *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, [1996] 3 F.C. 609, at p. 652, Noël J. of the Federal Court, Trial Division wrote:

> The enactment by Parliament of Part IV of the *Canadian Human Rights Act*, later replaced by the *Privacy Act*, illustrated its recognition of the importance of the protection of individual privacy. A purposive approach to the interpretation of the *Privacy Act* is thus justified by the statute's quasi-constitutional legislative roots. [Emphasis added.]

25 The *Privacy Act* is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society. In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, La Forest J. wrote (although he dissented, he spoke for the entire Court on this point):

> The protection of privacy is a fundamental value in modern, democratic states; see Alan F. Westin, *Privacy and Freedom* (1970), at pp. 349-50. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions; see *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427, *per* La Forest J.; see also Joel Feinberg, "Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?" (1982), 58 *Notre Dame L. Rev.* 445.
>
> Privacy is also recognized in Canada as worthy of constitutional protection, at least in so far as it is encompassed by the right to be free from unreasonable searches and seizures under s. 8 of the *Canadian Charter of Rights*

partie IV de la *Loi canadienne sur les droits de la personne*, S.C. 1976-77, ch. 33, qui contenait l'essentiel des garanties légales de confidentialité des renseignements personnels. La partie IV de la *Loi canadienne sur les droits de la personne* fut abrogée (S.C. 1980-81-82-83, ch. 111 (ann. IV, art. 3)) et remplacée par la *Loi sur la protection des renseignements personnels* (S.C. 1980-81-82-83, ch. 111, ann. II). Considérant la vocation quasi-constitutionnelle de cette loi, les tribunaux en ont reconnu le caractère privilégié. C'est ainsi que le juge Noël, de la Section de première instance de la Cour fédérale, s'exprimait dans *Canada (Commissaire à la protection de la vie privée) c. Canada (Conseil des relations du travail)*, [1996] 3 C.F. 609, p. 652 :

> L'adoption, par le Parlement, de la partie IV de la *Loi canadienne sur les droits de la personne*, remplacée depuis par la *Loi sur la protection des renseignements personnels*, montre toute l'importance qu'on accorde à la protection de la vie privée des individus. Compte tenu de cette origine législative quasi constitutionnelle de la *Loi sur la protection des renseignements personnels*, c'est à juste titre qu'on l'interprète en fonction de son objet. [Je souligne.]

La *Loi sur la protection des renseignements personnels* rappelle à quel point la protection de la vie privée est nécessaire au maintien d'une société libre et démocratique. Dans l'arrêt *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403, par. 65-66, le juge La Forest affirmait (bien qu'il soit dissident, il exprime sur ce point l'opinion de l'ensemble de la Cour) :

> La protection de la vie privée est une valeur fondamentale des États démocratiques modernes; voir Alan F. Westin, *Privacy and Freedom* (1970), aux pp. 349 et 350. Étant l'expression de la personnalité ou de l'identité unique d'une personne, la notion de vie privée repose sur l'autonomie physique et morale — la liberté de chacun de penser, d'agir et de décider pour lui-même; voir *R. c. Dyment*, [1988] 2 R.C.S. 417, à la p. 427, le juge La Forest; voir aussi Joel Feinberg, « Autonomy, Sovereignty, and Privacy : Moral Ideals in the Constitution? » (1982), 58 *Notre Dame L. Rev.* 445.
>
> La vie privée est également reconnue au Canada comme étant digne d'être protégée par la Constitution, du moins dans la mesure où elle est incluse dans le droit à la protection contre les fouilles, perquisitions et saisies

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and Freedoms; see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. Certain privacy interests may also inhere in the s. 7 right to life, liberty and security of the person; see *R. v. Hebert*, [1990] 2 S.C.R. 151, and *R. v. Broyles*, [1991] 3 S.C.R. 595.

La Forest J. also did not hesitate in that case to recognize "the privileged, foundational position of privacy interests in our social and legal culture" (para. 69). La Forest J. added, at para. 61, that the overarching purpose of access to information legislation is to facilitate democracy:

It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.

And lastly, L'Heureux-Dubé J., dissenting, but not on this point, wrote on the question of the importance of protecting privacy in *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 614:

The importance of privacy as a fundamental value in our society is underscored by the protection afforded to everyone under s. 8 of the *Charter* "to be secure against unreasonable search or seizure". This value finds expression in such legislation as the *Privacy Act*, R.S.C., 1985, c. P-21, which restricts the purposes for which information may be used to those for which it was received. [Emphasis in original.]

The *Official Languages Act* and the *Privacy Act* are closely linked to the values and rights set out in the Constitution, and this explains the quasi-constitutional status that this Court has recognized them as having. However, that status does not operate to alter the traditional approach to the interpretation of legislation, defined by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

abusives, garanti par l'art. 8 de la *Charte canadienne des droits et libertés*; voir *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145. Certains droits à la vie privée peuvent également être inclus dans le droit à la vie, à la liberté et à la sécurité de la personne, garanti par l'art. 7; voir *R. c. Hebert*, [1990] 2 R.C.S. 151, et *R. c. Broyles*, [1991] 3 R.C.S. 595.

De plus, dans cette même affaire, le juge La Forest n'a pas hésité à reconnaître, « le statut privilégié et fondamental du droit à la vie privée dans notre culture sociale et juridique » (par. 69). Le juge La Forest ajoute également, au par. 61, que la loi en matière d'information a pour objet général de favoriser la démocratie :

Elle aide à garantir, en premier lieu, que les citoyens possèdent l'information nécessaire pour participer utilement au processus démocratique, et, en second lieu, que les politiciens et bureaucrates demeurent comptables envers l'ensemble de la population.

Enfin, madame le juge L'Heureux-Dubé, dissidente mais non sur ce point, s'exprimait ainsi à l'égard de l'importance de la protection de la vie privée dans l'arrêt *R. c. Osolin*, [1993] 4 R.C.S. 595, p. 614 :

L'importance fondamentale qu'accorde notre société au respect de la vie privée est soulignée par la protection que garantit à chacun l'art. 8 de la *Charte* « contre les fouilles, les perquisitions ou les saisies abusives ». Cette valeur trouve son expression dans des lois telle la *Loi sur la protection des renseignements personnels*, L.R.C. (1985), ch. P-21, qui restreint les fins auxquelles les renseignements peuvent être utilisés à celles auxquelles ils ont été reçus. [Souligné dans l'original.]

La *Loi sur les langues officielles* et la *Loi sur la protection des renseignements personnels* sont étroitement liées aux valeurs et aux droits prévus par la Constitution, ce qui explique leur statut quasi-constitutionnel reconnu par cette Cour. Ce statut n'a toutefois pas pour effet de modifier l'approche traditionnelle d'interprétation des lois, définie par E. A. Driedger dans *Construction of Statutes* (2e éd. 1983), p. 87 :

[TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

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The quasi-constitutional status of the *Official Languages Act* and the *Privacy Act* is one indicator to be considered in interpreting them, but it is not conclusive in itself. The only effect of this Court's use of the expression "quasi-constitutional" to describe these two Acts is to recognize their special purpose.

Le statut quasi-constitutionnel de la *Loi sur les langues officielles* et de la *Loi sur la protection des renseignements personnels* est un indicateur à considérer dans leur interprétation, mais n'est pas déterminant en soi. L'utilisation par notre Cour de l'expression « quasi-constitutionnel » pour décrire ces deux lois n'a pour effet que de reconnaître leur objet particulier.

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The *Privacy Act* deals with "personal information", which is defined in s. 3 of the Act. As Jerome A.C.J. said in *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551 (T.D.), at p. 557, s. 3 is "deliberately broad" and "is entirely consistent with the great pains that have been taken to safeguard individual identity". (See also *Dagg*, *supra*, at para. 69.) Section 3 provides, *inter alia*:

3. . . .

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

. . .

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

Comme son nom l'indique, la *Loi sur la protection des renseignements personnels* vise les « renseignements personnels » que définit l'art. 3 de cette loi. Comme l'a précisé le juge en chef adjoint Jerome dans *Canada (Commissaire à l'information) c. Canada (Solliciteur général)*, [1988] 3 C.F. 551 (1re inst.), p. 557, l'art. 3 est « délibérément large » et « illustre tout à fait les efforts considérables qui ont été déployés pour protéger l'identité des individus ». (Voir également l'affaire *Dagg*, précitée, par. 69.) L'article 3 prévoit entre autres :

3. . . .

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

. . .

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

27

To achieve the objectives of the *Privacy Act*, Parliament has created a detailed scheme for collecting, using and disclosing personal information. First, the Act specifies the circumstances in which personal information may be collected by a government institution, and what use the institution may make of it: only personal information that relates directly to an operating program or activity of the government institution that collects it may be collected (s. 4), and it may be used for the purpose for which it was obtained or compiled by the institution or for a use consistent with that purpose, and for a purpose for which the information may be disclosed to the institution under s. 8(2) (s. 7). As a rule, personal information may never be disclosed to third parties except with the consent of the individual to whom it relates (s.

Pour réaliser les objectifs de la *Loi sur la protection des renseignements personnels*, le législateur a mis en place un régime détaillé de collecte, d'utilisation et de communication des renseignements à caractère personnel. D'abord, la loi précise dans quelles circonstances des renseignements personnels peuvent être recueillis par une institution fédérale et l'usage qu'on peut en faire, soit seuls les renseignements personnels ayant un lien direct avec les programmes ou les activités de l'institution fédérale qui les recueille (art. 4), et ceci pour les fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins, et celles auxquelles ils peuvent lui être communiqués en vertu du par. 8(2) (art. 7). En principe, les renseignements personnels ne peuvent être communiqués à des tiers,

8(1)) and subject to the exceptions set out in the Act (s. 8(2)).

28 The Act also governs the retention of personal information, which must be stored in personal information banks (s. 10). The Act provides that every individual who is a Canadian citizen or permanent resident has a right to be given access to personal information about the individual held by a government institution (s. 12). It is that section that Mr. Lavigne relies on in requesting access to personal information about him.

29 The Act also sets out the circumstances in which a government institution may or must refuse to disclose personal information to the individual to whom the information relates (ss. 18 to 28). B. McIsaac, R. Shields and K. Klein describe those exceptions as follows in *The Law of Privacy in Canada* (looseleaf), at p. 3-15:

> Sections 18 through 28 of the *Privacy Act* provide for the establishment of exempt banks of personal information and establish various provisions for the exemption of personal information which has been requested. These exempting provisions fall into two major types. First there are exemptions which are based on the classification or type of personal information involved. In these cases, the personal information is subject to exemption from disclosure simply because it falls into the class described in the exempting provision. The other exemptions require that the head of the institution be satisfied that the use of the personal information in question would result in an injury or other consequence which is specified in the exempting section. The reasonable expectation of injury test requires that there be a reasonable expectation of "probable" harm. . . . In most cases, even if the personal information falls within a class which is exempt from disclosure simply because of the nature of the personal information in question, the head of the institution still has a discretion to release the personal information. There are only three situations in which the head of the institution is statutorily obliged to refuse to release personal information [ss. 19, 22(2) and 26].

30 Given that one of the objectives of the *Privacy Act* is to provide individuals with access to personal information about themselves, the courts have

sauf avec le consentement de l'individu qu'ils concernent (par. 8(1)) et sauf exceptions prévues à cette loi (par. 8(2)).

Cette loi réglemente également la conservation des renseignements personnels en prévoyant leur versement dans des fichiers de renseignements personnels (art. 10). La loi prévoit le droit d'accès de tout citoyen canadien et tout résident permanent aux renseignements personnels les concernant et détenus par une institution fédérale (art. 12). C'est en vertu de cet article que M. Lavigne a demandé l'accès aux renseignements personnels le concernant.

Cette loi prévoit aussi des circonstances où l'institution fédérale peut ou doit refuser la communication de renseignements personnels à l'individu visé par ces renseignements (art. 18 à 28). B. McIsaac, R. Shields et K. Klein décrivent ainsi ces exceptions dans *The Law of Privacy in Canada* (feuilles mobiles), p. 3-15 :

> [TRADUCTION] Les articles 18 à 28 de la *Loi sur la protection des renseignements personnels* prévoient l'établissement de fichiers de renseignements personnels inconsultables ainsi que différentes dispositions exemptant de communication certains renseignements personnels demandés. Ces dispositions d'exemption entrent dans deux grandes catégories. Premièrement, il y a les exemptions fondées sur la qualification ou le genre des renseignements personnels en cause. Dans ces cas, les renseignements personnels sont exemptés de communication simplement parce qu'ils relèvent de la catégorie décrite dans la disposition d'exemption. Les autres exemptions exigent que le responsable de l'institution soit convaincu que l'utilisation des renseignements personnels en question causerait un préjudice ou entraînerait une autre conséquence précisée dans la disposition portant exception. Le critère de la prévisibilité raisonnable du dommage exige une attente raisonnable de préjudice « probable ». [. . .] Dans la plupart des cas, même si les renseignements personnels relèvent d'une catégorie exemptée de communication simplement en raison de leur nature, le responsable de l'institution a le pouvoir discrétionnaire de les communiquer. Il n'existe que trois cas où la loi interdit au responsable de l'institution de communiquer des renseignements personnels [art. 19, par. 22(2) et art. 26].

Étant donné qu'un des objectifs de la *Loi sur la protection des renseignements personnels* est d'assurer l'accès des individus aux renseignements

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generally interpreted the exceptions to the right of access narrowly. For instance, in *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, *supra*, Richard J. of the Federal Court, Trial Division said, at paras. 34-35:

The general preamble as contained in s. 2 of the *Privacy Act*, has the same general effect as s. 2(1) of the *Access to Information Act.* The *Privacy Act* must also be guided by the purposive clause. . . .

The *Privacy Act*'s purpose is to provide access to personal information maintained by government. The rules of interpretation described above also apply in this instance. The necessary exceptions to the access must be strictly construed.

31 Similarly, in *Reyes v. Secretary of State* (1984), 9 Admin. L.R. 296, at p. 299, the Federal Court, Trial Division said:

It must also be emphasized that since the main purpose of these "access to information" statutes is to codify the right of public access to government information, two things follow: first, such public access ought not be frustrated by the Courts except upon the clearest of grounds so that doubt ought to be resolved in favour of disclosure; second, the burden of persuasion must rest upon the party resisting disclosure, in this case the government.

32 The *Privacy Act* provides for the appointment of a Commissioner responsible for administering and enforcing the Act. The Privacy Commissioner's duties include:

– Receiving (and investigating) complaints from individuals who allege that personal information about themselves held by a government institution has been used or disclosed otherwise than in accordance with s. 7 or 8 (s. 29(1)(*a*)), and receiving (and investigating) complaints from individuals who have been refused access to personal information requested under s. 12(1) or who allege that they are

personnels qui les concernent, les tribunaux ont généralement interprété de manière restrictive les exceptions au droit d'accès. C'est ce qu'a affirmé notamment le juge Richard, de la Section de première instance de la Cour fédérale, dans *Canada (Commissaire à l'information) c. Canada (Commission de l'immigration et du statut de réfugié)*, précité, par. 34-35 :

Le préambule que constitue l'article 2 de la *Loi sur la protection des renseignements personnels* a dans l'ensemble le même effet que le paragraphe 2(1) de la *Loi sur l'accès à l'information*. L'interprétation de la *Loi sur la protection des renseignements personnels* doit, elle aussi, partir de la disposition exposant son objet . . .

La *Loi sur la protection des renseignements personnels* a pour objet de donner accès aux renseignements personnels conservés par le gouvernement. Les règles d'interprétation décrites plus haut s'appliquent en l'occurrence. Les exceptions nécessaires au droit d'accès doivent être interprétées de manière stricte.

De même, dans la décision *Reyes c. Canada (Secrétariat d'État)*, [1984] A.C.F. nº 1135 (QL), la Section de première instance de la Cour fédérale soulignait au par. 3 :

Il convient aussi d'insister sur le fait que, vu que l'objectif essentiel de ces lois sur l'accès à l'information vise à codifier le droit de l'accès du public aux renseignements gouvernementaux, il en résulte que : tout d'abord, l'accès du public ne devrait pas être gêné par les décisions judiciaires, sauf en cas de motifs manifestes, de sorte que le doute devrait jouer en faveur de la divulgation; en second lieu, c'est à la partie qui empêche la divulgation qu'il incombe de justifier ce refus, en l'espèce le gouvernement.

La *Loi sur la protection des renseignements personnels* prévoit la nomination d'un commissaire chargé de veiller à l'application et au respect de la loi. Le Commissaire à la protection de la vie privée a, entre autres, comme mandat de :

– Recevoir les plaintes (et faire enquête sur celles-ci) déposées par des individus qui prétendent que des renseignements personnels les concernant et détenus par une institution fédérale ont été utilisés ou communiqués contrairement aux art. 7 ou 8 (al. 29(1)*a*)); de recevoir les plaintes (et faire enquête sur celles-ci) déposées par des individus qui se sont vu refuser la communication de renseignements

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not being accorded the rights to which they are entitled under s. 12(2) (s. 29(1)(*b*) and (*c*));

personnels, demandés en vertu du par. 12(1), ou qui se prétendent lésés des droits que leur accorde le par. 12(2) (al. 29(1)*b*) et *c*)).

– Initiating a complaint where the Privacy Commissioner is satisfied there are reasonable grounds to investigate a matter under the *Privacy Act* (s. 29(3));

– Prendre l'initiative d'une plainte s'il a des motifs raisonnables de croire qu'une enquête devrait être menée sur une question relative à la *Loi sur la protection des renseignements personnels* (par. 29(3)).

– Carrying out investigations of the files contained in personal information banks designated as exempt banks under s. 18, to determine whether the files should in fact be in those banks (s. 36);

– Procéder à des enquêtes sur les dossiers versés dans les fichiers inconsultables classés comme tels en vertu de l'art. 18 afin de vérifier si les dossiers qui s'y trouvent devraient bel et bien y être (art. 36).

– Carrying out investigations in respect of compliance with ss. 4 to 8 (collection, retention and protection of personal information) (s. 37).

– Tenir des enquêtes relativement à l'application des art. 4 à 8 (collecte, conservation et protection des renseignements personnels) (art. 37).

33 The Privacy Commissioner has broad powers for the purposes of conducting investigations into complaints that are filed. He has access to all information held by a government institution, with the exception of confidences of the Queen's Privy Council for Canada, and no information to which he has access may be withheld from him (s. 34(2)). He has the right to summon and enforce the appearance of witnesses before him and to compel them to give oral or written evidence on oath and to produce such documents and things as he deems requisite to the full investigation and consideration of the complaint. In addition, he may administer oaths and receive such evidence and other information, whether on oath or by affidavit or otherwise, as the Privacy Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law. The Commissioner may also enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises, converse in private with any person therein, and carry out such inquiries within the Privacy Commissioner's authority under the *Privacy Act* as he sees fit. Lastly, the Privacy Commissioner may examine or obtain copies of or extracts from books or other records found in the premises occupied by a government institution containing any matter relevant to the investigation (s. 34(1)).

Afin de mener à terme l'instruction des plaintes déposées, le Commissaire à la protection de la vie privée possède de vastes pouvoirs. Il a accès à tous les renseignements qui relèvent d'une institution fédérale, à l'exclusion des renseignements confidentiels du Conseil privé de la Reine pour le Canada et aucun des renseignements auxquels il a accès ne peut lui être refusé (par. 34(2)). Il a le droit 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 plus, il peut faire prêter serment et recevoir des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu'il juge indiqué, indépendamment de leur admissibilité devant les tribunaux. Il peut également pénétrer dans les locaux occupés par une institution fédérale, à condition de satisfaire aux normes de sécurité établies par l'institution pour ces locaux, s'entretenir en privé avec toute personne s'y trouvant et y mener, dans le cadre de la compétence conférée par la *Loi sur la protection des renseignements personnels*, les enquêtes qu'il croit nécessaires. Enfin, il peut examiner ou 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 occupés par une institution fédérale (par. 34(1)).

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After completing his investigation, the Privacy Commissioner reports his findings to the head of the government institution in question, if he finds that a complaint is well-founded. Where appropriate, the Privacy Commissioner may report his findings to the complainant. In his report, he may ask the head of the government institution in question to disclose the personal information in issue or to make changes in the management or use of personal information (ss. 35, 36 and 37).

À l'issue de son enquête, le Commissaire à la protection de la vie privée fait rapport de ses conclusions au responsable de l'institution fédérale concernée s'il conclut au bien-fondé d'une plainte. S'il y a lieu, il fait également rapport au plaignant de ses conclusions. Dans son rapport, il peut demander au responsable de l'institution fédérale concernée de communiquer les renseignements personnels en cause ou de procéder à des changements dans la gestion ou l'utilisation des renseignements personnels (art. 35, 36 et 37).

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Like the Privacy Commissioner, the Commissioner of Official Languages plays an important role. It is his job to take the measures that are necessary in respect of the recognition of each of the two official languages, and to secure compliance with the spirit of the *Official Languages Act*, in particular in the administration of the affairs of federal institutions. It is therefore the Commissioner who has been given the mandate to ensure that the objectives of that Act are implemented. To allow him to fulfil a social mission of such broad scope, he has been vested with broad powers by the Parliament of Canada. For instance, he may conduct investigations into complaints that in any particular case the status of an official language was not recognized, or any provision of an Act of Parliament or regulation relating to the status or use of the two official languages, or the spirit or intent of the *Official Languages Act*, was not complied with:

56. (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and <u>compliance with the spirit and intent of this Act</u> in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.

(2) It is the duty of the Commissioner, for the purpose set out in subsection (1), to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to the Commissioner and to report and make recommendations with respect thereto as provided in this Act.

58. (1) Subject to this Act, the Commissioner shall <u>investigate any complaint made to the Commissioner</u>

Tout comme le Commissaire à la protection de la vie privée, le Commissaire aux langues officielles joue un rôle important. C'est à lui que revient la tâche de prendre toutes les mesures nécessaires visant la reconnaissance du statut de chacune des deux langues officielles et de faire respecter l'esprit de la *Loi sur les langues officielles* notamment au sein de l'administration des affaires des institutions fédérales. C'est donc le commissaire qui a le mandat d'assurer la poursuite des objectifs de cette loi. Pour lui permettre de s'acquitter de cette mission sociale de grande envergure, le Parlement du Canada l'a investi de vastes pouvoirs. Ainsi, il peut procéder à des enquêtes sur un cas précis de non-reconnaissance du statut d'une langue officielle ou de manquement à une loi ou un règlement fédéral sur le statut ou l'usage des deux langues officielles ou, encore, à l'esprit de la *Loi sur les langues officielles* ou à l'intention du législateur :

56. (1) Il incombe au commissaire de prendre, dans le cadre de sa compétence, toutes les mesures visant à assurer la reconnaissance du statut de chacune des langues officielles et à faire <u>respecter l'esprit de la présente loi et l'intention du législateur</u> en ce qui touche l'administration des affaires des institutions fédérales, et notamment la promotion du français et de l'anglais dans la société canadienne.

(2) Pour s'acquitter de cette mission, le commissaire procède à des enquêtes, soit de sa propre initiative, soit à la suite des plaintes qu'il reçoit, et présente ses rapports et recommandations conformément à la présente loi.

58. (1) Sous réserve des autres dispositions de la présente loi, le commissaire <u>instruit toute plainte reçue</u> — sur

arising from any act or omission to the effect that, in any particular instance or case,

(*a*) the status of an official language was not or is not being recognized,

(*b*) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or

(*c*) the spirit and intent of this Act was not or is not being complied with

in the administration of the affairs of any federal institution.

(2) A complaint may be made to the Commissioner by any person or group of persons, whether or not they speak, or represent a group speaking, the official language the status or use of which is at issue. [Emphasis added.]

un acte ou une omission — et faisant état, dans l'administration d'une institution fédérale, d'un cas précis de non-reconnaissance du statut d'une langue officielle, de manquement à une loi ou un règlement fédéraux sur le statut ou l'usage des deux langues officielles ou encore à l'esprit de la présente loi et à l'intention du législateur.

(2) Tout individu ou groupe a le droit de porter plainte devant le commissaire, indépendamment de la langue officielle parlée par le ou les plaignants. [Je souligne.]

The Commissioner may also exercise his persuasive influence to ensure that any decision that is made is implemented and that action is taken on the recommendations made in respect of an investigation. For instance, s. 63(3) of the *Official Languages Act* provides that he may request the deputy head or other administrative head of the federal institution concerned to notify him within a specified time of the action, if any, that the institution proposes to take to give effect to those recommendations. He may also, in his discretion and after considering any reply made by or on behalf of any federal institution concerned, transmit a copy of the report and recommendations to the Governor in Council, and the Governor in Council may take such action as the Governor in Council considers appropriate in relation to the report (s. 65(1) and (2)). The Commissioner may make a report to Parliament where the Governor in Council has not taken action on it (s. 65(3)). He also has the authority to apply to the Court for a remedy, with the consent of the complainant (s. 78).

Le commissaire peut également exercer son influence persuasive afin de mettre en œuvre toute décision prise et de donner suite aux recommandations formulées après une enquête. Ainsi, le par. 63(3) de la *Loi sur les langues officielles* prévoit qu'il peut demander aux administrateurs généraux ou aux autres responsables administratifs de l'institution fédérale concernée de lui faire savoir, dans un délai qu'il fixe, les mesures envisagées pour donner suite à ses recommandations. Il peut en outre, selon son appréciation et après examen des réponses faites par l'institution fédérale concernée ou en son nom, transmettre au gouverneur en conseil un exemplaire du rapport et de ses recommandations; celui-ci peut ensuite prendre les mesures qu'il juge indiquées pour donner suite au rapport (par. 65(1) et (2)). Le commissaire peut déposer une copie du rapport au Parlement lorsque le gouverneur en conseil n'a pas donné suite au rapport (par. 65(3)). Enfin, il a le pouvoir d'exercer un recours judiciaire avec le consentement du plaignant (art. 78).

36 As well, it is the Commissioner who decides what procedure to follow in conducting investigations, subject to the following requirements: the obligation to give notice of intention to investigate (s. 59), the obligation to ensure that investigations are conducted in private (s. 60(1)) and the obligation to give the individual or federal institution in question the opportunity to answer any adverse

De plus, c'est le commissaire qui décide de la procédure à suivre lors des enquêtes, sous réserve des exigences suivantes : l'obligation de faire parvenir un avis de son intention d'enquêter (art. 59), l'obligation de veiller à ce que les enquêtes soient secrètes (par. 60(1)) et l'obligation de donner au particulier ou à l'institution fédérale concernée la possibilité de répondre aux critiques dont ils font l'objet

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allegation or criticism (s. 60(2)). The investigation must also be conducted promptly, since the complainant is entitled to make an application for a court remedy six months after the complaint is made (s. 77(3)). The Commissioner and every person acting on his behalf may not disclose any information that comes to their knowledge in the performance of their duties and functions under the *Official Languages Act* (s. 72).

(par. 60(2)). L'enquête doit également être menée promptement puisque le plaignant a le droit d'exercer un recours judiciaire six mois après le dépôt de la plainte (par. 77(3)). Le commissaire et toute personne agissant en son nom sont tenus au secret en ce qui concerne les renseignements dont ils ont connaissance dans l'exercice des attributions que leur confère la *Loi sur les langues officielles* (art. 72).

37

In many significant respects, the mandates of the Commissioner of Official Languages and the Privacy Commissioner are in the nature of an ombudsman's role (see M. A. Marshall and L. C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995), 34 *Alta. L. Rev*. 215):

– They are independent of the government's administrative institutions and hold office during good behaviour for a specified period. They receive the same salary as a judge of the Federal Court. This independence is reinforced by the fact that they may not, as a rule, be compelled to testify, and no civil or criminal proceedings lie against them for anything done in the performance of their duties;

– They examine complaints made by individuals against the government's administrative institutions, and conduct impartial investigations;

– They attempt to secure appropriate redress when the individual's complaint is based on non-judicial grounds;

– They attempt to improve the level of compliance by government institutions with the *Privacy Act* and the *Official Languages Act*;

– As a rule, they may not disclose information they receive.

Le Commissaire aux langues officielles et le Commissaire à la protection de la vie privée détiennent un mandat dont plusieurs éléments importants sont propres au rôle d'un ombudsman (voir M. A. Marshall et L. C. Reif, « The Ombudsman : Maladministration and Alternative Dispute Resolution » (1995), 34 *Alta. L. Rev*. 215) :

– Ils sont indépendants de l'administration gouvernementale et occupent leur charge à titre inamovible pour une période déterminée. Ils reçoivent le même traitement qu'un juge de la Cour fédérale. Cette indépendance est renforcée du fait qu'ils ne peuvent pas généralement être contraints à témoigner et jouissent d'une immunité en matière civile ou pénale pour les actes accomplis dans l'exercice de leurs fonctions;

– Ils examinent les plaintes des citoyens contre l'administration gouvernementale et mènent des enquêtes impartiales;

– Ils cherchent à obtenir la réparation appropriée lorsque la plainte du citoyen est fondée sur des moyens non judiciaires;

– Ils cherchent à améliorer le degré de conformité de l'administration gouvernementale à la *Loi sur la protection des renseignements personnels* et à la *Loi sur les langues officielles*;

– Ils sont généralement tenus à la confidentialité.

38

The Privacy Commissioner and the Official Languages Commissioner follow an approach that distinguishes them from a court. Their unique mission is to resolve tension in an informal manner: one reason that the office of ombudsman was created was to address the limitations of legal proceedings.

Le Commissaire à la protection de la vie privée et le Commissaire aux langues officielles utilisent une approche qui les distingue d'une cour de justice. Ils ont pour mission propre de résoudre les tensions d'une manière informelle. C'est, entre autres, pour répondre aux limites des recours judiciaires que

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As W. Wade wrote (*Administrative Law* (8th ed. 2000), at pp. 87-88):

If something illegal is done, administrative law can supply a remedy, though the procedure of the courts is too formal and expensive to suit many complainants. But justified grievances may equally well arise from action which is legal, or at any rate not clearly illegal, when a government department has acted inconsiderately or unfairly or where it has misled the complainant or delayed his case excessively or treated him badly. Sometimes a statutory tribunal will be able to help him both cheaply and informally. But there is a large residue of grievances which fit into none of the regular legal moulds, but are none the less real. A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country. . . . What every form of government needs is some regular and smooth-running mechanism for feeding back the reactions of its disgruntled customers, after impartial assessment, and for correcting whatever may have gone wrong. . . . It was because it filled that need that the device of the ombudsman suddenly attained immense popularity, sweeping round the democratic world and taking root in Britain and in many other countries, as well as inspiring a vast literature.

l'ombudsman a été créé. En effet, selon W. Wade (*Administrative Law* (8e éd. 2000), p. 87-88) :

[TRADUCTION] Si un acte illégal est commis, le droit administratif peut prévoir un recours, quoique la procédure des cours de justice soit trop formelle et trop coûteuse pour convenir à de nombreux plaignants. Mais des griefs justifiés peuvent tout aussi bien découler d'un acte légal ou d'un acte qui n'est, en tout cas, pas clairement illégal, lorsqu'un organisme gouvernemental a agi de façon inconsidérée ou inéquitablement, ou lorsqu'il a induit en erreur le plaignant, qu'il a retardé son dossier de façon excessive ou qu'il l'a traité cavalièrement. Un tribunal créé par la loi est parfois en mesure de l'aider à peu de frais et de façon informelle. Il y a cependant un bon nombre de griefs qui ne correspondent à aucun des modèles juridiques habituels, mais qui n'en sont pas moins réels. Un système de gouvernement empreint de compassion doit fournir un moyen de régler ces griefs, tant pour les fins de la justice que parce que l'accumulation du mécontentement constitue un obstacle important à l'efficacité administrative dans un pays démocratique. [. . .] Toute forme de gouvernement a besoin d'un mécanisme régulier bien rodé pour répondre, après évaluation impartiale, aux réactions de ses clients insatisfaits et pour corriger ce qui a pu mal fonctionner. [. . .] C'est parce qu'il a comblé ce besoin que l'instrument que constitue l'ombudsman s'est soudainement attiré une immense popularité, faisant le tour du monde démocratique et prenant racine en Grande-Bretagne et dans de nombreux autres pays tout en faisant couler beaucoup d'encre.

39 An ombudsman is not counsel for the complainant. His or her duty is to examine both sides of the dispute, assess the harm that has been done and recommend ways of remedying it. The ombudsman's preferred methods are discussion and settlement by mutual agreement. As Dickson J. wrote in *British Columbia Development Corp. v. Friedmann*, [1984] 2 S.C.R. 447, the office of ombudsman and the grievance resolution procedure, which are neither legal nor political in a strict sense, are of Swedish origin, *circa* 1809. He described their genesis (at pp. 458-59):

As originally conceived, the Swedish Ombudsman was to be the Parliament's overseer of the administration, but over time the character of the institution gradually changed. Eventually, the Ombudsman's main function came to be the investigation of complaints of maladministration on behalf of aggrieved citizens and the recommendation of corrective action to the governmental official or department involved.

L'ombudsman n'est pas l'avocat du plaignant. Il a le devoir d'examiner les deux côtés du litige, apprécier les torts et recommander les moyens d'y remédier. Il privilégie la discussion et l'entente à l'amiable. Selon le juge Dickson dans l'affaire *British Columbia Development Corp. c. Friedmann*, [1984] 2 R.C.S. 447, la fonction d'ombudsman et la procédure de règlement qui ne sont ni légales ni politiques au sens strict sont d'origine suédoise et remontent aux environs de 1809. Il en décrit la genèse (aux p. 458-459) :

Au début, l'ombudsman suédois devait être le surveillant parlementaire de l'administration, mais par la suite la nature de l'institution s'est progressivement modifiée. Finalement, l'ombudsman en est venu à avoir pour fonction principale d'enquêter sur des plaintes de mauvaise administration pour le compte de citoyens lésés et de recommander des mesures correctives aux fonctionnaires ou ministères gouvernementaux visés.

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The institution of Ombudsman has grown since its creation. It has been adopted in many jurisdictions around the world in response to what R. Gregory and P. Hutchesson in *The Parliamentary Ombudsman* (1975) refer to, at p. 15, as "one of the dilemmas of our times" namely, that "(i)n the modern state . . . democratic action is possible only through the instrumentality of bureaucratic organization; yet bureaucratic — if it is not properly controlled — is itself destructive of democracy and its values".

L'institution d'ombudsman a connu un essor depuis sa création. De nombreux pays dans le monde l'ont adoptée pour répondre à ce que R. Gregory et P. Hutchesson, à la p. 15 de leur ouvrage intitulé *The Parliamentary Ombudsman* (1975), appellent [TRADUCTION] « l'un des dilemmes de notre époque », savoir que [TRADUCTION] « dans l'État moderne . . . l'action démocratique n'est possible qu'au moyen de l'organisation bureaucratique; mais la puissance bureaucratique, si elle n'est pas bien contrôlée, tend elle-même à détruire la démocratie et ses valeurs ».

The factors which have led to the rise of the institution of Ombudsman are well-known. Within the last generation or two the size and complexity of government has increased immeasurably, in both qualitative and quantitative terms. Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable.

Les facteurs qui ont contribué à l'essor de l'institution d'ombudsman sont bien connus. Depuis une ou deux générations, la taille et la complexité du gouvernement ont augmenté considérablement tant du point de vue qualitatif que quantitatif. Depuis l'avènement de l'État-providence moderne, l'ingérence du gouvernement dans la vie et les moyens de subsistance des individus a augmenté de façon exponentielle. Le gouvernement assure maintenant des services et des avantages, intervient activement sur le marché et exerce des fonctions de propriétaire, à un degré qui aurait été inconcevable il y a cinquante ans.

B. *The Connection Between the Official Languages Act and the Privacy Act*

B. *Les liens entre la Loi sur les langues officielles et la Loi sur la protection des renseignements personnels*

40

Parliament has made it plain that the *Privacy Act* applies to the Office of the Commissioner of Official Languages: the latter is listed in the schedule to the Act as a government institution that is subject to the *Privacy Act*. As well, s. 2 of the *Privacy Act* provides that its purpose is to extend the present laws of Canada, and this includes the *Official Languages Act*, although s. 82 of the *Official Languages Act* provides that the provisions of Parts I to V prevail over any other Act of Parliament or regulation thereunder. None of the sections relied on by the appellant is found in those parts: ss. 60(1), 72, 73 and 74 are in Part IX of the Act. The meanings of the provisions in issue in these appeals must therefore be reconciled, and they must be read together.

Le législateur a clairement indiqué que la *Loi sur la protection des renseignements personnels* s'applique au Commissariat aux langues officielles. En effet, celui-ci est énuméré à l'annexe de la loi en tant qu'institution fédérale assujettie à la *Loi sur la protection des renseignements personnels*. De plus, l'art. 2 stipule qu'elle a pour objet de compléter la législation canadienne, dont la *Loi sur les langues officielles*, quoique l'art. 82 de la *Loi sur les langues officielles* prévoit que les dispositions des parties I à V l'emportent sur toute autre loi ou tout autre règlement fédéraux. Aucun des articles invoqués par l'appelant ne figure dans ces parties. En effet, le par. 60(1) ainsi que les art. 72, 73 et 74 se situent dans la partie IX de la loi. Les dispositions en litige dans le présent pourvoi doivent donc être conciliées et lues ensemble.

41

Section 12 of the *Privacy Act* creates a right of access to personal information, "[s]ubject to this Act". Exceptions to the right of access must therefore be prescribed by that Act. Where a government institution refuses to give access to the information, it is required to state the specific provision of the

L'article 12 de la *Loi sur la protection des renseignements personnels* donne un droit d'accès aux renseignements personnels, « [s]ous réserve des autres dispositions de la présente loi ». Les exceptions au droit d'accès doivent donc être prévues par cette loi. Lorsque l'institution fédérale refuse

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Act on which the refusal is based (s. 16(1)(*b*)) and to establish that it is authorized to refuse to disclose the information (s. 47). In this case, the refusal to disclose is based on s. 22(1)(*b*).

42 The *Privacy Act* must therefore be applied to the Office of the Commissioner of Official Languages in a manner consistent with the objective of the *Official Languages Act* of promoting equality of status of the two official languages of Canada and guaranteeing minority language groups the right to use the language of their choice within federal institutions. Parliament has expressly provided that investigations by the Commissioner shall be conducted in private and that investigators shall not disclose information that comes to their knowledge in the performance of their duties and functions:

> **60.** (1) Every investigation by the Commissioner under this Act shall be conducted in private.
>
> **72.** Subject to this Act, the Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act. [Emphasis added.]

These provisions illustrate Parliament's desire to facilitate access to the Commissioner and to recognize the very delicate nature of the use of an official language at work by a minority group. The private and confidential nature of investigations is an important aspect of the implementation of the *Official Languages Act*. Without protections of this nature, complainants might be reluctant to file complaints with the Commissioner, for example because they are afraid that their opportunities for advancement would be reduced, or their workplace relationships would suffer. As well, these provisions encourage witnesses to participate in the Commissioner's investigations. They are less likely to be afraid that their participation might have a negative impact on the employer-employee relationship or their relations with other employees, and to refuse to cooperate for fear of getting in trouble or damaging their careers. The affidavit of Mr. Langelier, Assistant Director General of the Investigations Branch, explains the importance of preserving a measure

l'accès aux renseignements, il lui appartient de préciser la disposition sur laquelle elle fonde son refus (al. 16(1)*b*)) et d'établir le bien-fondé de cette décision (art. 47). En l'occurrence, le refus de divulguer est basé sur l'al. 22(1)*b*).

L'application de la *Loi sur la protection des renseignements personnels* au Commissariat aux langues officielles doit donc se faire dans le respect de l'objectif de la *Loi sur les langues officielles* de promouvoir le statut d'égalité des deux langues officielles au Canada et d'assurer aux minorités linguistiques le droit d'utiliser la langue de leur choix au sein des institutions fédérales. Le législateur a expressément prévu que les enquêtes du commissaire sont secrètes et que les enquêteurs sont tenus au secret en ce qui concerne les informations qu'ils obtiennent dans l'exercice de leurs fonctions :

> **60.** (1) Les enquêtes menées par le commissaire sont secrètes.
>
> **72.** Sous réserve des autres dispositions de la présente loi, le commissaire et les personnes agissant en son nom ou sous son autorité sont tenus au secret en ce qui concerne les renseignements dont ils prennent connaissance dans l'exercice des attributions que leur confère la présente loi. [Je souligne.]

Ces dispositions démontrent le souci du législateur de faciliter l'accès au commissaire et de reconnaître la nature très délicate de l'usage d'une langue officielle au travail par une minorité. Le caractère secret et confidentiel des enquêtes est un élément important de la mise en œuvre de la *Loi sur les langues officielles*. Sans de telles protections, les plaignants pourraient hésiter à déposer une plainte auprès du commissaire de peur, par exemple, de voir diminuer leurs chances d'avancement ou de voir s'effriter leurs relations au travail. De même, ces dispositions favorisent la participation des témoins aux enquêtes du commissaire. Ceux-ci sont ainsi moins susceptibles de craindre que leur participation puisse avoir un impact néfaste sur la relation employeur-employé ou la relation avec les autres employés et de refuser d'y collaborer par crainte d'ennuis ou de préjudice à leur carrière. L'affidavit de M. Langelier, directeur général adjoint à la Direction générale des enquêtes, explique l'importance de conserver une

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of confidentiality in the Commissioner's investigations, for the following reasons, among others:

[TRANSLATION] – the investigators gave assurances to the people interviewed that the information gathered would be kept confidential in order to secure the cooperation of those people . . . .

– . . . members of the public, and in particular public servants, will hesitate to file complaints . . . if they are warned that their identities and any information that they disclose to the OCOL investigators is likely to be disclosed otherwise than where required in order to comply with the principles of natural justice or, as an exception, in an application for a remedy under Part X of the [*Official Languages Act*];

– members of the public, and in particular public servants, will be more reluctant to cooperate with OCOL investigators, and in order to give effect to the obligation imposed on the COL to investigate complaints, investigators will have to resort to their powers in relation to investigations, including summoning witnesses to attend and compelling them to testify and produce documents;

– the OCOL's investigatory process will become much more formal and rigid, and this will compromise the COL's ombudsman role;

– the fact that the COL is required to disclose information could interfere with his role as mediator and facilitator and thereby jeopardize the power of persuasion and the credibility that an ombudsman must have in order to discharge his functions.

In *Beaulac*, *supra*, at para. 20, Bastarache J. explained the importance of providing conditions in which language rights may be exercised:

The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act*, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees . . . . [Emphasis added.]

certaine confidentialité des enquêtes du commissaire, notamment pour les raisons suivantes :

– les enquêteurs ont dû donner l'assurance aux personnes interviewées que les informations recueillies demeureraient confidentielles afin de s'assurer la collaboration de ces derniers . . .

– . . . les membres du public et notamment les fonctionnaires hésiteraient à déposer des plaintes [. . .] s'ils étaient prévenus que leur identité ainsi que toute information qu'ils auraient communiquée aux enquêteurs du Commissariat serait susceptible d'être dévoilée autrement que dans le contexte du respect des principes de justice naturelle ou, exceptionnellement, d'un recours judiciaire en vertu de la partie X de la [*Loi sur les langues officielles*];

– les membres du public et notamment les fonctionnaires seraient plus réticents à collaborer avec les enquêteurs du Commissariat et ces derniers devraient, pour donner suite à l'obligation qui est faite au Commissaire d'instruire les plaintes, avoir recours aux pouvoirs d'enquêtes et notamment assigner à comparaître et contraindre à témoigner et à produire des documents par voie d'assignations à témoigner;

– le processus d'enquête du Commissaire deviendrait beaucoup plus formel et rigide, ce qui compromettrait le rôle d'ombudsman du Commissaire;

– le fait que le Commissaire soit tenu de dévoiler certaines informations risquerait de porter atteinte à son rôle de médiateur et de facilitateur et compromettrait ainsi le pouvoir de persuasion et la crédibilité dont un ombudsman doit disposer pour s'acquitter de ses fonctions.

43

Le juge Bastarache expose l'importance de prévoir des conditions permettant l'exercice des droits linguistiques dans l'affaire *Beaulac*, précitée, par. 20 :

L'objectif de protéger les minorités de langue officielle, exprimé à l'art. 2 de la *Loi sur les langues officielles*, est atteint par le fait que tous les membres de la minorité peuvent exercer des droits indépendants et individuels qui sont justifiés par l'existence de la collectivité. Les droits linguistiques ne sont pas des droits négatifs, ni des droits passifs; ils ne peuvent être exercés que si les moyens en sont fournis. Cela concorde avec l'idée préconisée en droit international que la liberté de choisir est dénuée de sens en l'absence d'un devoir de l'État de prendre des mesures positives pour mettre en application des garanties linguistiques . . . [Je souligne.]

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Marshall and Reif, *supra*, at p. 219, explain the importance of confidentiality for an ombudsman:

> The confidentiality of the ombudsman's proceedings helps to ensure his independence as well as to facilitate cooperation throughout the investigation. The ombudsman's investigation must be held in private and his reports and investigation may not be made the subject of an inquiry or review, apart from a review ordered by the Legislative Assembly, its committees or another body which the Legislative Assembly authorizes. [Emphasis added.]

44 In addition to enacting specific provisions to ensure that investigations are held in private, Parliament gave the Commissioner the power to report the belief that a complainant or witness has been threatened, intimidated or made the object of discrimination, and the grounds therefor, to the President of the Treasury Board (s. 62(2)(*a*)). The Minister of Justice at the time, Ray Hnatyshyn, discussed that provision in addressing the legislative committee (*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-72*, Issue No. 20, June 7, 1988, at pp. 20:25 and 20:29) as follows:

> It is appropriate, after we have talked about the ombudsman character of the office, that in this case the commissioner has the opportunity to examine the kind of harassment, intimidation, discrimination or obstruction that might take place with respect to any individual and have an opportunity to examine these matters and bring them to the attention of the President of the Treasury Board. I think this is an opportunity to make sure all Canadians and all people who are involved and employed and against whom a complaint could be laid under this bill can do so freely without fear of discrimination. I think it is important for all Canadians to feel they have the right to use this bill and use the office of the commissioner without fear of retribution or recrimination for taking a complaint forward.
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> . . .
>
> But if you have raised a complaint in the first place, you are on record, and maybe you are being discriminated against.
>
> Certainly the commissioner's function is to protect you; not to make life any more difficult for you but make sure you are not going to suffer negative consequences. If you prevent him from doing that, or have a veto, then it

Marshall et Reif, *loc. cit.*, p. 219, expliquent l'importance de la confidentialité pour un ombudsman :

> [TRADUCTION] La confidentialité des procédures de l'ombudsman contribue à garantir son indépendance de même qu'à faciliter la collaboration tout au long de l'enquête. L'ombudsman doit faire enquête en privé, et ses rapports et enquêtes ne sont pas susceptibles d'examen sauf ordonnance contraire de l'assemblée législative, de ses comités ou d'un autre organisme autorisé par l'assemblée législative. [Je souligne.]

En plus d'avoir prévu des dispositions spécifiques assurant le caractère secret des enquêtes, le législateur a donné au commissaire le pouvoir de transmettre un rapport motivé au président du Conseil du Trésor lorsqu'un plaignant ou un témoin a fait l'objet de menaces, d'intimidation ou de discrimination (al. 62(2)*a*)). Voici comment le ministre de la Justice de l'époque, Ray Hnatyshyn, s'exprimait sur cette disposition au Comité législatif (*Procès-verbaux et témoignages du Comité législatif sur le projet de loi C-72*, Fascicule n° 20, 7 juin 1988, p. 20:25 et 20:28-20:29) :

> [TRADUCTION] Nous avons parlé du rôle de médiateur du commissaire aux langues officielles qui a la possibilité d'examiner le harcèlement, l'intimidation, la discrimination ou l'obstruction qu'ont pu subir certaines personnes afin de se pencher sur ces questions et de les soumettre à l'attention du président du Conseil du Trésor. On assure ainsi que des plaintes puissent être portées librement en vertu de ce projet de loi, sans crainte de discrimination. Il est important que tous les Canadiens estiment avoir le droit de recourir à cette législation et qu'ils puissent utiliser le bureau du commissaire pour porter plainte, sans craindre de mesures de rétorsion.
>
> . . .
>
> Il est entièrement possible que l'auteur d'une plainte en bonne et due forme fasse l'objet de discrimination.
>
> Évidemment, il incombe au commissaire de protéger ces personnes : non pas de leur compliquer la vie, mais de les protéger contre des conséquences malheureuses du fait d'avoir porté plainte. Si on empêchait le commissaire

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may be counterproductive in the legislation to the interests of all your fellow employees. It would certainly allow the same discrimination to take place with other people if they feel they cannot beat the system. [Emphasis added.]

d'exercer cette responsabilité, par exemple au moyen d'un veto, ce projet de loi pourrait remettre en question les droits de tous les fonctionnaires, et permettrait assurément le même genre de discrimination à l'endroit d'autres personnes qui éprouveraient un sentiment d'impuissance qui les empêcheraient de réagir. [Je souligne.]

The *Privacy Act* must be applied to the Office of the Commissioner of Official Languages in such a way as to recognize the unique context in which the Commissioner's investigations are conducted. In ss. 60, 62 and 72, Parliament clearly recognized the delicate situation involved in the use of an official language at work by a minority group, by requiring that investigations be conducted in private and be kept confidential, to protect complainants and witnesses from any prejudice that might result from their involvement in the complaints and the investigation process, and by giving the Commissioner the power to report the belief that a complainant or witness has been threatened, intimidated or made the object of discrimination, and the grounds therefor, to the President of the Treasury Board. If Parliament had not enacted those provisions, it might have been difficult to achieve the objectives of the *Official Languages Act*. The participation of witnesses and complainants is central to the effectiveness of the Act. Because the purpose of the investigation is to determine the truth and understand the individuals' experience of the situation, the investigators must be circumspect in collecting information and assessing the information obtained.

L'application de la *Loi sur la protection des renseignements personnels* au Commissariat aux langues officielles doit se faire de façon à reconnaître le contexte particulier des enquêtes du commissaire. Le législateur, par les art. 60, 62 et 72, a clairement reconnu le contexte délicat de l'utilisation d'une langue officielle au travail par une minorité en imposant le secret et la confidentialité pour protéger les plaignants et les témoins contre toutes formes de préjudice résultant de leur implication dans les plaintes et le processus d'enquête et en donnant au commissaire le pouvoir de transmettre un rapport motivé au président du Conseil du Trésor lorsqu'un plaignant ou un témoin a fait l'objet de menaces, d'intimidation ou de discrimination. Si le législateur n'avait pas prévu de telles dispositions, les objectifs de la *Loi sur les langues officielles* pourraient difficilement être atteints. La participation des témoins et des plaignants est au cœur même de l'efficacité de la loi. Le but de l'enquête étant la recherche de la vérité et d'apprécier le vécu de la situation, les enquêteurs doivent être prudents dans la collecte de renseignements et l'appréciation des renseignements obtenus.

45 Both the respondent and the Privacy Commissioner, who is an intervener in this case, argue that it is not necessary that interviews be confidential in order to secure the participation of witnesses, because the Commissioner of Official Languages has broad powers that include the power to summon and enforce the attendance of witnesses (s. 62 of the *Official Languages Act*). That argument cannot succeed, because using the procedure for compelling attendance compromises the ombudsman role of the Commissioner. It is the responsibility of the Commissioner to investigate complaints that are submitted to him impartially, and to resolve them using flexible mechanisms that are based on discussion and persuasion. The Commissioner must protect witnesses and assist victims in exercising

L'intimé de même que le Commissaire à la protection de la vie privée, agissant à titre d'intervenant dans la présente affaire, soutiennent que la confidentialité des entrevues n'est pas nécessaire pour qu'il y ait participation des témoins parce que le Commissaire aux langues officielles jouit de vastes pouvoirs, dont celui d'assigner des personnes et de les contraindre à comparaître devant lui (art. 62 de la *Loi sur les langues officielles*). Cet argument ne peut être retenu puisque l'utilisation de la procédure de contrainte compromet le rôle d'ombudsman du commissaire. Celui-ci a pour mission d'instruire de façon impartiale les plaintes qui lui sont soumises et de les régler dans le cadre de mécanismes souples basés sur la discussion et la persuasion. Le commissaire doit protéger les témoins et aider les victimes

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their rights. Requiring the Commissioner to have regular recourse to the procedure for enforcing the attendance of individuals before him is inconsistent with the role of an ombudsman. In addition, enforcing the attendance of witnesses would needlessly complicate the investigations, and would be injurious to them. A person who is compelled to testify may be recalcitrant and less inclined to cooperate. The way in which the *Official Languages Act* is interpreted must not be injurious to activities undertaken by the Commissioner that are intended to resolve conflicts in an informal manner.

à faire respecter leurs droits. Exiger du commissaire qu'il utilise sur une base régulière la contrainte afin de forcer les personnes à comparaître est contraire au rôle d'un ombudsman. De plus, la contrainte à témoigner alourdit inutilement les enquêtes et leur nuit. Une personne contrainte à témoigner risque d'être réticente et moins disposée à collaborer. L'interprétation à donner à la *Loi sur les langues officielles* ne doit pas nuire aux activités du commissaire visant à régler les conflits de manière informelle.

46 The appellant contends that the access to information mechanism set out in ss. 73 and 74 of the *Official Languages Act* is a complete scheme, and that those provisions enabled the respondent to obtain disclosure of the information he needed in order to submit his complaint and secure redress. In the appellant's submission, Parliament intended that the information collected by the Commissioner would remain private, unless, and only in the event that, it could be disclosed under the *Official Languages Act*. The effect of that interpretation is to exempt the *Official Languages Act* from the application of the *Privacy Act*. It defeats the complainant's right to obtain access to personal information about him under the *Privacy Act*. It would be contrary to the clear intention of Parliament, which was that the Office of the Commissioner of Official Languages was to be subject to the *Privacy Act*, to accept that interpretation, and it must be rejected. The two Acts must be interpreted and applied harmoniously.

L'appelant prétend que le mécanisme d'accès à l'information prévu aux art. 73 et 74 de la *Loi sur les langues officielles* est un régime complet et que l'intimé avait la possibilité en vertu de ces dispositions d'obtenir la communication des renseignements dont il avait besoin pour présenter sa plainte et obtenir réparation. Selon l'appelant, le Parlement a voulu que les renseignements recueillis par le commissaire demeurent secrets, sauf, et uniquement, dans la mesure où ils peuvent être communiqués en vertu de la *Loi sur les langues officielles*. Cette interprétation a pour effet de soustraire la *Loi sur les langues officielles* à l'application de la *Loi sur la protection des renseignements personnels*. Elle écarte le droit du plaignant d'avoir accès aux renseignements personnels le concernant en vertu de la *Loi sur la protection des renseignements personnels*. L'accepter serait contraire à l'intention claire du législateur de soumettre le Commissariat aux langues officielles à l'application de la *Loi sur la protection des renseignements personnels*. Cette interprétation est à rejeter. Les deux lois doivent être interprétées et appliquées de manière harmonieuse.

47 At the time in question, the policy of the Office of the Commissioner of Official Languages was to explain to witnesses that ss. 60 and 72 of the *Official Languages Act* provided that investigations were conducted in private, and that ss. 73 and 74 of the Act provided for limited circumstances in which testimony could be disclosed. As Mr. Langelier said in his affidavit:

> [TRANSLATION] The credibility of the Commissioner, in my view, requires that the information disclosed to the Commissioner and his representatives in the course of

À l'époque du litige, la politique du Commissariat aux langues officielles était d'expliquer aux témoins que les art. 60 et 72 de la *Loi sur les langues officielles* stipulent que les enquêtes sont secrètes et que la loi prévoit aux art. 73 et 74 les circonstances limitées dans lesquelles les témoignages pourraient être communiqués. Selon l'affidavit de M. Langelier :

> La crédibilité du Commissaire repose grandement, à mon avis, sur le respect de la stricte confidentialité des renseignements communiqués au Commissaire et à ses

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investigations is kept strictly confidential, subject to the following exceptions:

A) situations in which the Commissioner must disclose information which, in his opinion, is necessary for the conduct of his investigations. These include compliance with the principles of natural justice, where it is essential that the person or institution that is the subject of a recommendation know the identity of the complainant and what the complainant has said;

B) situations in which the Commissioner is involved in an application for a court remedy under Part X of the *OLA*. In those cases, the Commissioner may disclose or authorize the disclosure of information. [Emphasis added.]

The Commissioner's policy was therefore to assure witnesses that the information they disclosed to investigators would be kept confidential, within the limits of ss. 72, 73 and 74. In this case, the promise of confidentiality was also made subject to those sections; as the appellant's factum states:

The investigators explained the role and mandate of the Commissioner as an Ombudsman and gave their assurances that the interviews would be kept confidential in light of sections 60(1), 72, 73 and 74 of the *Official Languages Act*. The investigators explained that pursuant to these sections, the investigations are conducted "in private". [Emphasis added.]

The promise of confidentiality made to the witnesses in the course of the investigation concerning Mr. Lavigne's complaint was therefore not absolute.

48 After the respondent filed his complaint, the Commissioner of Official Languages altered the policy concerning the instructions to be given to witnesses. His new policy required that investigators inform witnesses that the Office of the Commissioner of Official Languages is subject to the *Privacy Act*. Investigators still inform witnesses that investigations are conducted in private, as provided in s. 60(1) of the *Official Languages Act*, and that the information that comes to the investigators' knowledge, including the testimony they give, will not be disclosed unless disclosure is necessary for the investigation or in the course of proceedings under Part X, or in cases where disclosure is required for reasons of procedural fairness under

représentants dans le cadre des enquêtes sous réserve toutefois :

A) des situations où le Commissaire doit communiquer les renseignements qui, à son avis, sont nécessaires pour mener ses enquêtes. On pense notamment au respect des principes de justice naturelle où il est essentiel que la personne ou l'institution visée par une recommandation puisse connaître l'identité du plaignant ainsi que les déclarations de cette dernière;

B) des situations dans lesquelles le Commissaire est impliqué dans un recours judiciaire formé en vertu de la partie X de la *LLO*. Dans ces cas, le Commissaire peut communiquer ou autoriser la communication des renseignements. [Je souligne.]

La politique du commissaire était donc d'assurer aux témoins que l'information qu'ils communiquent aux enquêteurs demeure confidentielle, dans les limites des art. 72, 73 et 74. En l'espèce, la promesse de confidentialité a également été donnée sous réserve de ces articles. En effet, selon le mémoire de l'appelant :

Les enquêteurs ont expliqué le rôle et la mission du [C]ommissaire aux langues officielles à titre d'ombudsman et ont donné l'assurance que les entrevues demeureraient confidentielles, compte tenu du paragraphe 60(1) ainsi que des articles 72, 73 et 74 de la *Loi sur les langues officielles*. Les enquêteurs ont expliqué que, conformément à ces dispositions, les enquêtes sont « secrètes ». [Je souligne.]

La promesse de confidentialité donnée aux témoins lors de l'enquête concernant la plainte de M. Lavigne n'était donc pas absolue.

À la suite de la plainte déposée par l'intimé, le Commissaire aux langues officielles a modifié sa politique à l'égard des instructions à donner aux témoins. Sa nouvelle politique demande aux enquêteurs d'informer les témoins que le Commissariat aux langues officielles est soumis à la *Loi sur la protection des renseignements personnels*. Les enquêteurs continuent à informer les témoins que les enquêtes sont secrètes, comme le prévoit le par. 60(1) de la *Loi sur les langues officielles*, et que les renseignements qui viennent à l'attention des enquêteurs, y compris leurs dépositions, ne seront pas communiqués sauf si une telle communication est requise pour l'enquête ou pour un recours formé sous le régime de la partie X ou encore dans les cas

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s. 60(2) of the *Official Languages Act*. In addition, investigators inform witnesses that the Office of the Commissioner of Official Languages is subject to the *Privacy Act* and that the information collected may be exempt from the disclosure requirement where an exception to disclosure applies.

C. *The Exception to the Right of Access to Personal Information under Section 22(1)(b)*

49 The purpose of s. 55 of the *Official Languages Act* is to limit the powers of the Commissioner to those powers provided by the Act or another Act of Parliament:

> **55.** The Commissioner shall carry out such duties and functions as are assigned to the Commissioner by this Act or any other Act of Parliament, and may carry out or engage in such other related assignments or activities as may be authorized by the Governor in Council.

Section 22(1)(*b*) of the *Privacy Act* gives the Commissioner of Official Languages the power to refuse access to information that is requested if disclosure could reasonably be expected to be injurious to the conduct of his investigations. It is primarily on this provision that the Commissioner bases his refusal to grant access to the information.

50 It is this decision by the Commissioner that is the subject of the application for judicial review. Any analysis of that decision necessarily rests on a determination of the meaning of the expression "lawful investigations". The following question arises in this respect: are future investigations covered by s. 22(1)(*b*)?

51 In the case before us, the appellant is not arguing that the disclosure of information would be injurious to investigations that are underway, because all of the investigations had been concluded at the time when the respondent requested the personal information in question from him. However, he submits that disclosure of the personal information could reasonably be expected to be injurious to his future investigations. The appellant contests the argument

où la communication est requise pour des raisons d'équité dans la procédure, en vertu du par. 60(2) de la *Loi sur les langues officielles*. De plus, les enquêteurs informent les témoins que le Commissariat aux langues officielles est soumis à la *Loi sur la protection des renseignements personnels* et que les renseignements recueillis peuvent être soustraits à l'exigence de communication lorsqu'une exception à la divulgation trouve application.

C. *L'exception au droit d'accès aux renseignements personnels prévue à l'al. 22(1)b)*

L'objet de l'art. 55 de la *Loi sur les langues officielles* est de circonscrire les attributions du commissaire à celles prévues par cette loi ou une autre loi fédérale :

> **55.** Le commissaire exerce les attributions que lui confèrent la présente loi et toute autre loi fédérale; il peut en outre se livrer à toute activité connexe autorisée par le gouverneur en conseil.

Or, l'al. 22(1)*b*) de la *Loi sur la protection des renseignements personnels* confère au Commissaire aux langues officielles le pouvoir de refuser l'accès aux renseignements demandés si la divulgation risque vraisemblablement de nuire au déroulement de ses enquêtes. C'est principalement sur cette disposition que le commissaire appuie son refus de donner accès aux renseignements.

C'est cette décision du commissaire qui fait l'objet du recours en révision judiciaire. L'analyse de celle-ci suppose nécessairement la détermination de la signification de l'expression « enquêtes licites ». À cet égard, la question suivante se pose : les enquêtes futures sont-elles visées par l'al. 22(1)*b*)?

Dans le cas qui nous occupe, l'appelant ne prétend pas que la divulgation des renseignements nuirait aux enquêtes en cours puisque toutes les enquêtes étaient terminées au moment où l'intimé lui a demandé les renseignements personnels en question. Cependant, il soutient que la divulgation des renseignements personnels risquerait vraisemblablement de nuire à ses enquêtes futures. Celui-ci conteste la prétention de l'intimé et celle de l'intervenant selon

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made by the respondent and the intervener, which is that s. 22(1)(*b*) applies only to investigations that are underway and cannot be relied on to protect future investigations or the investigative process in general. In his submission, this is a needlessly narrow interpretation of that provision, and it is injurious to the implementation of the Act and the attainment of its objectives.

lesquelles l'al. 22(1)*b*) ne s'applique qu'aux enquêtes en cours et ne peut être invoqué afin de sauvegarder des enquêtes futures ou le processus d'enquête en général. Selon lui, c'est une interprétation inutilement restrictive de cette disposition et nuisible à la mise en œuvre de la loi et à la réalisation de ses objectifs.

52

First, it must be noted that the word "investigation" is defined in s. 22(3) of the *Privacy Act*:

22. . . .

(3) For the purposes of paragraph (1)(*b*), "investigation" means an investigation that

(*a*) pertains to the administration or enforcement of an Act of Parliament;

(*b*) is authorized by or pursuant to an Act of Parliament; or

(*c*) is within a class of investigations specified in the regulations.

That definition does not suggest that the word is limited to a specific investigation, or an investigation that is circumscribed in time. Indeed, Parliament has not limited the scope of that expression by any qualifier whatever. None of the paragraphs of s. 22(3) limits the word "investigation" to investigations that are underway, or excludes future investigations or the investigative process in general from its protection. It therefore seems, *prima facie*, that the word retains its broad meaning and may refer equally to investigations that are underway, are about to commence, or will take place. We shall now consider whether Parliament restricted the scope of that definition for the purpose of the application of the exception to disclosure set out in s. 22(1)(*b*).

Tout d'abord, il faut noter que le mot « enquête » est défini au par. 22(3) de la *Loi sur la protection des renseignements personnels* :

22. . . .

(3) Pour l'application de l'alinéa (1)*b*), « enquête » s'entend de celle qui :

a) se rapporte à l'application d'une loi fédérale;

b) est autorisée sous le régime d'une loi fédérale;

c) fait partie d'une catégorie d'enquêtes précisée dans les règlements.

Cette définition ne suggère pas que ce mot soit limité à une enquête précise et circonscrite dans le temps. En effet, le législateur ne limite pas la portée de cette expression par un qualificatif quelconque. Aucun des alinéas du par. 22(3) ne limite le mot enquête aux enquêtes en cours ni n'exclut de sa protection les enquêtes futures et le processus d'enquête d'une façon générale. De prime abord, il semble donc que ce mot conserve son sens large et puisse faire référence autant aux enquêtes en cours qu'à celles qui sont sur le point de commencer ou qui auront lieu. Voyons maintenant si le législateur a restreint la portée de cette définition pour l'application de l'exception à la divulgation prévue à l'al. 22(1)*b*).

53

Parliament made it plain that s. 22(1)(*b*) retains its broad and general meaning by providing a non-exhaustive list of examples. It uses the word "*notamment*", in the French version, to make it plain that the examples given are listed only for clarification, and do not operate to restrict the general scope of the introductory phrase. The English version of the provision is also plain. Parliament introduces the list of examples with the expression "without restricting

Le législateur prend soin de préciser que l'al. 22(1)*b*) conserve son sens large et général par l'énumération non limitative d'exemples. Il utilise le mot « notamment » afin de préciser que les exemples donnés ne sont énumérés qu'à titre indicatif et n'ont pas pour effet de limiter la portée générale de la phrase introductive. La version anglaise de cette disposition est aussi explicite. Le législateur introduit l'énumération d'exemples

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the generality of the foregoing". This Court has had occasion in the past to examine the interpretation of the expression "without restricting the generality of the foregoing" in similar circumstances: in *Dagg*, *supra*, at para. 68, La Forest J. analyzed s. 3 of the *Privacy Act*, the wording of which resembles the wording of s. 22(1)(*b*) of that Act:

> In its opening paragraph, the provision states that "personal information" means "information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing". On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at pp. 289-91.

Although s. 22(1)(*b*)(i) relates specifically to a particular investigation, it in no way alters the generality of the introductory sentence. In fact, s. 22(1)(*b*)(ii), which authorizes refusal to disclose information that would reveal the identity of a confidential source of information, contemplates the protection of future investigations as well as existing investigations. A reliable confidential source may be useful beyond the confines of one specific investigation.

54 In short, there is nothing in s. 22(1)(*b*) that should be interpreted as restricting the scope of the word "investigation" to investigations that are underway or are about to commence, or limiting the general meaning of that word to specific investigations. There is therefore no justification for limiting the scope of that section.

55 Exceptions to the disclosure of personal information have generally been narrowly construed by the courts. Nonetheless, as McDonald J.A. of the Federal Court of Appeal said, "[i]f the meaning [of the wording of a provision] is plain, it is not for this Court, or any other court, to alter it" (*Rubin*, *supra*, at para. 24; see also *St. Peter's Evangelical*

par l'expression « *without restricting the generality of the foregoing* ». Notre Cour a déjà eu à examiner l'interprétation du mot « notamment » dans des circonstances similaires. En effet, dans l'affaire *Dagg*, précitée, par. 68, le juge La Forest a analysé l'art. 3 de la *Loi sur la protection des renseignements personnels* dont la phraséologie ressemble à celle de l'al. 22(1)*b*) de cette même loi :

> La disposition liminaire de cet article définit l'expression « renseignements personnels » comme étant « [l]es renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment ». Selon son sens clair, cette définition est indéniablement large. En particulier, elle précise que la liste des exemples particuliers qui suit la définition générale n'a pas pour effet d'en limiter la portée. Comme l'a récemment jugé notre Cour, cette phraséologie indique que la disposition liminaire générale doit servir de principale source d'interprétation. L'énumération subséquente ne fait que donner des exemples du genre de sujets visés par la définition générale; voir *Schwartz c. Canada*, [1996] 1 R.C.S. 254, aux pp. 289 à 291.

Même si le sous-al. 22(1)*b*)(i) se rattache spécifiquement à une enquête déterminée, la portée générale de la phrase introductive n'est pas pour autant modifiée. D'ailleurs, le sous-al. 22(1)*b*)(ii), autorisant la non-divulgation des renseignements qui permettent de remonter à une source de renseignements confidentielle, envisage la protection des enquêtes futures aussi bien qu'actuelles. Une source confidentielle fiable peut être utile au-delà d'une seule enquête précise.

Bref, rien à l'al. 22(1)*b*) ne doit s'interpréter comme restreignant la portée du mot « enquête » aux seules enquêtes en cours ou à celles sur le point de commencer, ni comme limitant la portée générale de ce mot à des enquêtes précises. Il n'est donc pas justifié de limiter la portée de cet article.

Les exceptions à la divulgation des renseignements personnels ont généralement été interprétées d'une manière restrictive par les tribunaux. Il n'en demeure pas moins, comme le disait le juge McDonald, de la Cour d'appel fédérale, que « [s]i le sens [du libellé d'une disposition] est manifeste, il n'appartient pas à la Cour ou à un autre tribunal

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Lutheran Church, Ottawa v. City of Ottawa, [1982] 2 S.C.R. 616, at p. 626). The argument made by the intervener and the respondent, that it is never possible to invoke the exemption from disclosure once the investigation is over, is an interpretation that is not supported by the wording of the provision. The disclosure of personal information may be as damaging to future investigations as to investigations that are underway.

56

The appellant relies on another portion of s. 22(1)(*b*). He contends that disclosure of the personal information requested by the respondent could reasonably be expected to be injurious to the enforcement of a law of Canada or a province, and more specifically of the *Official Languages Act*:

> **22.** (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)
>
> . . .
>
> (*b*) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information . . . .
>
> **22.** (1) Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) :
>
> . . .
>
> *b*) soit dont la divulgation risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois fédérales ou provinciales ou au déroulement d'enquêtes licites, notamment . . . . [Emphasis added.]

The respondent and the intervener submit that the Commissioner of Official Languages does not have the power to enforce the *Official Languages Act* and that, consequently, this argument must be rejected. They contend that the power to enforce that Act is set out in Part X of the Act, entitled "Court

de le modifier » (*Rubin c. Canada (Ministre des Transports)*, précité, par. 24; voir également *Église luthérienne évangélique St. Peter d'Ottawa c. Ville d'Ottawa*, [1982] 2 R.C.S. 616, p. 626). Les prétentions de l'intervenant et de l'intimé selon lesquelles il n'est jamais possible d'invoquer l'exclusion pour ce qui est de la divulgation, une fois l'enquête close, représentent une interprétation que ne permet pas le libellé de la disposition. La divulgation de renseignements personnels peut être aussi dommageable à des enquêtes futures qu'à des enquêtes en cours.

L'appelant invoque une autre partie de l'al. 22(1)*b*). Il prétend que la divulgation des renseignements personnels demandés par l'intimé risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois fédérales ou provinciales et plus particulièrement la *Loi sur les langues officielles* :

> **22.** (1) Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) :
>
> . . .
>
> *b*) soit dont la divulgation risquerait vraisemblablement de nuire aux activités destinées à faire respecter les lois fédérales ou provinciales ou au déroulement d'enquêtes licites, notamment . . .
>
> **22.** (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)
>
> . . .
>
> (*b*) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information . . . [Je souligne.]

L'intimé et l'intervenant soutiennent que le Commissaire aux langues officielles n'a pas le pouvoir de faire respecter la *Loi sur les langues officielles* et que, par conséquent, cet argument doit être rejeté. Ils prétendent que le pouvoir de la faire respecter est prévu à la partie X de cette loi ayant pour

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Remedy", and that only the Federal Court has that power. In their submission, the English expression "enforcement of any law" expressly refers to activities to compel compliance.

titre « Recours judiciaire » et que seule la Cour fédérale a un tel pouvoir. Selon eux, l'expression anglaise « *enforcement of any law* » fait expressément référence à des activités comportant contrainte.

57 The question is whether "the enforcement of any law of Canada" refers only to activities the purpose of which is to compel certain individuals or institutions to comply with the provisions of a law of Canada, or whether mediation and making non-coercive recommendations, as provided by the *Official Languages Act*, also constitute "the enforcement of any law of Canada". I do not believe that it is necessary for this Court to construe that expression in order to dispose of this matter. The appeal essentially addresses the question of how the *Privacy Act*, which provides for access to personal information by the person concerned, may be reconciled with the right of the Commissioner of Official Languages to keep investigations confidential and private. The question of confidentiality arises in this case only in relation to investigations.

La question est de savoir si les « activités destinées à faire respecter les lois fédérales » ne visent que celles qui ont pour objet de contraindre certains individus ou institutions à se conformer aux dispositions d'une loi fédérale ou si la médiation et la formulation de recommandations non exécutoires, prévues par la *Loi sur les langues officielles*, constituent également des « activités destinées à faire respecter les lois fédérales ». Je ne crois pas qu'il soit nécessaire que notre Cour interprète cette expression pour décider du litige. Ce pourvoi porte essentiellement sur la conciliation de la *Loi sur la protection des renseignements personnels* prévoyant l'accès aux renseignements personnels par la personne concernée et le droit du Commissaire aux langues officielles de maintenir confidentielles et secrètes les enquêtes. Cette question de confidentialité se pose ici uniquement dans le contexte des enquêtes.

58 The non-disclosure of personal information provided in s. 22(1)(*b*) is authorized only where disclosure "could reasonably be expected" to be injurious to investigations. As Richard J. said in *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, *supra*, at para. 43, "[t]he reasonable expectation of probable harm implies a confident belief". There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure. Confidentiality of personal information must only be protected where justified by the facts and its purpose must be to enhance compliance with the law. A refusal to ensure confidentiality may sometimes create difficulties for the investigators, but may also promote frankness and protect the integrity of the investigation process. The Commissioner of Official Languages has an obligation to be sensitive to the differences in situations, and he must exercise his discretion accordingly. The

La non-divulgation des renseignements personnels prévue à l'al. 22(1)*b*) n'est autorisée que s'il existe un risque « vraisemblable » que la divulgation nuise à l'enquête. Or, comme le mentionne le juge Richard dans l'arrêt *Canada (Commissaire à l'information) c. Canada (Commission de l'immigration et du statut de réfugié)*, précité, par. 43, « [l]a vraisemblance du préjudice implique qu'on ait des motifs d'y croire ». Il faut qu'il y ait entre la divulgation d'une information donnée et le préjudice allégué un lien clair et direct. La non-divulgation ne doit pas avoir pour seul objectif de faciliter le travail de l'organisme en question et doit se justifier par un vécu professionnel. La confidentialité des renseignements personnels ne doit être protégée que lorsque les faits le justifient et doit avoir pour but de favoriser le respect de la loi. Le refus d'assurer la confidentialité peut parfois créer des difficultés aux enquêteurs, mais peut aussi inciter à la franchise et protéger l'intégrité du processus d'enquête. Le Commissaire aux langues officielles a l'obligation d'être sensible aux différences de situations et il doit actualiser l'application de son

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power provided in s. 22(1)(*b*) must be exercised in a manner that respects the nature and objectives of the *Official Languages Act*. The Commissioner must have regard to, *inter alia*, the private and confidential nature of investigations, as provided by Parliament. As I have explained, the sections providing for the confidentiality and secrecy of investigations are essential to the implementation of the *Official Languages Act*. Section 22(1)(*b*) must be applied in a way that is consistent with both Acts.

pouvoir. L'exercice du pouvoir prévu à l'al. 22(1)*b*) doit respecter la nature et les objectifs de la *Loi sur les langues officielles*. Le commissaire doit, entre autres, tenir compte du caractère secret et confidentiel des enquêtes prévu par le législateur. Comme je l'ai expliqué, les articles prévoyant la confidentialité et le secret des enquêtes sont essentiels à la mise en œuvre de la *Loi sur les langues officielles*. L'application de l'al. 22(1)*b*) doit se faire dans le respect des deux lois.

D. *Application of the Law to the Facts of the Case*

D. *Application du droit aux faits en l'espèce*

59 The only interview notes that Mr. Lavigne is attempting to obtain in this application are the notes in respect of Jacqueline Dubé: during the course of the proceedings, Normand Chartrand and France Doyon agreed to allow the Commissioner of Official Languages to give the respondent access to the personal information about him. The issue that remains to be determined is whether it can reasonably be concluded from the Commissioner's statements that disclosure of the notes of the interview with Jacqueline Dubé could reasonably be expected to be injurious to the conduct of the Commissioner's future investigations.

Les seules notes d'entrevue que tente d'obtenir M. Lavigne par la présente demande sont celles de Jacqueline Dubé. En effet, au cours des procédures, Normand Chartrand et France Doyon ont convenu de permettre au Commissaire aux langues officielles de donner accès à l'intimé aux renseignements personnels le concernant. La question qui reste à trancher est de savoir si les affirmations du commissaire permettent raisonnablement de conclure que la divulgation des notes d'entrevue de Jacqueline Dubé risquerait vraisemblablement de nuire aux enquêtes futures du commissaire.

60 As I have said, s. 22(1)(*b*) is not an absolute exemption clause. The decision of the Commissioner of Official Languages to refuse disclosure under s. 22(1)(*b*) must be based on concrete reasons that meet the requirements imposed by that paragraph. Parliament has provided that there must be a reasonable expectation of injury in order to refuse to disclose information under that provision. In addition, s. 47 of the *Privacy Act* provides that the burden of establishing that the discretion was properly exercised is on the government institution. If the government institution is unable to show that its refusal was based on reasonable grounds, the Federal Court may then vary that decision and authorize access to the personal information (s. 49). The appellant relied primarily on Mr. Langelier's affidavit to establish the reasonable expectation of injury.

Comme je l'ai mentionné, l'al. 22(1)*b*) n'est pas une clause d'exclusion absolue. La décision du Commissaire aux langues officielles de refuser la divulgation en application de l'al. 22(1)*b*) doit être appuyée sur des motifs concrets à l'intérieur des conditions imposées par cet alinéa. En effet, le législateur a prévu qu'il doit exister une vraisemblance de préjudice pour refuser de communiquer les renseignements en vertu de cette disposition. De plus, l'art. 47 de la *Loi sur la protection des renseignements personnels* prévoit qu'il appartient à l'institution fédérale de faire la preuve du bien-fondé de l'exercice de son pouvoir discrétionnaire. Si l'institution fédérale n'arrive pas à démontrer que son refus est basé sur des motifs raisonnables, la Cour fédérale peut alors modifier cette décision et autoriser l'accès aux renseignements personnels (art. 49). L'appelant s'est principalement basé sur l'affidavit de M. Langelier afin de démontrer le risque vraisemblable de préjudice.

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61 I do not believe that Mr. Langelier's statements provide a reasonable basis for concluding that disclosure of the notes of the interview with Ms. Dubé could reasonably be expected to be injurious to future investigations. Mr. Langelier contends that disclosure would have an injurious effect on future investigations, without proving this to be so in the circumstances of this case. The Commissioner's decision must be based on real grounds that are connected to the specific case in issue. The evidence filed by the appellant shows that the Commissioner's decision not to disclose the personal information requested was based on the fact that Ms. Dubé had not consented to disclosure, and does not establish what risk of injury to the Commissioner's investigations the latter might cause. If Ms. Dubé had given permission, the Commissioner would have disclosed the information. The appellant's factum states:

> Jacqueline Dubé did not give permission to disclose to the Respondent the personal information concerning him that was recorded in the course of the interview she gave the OCOL [Office of the Commissioner of Official Languages] [and so] [t]he OCOL did not disclose any of this personal information. [Emphasis added.]

The appellant does not rely on any specific fact to establish the likelihood of injury. The fact that there is no detailed evidence makes the analysis almost theoretical. Rather than showing the harmful consequences of disclosing the notes of the interview with Ms. Dubé on future investigations, Mr. Langelier tried to prove, generally, that if investigations were not confidential this could compromise their conduct, without establishing specific circumstances from which it could reasonably be concluded that disclosure could be expected to be injurious. There are cases in which disclosure of the personal information requested could reasonably be expected to be injurious to the conduct of investigations, and consequently the information could be kept private. There must nevertheless be evidence from which this can reasonably be concluded. Even if permission is given to disclose the interview notes in this case, that still does not mean that access to personal information must always be given. It will still be possible for investigations to be confidential and private, but the right to confidentiality and privacy will be qualified by the limitations imposed by

Je ne crois pas que les affirmations de M. Langelier permettent raisonnablement de conclure que la divulgation des notes d'entrevue de Mme Dubé risquerait vraisemblablement de nuire aux enquêtes futures. Monsieur Langelier prétend que la divulgation aura un effet nuisible sur les enquêtes futures sans en faire une preuve dans les circonstances de l'espèce. Or, la décision du commissaire doit être basée sur des motifs réels et liée au cas précis à l'étude. La preuve déposée par l'appelant démontre que la décision du commissaire de ne pas divulguer les renseignements personnels demandés s'appuie sur l'absence de consentement de Mme Dubé à la divulgation et n'établit pas le risque de préjudice que celle-ci pourrait causer aux enquêtes du commissaire. Si Mme Dubé avait donné son autorisation, le commissaire aurait divulgué les renseignements. En effet, selon le mémoire de l'appelant :

> Jacqueline Dubé n'a pas donné l'autorisation de communiquer à l'intimé les renseignements personnels le concernant qui ont été consignés au cours de l'entrevue qu'elle a accordée au CoLo [Commissariat aux langues officielles], et celui-ci n'a donc communiqué aucun des renseignements personnels en question. [Je souligne.]

L'appelant n'invoque aucun autre fait précis pour établir le risque vraisemblable de préjudice. L'absence de preuve circonstanciée rend l'analyse presque théorique. Au lieu de démontrer les conséquences néfastes de la divulgation des notes d'entrevue de Mme Dubé sur les enquêtes futures, M. Langelier a tenté de faire une preuve générale que l'absence de confidentialité des enquêtes risquerait de compromettre leur bonne marche, sans établir des circonstances particulières permettant de conclure raisonnablement à la vraisemblance du préjudice. Il existe des cas où la divulgation des renseignements personnels demandés risquerait vraisemblablement de nuire au déroulement d'enquêtes et, par conséquent, ceux-ci pourront être gardés secrets. Encore faut-il que la preuve permette raisonnablement de conclure en ce sens. L'autorisation de divulguer les notes d'entrevue dans ce cas-ci ne veut pas dire pour autant que les renseignements personnels soient toujours accessibles. La confidentialité et le caractère secret des enquêtes seront encore possibles, mais le droit à la confidentialité et au secret est nuancé par les limites imposées par la *Loi sur la protection des*

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the *Privacy Act* and the *Official Languages Act*. The Commissioner must exercise his discretion based on the facts of each specific case. In the case of Ms. Dubé, the record as a whole does not provide a reasonable basis for concluding that disclosure of the notes of her interview could reasonably be expected to be injurious to the Commissioner's investigations.

renseignements personnels et la *Loi sur les langues officielles*. Le commissaire exerce son pouvoir discrétionnaire en fonction de chaque cas spécifique. Dans le cas de Mme Dubé, l'ensemble du dossier ne permet pas raisonnablement de conclure que la divulgation de ses notes d'entrevue risquerait vraisemblablement de nuire aux enquêtes du commissaire.

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The evidence presented by the intervener is no more persuasive. The intervener submits that it is not necessary for the Commissioner's investigations to be confidential by referring to the affidavit of Gerald Neary, the Director of Investigations in the Office of the Privacy Commissioner of Canada, said:

> OCOL argues that providing promises of confidentiality to witnesses in the context of its investigations is both a necessary and consistent part of its alleged role as an ombudsman. <u>However, the nature of the role of the Commissioner of Official Languages is similar to the role of the Privacy Commissioner of Canada. As an Ombudsman, the Privacy Commissioner has found that blanket promises of confidentiality are not necessary in order to preserve the role of ombudsman, or in order to ensure effective investigations.</u> [Emphasis added.]

The Director of Investigations in the Office of the Privacy Commissioner is not necessarily the person most suited to determining the best way for investigations to be conducted by the Commissioner of Official Languages. Mr. Neary's affidavit does not establish that he has any expertise in the specific field of official languages. Mr. Langelier, unlike Mr. Neary, has lengthy experience in that field. For a number of years, he worked as the Director of the Complaints and Audits Branch and as a complaints officer in the Office of the Commissioner of Official Languages. When his affidavit was filed, he had over 20 years' experience.

La preuve déposée par l'intervenant n'est pas pour autant plus convaincante. En effet, l'intervenant soutient que la confidentialité des enquêtes du commissaire n'est pas nécessaire en référant à l'affidavit de M. Gerald Neary, directeur des enquêtes au Commissariat à la protection de la vie privée au Canada :

> [TRADUCTION] Le COLO prétend que promettre la confidentialité aux témoins dans le cadre de ses enquêtes est à la fois nécessaire et conforme à son rôle d'ombudsman. <u>Pourtant, le rôle du Commissaire aux langues officielles est semblable par sa nature à celui du Commissaire à la protection de la vie privée du Canada, et, en tant qu'om budsman, le Commissaire à la protection de la vie privée a constaté qu'il n'était pas nécessaire de faire des promesses générales de confidentialité pour préserver le rôle d'ombudsman ou pour garantir l'efficacité des enquêtes.</u> [Je souligne.]

Le directeur des enquêtes au Commissariat à la protection de la vie privée n'est pas nécessairement la personne la plus apte à apprécier la meilleure façon de mener à terme les enquêtes du Commissaire aux langues officielles. L'affidavit de M. Neary ne démontre pas qu'il possède une quelconque expertise dans le domaine particulier des langues officielles. Contrairement à M. Neary, M. Langelier possède une longue expérience dans ce domaine. Il a agi pendant plusieurs années à titre de directeur à la Direction des plaintes et vérifications du Commissariat aux langues officielles et à titre d'agent de plaintes. Au moment du dépôt de l'affidavit, il possédait une expérience de plus de 20 années.

63

Although the role of the Commissioner of Official Languages is similar to that of the Privacy Commissioner, the two Acts that they are responsible for enforcing, and the situations in which those Acts apply, are different in a number of respects.

Bien que le rôle du Commissaire aux langues officielles s'apparente à celui du Commissaire à la protection de la vie privée, les deux lois dont ils sont chargés d'assurer le respect et leurs circonstances d'application sont différentes à bien des égards. La

Language is a means of expression proper to an individual. It is the vehicle by which a cultural group transmits its distinct culture and traditions, and it is an essential tool for expressing and communicating ideas. It is not surprising that the history of Canada is marked by a number of conflicts over language, considering the presence of two dominant languages in this country. As A. Braën explained, language is a cultural benchmark that may be the source of conflicts ("Language Rights", in M. Bastarache, ed., *Language Rights in Canada* (1987), 1, at pp. 15-16:

> Language is an essential means of cultural expression and its vitality, according to the Commission [Royal Commission on Bilingualism and Biculturalism], is a necessary although insufficient condition for the survival of a culture as a whole. <u>However, in a bilingual or multilingual society language will be a constant focus of tensions</u> to the extent [that] it expresses the community interests of cultural or language groups. [Emphasis added.]

On the history of bilingualism in Canada, see: C.-A. Sheppard, *The Law of Languages in Canada* (1971), Study No. 10 of the Royal Commission on Bilingualism and Biculturalism, at pp. 1-96, and F. Chevrette and H. Marx, *Droit constitutionnel: notes et jurisprudence* (1982), at pp. 1583-88.

64 In the particular context of employment, the use of an official language by a minority group is a very delicate situation. It may be difficult for an employee to make a complaint for the purpose of having his or her language rights recognized. The employee is in a situation of twofold weakness: he belongs to a minority group, and his relationship with the employer is one of subordination. Instead of tackling these difficulties by asserting his rights, an employee may prefer to conform to the language of the majority. The objective of the *Official Languages Act* is precisely to make that kind of behaviour unnecessary, by enhancing the vitality of both official languages. To facilitate the exercise of language rights, Parliament has expressly provided that investigations will be private and confidential, and has given the Commissioner of Official Languages a mandate to ensure that the Act is enforced. This is the delicate

langue est un moyen d'expression qui appartient à l'individu. Elle permet l'épanouissement de la culture et des traditions propres à un groupe culturel et représente un véhicule privilégié d'expression et de communication de la pensée. Il n'est pas étonnant que l'histoire du Canada soit marquée par plusieurs luttes linguistiques considérant la présence de deux langues dominantes au pays. Comme l'expose A. Braën, la langue est un repère culturel pouvant être à l'origine de conflits (« Les droits linguistiques », dans M. Bastarache, dir., *Les droits linguistiques au Canada* (1986), 1, p. 17 :

> La langue est un mode privilégié d'expression culturelle et sa vitalité est, selon la même Commission [Commission royale d'enquête sur le bilinguisme et le biculturalisme], une condition nécessaire, quoiqu'insuffisante à elle seule, au maintien intégral d'une culture. <u>Elle demeure malgré tout un foyer continu de tensions au sein d'une société bilingue ou multilingue</u> dans la mesure où la langue exprime une communauté d'intérêts propres à un groupe linguistique et culturel. [Je souligne.]

Concernant l'histoire du bilinguisme au Canada, voir : C.-A. Sheppard, *The Law of Languages in Canada* (1971), étude n° 10 de la Commission royale d'enquête sur le bilinguisme et le biculturalisme, p. 1-96, et F. Chevrette et H. Marx, *Droit constitutionnel : notes et jurisprudence* (1982), p. 1583-1588.

Dans le contexte particulier de l'emploi, l'utilisation d'une langue officielle par une minorité est une situation très délicate. Il peut être difficile pour un employé de déposer une plainte visant la reconnaissance de ses droits linguistiques. En effet, l'employé se trouve dans une double situation de faiblesse : il appartient à un groupe minoritaire et il a une relation de subordination vis-à-vis l'employeur. Au lieu d'affronter ces difficultés en faisant valoir ses droits, un employé peut préférer se conformer à la langue de la majorité. Or, la *Loi sur les langues officielles* a justement pour objectif d'éviter ce type de comportement en favorisant l'épanouissement des deux langues officielles. Pour faciliter l'exercice des droits linguistiques, le législateur a expressément prévu le caractère confidentiel et secret des enquêtes et a confié au Commissaire aux langues officielles le mandat de veiller à la mise en application de cette loi. C'est

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context in which the Commissioner carries out his functions.

Parliament has made the Office of the Commissioner of Official Languages subject to the *Privacy Act*, and only when a government institution is able to justify the exercise of its discretion to refuse disclosure may it do so. In the case before us, the appellant has not succeeded in showing that it is reasonable to maintain confidentiality. For these reasons, I would dismiss the main appeal.

In the cross-appeal, the respondent is seeking disclosure of information other than personal information that is held by the Commissioner in connection with the official languages complaint he made. Mr. Lavigne's request to the Office of the Commissioner of Official Languages is based on s. 12(1) of the *Privacy Act*. Section 12 of that Act provides that only personal information may be requested. I agree with Sharlow J.A. of the Federal Court of Appeal that a person who makes a request under the *Privacy Act* is not entitled to information other than personal information. For those reasons, I would dismiss the cross-appeal.

VII. Conclusion

The main appeal and the cross-appeal are dismissed, without costs.

Appeal and cross-appeal dismissed.

Solicitors for the appellant/respondent on the cross-appeal: McCarthy Tétrault, Ottawa; The Office of the Commissioner of Official Languages, Ottawa.

Solicitors for the intervener : Nelligan O'Brien Payne, Ottawa.

dans ce contexte délicat que le commissaire exerce ses fonctions.

65 Le législateur a assujetti le Commissariat aux langues officielles à l'application de la *Loi sur la protection des renseignements personnels* et ce n'est que lorsque l'institution fédérale peut justifier l'exercice de sa discrétion de refuser la divulgation qu'elle peut le faire. Dans le cas qui nous concerne, l'appelant n'a pas réussi à démontrer qu'il est raisonnable de maintenir la confidentialité. Pour ces motifs, je suis d'avis de rejeter le pourvoi principal.

66 Quant au pourvoi incident, l'intimé cherche à obtenir la divulgation d'informations autres que des renseignements personnels et détenues par le commissaire en rapport avec la plainte qu'il a formulée en matière de langues officielles. La demande de M. Lavigne auprès du Commissariat aux langues officielles est fondée sur le par. 12(1) de la *Loi sur la protection des renseignements personnels*. Or, l'article 12 de cette loi prévoit que seuls les renseignements personnels peuvent être demandés. Je conviens avec le juge Sharlow de la Cour d'appel fédérale qu'une demande en vertu de la *Loi sur la protection des renseignements personnels* ne permet pas d'obtenir des renseignements autres que personnels. Pour ces motifs, je suis d'avis de rejeter le pourvoi incident.

VII. Conclusion

67 Le pourvoi principal de même que le pourvoi incident sont rejetés, sans frais.

Pourvoi principal et pourvoi incident rejetés.

Procureurs de l'appelant/intimé au pourvoi incident : McCarthy Tétrault, Ottawa; Le Commissariat aux langues officielles, Ottawa.

Procureurs de l'intervenant : Nelligan O'Brien Payne, Ottawa.

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Indexed as:

Apotex Inc. v. Canada (Minister of Health)

Between
Apotex Inc., applicant, and
The Minister of Health, respondent

[2000] F.C.J. No. 248

[2000] A.C.F. no 248

186 F.T.R. 84

4 C.P.R. (4th) 421

95 A.C.W.S. (3d) 549

Court File No. T-2074-99

Federal Court of Canada - Trial Division
Ottawa, Ontario

McGillis J.

Heard: February 15 and 16, 2000.
Judgment: February 24, 2000.

(15 paras.)

Intellectual property law -- Patents -- Procedure -- Parties -- Adding or substituting -- Motions by Bristol-Myers Squibb Canada Inc. and others to be added as parties or interveners allowed in part -- Bristol-Myers clearly a proper party as patentee of the drug in question and no provision under the Federal Court Rules, 1998 to limit its rights -- Other drug companies not helpful in determining factual or legal issues -- Association representing employees of research-based drug companies had failed to adduce evidence its participation would be helpful -- Federal Court Rules, 1998, Rule 109(2)(b).

Motions by Bristol-Myers Squibb Canada Inc. and others to be added as parties or interveners

allowed in part -- Apotex had sought relief as a result of the failure of the Minister of Health to process its abbreviated new drug submission for an unnamed product -- Several drug companies and a national association then brought motions to be added as parties or interveners -- Apotex revealed product and consented to Bristol-Myers, the patentee, being added as a party respondent on some issues only -- HELD: Motions allowed in part -- Bristol-Myers added as a party but other motions dismissed -- Bristol-Myers clearly a proper party as patentee of the drug in question and no provision under the Federal Court Rules, 1998 to limit its rights -- Other drug companies not helpful in determining factual or legal issues -- Association representing employees of research-based drug companies had failed to adduce evidence its participation would be helpful given participation of Bristol-Myers.

Statutes, Regulations and Rules Cited:

Federal Court Rules, 1998, Rule 109, Rule 109(2)(b)

Federal Court Rules, Rule 1611

Patented Medicines (Notice of Compliance) Regulations, SOR/ 93-133, s. 5, s. 5(1)

Counsel:

Andrew Brodkin and Julie Perrin, for the applicant.
Anthony G. Creber and James E. Mills, for the proposed respondent/intervenors.
Harry Underwood, for the proposed intervenors.
Frederick Woyiwada, for the respondent.

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1 **McGILLIS J.** (Reasons for Order):-- The four motions in this matter raise questions concerning, among other things, the rights of a party and the test to be applied on a motion for intervention under Rule 109 of the Federal Court Rules, 1998.

2 Apotex Inc. ("Apotex") instituted an application on November 24, 1999 in which it sought various forms of relief as a result of the failure of the Minister of Health ("Minister") to process its abbreviated new drug submission for the unnamed product X. In its application, Apotex alleged, among other things, that it was not required to comply with section 5 of the Patented Medicines (Notice of Compliance) Regulations, SOR/93-133 as amended. In its submission for a notice of compliance, Apotex used a foreign product not sold in Canada as the Canadian reference product. The Minister refused to process the submission on the basis that Apotex was required to comply with section 5 of the Patented Medicines (Notice of Compliance) Regulations by sending a notice of allegation to the patentee of the Canadian approved product.

3 Several innovator drug companies and a national association learned of Apotex' application in relation to product X and brought motions to be added as parties or interveners. Shortly before the return of those motions, Apotex disclosed that product X was pravastatin sodium. Apotex consented to the addition of Bristol-Myers Squibb Canada Inc. ("Bristol-Myers"), the patentee of pravastatin sodium, as a party respondent in the proceeding. However, Apotex limited its consent by taking the position that Bristol-Myers was a proper party only in relation to the relief sought in paragraphs 3 to 5 inclusive of the application and not in relation to paragraphs 1, 2, 6, 7 and 8.

4 There were four motions before the Court: a motion by Bristol-Myers, Glaxo Wellcome Inc., Janssen-Ortho Inc., Novartis Pharmaceuticals Canada Inc., and Schering Canada Inc. seeking, among other things, to be added as parties or interveners; a motion by Pfizer Canada Inc. and Amgen Canada Inc. seeking, among other things, to be added as parties or interveners; a motion on behalf of Canada's Research-based Pharmaceutical Companies ("Rx&D") seeking, among other things, to be added as an intervener; and, a motion on behalf of Merck & Co., Inc. and Merck Frosst Canada & Co. ("Merck") seeking, among other things, to be added as parties or interveners. At the return of the motions, Bristol-Myers limited its submissions to the question of whether it was entitled to participate fully as a party in the proceeding. All other applicants in the motions sought only to intervene in the proceeding. These Reasons for Order apply to all of those motions.

i) extent of participation by Bristol-Myers as a party

5 Counsel for Apotex was unable to cite any authority to support the proposition that the participation of a party in a proceeding may be limited. In my opinion, the assertion that the participatory right of a party may be limited by the wording used to describe the relief sought in an application is unsupported by the Federal Court Rules, 1998 and the jurisprudence. Bristol-Myers is either a proper or necessary party or it is not. In the present proceeding, Bristol-Myers is clearly and unquestionably a proper party due to its status as the patentee of the drug in question. Under the Federal Court Rules, 1998, there is no provision permitting the Court to limit the rights of a person who is a proper or necessary party. To the contrary, the Federal Court Rules, 1998 accord specific procedural rights to all parties. As a party, Bristol-Myers is therefore entitled to participate fully in exercising all of the rights that accrue to a party in a proceeding [See also Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare) (1997), 72 C.P.R. (3d) 187 at 191 (F.C.T.D.); aff'd (1997), 72 C.P.R. (3d) 517 (F.C.A.)]. Finally, the notion that it is somehow appropriate to limit the participatory rights of a party is undesirable in that it would encourage unnecessary interlocutory motions.

6 Alternatively, in the event that I have erred in concluding that the participatory rights of a party may not be limited, it is necessary to consider the question in the context of the relief sought in the notice of application. The relevant provisions of the application state as follows:

THE APPLICANT MAKES APPLICATION FOR

(1) a Declaration that the Respondent, Minister of Health ("Minister"), unlawfully refused to the process the Apotex Abbreviated New Drug Submission for product X ("Apotex ANDS") in accordance with the provisions of Division 8, Part C, of the Food and Drug Regulations ("FDA Regulations") following its filing with the Minister on December 23, 1998;

(2) an Order directing the Minister forthwith to review and process the Apotex ANDS in such manner as to place the Apotex ANDS in the position it would have been in had the Minister lawfully carried out his duties under Division 8, Part C, of the FDA Regulations and processed the Apotex ANDS upon its receipt on December 23, 1988, and more particularly:

  (i) review the ANDS forthwith and in any event within 14 days; and

  (ii) in the event that the Minister finds that there are any deficiencies requiring response, forthwith to provide such deficiencies to Apotex and to review any response thereto within 7 days of receipt.

(3) a Declaration that, as at December 23, 1998, the date of submission of the Apotex ANDS, Apotex was not required to comply with section 5 of the Patented Medicines (Notice of Compliance) Regulations ("Patent Regulations");

(4) a Declaration that Apotex has a vested right to have the Apotex ANDS processed by the Minister in accordance with the provisions of Division 8, Part C, of the FDA Regulations and without regard to the Patent Regulations, and more particularly, a declaration that the amendments to the Patent Regulations made October 1, 1999 are not applicable to the Apotex ANDS;

(5) an Order directing the Minister to issue Apotex its Notice of Compliance ("NOC') for product X immediately upon satisfactory review and processing of the Apotex ANDS pursuant to Division 8, Part C, of the FDA Regulations;

(6) a Declaration that, by refusing to process the Apotex ANDS on the basis that Apotex was required to comply with the Patent Regulations, the Minister acted arbitrarily and unlawfully discriminated against Apotex;

(7) a Declaration that, by persistently ignoring and refusing to respond to Apotex' complaint that there was no basis upon which to distinguish the status and processing of the Apotex ANDS from other cases, the Minister acted unfairly, high-handedly and in bad faith;

(8) costs of this application on a solicitor and client basis.

7 In his effort to limit the right of Bristol-Myers to participate as a party in the proceeding, counsel for Apotex submitted that paragraphs 1, 2, 6 and 7 were not relevant to Bristol-Myers as patentee in that they raised issues relating to the Food and Drug Regulations, C.R.C., c. 870 as amended, and not the Patented Medicines (Notice of Compliance) Regulations. I cannot accept that

submission. All of those paragraphs, with the possible exception of paragraph 7, will require the Court to interpret section 5 of the Patented Medicines (Notice of Compliance) Regulations, as well as the relevant provisions of the Food and Drug Regulations, in order to determine whether the Minister erred in refusing to process the abbreviated new drug submission for pravastatin sodium. This case is simply the next variation on the issues considered in Nu-Pharm Inc. v. Canada (Attorney General) (1998), 80 C.P.R. (3d) 74 (F.C.A.) and Merck & Co. v. Canada (Attorney General), [1999] F.C.J. No. 1825, T-398-99 (November 23, 1999) (T.D.). In the circumstances, I am satisfied that the participation of Bristol-Myers as a party in the proceeding ought not to be limited in any manner.

ii) motion for intervention under Rule 109

8 Rule 109 of the Federal Court Rules, 1998 governs interventions. That Rule provides as follows:

> 109.(1) The Court may, on motion, grant leave to any person to intervene in a proceeding.
>
> (2) Notice of a motion under subsection (1) shall
>
> (a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and
> (b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.
>
> (3) In granting a motion under subsection (1), the Court shall give directions regarding
>
> (a) the service of documents; and
> (b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.
>
> * * *
>
> 109.(1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
> (2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

(3) La Cour assortit l'autorisation d'intervenir de directives concernant :

a) la signification de documents;
b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

9 Prior to the enactment of Rule 109 in the Federal Court Rules, 1998, the procedure to be followed under the previous Federal Court Rules on a motion for intervention varied depending on the nature of the proceeding [See Pfizer Inc. v. Canada (1999), 1 C.P.R. (4th) 349 at 355 (F.C.T.D.)]. None of the rules governing interventions under the previous Federal Court Rules outlined any criteria or other matters to be considered by the Court on a motion for intervention. As a result, the criteria to be applied on a motion for intervention under the previous Federal Court Rules were developed in the jurisprudence.

10 For present purposes, it is unnecessary to conduct an exhaustive review of all previous cases dealing with interventions. Suffice it to say that the criteria outlined in the cases varied somewhat, but reflected certain common elements. The criteria typically applied by the Court, both in public interest cases and otherwise, included matters such as the interest of the proposed intervener in the outcome, the effect on the rights of the proposed intervener, the interests of justice, the ability of the Court to hear and determine the matter on its merits without any intervention, and whether the proposed intervener had a different view to bring to the case [See, for example, Canadian Wildlife Federation Inc. v. Canada (Minister of Environment) (1989), 26 F.T.R. 241 at 243 (T.D.); Rothmans, Benson & Hedges Inc. v. Canada (Attorney General), [1990] 1 F.C. 74 at 79-80 (T.D.); aff'd on that point [1990] 1 F.C. 90 at 92; Canadian Council of Professional Engineers v. Memorial University of Newfoundland (1997), 75 C.P.R. (3d) 291 at 293 (F.C.T.D.)]. In Apotex Inc. v. Canada (Attorney-General) (1994), 56 C.P.R. (3d) 261 (F.C.T.D.), Simpson J. expanded on the criteria to be applied under former Rule 1611 on a motion for intervention. At page 266, she stated as follows:

> I have concluded that the following factors are relevant to the exercise of my discretion:

(i) The status of the case. What is the procedural and substantive development of the matter to date? How well have the issues been defined?
(ii) The impact of the decision. Who will be affected? Are the issues of interest to the parties, to a broader group such as an industry or to the public at large?
(iii) The nature of the rights which the moving parties assert. Are they direct or remote? Are they substantive, procedural, economic?
(iv) The nature of the evidence the proposed parties or interveners are in a position to adduce and whether it will assist the court in reaching its decision.
(v) The ability of the existing parties to adduce all the relevant evidence and their apparent enthusiasm for the task.

In Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare), supra, MacKay J. cited the decision in Apotex Inc. v. Canada (Attorney-General), supra, but relied primarily in his analysis on the evidence and arguments that the proposed interveners could bring before the Court, given that their interests were divergent from those of the existing parties. In short, as is apparent from a brief overview of the jurisprudence, the criteria to be applied in determining whether to permit an intervention varied somewhat.

11 The procedure governing interventions was simplified and streamlined in the Federal Court Rules, 1998, in that a single rule now governs all motions for intervention, regardless of the nature of the proceeding. Furthermore, Rule 109(2)(b) requires an applicant on a motion for intervention to "describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding". None of the rules pertaining to interventions in the previous Federal Court Rules contained a provision analogous to Rule 109(2)(b). The new requirement that a proposed intervener must indicate in the notice of motion the manner in which the described participation "...will assist in the determination of a factual or legal issue..." therefore clearly signals that the Court will focus on that issue in determining whether an intervention should be permitted. In Pfizer Inc. v. Canada, supra, Lemieux J. recognized the significance of the requirement in Rule 109(2)(b), noting at page 355 that it "...is an important criteria [sic] in terms of evaluating whether intervention should be permitted or not". In my respectful opinion, it is more than an important criterion; it is the fundamental question to be determined on a motion for intervention. In short, the issue to be addressed on a motion for intervention under Rule 109 is whether the participation of the proposed intervener will assist the Court in determining a factual or legal issue related to the proceeding. Given the shift in focus indicated by the wording of Rule 109 in the Federal Court Rules, 1998, the approach taken in the jurisprudence concerning interventions under the various rules in the previous Federal Court Rules should be approached with caution. However, some of the factors outlined in the previous jurisprudence continue to be relevant, on a motion for intervention under Rule 109, in assessing whether the participation of the proposed intervener will assist the Court in determining a factual or legal issue related to the proceeding. For example, the Court may consider, among other things, the

nature of the evidence to be adduced, the ability of the existing parties to adduce all of the relevant evidence or to adequately advance the position of the proposed intervener, and whether the Court can hear and decide the case on its merits without the assistance of the proposed intervener.

12 To date, reasons have been rendered on three motions for intervention under Rule 109. Pfizer Inc. v. Canada, supra at 355-357 and Bayer v. Canada (Attorney General) (1999), 85 C.P.R. (3d) 175 at 182-183 (F.C.T.D.) applied the criteria enunciated in Rothmans, Benson & Hedges Inc. v. Canada (Attorney-General) and Apotex Inc. v. Canada (Attorney-General), supra. In Yale Indian Band v. Aitchelitz Indian Band, [1998] F.C.J. No. 1060, T-776-98 (June 24, 1998) (Proth.), the criteria outlined in Canadian Wildlife Federation Inc. v. Canada (Minister of Environment), supra were applied. I simply wish to note that, in Bayer v. Canada (Attorney General) and Yale Indian Band v. Aitchelitz Indian Band, supra, the impact of the wording used in Rule 109(2)(b) of the Federal Court Rules, 1998, was not addressed.

iii) motions to add innovator companies as interveners

13 As indicated previously, Glaxo Wellcome Inc., Janssen-Ortho Inc., Novartis Pharmaceuticals Canada Inc., Schering Canada Inc., Pfizer Canada Inc., Amgen Canada Inc. and Merck ("innovator companies") have brought motions requesting intervener status in this proceeding. I have concluded, in the exercise of my discretion, that those three motions ought to be dismissed. In arriving at my decision, I have carefully considered all of the materials submitted on those motions, as well as the detailed submissions made by all counsel. The central issue to be determined in this proceeding is clearly yet another variation on the question of the interpretation of section 5(1) of the Patented Medicines (Notice of Compliance) Regulations in circumstances where a drug other than the patented drug is named in the abbreviated new drug submission. I am not satisfied, on the basis of the evidence adduced, that the participation of the innovator companies will assist the Court in determining the factual or legal issues related to the proceeding. At the time the innovator companies filed their evidence on the motion, Apotex had not disclosed the identity of product X. As a result, the innovator companies were seeking status as parties, and in the alternative were requesting to be added as interveners. Most of the evidence adduced by the innovator companies related to concerns raised as a result of the refusal of Apotex to identify product X. Now that Apotex has disclosed the identity of product X, the evidence adduced on that issue is irrelevant. However, I have carefully considered the evidence of each innovator company in its entirety. In my opinion, the evidence tendered by each innovator company concerning its proposed participation in the proceeding is couched largely in generalities and is not sufficient to establish that its participation will assist the Court in determining a factual or legal issue related to the proceeding. Furthermore, I am satisfied that the respondents, namely the patentee Bristol-Myers and the Minister, are able to adduce all of the relevant evidence necessary to assist the Court in determining the factual or legal issues related to the proceeding. I have therefore concluded, in the exercise of my discretion, that the innovator companies ought not to be added as interveners.

iv) motion to add Rx&D as intervener

14 The proposed intervener Rx&D is a national association representing over 19,000 Canadians who work for more than 60 member companies of Canada's research based pharmaceutical companies. The Rx&D members include all of the innovator companies proposed as interveners in this proceeding. In its materials filed on the motion, Rx&D has indicated that it wishes to tender the evidence of its president, Murray Elston, concerning consultations between Rx&D and Industry Canada during August and September 1999 in relation to the Regulations Amending the Patented Medicines (Notice of Compliance) Regulations, SOR/99-379 which came into force on October 1, 1999. In his affidavit, Mr. Elston stated that, given his "experience in consulting with Industry Canada" in relation to those Regulations, he was "...in a position to provide evidence as to the applicability of these amendments to the Apotex [abbreviated new drug submission] that could not be put forward by either of the current parties to this proceeding". At the time Mr. Elston swore his affidavit, only Apotex and the Minister were parties to the proceeding. However, Bristol-Myers is now a party. In the event that the evidence of Mr. Elston is relevant, Bristol-Myers can certainly tender it. Rx&D has therefore failed to adduce any evidence to establish that its participation will assist the Court in determining a factual or legal issue related to the proceeding. In the circumstances, I have concluded, in the exercise of my discretion, that Rx&D ought not to be added as an intervener.

DECISION

15 The motion of Bristol-Myers to participate as a party is granted with costs. The motions of the other innovator companies and Rx&D to intervene in the proceeding are dismissed with costs.

McGILLIS J.

Indexed as:

Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.

Between
Canadian Airlines International Limited and Air Canada, appellants, and
Canadian Human Rights Commission, Canadian Union of Public Employees (Airline Division) and Public Service Alliance of Canada, respondents

[2000] F.C.J. No. 220

[2000] A.C.F. no 220

[2010] 1 F.C.R. 226

[2010] 1 R.C.F. 226

95 A.C.W.S. (3d) 249

2000 CanLII 14938

2010EXP-3562

Court File No. A-346-99

Federal Court of Appeal
Montréal, Québec

Richard C.J., Létourneau and Noël JJ.

Heard: February 15, 2000.
Oral judgment: February 15, 2000.

(13 paras.)

Civil rights -- Federal or provincial legislation -- Practice -- Judicial review -- Parties -- Intervenors.

Appeal by Canadian Airlines from an interlocutory decision granting the Public Service Alliance of Canada leave to intervene in judicial review applications brought by the Canadian Human Rights Commission and the Canadian Union of Public Employees Airline Division. The judicial review applications pertained to a decision by the Canadian Human Rights Tribunal rejecting a complaint by the Union that Canadian paid discriminatory wages to their flight attendants, pilots and technical operations personnel. The Tribunal held that the employees of Air Canada and Canadian worked in separate establishments for the purposes of the Canadian Human Rights Act because they were subject to different wage and personnel policies.

HELD: Appeal allowed and the order granting leave to intervene was set aside. The Alliance's application for leave to intervene was dismissed. The Alliance failed to demonstrate how its expertise could be of assistance in the determination of the issues placed before the Court by the parties. There was no apparent basis upon which the Judge could have granted the intervention without falling into error.

Statutes, Regulations and Rules Cited:

Canadian Human Rights Act, s. 11.

Federal Court Rules, Rule 109.

Counsel:

Peter M. Blaikie, for the appellants.
Andrew Raven, for the respondent, Public Service Alliance of Canada.

The judgment of the Court was delivered orally by

1 NOËL J.:-- This is an appeal from an interlocutory decision of the Trial Division granting the Public Service Alliance of Canada ("PSAC") leave to intervene in the judicial review applications brought by the Canadian Human Rights commission (the "Commission") and the Canadian Union of Public Employees Airline Division ("CUPE"). These judicial review applications pertain to a decision of the Canadian Human Rights Tribunal (the "Tribunal") rejecting a complaint by CUPE, that the appellants paid discriminatory wages to their flight attendants, pilots and technical operations personnel.

2 By this decision, the Tribunal held inter alia that the above described employees of Air Canada and Canadian Airlines International Limited ("Canadian") work in separate "establishments" for the purposes of section 11 of the Canadian Human Rights Act since they are subject to different wage and personnel policies.

3 PSAC did not seek to intervene in the proceedings before the Tribunal.

4 The Tribunal's decision was released on December 15, 1998. The Commission and CUPE filed judicial review applications on January 15, 1999, and PSAC's application for leave to intervene was filed on May 6, 1999. The sole issue with respect to which leave to intervene was sought is wether the pilots, flight attendants and technical operations personnel employed by Air Canada and Canadian respectively are in the same "establishment" for the purposes of section 11 of the Act.

5 The Order allowing PSAC's intervention was granted on terms but without Reasons. The Order reads:

> The Public Service Alliance of Canada (the Alliance) is granted leave to intervene on the following basis:
>
> (a) the Alliance shall be served with all materials of the other parties;
> (b) the Alliance may file its own memorandum of fact and law by June 14, 1999, being within 14 days of the date for serving and filing the Respondent Canadian Airlines International Limited and the Respondent Air Canada's memoranda of fact and law as set out in the order of Mr. Justice Lemieux, dated March 9, 1999;
> (c) the Applicant Canadian Union of Public Employees (Airline Division) and the Applicant Canadian Human Rights Commission and the Respondents Canadian Airlines International Limited and Air Canada may file a reply to the Alliance's memorandum of fact and law by June 28, 1999, being 14 days from the date of service of the Alliance's memorandum of fact and law;
> (d) the parties' right to file a requisition for trial shall not be delayed as a result of the Alliance's intervention in this proceeding;
> (e) the Alliance shall be consulted on hearing dates for the hearing of this matter;
> (f) the Alliance shall have the right to make oral submissions before the Court.

6 In order to succeed, the appellants must demonstrate that the motions Judge misapprehended the facts or committed an error of principle in granting the intervention. An Appellate Court will not disturb a discretionary order of a motions Judge simply because it might have exercised its discretion differently.

7 In this respect, counsel for PSAC correctly points out that the fact that the motions Judge did not provide reasons for her Order is no indication that she failed to have regard to the relevant considerations. It means however that this Court does not have the benefit of her reasoning and hence no deference can be given to the thought process which led her to exercise her discretion the way she did.

8 It is fair to assume that in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:[1]

1) Is the proposed intervener directly affected by the outcome?
2) Does there exist a justiciable issue and a veritable public interest?
3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
5) Are the interests of justice better served by the intervention of the proposed third party?
6) Can the Court hear and decide the cause on its merits without the proposed intervener?

9 She also must have had in mind rule 109 of the Federal Court Rules, 1998, and specifically paragraph 2 thereof which required PSAC to show in the application before her how the proposed intervention "... will assist the determination of a factual or legal issue related to the proceeding".

10 Accepting that PSAC has acquired an expertise in the area of pay equity, the record reveals that:

1. PSAC represents no one employed by either of the appellant airlines;
2. the Tribunal's decision makes no reference to any litigation in which PSAC was or is engaged;
3. the grounds on which PSAC has been granted leave to intervene are precisely those which both the Commission and CUPE intend to address;
4. nothing in the materials filed by PSAC indicates that it will put or place before the Court any case law, authorities or viewpoint which the Commission or CUPE are unable or unwilling to present.

11 It seems clear that at its highest PSAC's interest is "jurisprudential" in nature; it is concerned that the decision of the Tribunal, if allowed to stand, may have repercussions on litigation involving pay equity issues in the future. It is well established that this kind of interest alone cannot justify an application to intervene.[2]

12 Beyond asserting its expertise in the area of pay equity, it was incumbent upon PSAC to show in its application for leave what it would bring to the debate over and beyond what was already available to the Court through the parties. Specifically, it had to demonstrate how its expertise would be of assistance in the determination of the issues placed before the Court by the parties. This has not been done. Without the benefit of the motion Judge's reasoning, we can see no basis on which she could have granted the intervention without falling into error.

13 The appeal will be allowed, the order of the motions Judge granting leave to intervene will be set aside, PSAC's application for leave to intervene will be dismissed and its memorandum of Fact and Law filed on June 14, 1999 will be removed from the record. The appellants will be entitled to their costs on this appeal.

NOËL J.

1 Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (No.1) (1989), [1990] 1 F.C. 74 (T.D.) at 79-83; Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (No.2) (1989), [1990] 1 F.C. 84 (T.D.) at 88; Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (No.3) (1989), [1990] 1 F.C. 90 (C.A.).

2 See R v. Bolton [1976] 1 F.C. 252, (per Jackett C.J.); Tioxide Canada Inc. v. Ministre du Revenu national [1994], 174 N.R. 212, (per Hugessen J.A.)

Case Name:

Boutique Jacob Inc. v. Paintainer Ltd.

Between
Canadian Pacific Railway Company, Appellant, and
Boutique Jacob Inc., Respondent

[2006] F.C.J. No. 1947

[2006] A.C.F. no 1947

2006 FCA 426

2006 CAF 426

357 N.R. 384

154 A.C.W.S. (3d) 264

Docket A-116-06

Federal Court of Appeal
Ottawa, Ontario

Nadon J.A.

Heard: In writing.
Judgment: December 22, 2006.

(31 paras.)

Civil procedure -- Parties -- Interveners -- Motion by ocean carriers to intervene in appeal from judgment against railway in favour of shipper of goods allowed -- Motion by another railway to intervene dismissed -- Railway would adequately defend other railway's position, but ocean carriers could put forth another position of assistance to court in determining legal issues -- Federal Courts Rules, Rule 109.

Transportation law -- Carriers -- Contracts of carriage -- Carriage of goods -- Bills of lading -- Legislation -- Canada Transportation Act -- Liability -- Motion by ocean carriers to intervene in

appeal from judgment against railway in favour of shipper of goods allowed -- Motion by another railway to intervene dismissed -- Railway would adequately defend other railway's position, but ocean carriers could put forth another position of assistance to court in interpreting definition of shipper under Canada Transportation Act, and in determining rights of railways to use Himalaya clauses and confidential contracts with ocean carriers to defend actions by shippers for lost cargo -- Canada Transportation Act, s. 137.

Motion by ocean carrier companies for leave to intervene in the appeal of CPR from a judgment in favour of Boutique Jacob. Boutique Jacob was awarded judgment against CPR for damages for a lost shipment of cargo. The cargo was comprised of textiles in cartons. It originated in Hong Kong and its destination was Montreal. Boutique Jacob hired Paintainer, which hired Panalpina, which engaged Ocean Container to ship the cargo by ocean liner, which engaged CPR to ship the cargo by rail. The loss resulted from a train derailment in Ontario. Boutique's action was dismissed against all but CPR. The judge held CPR was not entitled to limit its liability where it had no written agreement with Boutique Jacob, the shipper, providing for such limitation. The agreement between CPR and Ocean Container was not sufficient, as Ocean Container was not, in the judge's opinion, the shipper. CPR appealed, and several other carriers, a railway, and some operators of ocean liners filed motions for leave to intervene. The interveners wanted the court to interpret the provision of the Canada Transportation Act that dealt with the definition of shipper, and to rule on the rights of railways to invoke the Himalaya clause in ocean carrier's bills of lading and to enforce the terms of confidential contracts with ocean carriers when such railways were sued by owners of damaged or lost cargo.

HELD: Motion allowed in part. The ocean carriers were granted leave to intervene because their position would not be adequately defended by CPR in the appeal, and their participation would assist the court in determining the legal issues raised by the appeal. The railway was not permitted to intervene as its position would be adequately defended by CPR.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. C-10, s. 137, s. 137(1)

Federal Courts Rules, Rule 109, Rule 109(2)

Counsel:

Written representations by :

Sandra Sahyouni, for the Respondent.

Jean-Marie Fontaine, for the Proposed Interveners Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S, Hapag-Lloyd Container Line GmbH, Safmarine Container Lines N.V.,

American Steamship Owners Mutual Protection and Indemnity Association Inc. et al.

L. Michel Huart, for the Proposed Intervener Canadian National Railway Company.

REASONS FOR ORDER

1 **NADON J.A.**:-- Before me are four motions to intervene in the present appeal of a decision of de Montigny J. of the Federal Court, [2006] F.C.J. No. 292, 2006 FC 217, February 20, 2006.

2 By his decision, the learned Judge maintained, in part, an action for damages commenced by Boutique Jacob Inc. (the "respondent") against a number of defendants, namely, Pantainer Ltd., Panalpina Inc., Orient Overseas Container Line Ltd. ("OOCL") and Canadian Pacific Railway ("CPR"). Specifically, the Judge granted judgment in favour of the respondent against the defendant CPR and awarded it the sum of $35,116.56 with interest, and he dismissed the action insofar as it was directed against the other defendants.

3 A brief examination of the facts and issues leading to the judgement of de Montigny J. will be helpful in understanding the basis upon which the motions to intervene are being made.

4 At issue before the Judge was the carriage by various modes of transport from Hong Kong to Montreal of a container of goods, namely, pieces of textile in cartons, destined for the respondent. As is usual in the transport of containerized cargo, a number of entities were involved in the carriage of the container, namely, an ocean carrier, OOCL, which carried it from Hong Kong to Vancouver, and a railway carrier, CPR, which carried it from Vancouver to Montreal.

5 On April 27, 2003, as a result of a train derailment which occurred near Sudbury, Ontario, part of the respondent's cargo was damaged and part of it was lost.

6 It should be pointed out that at no time whatsoever did the respondent contract with either OOCL or CPR. Rather, the respondent retained the services of Panalpina Inc. which, in turn, retained the services of Pantainer Ltd. to carry the respondent's cargo from Hong Kong to Montreal. Pantainer then proceeded to engage OOCL to carry the container from Hong Kong to Montreal. In turn, OOCL entered into a contract of carriage with CPR with respect to the carriage of the container from Vancouver to Montreal.

7 The issues before the Judge were, *inter alia*, whether the defendants, individually or collectively, were liable for the damages suffered by the respondent and, in the event of liability, whether the defendants could limit their liability either by law or by contract.

8 As I have already indicated, the Judge dismissed the respondent's action against all of the

defendants, except CPR. In so concluding, the Judge held that CPR was not entitled to limit its liability because it had not complied with the terms of section 137 of the *Canada Transportation Act*, S.C. 1996, c. C-10 (the "Act"), which provides as follows:

> 137. (1)**A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers.**
>
> (2) If there is no agreement, the railway company's liability is limited or restricted to the extent provided in any terms and conditions that the Agency may
>
> *(a)* on the application of the company, specify for the traffic; or
>
> *(b)* prescribe by regulation, if none are specified for the traffic.

[Emphasis added]

* * *

> 137. (1) **La compagnie de chemin de fer ne peut limiter sa responsabilité envers un expéditeur pour le transport des marchandises de celui-ci, sauf par accord écrit signé soit par l'expéditeur, soit par une association ou un groupe représentant les expéditeurs.**
>
> (2) En l'absence d'un tel accord, la mesure dans laquelle la responsabilité de la compagnie de chemin de fer peut être limitée en ce qui concerne un transport de marchandises est prévue par les conditions de cette limitation soit fixées par l'Office pour le transport, sur demande de la compagnie, soit, si aucune condition n'est fixée, établies par règlement de l'Office.

[Le souligné est le mien]

9 More particularly, the Judge held that CPR could not limit its liability because it had not entered into a "... written agreement signed by the shipper or by an association or other body representing shippers" to that effect.

10 It will be recalled that the services of CPR were retained by the ocean carrier, OOCL, and not by the owner of the goods, the respondent Boutique Jacob. In the Judge's view, the written agreement between CPR and OOCL did not meet the requirements of sub-section 137(1), as "the shipper" was not OOCL, but the respondent.

11 CPR also argued that it was entitled to benefit from the limitations and exemptions of liability found in the bills of lading issued both by OOCL and by Pantainer, and more particularly, that it

could benefit from the so-called Himalaya clause found in these bills of lading. De Montigny J. concluded that by reason of section 137 of the Act, neither the Himalaya clause nor the principles of sub-bailment could be successfully invoked by CPR. At paragraph 50 of his Reasons, he explained his conclusion in the following terms:

> 50. Alternatively, counsel for CPR has argued that her client could take advantage of the limitations and exemptions found in OOCL and Paintainer terms and conditions. It is true that clause 1 of the OOCL waybill and clause 3 of the Pantainer bill of lading explicitly provide that participating carriers shall be entitled to the same rights, exemptions from liability, defences and immunities to which each of these two carriers are entitled. But the application of these clauses to a railway carrier would defeat the purpose of s. 137 of the *Canada Transportation Act*. It would make no sense to protect the shipper by prescribing that a railway company cannot limit its liability except by written agreement signed by that shipper, if the railway company could nevertheless achieve the same result through the means of a Himalaya clause found upstream in the contract of another carrier. I recognize that such reasoning results in a less advantageous position for railway companies as opposed to other carriers. But this is true not only for the purpose of liability but also in many other respects, since other modes of transportation are not as heavily regulated as are railway companies.

12 On March 20, 2006, CPR filed a Notice of Appeal in this Court and on March 30, 2006, the respondent filed a cross-appeal. On June 15, 2006, Zim Integrated Shipping Services Ltd., A.P. Moller-Maersk A/S and Hapag-Lloyd Container Line GmbH filed a motion for leave to intervene in the appeal. On July 13, 2006, August 23, 2006 and September 11, 2006, similar motions were filed respectively by 13 protection and indemnity clubs ("P&I Clubs"), by Canadian National Railway Company ("CN") and by Safmarine Container Line Ltd.

13 The proposed interveners seek to intervene in this appeal on the following questions:

1. The interpretation of section 137 of the Act, including, *inter alia*, the definition of "shipper", "association of" or "body representing shippers".
2. The right of a railway to invoke the Himalaya clause found in the ocean carrier's bill of lading.
3. The right of a railway to enforce the terms of confidential contracts that it has with an ocean carrier when sued by the owner of the damaged or lost cargo.

14 The motions to intervene are all made pursuant to Rule 109 of the *Federal Courts Rules*, which reads as follows:

> **109**. (1) **<u>the Court may, on motion, grant leave to any person to intervene in</u>**

a proceeding.

(2) Notice of a motion under subsection (1) shall

(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

*(b)***describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.**

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(a) the service of documents; and

(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

[Emphasis added]

* * *

109. (1) **La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.**

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

*b)***explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.**

(3) La Cour assortit l'autorisation d'intervenir de directives concernant :

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[Le souligné est le mien]

15 Three of the motions are brought by a number of companies, all represented by the same attorneys, which I will hereinafter refer to as the ocean carriers. These proposed interveners, with the exception of the P&I Clubs, are, like the defendant OOCL in the proceedings below, engaged in the transportation of containerized cargo to Canada from various points around the world and from Canada to various points around the world. The other proposed interveners in this group, the P&I Clubs, are insurance mutuals which protect their member shipowners and operators against, *inter alia*, third-party liability for cargo damage. For the present purposes, it is sufficient to note that they insure about 90% of the world's oceangoing tonnage and represent most, if not all, of the international ocean carriers of containerized cargo operating in Canada.

16 The other motion is brought by CN, a federally-regulated railway which operates a continuous railway system in Canada and in the United States.

17 The ocean carriers say that they meet the requirements for intervention and further say that their participation in the appeal will assist this Court in determining the factual and legal issues of the appeal for the following reasons:

- The ocean carrier involved in the trial of this action, OOCL, is not a party to the appeal and hence the Court of Appeal will not have the benefit of the point of view of one of the vital links to multimodal transportation, i.e., the ocean carrier which issued a multimodal bill of lading;
- An ocean carrier, such as OOCL, can be a shipper in the context of the rail movement of cargo as that term is understood in Section 137 of the Act, a point that CPR may not need to make or cannot make in its arguments on appeal;
- An ocean carrier could, alternatively, be a "body representing shippers" as that term is understood in Section 137 of the Act, an argument that CPR may not need to make or cannot make in its arguments on appeal;
- Himalaya clauses similar to the one contained in the OOCL bill of lading at issue are provisions which were developed by ocean carriers and are regularly found in all bills of lading of ocean carriers of containerized cargo. They have been developed to allow the ocean carrier's

sub-contractors such as railways to benefit from, *inter alia*, the same liability regime and limits of liability to which the ocean carriers benefit under the terms of their contracts of carriage with cargo owners. Ocean carriers are therefore in the best position to speak to the intent and application of such clauses.

- Ocean carriers are in the best position to make the argument regarding the application of the rules on sub-bailment because CPR, in the present case, does not have to reply on this argument as it is arguably protected by the indemnity provisions found in its tariff. In any event, it is likely that the limits of liability incorporated in the rail contract between OOCL and CPR may have exceeded the value of the Plaintiff's claim, hence CPR's lack of interest to press the issue of the application of the principles of sub-bailment.

18 With respect to its proposed intervention, CN says that its presence in the appeal will be of assistance to this Court in that:

- CN proposes to argue that the definition of shipper involves the control and not necessarily the ownership of goods;
- CN is the only Canadian railway with a full North American network and proposes to demonstrate the legal impact of the Trial decision on goods moving through Canada en route from and to international points;
- CN proposes to argue that Himalaya clauses should receive an interpretation harmonized with the interpretation given by the United States Supreme Court considering that a significant portion of containerized traffic destined to the United States enters that country through CN's network;
- CN is in the best position to assist the Federal Court of Appeal with respect to the issues raised in this appeal and in the appeal before the Quebec Court of Appeal of the Quebec Superior Court's decision in *Sumitomo Marine and Fire Insurance Co. Ltd. v. CN*, [2004] J.Q. 11243 in connection with the interpretation of section 137.

19 In *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220, this Court, at paragraph 8 of the Reasons of Noël J.A., enumerated the following factors as those which ought to be considered in deciding whether a motion to intervene should be allowed:

> 8 It is fair to assume that in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:

1) Is the proposed intervener directly affected by the outcome?
2) Does there exist a justiciable issue and a veritable public interest?
3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
5) Are the interests of justice better served by the intervention of the proposed third party?
6) Can the Court hear and decide the cause on its merits without the proposed intervener?

20 In addition, Noël J.A. indicated that the Court had to have regard to Rule 109(2), which required a proposed intervener to indicate how its participation would assist the Court in determining the factual or legal issues raised by the proceedings.

21 It must also be said that for leave to intervene to be granted, it is not necessary that all of the factors be met by a proposed intervener (see: *Rothmans Benson and Hedges Inc. v. Canada*, [1990] 1 F.C. 84 (TD); affirmed [1990] 1 F.C. 90 (CA)) and that, in the end, the Court has the inherent authority to allow intervention on terms and conditions which are appropriate in the circumstances (see: *Canada (Director of Investigations and Research) v. Air Canada*, [1989] 2 F.C. 88 (CA); affirmed [1989] 1 S.C.R. 236; also *Fishing Vessel Owners Association of B.C. v. Canada*, (1985), 57 N.R. 376 (CA) at 381).

22 I now turn to the ocean carriers' motions to intervene.

23 The ocean carriers say that the decision to be rendered by this Court in the appeal will have a significant impact on the multi-modal transportation industry, as the factual matrix represents a typical multi-modal transportation case and that the contractual documents in evidence are common across the industry. They say that de Montigny J.'s decision and that of the Quebec Superior Court in *Sumitomo Marine and Fire Insurance Co. Ltd. v. Canadian National Railway Co.*, [2004] J.Q. 11243, are the only two interpretations of section 137 of the Act. They further say that most ocean carriers of containerized cargo offer to their clients multi-modal transportation services in Canada, that they have contracts with either CN or CPR with respect to the inland portion of the transportation services which they provide, and that such contracts consistently incorporate tariffs which provide for, *inter alia*, limitations of liability in favour of the railway for damage to cargo as well as an obligation of the part of the ocean carrier to indemnify the railway in the event that the latter is held liable to third parties in excess of such limits of liability.

24 Hence, the ocean carriers point out that the direct consequence of de Montigny J.'s interpretation of section 137 of the Act is that failing written agreements between railways and cargo owners, the railways will be facing unlimited liability and, consequently, will seek to pursue indemnity rights against the ocean carriers in order to recover any amount paid in excess of the

limits stipulated in the contracts between them and the ocean carriers.

25 The ocean carriers therefore submit that they will ultimately be paying the amount of damages to which the railways have been condemned, to the extent that these amounts exceed the railways' limits of liability.

26 In my view, leave ought to be granted to the ocean carriers. I am satisfied that the position which the ocean carriers seek to assert will not be adequately defended by CPR and that their participation will undoubtedly assist this Court in determining the legal issues raised by the appeal. An important, if not crucial, consideration in my decision to grant leave to the ocean carriers is that OOCL, the ocean carrier which carried the respondents' container from Hong Kong to Vancouver and which sub-contracted the Vancouver to Montreal portion of the carriage to CPR, is not a party in the appeal.

27 As a result, it is my view that the interests of justice will be better served by allowing the ocean carriers to intervene.

28 For these reasons, I will grant leave to the ocean carriers to intervene in the appeal and costs shall be spoken to. In so concluding, I am obviously not casting any aspersions on CPR and its attorneys. My point is simply that the ocean carriers will be bringing a different perspective to the issues which are before the Court.

29 I now turn to CN's motion.

30 I have not been convinced that leave to intervene ought to be granted to CN. In my view, CN's position and the arguments which it seeks to make in the appeal are identical to the position and the arguments that will be put forward by CPR. I have no reason to believe, and CN has offered none, that CPR will not adequately defend the position which it seeks to advance. As a result, this Court can hear and decide the appeal on its merits without the participation of CN. In the end, I do not believe that the interests of justice will be better served by allowing CN to intervene in this appeal.

31 As a result, CN's motion will be dismissed. Costs shall be spoken to.

NADON J.A.

cp/e/qlklc/qlcem/qltxp

Federal Court

Cour fédérale

Date: 20051024

Docket: T-2061-04

Toronto, Ontario, October 24th, 2005

PRESENT: Roger R. Lafrenière, Esquire
Prothonotary

BETWEEN:

RICHARD BREITHAUPT and PEGGY FOURNIER

Applicants

and

HALI MACFARLANE and CALM AIR INTERNATIONAL LTD.

Respondents

ORDER

UPON MOTION in writing dated the 3rd day of October, 2005 on behalf of the Privacy Commissioner of Canada for:

(a) An Order granting leave to the Privacy Commissioner of Canada, under subsection 15(c) of the *Personal Information Protection and Electronic Documents Act* (the *PIPED Act*), to appear as a party to this Application made under section 14 of the Act (or in the alternative, leave to be added as an intervener pursuant to Rule 109 of the *Federal Courts Rules*);

(b) An Order, pursuant to Rules 53 and 104 of the *Federal Courts Rules*, amending the title of proceeding to include the Privacy Commissioner as an added Respondent;

(c) An Order requiring the Applicant and Respondent to serve their respective Application Records on the Respondent within 10 days of this Court's Order;

(d) An Order permitting the Privacy Commissioner of Canada to file a Memorandum of Fact and Law within 30 days of this Court's Order; and

(e) Such further relief as counsel may advise and this Honourable Court may Order.

AND UPON reading the motion record filed on behalf of the Privacy Commissioner of Canada, the motion record in response of the Respondent, Calm Air International Ltd. ("Calm Air"), and the Privacy Commissioner's written representations in reply; the Applicants and the Respondent, Hali MacFarlane, taking no position on the motion although duly served;

The Privacy Commissioner, relying on section 15(c) of the *PIPED Act*, seeks leave to be added as a party to this application, or in the alternative, to be added as an intervenor. She identifies two issues that she submits warrant her participation in this application. The first one is whether, and in what circumstances, an employer organization should be held liable under the *PIPED Act* for the actions of its employees. The second issue is what factors should be considered by the Court is assessing damages pursuant to section 16 of the *PIPED Act*.

Calm Air opposes the motion on the grounds that: (1) the Privacy Commissioner failed to seek leave in a timely manner, and that Calm Air would suffer unnecessary delay expense and prejudice if leave is granted at this late stage of the proceeding; and (2) that the Privacy Commissioner failed to show that she can offer a different perspective from that of the Applicants, or how her participation would assist in the Court in the determination of the issues.

In my view, there would be no serious prejudice to Calm Air if leave to participate is granted to the Privacy Commissioner. Although the motion to participate as a party is brought at a late stage, it remains that the Privacy Commissioner does not intend to adduce further evidence, or otherwise supplement the record of the parties, but simply to making written and oral representations concerning the proper interpretation of the *PIPED Act* in the context of the record as it presently stands.

Further, I am satisfied that the Privacy Commissioner's intervention would bring a unique perspective that the Applicants are unable or unwilling to adequately place before the Court. The Privacy Commissioner is not required to satisfy the rather stringent requirements set out in Rule 109 of the *Federal Courts Rules* in order to be granted leave to participate in proceedings involving the interpretation or application of the *PIPED Act*. The function and responsibilities of the Privacy Commissioner under the *PIPED Act* give her special status to intervene in judicial proceedings, particularly when the issues raised are significant and could set a precedent.

Being substantially in agreement with the written representations filed on behalf of the Privacy Commissioner, and more particularly the written representations in reply, I consider it just and appropriate to grant the Privacy Commissioner full party status. Since no costs were requested by the Privacy Commissioner, none will be granted.

THIS COURT ORDERS that

The Privacy Commissioner of Canada is granted leave to appear as a respondent to this application.

2. The style of cause is amended to include the Privacy Commissioner as a respondent.

The Applicants and the Respondents shall serve their respective application records on Privacy Commissioner no later than November 7, 2005.

The Privacy Commissioner of Canada shall serve and file a respondent's application record within 30 days of service of the parties' application records.

There shall be no order as to costs of this motion.

"Roger R. Lafrenière"
Prothonotary

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

\- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION RECORD OF THE PRIVACY COMMISSIONER OF CANADA

(pursuant to Rules 109 and 369 of the *Federal Courts Rules*)

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