Date: 20061017

Docket: T-555-05

Citation: 2006 FC 1235

Ottawa, Ontario, October 17th, 2006

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

THE INFORMATION COMMISSIONER OF CANADA

Applicant

and

THE MINISTER OF ENVIRONMENT CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for review of the refusal of the Minister of Environment Canada (the Minister) to disclose portions of a Memorandum to Cabinet dated March 1995 regarding Methylcyclopentadienyl Manganese Tricarbonyl (MMT) by reason that the requested records are exempt from disclosure under paragraphs 21(1)(a) and (b) of the *Access to Information Act*, R.S.C. 1985, c. A-1, (the *Access Act*). The Minister disclosed pages 11 to 38 and Appendix 1 of the Memorandum to Cabinet except for redactions in portions of nine paragraphs, which are the subject of this application.

[2] A table identifying the specific portions of the Memorandum withheld by the Minister that are the subject of this application (the Disputed Passages) is set out in Appendix "A" to these Reasons.

FACTS

[3] The Memorandum to Cabinet consisted of two sections. The first section was a three-page advocacy document in which the sponsoring Minister presented Cabinet with an overview of the issue, together with recommendations, their costs and the principal arguments in support of the recommendations. The second section was called the "Analysis Section", which presented an objective analysis of the background of the issue, the factors that were considered in arriving at the possible options described, and the cost of implementing each. This "Analysis Section" was previously known as the "Discussion Paper" in a Memorandum to Cabinet.

The requested information

[4] The requested information is the "Analysis Section" or discussion paper that is part of a Memorandum to Cabinet. The discussion paper is confined to pages 11 to 38 and Appendix 1, and it is presented in both official languages. The discussion paper relates to the fuel additive MMT. Cabinet made its decision concerning MMT public on May 19, 1995 when the government introduced Bill C-94, the *Manganese-based Fuel Additives Act.* Bill C-94 was reintroduced as Bill C-29 on April 22, 1996 and was adopted by Parliament on April 25, 1997 (S.C. 1997, C-11). The

purpose of the statute was to prohibit the inter-provincial trade and import for commercial purposes of MMT and gasoline containing MMT.

History of this *Access Act* request

(a) The Request

[5] On September 16, 1997, Ethyl Canada Inc., through its solicitor, submitted to the Minister a request under section 6 of the *Access Act* for:

> Discussion Papers, the purpose of which is to present background explanations, analyses of problems or policy options to the Queen's Privy Council for Canada for consideration by the Queen's Privy Council for Canada in making decisions with respect to Methylcyclopentadienyl Manganese Tricarbonyl (MMT).

[6] On October 28, 1997, the Minister identified four records relevant to Ethyl's request but advised Ethyl that access to all four records would be denied because they constituted "confidences of the Queen's Privy Council for Canada" ("Cabinet Confidences") and were therefore excluded from the scope of the *Access Act* under paragraphs 69(1)(a) and (e).

[7] After the Minister refused to disclose the records, Ethyl complained to the Commissioner. The Commissioner conducted an investigation under section 30 of the *Access Act*. The Commissioner concluded that a portion of the Memorandum, namely the analysis section, fell within the scope of "discussion paper" material identified in paragraph 69(1)(b) of the *Access Act* and therefore recommended that the Minister disclose portions of the requested records.

[8] The Minister rejected the Commissioner's recommendation. The Commissioner then applied to the Federal Court pursuant to paragraph 42(1)(a) of the *Access Act* for a review of the Minister's refusal to disclose the requested records.

(b) 1st Federal Court Review in 2001

[9] On April 2, 2001, Mr. Justice Edmond Blanchard allowed the Commissioner's application for review and issued an Order, as set out in Appendix "B" to these Reasons, requiring the Clerk of the Privy Council (the Clerk) to sever and release portions of the requested records containing background explanations or analyses of problems or policy options: *Canada (Information Commissioner) v. Canada (Minister of Environment)*, [2001] 3 F.C. 514.

[10] On February 7, 2003, the Federal Court of Appeal upheld Justice Blanchard but allowed to a limited extent the appeal by the Minister: Canada *(Information Commissioner) v. Canada (Minister of the Environment)*, 2003 FCA 68. Writing for a unanimous Court, Noël J.A. stated:

> ¶ 27 I would therefore allow the appeal to the limited extent indicated by these reasons, and vary paragraph 2 of the order given by the Applications Judge as follows:
>
> 2. The four documents which both the Minister and the Privy Council Office determined as Cabinet confidences are to be returned for review by the Clerk of the Privy Council to determine:
>
> (a) whether there exists within or appended to the documents a *corpus* of words the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions, that can be reasonably severed from the documents pursuant to section 25 of the Access Act;

> (b) if such severable *corpus* of words is found to exist by the Clerk of the Privy Council Office, it is hereby ordered that it be severed and released to the applicant subject to any exemption which may be claimed by the head of the government institution.

[11] Justice Blanchard held that section 69 of the *Access Act*, which provides that the Act does not apply to Cabinet Confidences, did not include the "Analysis Section" of the Memorandum to Cabinet. The historical evidence demonstrated that the government transformed the "Discussion Paper", which was part of the Memorandum to Cabinet, into the "Analysis Section". Justice Blanchard held at paragraph 45:

> […] Such a change to the Cabinet paper system could be viewed as an attempt to circumvent the will of Parliament.

Therefore, Justice Blanchard found that the Analysis Section of the Memorandum to Cabinet was subject to the *Access Act*. This groundbreaking decision was upheld by the Federal Court of Appeal. The Court of Appeal held at paragraph 10 per Noël J.A.:

> In considering the evolution of the Cabinet paper system, the Applications Judge found that the type of discussion previously reflected in a separate document identified as a "discussion paper" was, during the period in issue, moved to the "analysis" section of a document referred to as a "memorandum to Cabinet" (or M.C.). He then analysed the words, purpose and intent of Parliament in enacting paragraph 69(3)(b) of the *Access Act* and paragraph 39(4)(b) of the *CEA* and concluded that Parliament did not intend to allow Cabinet to circumvent the application of the legislation by merely incorporating one accessible document into another which is not. He held that it was the contents of a document, rather than its title, which ought to govern and attributed the refusal to produce the requested documents to a misapprehension of the legal effect of the relevant legislation.

[12] The part of the decision not upheld was the finding of Justice Blanchard at paragraph 47 that the Analysis Section must be disclosed without reference to any exemptions in the *Access Act*:

> In my opinion, the correct meaning of a "discussion paper" intended in paragraphs. 69(1)(b) and 69(3)(b) of the Access Act is information the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions. If this information exists but is included in a memorandum to Cabinet, the next step is to determine whether this information can be reasonably severed from the memorandum to Cabinet pursuant to section 25 of the Access Act. If the information can be reasonably severed, it must be released to the public. […]
>
> [Emphasis added]

The Court of Appeal held at paragraph 16 that the Minister (or head of the government institution) must be provided the opportunity to invoke any exemption that might apply to this information under sections 13 to 26 of the *Access Act*. The Court of Appeal varied the Order of Justice Blanchard to allow the Minister of the Environment in this case the opportunity to consider and claim any exemption that might apply to the analysis section of the Memorandum to Cabinet.

(c) Clerk certifies under the *Canada Evidence Act*

[13] The Clerk then reviewed the four records and certified that documents #2, #3 and #4 constituted confidences of the Privy Council. Document #1, a 51-page document, is the Memorandum. The Clerk certified that pages 1-10 and 39-51 of the Memorandum consisted of information contained in "a memorandum the purpose of which is to present proposals or recommendations to Council" within the meaning of paragraph 39(2)(a) of the *Canada Evidence Act* (the CEA).

[14] The Clerk determined that pages 11-38 of the Memorandum and Appendix 1 to the Memorandum (the Analysis Section) contained "a *corpus* of words the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions." Accordingly, the Clerk referred the Analysis Section to the Minister for review and invited the Minister to claim any remaining grounds for exempting disclosure under the *Access Act* as contemplated in the judgment of the Court of Appeal.

(d) 2nd Complaint by the Commissioner and Federal Court Review

[15] On June 2, 2003, the Commissioner initiated another complaint under subsection 30(3) of the *Access Act* in respect of the Minister's failure to process the Analysis Section.

[16] On June 20, 2003, the Minister informed the Commissioner and Ethyl of his decision to invoke in respect of portions of the Analysis Section the exemptions provided in subsections 14, 21(1)(a),(b) and (c), and 23 of the *Access Act*. The Minister provided Ethyl with the portions of the Analysis Section that were not subject to exemptions.

[17] Further to his own complaint, the Commissioner investigated the Minister's response to Ethyl's request by examining the exemptions claimed by the Minister and seeking representations from Ethyl and the Minister concerning the application of the exemptions.

[18] On February 20, 2004, the Minister withdrew his reliance on section 14 of the *Access Act* in respect of paragraphs 37 and 68-79 of the Analysis Section and on paragraph 21(1)(c) of the *Access*

Act in respect of paragraphs 55-106 of the Analysis Section. The Minister maintained his reliance, however, on the exemptions provided in subsections 21(1)(a),(b) and 23 of the *Access Act*.

[19] On September 30, 2004, the Commissioner completed his investigation of his complaint. The Commissioner concluded that the portions of the Analysis Section withheld under paragraphs 21(1)(a) and (b) were not exempt and recommended that the Minister disclose the corresponding portions of the Analysis Section. The Commissioner also concluded, however, that the Minister properly claimed exemptions under section 23 of the *Access Act* in respect of other portions of the Analysis Section.

[20] The Minister rejected the Commissioner's recommendation to disclose additional information. On March 25, 2005, with Ethyl's consent, the Commissioner applied to this Court for a review of the Minister's refusal to disclose the Disputed Passages.

RELEVANT LEGISLATION

[21] The legislation relevant to this application is:

1. the *Access to Information Act*, R.S.C. 1985, c. A-1; and
2. the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

The relevant excerpts of these statutes are reproduced at Appendix "C" to these Reasons.

STANDARD OF REVIEW

[22] Before embarking on an analysis of the issues raised in this application, it is necessary to undertake the pragmatic and functional analysis of the appropriate standard of review: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226. As stated by Linden J.A. in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404:

> ¶ 46 …[T]he pragmatic and functional analysis must be undertaken anew by the reviewing Court with respect to each decision of an administrative decision-maker, not merely each general type of decision of a particular decision-maker under a particular provision.

[23] This application raises as issues the interpretation and application of the discretionary exemptions under paragraphs 21(1)(a) and (b) of the *Access Act* to a particular set of records. If this Court finds that the exemptions apply, the Commissioner additionally calls upon this Court to review the exercise of the Minister's discretion to refuse disclosure of the Disputed Passages. These are two distinct issues requiring separate analyses of the applicable standard of review.

(i) <u>Standard of review with respect to paragraphs 21(1)(a) and (b): Interpretation and Application</u>

(a) Presence or absence of a privative clause or statutory right of appeal

[24] The first factor is the presence or absence of a privative clause or statutory right of appeal. This factor was assessed by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66. At paragraph 15, Gonthier J. held that the *Access Act* does not contain a privative clause insulating decisions of heads of government institutions on questions of access to information, and subsections 41 and 42 of that Act provide a statutory right of judicial

review of these decisions before the Federal Court. Accordingly, this factor suggests no deference.

(b) Relative expertise

[25] The second factor to consider is the expertise of the decision-maker relative to the Court. The finding under review involves the statutory interpretation by the Minister of the interplay between subsections 21(1)(a), (b) and section 69 of the *Access Act*. Relative to the reviewing judge, this decision-maker has no expertise in statutory interpretation. The Court is better able to decide questions of law than the Minister. Accordingly, this factor suggests a less deferential review.

(c) Purpose of the legislation

[26] The third factor to consider is the purpose of the applicable legislation, namely the *Access Act.* In *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), supra*, the Supreme Court per Gonthier J. at paragraph 17 determined that the purpose of the *Access Act* is advanced by adopting a less deferential standard of review.

(d) Nature of the question

[27] The fourth factor to be addressed is the nature of the question: whether it is one of law, fact, or mixed law and fact. The Court will accord greater deference to the head of government's factual findings, and less deference on questions of legal principle or interpretation. The question in this review involves the statutory interpretation of the interplay of provisions under the *Access Act* with respect to the Disputed Passages. This is a question of law, which warrants no deference.

(e) Conclusion

[28] Having regard to the four factors, the Minister's decision to withhold the Disputed Passages on the basis of the exemptions provided in paragraphs 21(1)(a) and (b) should be assessed on the correctness standard.

(ii) Standard of review with respect to the Exercise of Discretion

[29] The *Access Act* leaves the disclosure of records falling within paragraphs 21(1)(a) or (b) to the discretion of the Minister. The Federal Court of Appeal considered the standard of review applicable to a minister's exercise of discretion under paragraph 21(1)(a) in 3430901 *Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421 [*Telezone*]. At paragraph 45, Evans J.A. stated:

> In my opinion, the Minister's exercise of discretion under paragraph. 21(1)(a) is now also subject to review for unreasonableness. Further, "unreasonableness *simpliciter*," not patent unreasonableness, is the relevant variant of rationality review applicable to the discretionary decision in this case. The expertise available to the Minister in making the decision, and his accountability to Parliament, are outweighed by the importance afforded by the Act to the right affected, namely, the public right of access to government records secured by an independent review of refusals to disclose, and by the case-specific nature of the policy decision made.
>
> [Emphasis added]

[30] In my view, Evans J.A.'s analysis is equally applicable to this Court's review of the Minister's exercise of discretion under paragraphs 21(1)(a) and (b). I therefore conclude that the Minister's exercise of discretion should be assessed on the reasonableness standard.

BURDEN OF PROOF

[31] Section 48 of the *Access Act* provides that the government institution concerned bears the burden of establishing that its head is authorized to refuse to disclose a requested record. The parties agree that, as the party attempting to prevent disclosure, the Minister bears the burden of proving the applicability of an exemption to a particular set of records.

[32] The Minister argues, however, that, as the party alleging that discretion has been improperly exercised, the Commissioner bears the burden of proving this allegation. The Minister relies on the Federal Court of Appeal's judgment in *Telezone*, supra. At paragraph 99 of that judgment, Evans J.A. concluded that "…the burden of proof was on the appellants to establish that the Minister had failed to exercise according to law the statutory discretion to disclose the documents containing advice and recommendations within the meaning of paragraph 21(1)(a)."

[33] In my view, however, the Supreme Court of Canada's subsequent judgment in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, disposes of this issue. At paragraph 60, Gonthier J., writing for a unanimous Court, stated the following in relation to the *Privacy Act*:

> 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).
>
> [Emphasis changed]

[34] Although Gonthier J.'s statement in *Lavigne* concerns section 47 of the *Privacy Act*, the same reasoning applies with equal force to section 48 of the *Access Act*. As Evans J.A. noted in *Telezone, supra*, at paragraph 93, "Sections 47 and 48 of the *Privacy Act* are not materially different from sections 48 and 49 of the [*Access Act*]."

[35] Accordingly, the Court must be satisfied that the Minister was correct in determining that paragraphs 21(1)(a) or (b) apply in respect of the Disputed Passages and that the Minister's discretionary refusal to disclose was reasonable.

ISSUES

[36] The issue is whether the Minister lawfully refused to disclose the Disputed Passages on the basis of the exemption provided in paragraphs 21(1)(a) and (b) of the *Access Act*. Specifically:

1. Are the Disputed Passages exempt from disclosure under paragraphs 21(1)(a) or (b) of the *Access Act*?
2. If exempt, did the Minister lawfully exercise his discretion to refuse to disclose the Disputed Passages?

ANALYSIS

Issue No. 1: Are the Disputed Passages exempt from disclosure?

(a) The interplay between section 21 and section 69 of the *Access Act*

[37] Paragraphs 21(1)(a) and (b) grant the Minister discretion to withhold certain records containing advice provided to the government:

Operations of Government

Advice, etc.

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

(*a*) advice or recommendations developed by or for a government institution or a minister of the Crown,

(*b*) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown,

[…]

if the record came into existence less than twenty years prior to the request.

Activités du gouvernement

Avis, etc.

21. (1) Le responsable d'une institution fédérale peut refuser la communication de documents datés de moins de vingt ans lors de la demande et contenant :

a) des avis ou recommandations élaborés par ou pour une institution fédérale ou un ministre;

b) des comptes rendus de consultations ou délibérations où sont concernés des cadres ou employés d'une institution fédérale, un ministre ou son personnel;

[38] Before considering the specific application of paragraphs 21(1)(a) and (b) to the Disputed Passages, it is necessary to address a preliminary issue raised by the Commissioner concerning the interplay between sections 21 and 69 of the *Access Act*.

[39] Subsection 69(1) provides that, as a general rule, the *Access Act* does not apply to Cabinet Confidences. Subsection 69(3) carves out an exception to this rule:

Confidences of the Queen's Privy Council for Canada	Documents confidentiels du Conseil privé de la Reine pour le Canada
69. (1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,	**69.** (1) La présente loi ne s'applique pas aux documents confidentiels du Conseil privé de la Reine pour le Canada, notamment aux:
[…]	[…]
(*b*) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;	*b*) documents de travail destinés à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil;
[…]	[…]
Exception	Exception
(3) Subsection (1) does not apply to	(3) Le paragraphe (1) ne s'applique pas :
(*a*) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or	*a*) aux documents confidentiels du Conseil privé de la Reine pour le Canada dont l'existence remonte à plus de vingt ans;
(*b*) discussion papers described in paragraph (1)(*b*)	*b*) aux documents de travail visés à l'alinéa (1)*b*), dans les cas où les décisions auxquelles ils se rapportent ont été rendues publiques ou, à défaut de publicité, ont été rendues quatre ans auparavant.
(i) if the decisions to which the discussion papers relate have been made public, or	
(ii) where the decisions have not been made public, if four years have passed since the decisions were made.	

[40] In accordance with the Court of Appeal's judgment dated February 7, 2003, the Clerk reassessed the four documents originally identified as responsive to Ethyl's request and severed the portions falling within the scope of the exception defined in paragraph 69(3)(b). The Clerk concluded that the Analysis Section constituted a "discussion paper" within the meaning of

paragraph 39(4)(b) of the *Canada Evidence Act* and therefore did not warrant protection as a Cabinet Confidence. Paragraph 39(4)(b), which is set out in Appendix "C" to these Reasons, is identical to paragraph 69(3)(b) of the *Access Act*. Further to the Court of Appeal's judgment, the Minister was given an opportunity to claim exemptions applicable to the Analysis Section.

[41] The Commissioner argues, however, that the exemptions provided in paragraphs 21(1)(a) and (b) cannot apply when the conditions in paragraph 69(3)(b) are met. Discussion papers removed from the "protection of candour" regime found in subsection 69(1), it is argued, cannot be exempt from disclosure by being categorized as "advice and recommendations" or "accounts of consultations or deliberations" under paragraphs 21(1)(a) or (b). The Commissioner argues that such a result defeats the intent of Parliament and the stated purpose of the *Access Act*.

[42] The modern approach to statutory interpretation described by Elmer Driedger in *The Construction of Statutes* (Toronto: Butterworths, 1974) at page 67 was adopted by the Supreme Court of Canada in *Re Rizzo and Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27 at 41:

> 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.

[43] The Commissioner has filed material tracing the legislative history of sections 21 and 69. On the basis of this extrinsic material, the Commissioner asks the Court to interpret the *Access Act* in such a way as to prevent the exemption under subsection 21(1) of any records within the scope of subsection 69(3). It is well established that the Court may look to extrinsic material, including

Hansard, to ascertain the purpose behind an enactment or provision: *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783 at paragraph 17; *R. v. Morgentaler*, [1993] 2 S.C.R. 463 at 483-84.

[44] Both a plain reading of sections 21 and 69 and a review of the *Access Act's* legislative history, however, leads me to conclude that the Commissioner's argument on this point must fail.

[45] First, the effect of subsection 69(3) is discerned, albeit circuitously, by reading the opening text of subsections 69(1) and (3):

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

[…]

(3) Subsection (1) does not apply to […]

[Emphasis added]

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

[…]

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

[Je souligne]

A plain reading of these provisions indicates that if a record falls within the scope of subsection 69(3), then, as an exception to the rule in subsection 69(1) excluding Cabinet Confidences, the *Access Act* applies in respect of the record. As noted below, this fact alone does not determine whether the record must be released on request. Such a determination must be made in accordance with the other provisions of the *Access Act*.

[46] Second, the Court of Appeal was clear in granting the Minister an opportunity to claim any exemptions found to apply to the records which the Clerk found did not constitute Cabinet

Confidences under paragraph 69(3)(b) of the *Access Act*. As referred to above in paragraph 9, Noël. J.A. stated:

> (b) if such severable corpus of words is found to exist by the Clerk of the Privy Council Office, it is hereby ordered that it be severed and released to the applicant subject to any exemption which may be claimed by the head of the government institution.
>
> [Emphasis added]

If the application of paragraph 69(3)(b) precluded all other exemptions under the *Access Act*, no such opportunity would have been provided.

[47] Third, the specific exemption under subsection 21(1) of "advice and recommendations" and "accounts of consultations or deliberations" is distinct from the terminology found in paragraph 69(1)(b): "discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions". As Malone J.A. explained in *Jabel Image Concepts Inc. v. Canada (Minister of National Revenue)* (2000), 257 N.R. 193, at paragraph 12 (F.C.A.):

> […] When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning. […]

It follows that, whatever Parliament's intention was in respect of discussion papers, the intention as expressed in subsection 21(1) is that the Minister has discretion to refuse to disclose records containing information described in that subsection.

[48] Finally, the legislative history of the *Access Act* indicates that Parliament did not intend the application of subsection 69(3) to preclude the operation of subsection 21(1). Bill C-43, which

enacted the *Access Act*, received first reading in the House of Commons on July 17, 1980. Bill C-43 at first reading contained distinct exemptions for Cabinet Confidences and records containing "advice and recommendations" and "accounts of consultations or deliberations": the former were subject to a mandatory exemption under clause 21, and the latter were subject to a discretionary exemption under clause 22. Clauses 21 and 22, as they read during first reading of Bill C-43, are set out in Appendix "D" to these Reasons. During the Committee stage, Bill C-43 was amended by removing the mandatory exemption for Cabinet Confidences under clause 21 and substituting a new clause 69, which removed altogether Cabinet Confidences from the scope of the *Access Act*. In doing so, the Committee added an exception for background papers. Clause 22 now appears as section 21 of the *Access Act*, and clause 69 appears as section 69 of the *Access Act*.

[49] Clauses 21 and 22 addressed distinct classes of records based on distinct justifications for their non-disclosure. Notwithstanding the differences between these predecessor clauses and the current provisions found in subsections 21(1) and 69(3) of the *Access Act*, it is clear that Parliament did not intend these provisions to be applied such that records within the scope of the latter are necessarily excluded from the former. While the possibility for overlap exists, nothing inherent in these provisions requires it.

[50] The Commissioner's argument that exemptions under subsection 21(1) cannot be applied to records within the scope of subsection 69(3) must therefore fail.

Issue No. 1: Are the Disputed Passages exempt from disclosure?

(b) "Advice or Recommendations": Paragraph 21(1)(a)

[51] Paragraph 21(1)(a) provides a discretionary exemption for "advice or recommendations developed by or for a government institution or a minister of the Crown." The Federal Court of Appeal held in *Telezone, supra* at paragraph 50, that:

> […] by exempting "advice and recommendations" from disclosure, Parliament must be taken to have intended the former to have a broader meaning than the latter, otherwise it would be redundant. [Emphasis in original]

The Court of Appeal then interpreted "advice" at paragraph 52:

> On the basis of these considerations, I would include within the word "advice" an expression of opinion on policy-related matters, but exclude information of a largely factual nature, even though the verb "advise" is sometimes used in ordinary speech in respect of a communication that is neither normative, nor in the nature of an opinion.

[52] I am also guided by the interpretation of section 21 provided by Evans J., as he then was, in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245 at paragraph 39:

> It is difficult to avoid the conclusion that the combined effect of paragraphs 21(1)(a) and (b) is to exempt from disclosure under the Act a very wide range of documents generated in the internal policy processes of a government institution. Documents containing information of a factual or statistical nature, or providing an explanation of the background to a current policy or legislative provision, may not fall within these broad terms. However, most internal documents that analyse a problem, starting with an initial identification of a problem, then canvassing a range of solutions, and ending with specific recommendations for change, are likely to be caught within paragraph (a) or (b) of subsection 21(1).

[53] In refusing to release the Disputed Passages, the Minister has relied on both paragraphs 21(1)(a) and (b). Having reviewed the material, I conclude that some portions of the Disputed Passages are subject to the discretionary exemption under paragraph 21(1)(a). I will review separately the applicability of paragraph 21(1)(b) to the Disputed Passages. The Confidential Appendix to these Reasons sets out for greater certainty the appropriate redactions in the nine paragraphs in dispute. The highlighted portions in the Confidential Appendix indicate the portions of text which the Court concludes are not subject to paragraph 21(1)(a).

Paragraph 46

[54] Paragraph 46, which discusses the "economic implications and competitiveness of the motor vehicle and petroleum industries", contains eight sentences. The last four sentences have been withheld. Of these sentences, the first contains purely factual information and is therefore not subject to paragraph 21(1)(a). The second sentence contains both opinion and fact. Accordingly, I find that paragraph 21(1)(a) applies in respect of the opinion expressed in the first 15 words in the second sentence but not in respect of the factual information provided in the remaining 18 words. The third sentence reflects an opinion and is therefore subject to paragraph 21(1)(a). The fourth sentence contains both fact and opinion, and I find that paragraph 21(1)(a) applies only in respect of the final 12 words.

Paragraph 47

[55] The last three sentences of paragraph 47 have been withheld. The first of these sentences contains both fact and advice, and I would apply paragraph 21(1)(a) only in respect of the opinion expressed in the final thirteen words. The second sentence in dispute contains purely factual

information to which paragraph 21(1)(a) does not apply. I am satisfied that the third sentence consists entirely of opinion on a policy issue and is therefore subject to paragraph 21(1)(a).

Paragraph 66

[56] The Minister refused to disclose both sentences in paragraph 66, which discusses a disadvantage of the "National Approach" option. The second sentence has been withheld on the basis of the solicitor-client privilege exemption under section 23 of the *Access Act*. The Commissioner does not take issue with the Minister's refusal to disclose the second sentence. It is not clear from the material whether section 23 has also been invoked in respect of the first sentence. In any event, the Minister claims the first sentence is exempt under paragraphs 21(1)(a) and (b).

[57] The first sentence of paragraph 66 contains purely factual information. Moreover, it is almost identical to the statement already released in paragraph 36 of the Analysis Section. The Minister cannot rely on paragraph 21(1)(a) to refuse disclosure of the first sentence. Any claim to withhold the first sentence on the basis of section 23 must also fail because solicitor-client privilege does not apply to information which has already been disclosed.

Paragraph 84

[58] The Minister refused to disclose the second sentence in paragraph 84, which discusses a disadvantage of the option to "Harmonize motor vehicle emissions standards with U.S. Federal Standards (without removing MMT)" ("Option 3"). I am not satisfied that

this sentence constitutes “advice or recommendations” within the meaning of paragraph 21(1)(a).

Paragraph 87

[59] The Minister refused to disclose all three sentences in paragraph 87, which continues the discussion of disadvantages of Option 3. The information contained in the first two sentences, while somewhat speculative, is largely factual. Accordingly, I cannot conclude that the first two sentences are exempt under paragraph 21(1)(a). The third sentence, however, consists of opinion and is exempt under paragraph 21(1)(a).

Paragraph 89

[60] The Minister refused to disclose both sentences in paragraph 89, which is also part of the section describing disadvantages of Option 3. The first eleven words clearly constitute advice within the meaning of paragraph 21(1)(a); however, the remaining text in paragraph 89 consists of factual information. While the last eleven words in the first sentence appear to form the basis of the advice expressed in the opening words of the sentence, I am satisfied that severance is appropriate in this situation. Therefore, only the first eleven words of paragraph 89 are exempt under paragraph 21(1)(a).

Paragraph 94

[61] Paragraph 94, the last sentence of which has been withheld by the Minister, begins the discussion of disadvantages of the “Excise Tax Option” (“Option 4”). The withheld text contains information that is entirely speculative in nature. It is characterized more

accurately, in my view, as explanatory than as an opinion on a policy matter. I am not satisfied that it constitutes "advice or recommendations" within the meaning of paragraph 21(1)(a).

Paragraph 95

[62] Paragraph 95, which consists of two sentences, continues the discussion of Option 4's disadvantages. The Minister has refused to disclose paragraph 95 in its entirety. It is clear from a reading of the first sentence that it is normative and expresses an opinion on the appropriateness of Option 4. It is therefore exempt under paragraph 21(1)(a). The second sentence, however, is entirely factual in nature and is not subject to paragraph 21(1)(a).

Paragraph 106

[63] Paragraph 106, which contains two sentences and has been withheld in its entirety, discusses a disadvantage of the "Market-Based (Do-Nothing) Approach". I am satisfied that the both sentences consist of advice within the meaning of paragraph 21(1)(a).

<u>Issue No. 1</u>: Are the Disputed Passages exempt from disclosure?

(c) "Account of Consultations or Deliberations": Paragraph 21(1)(b)

[64] There has been relatively little judicial consideration of paragraph 21(1)(b). I am, however, guided by the interpretive comments provided by Martineau J. in *Newfoundland Power Inc. v. Canada (Minister of National Revenue)*, 2002 FCT 692 at paragraph 5:

> I consider that the analysis of various strategic or legal alternatives, and any recommendation made by managers or employees of the defendant regarding the position the latter should take on a taxpayer's

> notice of objection, are clearly covered by paragraph 21(1)(b) of the Act.

[65] Also noteworthy is the interpretation provided in Chapter 2-8 of the Treasury Board Manual on Access to Information Policy and Guidelines. Before reviewing its content, the admissibility and use of the manual must be addressed. As stated by *R. Sullivan in Sullivan and Driedger on the Construction of Statutes* (Toronto: Butterworths, 2002) at pages 505-506:

> It is well established that administrative interpretation may be relied on by courts to assist in determining the meaning or effect of legislation. However, the opinion of administrative interpreters is not binding on the courts. Except in so far as they are empowered to do so by statute, administrators can neither make law (that is the job of the legislature) nor determine its true meaning (that is the job of the courts. All they can do is offer an opinion that is more or less persuasive.

The Treasury Board Manual provides the following discussion of paragraph 21(1)(b):

> This provision has certain key components. The first is the term "account". As this term is not defined in the Act, it is given its ordinary meaning as a "particular statement or narrative of an event or thing; a relation, report or description". The term "account" encompasses an exchange of views.
>
> […]
>
> It is important in this context, however, to bear in mind that the existence of an account is not sufficient. It must be an account of "consultations or deliberations". As these words are not defined for the purposes of the Access to Information Act, they would be given their ordinary and usual meaning. "Consultation" is defined as "the action of consulting or taking counsel together;..." The term "consult" is defined as "to ask advice of, seek counsel from; to have recourse to for instruction or professional advice..." "Deliberation" is defined as "...careful consideration with a view to decision or the consideration and discussion of the reasons for and against a measure by a number of councillors".
>
> Based on these definitions, only that information describing the advice provided, the consultations undertaken or the exchange of views leading to a particular decision would qualify as an account exemptible under paragraph 21(1)(b).

[Emphasis added]

[66] I agree that the terms “account”, “consultation” and “deliberations” should be given their ordinary and usual meaning as reflected in the Treasury Board Manual.

[67] It follows from the definitions above that factual information must generally be excluded from the scope of paragraph 21(1)(b). Accordingly, I conclude that the portions of the Disputed Passages that I have identified above in my analysis of paragraph 21(1)(a) as containing largely factual information are not exempt under paragraph 21(1)(b).

[68] In the context of a Memorandum to Cabinet, it is apparent that there may be considerable overlap between the scope of records covered by each of paragraphs 21(1)(a) and (b). This overlap flows from the consultative nature of the memorandum, which has been prepared by the staff of a government institution or a minister of the Crown. In the specific context of the Analysis Section, I am satisfied that the portions of the Disputed Passages that I have identified as falling within the scope of paragraph 21(1)(a) are also exempt under paragraph 21(1)(b).

[69] I therefore conclude that paragraphs 21(1)(a) and (b) of the *Access Act* apply in respect of the Disputed Passages to the extent set out in Appendix “A” to these Reasons.

Issue No. 2: If exempt, did the Minister lawfully exercise his discretion to refuse to disclose the Disputed Passages?

[70] The Commissioner argues that the Minister improperly exercised the discretion to refuse the release of the Disputed Passages. The parties have confidentially filed material to assist the Court in reviewing the Minister's exercise of discretion. As noted above, the Minister bears the burden of satisfying this Court that the exercise of discretion was reasonable.

[71] The general thrust of the Commissioner's argument is that the Minister's discretion was unreasonably exercised because the Minister refused to release passages containing the same information found in portions of the released material. The Commissioner further argues that the Minister failed to exercise his discretion in accordance with the principle cited by the Federal Court of Appeal in *Rubin v. Canada Mortgage and Housing Corp.*, [1989] 1 F.C. 265 at 274:

> Accordingly, it is incumbent upon the institutional head (or his delegate) to have regard to the policy and object of the *Access to Information Act* when exercising the discretion conferred by Parliament pursuant to the provisions of subsection 21(1). When it is remembered that subsection 4(1) of the Act confers upon every Canadian citizen and permanent resident of Canada a general right to access and that the exemptions to that general rule must be limited and specific, I think it clear that Parliament intended the exemptions to be interpreted strictly.

[72] The Commissioner has referred the Court to several passages within the released portion of the Analysis Section, which, in his submission, closely parallel information withheld by the Minister. The Court has already concluded that paragraphs 21(1)(a) and (b) do not apply to many of the Disputed Passages identified by the Commissioner. Of those that do not, I do not find that there is substantial similarity between these passages and the portions of the Disputed Passages exempt under paragraphs 21(1)(a) and (b). The exempted portions contain advice, while the passages to which the Commissioner has referred the Court consist of largely factual information.

[73] It is apparent from the record that the Minister's refusal to release the Disputed Passages was primarily because the MMT issue remained an active policy file for the government. In a letter to the Commissioner dated February 20, 2004, the Deputy Minister stated:

> The MMT issue continues to be in the public forum and has policy implications for the Government of Canada. The Minister of the Environment is now charting a course forward towards the establishment of a third-party independent review. The findings of that review will help determine if subsequent federal action on MMT is warranted. Given the continued activity on this file, we have determined that the release of additional information in the document could affect the Government's decision-making process and compromise future federal action.

[74] Earlier, the Deputy Minister wrote to Commissioner in a letter dated September 8, 2003:

> MMT continues to be an active file for the Government of Canada. The exemptions applied to the document are required to allow for the preservation of a full and frank flow of interchange among public officials participating in the decision making process. If this advice were to become public, the integrity of the Government's decision making process could be compromised.

[75] A review of the confidentially filed material does not disclose any further reasons for the Minister's refusal to release the Disputed Passages. In conducting the requisite balancing of interests for and against disclosure, the Minister's designate considered the "active" status of the MMT file as the overriding factor in refusing disclosure.

[76] The case law addresses the need for the Minister to consider the public interest for and against disclosure and weigh these competing interests with the purposes of the Act in mind. Also, the Treasury Board Manual directs that discretion to release records under section 21 requires considering "whether or not disclosure of the information will result in injury or harm to the processes for providing advice or recommendations or carrying on consultations and deliberations."

The Supreme Court of Canada has confirmed the common law principle that the public interest in disclosure must be weighed against the public interest in retaining confidentiality—even in the context of Cabinet Confidences: *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, at paragraphs 22, 28.

[77] The Court of Appeal provided in *Telezone, supra,* at paragraph 51, the following guidance on the purposes to be considered by the Minister in interpreting section 21:

> In addition, the exemption must be interpreted in light of its purposes, namely, removing impediments to the free and frank flow of communications within government departments, and ensuring that the decision-making process is not subject to the kind of intense outside scrutiny that would undermine the ability of government to discharge its essential functions: *Canadian Council of Christian Charities, supra*, at paragraphs 30-32.

[78] The competing public interest in disclosure was described by Evans J., as he then was, in *Canadian Council of Christian Charities, supra*, at paragraph 32:

> On the other hand, of course, democratic principles require that the public, and this often means the representatives of sectional interests, are enabled to participate as widely as possible in influencing policy development. Without a degree of openness on the part of government about its thinking on public policy issues, and without access to relevant information in the possession of government, the effectiveness of public participation will inevitably be curbed.

[79] The confidential cross-examination of the Deputy Minister does not provide any rationale for non-disclosure in relation to the public interest except for the publicly stated reason that the records were not being disclosed because MMT is an active file. There is no indication that the Deputy Minister was aware of the case law governing the interpretation and application of section 21, and it is unclear whether she appreciated the principles relevant to her exercise of discretion.

The Deputy Minister must consider whether disclosure is possible without impairing the effectiveness of government.

[80] The Court of Appeal in *Telezone, supra*, stated the following at paragraph 112 concerning the sufficiency of reasons:

> The question here is whether the reasons provide a sufficient explanation for the refusal to disclose so as to enable the Court to perform its reviewing function, or reveal that the Minister's discretion to withhold documents exempted under paragraph 21(1)(a) was not exercised according to law.

The provision of reasons also promotes transparency and accountability in administrative decision-making. As Estey J. stated in *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 at 706:

> […] This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal and if taken, the opportunity in the reviewing or appellate tribunal of a full hearing which may well be denied where the basis of the decision has not been disclosed. […]

[81] In scrutinizing the Minister's "weighing" process on a standard of reasonableness, I find that there are insufficient reasons provided in support of the Minister's refusal to disclose. In my view, the Deputy Minister's analysis was somewhat capricious. Portions continued to be released even after the Deputy Minister determined disclosure would impair government action despite no appreciable change in circumstances. As well, much of what the Deputy Minister withheld based on impairment concerns do not, in this analysis, fall under section 21 in any event.

[82] I have not been referred to any evidence—public or confidential—that supports the Minister's conclusion that the release of the Disputed Passages would compromise future government action on the MMT issue. The government has already released virtually all of the Analysis Section. The analysis contains 106 paragraphs. Only parts of nine paragraphs have been redacted. The released text includes the details of the five options considered by Cabinet. The Minister's refusal to release the Disputed Passages on the basis of paragraphs 21(1)(a) and (b), which therefore cannot be said to withstand a probing examination, is unreasonable in the circumstances.

CONCLUSION

[83] Based on the foregoing, I would allow the application for review. Section 49 of the *Access Act* requires that the Court order the institutional head to disclose to the requester the portion of records for which there is no authority to refuse disclosure. Accordingly, I order the Minister to disclose to Ethyl the following portions of the Disputed Passages which are not subject to the section 21 discretionary exemptions:

1. in paragraph 46: the entire first sentence, the last 18 words in the second sentence, and the first 11 words in the fourth sentence;
2. in paragraph 47: the first ten words in the first sentence, and the entire second sentence;
3. the first sentence of paragraph 66;
4. all of paragraph 84;

5. the first two sentences in paragraph 87;
6. in paragraph 89, the last 11 words in the first sentence;
7. all of paragraph 94; and
8. the second sentence in paragraph 95.

[84] The remaining portions of the Disputed Passages to which paragraph 21(1)(a) and (b) apply are returned to the Minister to re-determine with reasons whether disclosure to Ethyl is warranted in the circumstances having regard to the public interest in favour of releasing information and in protecting the internal processes necessary for effective government.

COSTS

[85] Both parties have asked for costs. Subsection 53(1) of the *Access Act* provides that costs shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise. The Commissioner's submissions to the Court were largely focussed on the issue of the interplay between sections 21 and 69 of the *Access Act*. These arguments were substantially without merit. This will be reflected in an order that each party bear its own costs.

JUDGMENT

THIS COURT ADJUDGES AND DECLARES that:

1. The Minister must disclose to Ethyl the following portions of the Disputed Passages and the corresponding French text:

   a) in paragraph 46: the entire first sentence, the last 18 words in the second sentence, and the first 11 words in the fourth sentence;

   b) in paragraph 47: the first ten words in the first sentence, and the entire second sentence;

   c) the first sentence of paragraph 66;

   d) all of paragraph 84;

   e) the first two sentences in paragraph 87;

   f) in paragraph 89, the last 11 words in the first sentence;

   g) all of paragraph 94; and

   h) the second sentence in paragraph 95;

2. The following portions of the Disputed Passages are returned to the Minister for a re-determination with reasons of whether disclosure to Ethyl is warranted in the circumstances having regard to the public interest in favour of releasing information and in protecting the internal processes necessary for effective government:

   a) in paragraph 46, the first 15 words in the second sentence, the third sentence, and the last 12 words in the fourth sentence;

   b) in paragraph 47, the last 13 words in the first sentence, and the third sentence;

   c) the third sentence in paragraph 87;

d) the first 11 words in paragraph 89;

e) the first sentence in paragraph 95; and

f) paragraph 106;

3. The parties shall each bear their own costs in these proceedings.

"Michael A. Kelen"
Judge

APPENDIX "A"

The "Disputed Passages" in the Memorandum to Cabinet Regarding MMT

#	Page (English Version)	Para.	Material (English Version)	Provision(s) relied upon	Court's Conclusion	
					Exemption applied	Order
1	19	46	Last 4 sentences	21(1)(a) and (b)	Second sentence: first 15 words; third sentence; fourth sentence: last 12 words [21(1)(a),(b)]	Return exempt portion to Minister; release non-exempt portion to Ethyl.
2	21	47	Last 3 sentences	21(1)(a) and (b)	First sentence: last 13 words; third sentence. [21(1)(a),(b)]	Return exempt portion to Minister; release non-exempt portion to Ethyl.
3	25	66	First sentence	21(1)(a) and (b), 23	None.	Release to Ethyl.
4	27	84	Last sentence	21(1)(a) and (b)	None.	Release to Ethyl.
5	27	87	Entire paragraph (3 sentences)	21(1)(a) and (b)	Third sentence. [21(1)(a),(b)]	Return exempt portion to Minister; release non-exempt portion to Ethyl.
6	27	89	Entire paragraph (2 sentences)	21(1)(a) and (b)	First 11 words. [21(1)(a),(b)]	Return exempt portion to Minister; release non-exempt portion to Ethyl.
7	29	94	Last sentence	21(1)(a) and (b)	None.	Release to Ethyl.
8	29	95	Entire paragraph (2 sentences)	21(1)(a) and (b)	First sentence. [21(1)(a),(b)]	Return exempt portion to Minister; release non-exempt portion to Ethyl.
9	29	106	Entire paragraph (2 sentences)	21(1)(a) and (b)	Both sentences. [21(1)(a),(b)]	Return exempt portion to Minister.
	TOTAL		**19 sentences**			

APPENDIX "B"

Order of Blanchard J., April 2, 2001

1. This application for judicial review is allowed with costs.

2. The four documents which both the Minister and the Privy Council Office determined as Cabinet confidences are to be returned for review by the Clerk of the Privy Council to determine:

   (a) Whether the documents contain background explanations, analysis of problems or policy options that can be reasonably severed from the documents pursuant to s. 25 of the *Access Act*.

   (b) If such information is deemed severable by the Clerk of the Privy Council Office, it is hereby ordered released to the requirant.

APPENDIX "C"

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

Purpose

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

[…]

Right to access to records

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or
(b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act,

has a right to and shall, on request, be given access to any record under the control of a government institution.

[…]

Operations of Government

Advice, etc.

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

(*a*) advice or recommendations developed by or for a government institution or a minister of the Crown,

Objet

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

[…]

Droit d'accès

4. (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande:

a) les citoyens canadiens;
b) les résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés.

[…]

Activités du gouvernement

Avis, etc.

21. (1) Le responsable d'une institution fédérale peut refuser la communication de documents datés de moins de vingt ans lors de la demande et contenant :

a) des avis ou recommandations élaborés par ou pour une institution fédérale ou un ministre;

(*b*) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown,

[…]

if the record came into existence less than twenty years prior to the request.

[…]

Solicitor-client privilege

23. The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.

[…]

Severability

25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

[…]

Receipt and investigation of complaints

30. (1) Subject to this Act, the Information Commissioner shall receive and investigate complaints

(*a*) from persons who have been refused access to a record requested under this Act or a part thereof;

[…]

b) des comptes rendus de consultations ou délibérations où sont concernés des cadres ou employés d'une institution fédérale, un ministre ou son personnel;

[…]

Secret professionnel des avocats

23. Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel qui lie un avocat à son client.

[…]

Prélèvements

25. Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente loi pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

[…]

Réception des plaintes et enquêtes

30. (1) Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information reçoit les plaintes et fait enquête sur les plaintes :

a) déposées par des personnes qui se sont vu refuser la communication totale ou partielle d'un document qu'elles ont demandé en vertu de la présente loi;

[…]

Information Commissioner may initiate complaint

(3) Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Commissioner may initiate a complaint in respect thereof.

[…]

Review by Federal Court

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

[…]

Burden of proof

48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

Order of Court where no authorization to refuse disclosure found

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section

Plaintes émanant du Commissaire à l'information

(3) Le Commissaire à l'information 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 la demande ou à l'obtention de documents en vertu de la présente loi.

[…]

Révision par la Cour fédérale

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(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.

[…]

Charge de la preuve

48. Dans les procédures découlant des recours prévus aux articles 41 ou 42, la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document incombe à l'institution fédérale concernée.

Ordonnance de la Cour dans les cas où le refus n'est pas autorisé

49. La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution

50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

[…]

Costs

53. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

Idem

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

[…]

Confidences of the Queen's Privy Council for Canada

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

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

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

fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

[…]

Frais et dépens

53. (1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.

Idem

(2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

[…]

Documents confidentiels du Conseil privé de la Reine pour le Canada

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

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

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

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

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

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

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

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

(*f*) draft legislation; and

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

Definition of "Council"

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

Exception

(3) Subsection (1) does not apply to

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

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

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

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

formulation de sa politique;

e) documents d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le Conseil, ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa *d*);

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

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

Définition de « Conseil »

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

Exception

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

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

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

2. *Canada Evidence Act*, R.S.C. 1985, c. C-5

Objection relating to a confidence of the Queen's Privy Council

39. (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

Definition

(2) For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in

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

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

(*c*) an agendum of Council or a record recording deliberations or decisions of Council;

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

(*e*) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the

Opposition relative à un renseignement confidentiel du Conseil privé de la Reine pour le Canada

39. (1) Le tribunal, l'organisme ou la personne qui ont le pouvoir de contraindre à la production de renseignements sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, sans l'examiner ni tenir d'audition à son sujet, si le ministre ou le greffier attestent par écrit que le renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada.

Définition

(2) Pour l'application du paragraphe (1), un « renseignement confidentiel du Conseil privé de la Reine pour le Canada » s'entend notamment d'un renseignement contenu dans :

a) une note destinée à soumettre des propositions ou recommandations au Conseil;

b) un document de travail destiné à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil;

c) un ordre du jour du Conseil ou un procès-verbal de ses délibérations ou décisions;

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

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

subject of communications or discussions referred to in paragraph (*d*); and

(*f*) draft legislation.

Definition of "Council"

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

Exception

(4) Subsection (1) does not apply in respect of

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

(*b*) a discussion paper described in paragraph (2)(*b*)

(i) if the decisions to which the discussion paper relates have been made public, or

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

communications ou discussions visées à l'alinéa *d*);

f) un avant-projet de loi ou projet de règlement.

Définition de « Conseil »

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

Exception

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

a) à un renseignement confidentiel du Conseil privé de la Reine pour le Canada dont l'existence remonte à plus de vingt ans;

b) à un document de travail visé à l'alinéa (2)*b*), dans les cas où les décisions auxquelles il se rapporte ont été rendues publiques ou, à défaut de publicité, ont été rendues quatre ans auparavant.

APPENDIX "D"

3. Bill C-43, *An Act to enact the Access to Information Act and the Privacy Act, to amend the Federal Court Act and the Canada Evidence Act, and to amend certain other Acts in consequence thereof* (First Reading, July 17, 1980; First Session, Thirty-second Parliament)

Operations of Government

Memoranda to Cabinet, discussion papers and other Cabinet documents

21. (1) The head of a government institution shall refuse to disclose any record requested under this Act that falls within any of the following classes:

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

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

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

(*d*) records used for or reflecting consultations among Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(*e*) records the purpose of which is to brief Ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of consultations referred to in paragraph (*d*); and

(*f*) draft legislation before its introduction in Parliament.

Activités du gouvernement

Notes au Cabinet, documents de travail et autre documents du Cabinet

21. (1) Le responsable d'une institution fédérale est tenu de refuser la communication des documents qui entrent dans l'une des catégories suivantes :

(*a*) notes ou mémoires destines à soumettre des propositions ou recommandations au Conseil;

b) documents de travail destinés à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil, tant que celui-ci n'a pas pris de décision à leur sujet;

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

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

e) documents d'information à l'usage des ministres de la Couronne sur des questions portées ou qu'il est prévu de porter devant le Conseil, ou sur des questions qui font l'objet des consultations visées à l'alinéa *d*);

f) avant-projets de loi tant que les projets correspondants ne sont pas déposés devant le Parlement.

Records containing information about Cabinet records

(2) The head of a government institution shall refuse to disclose any record requested under this Act that contains information about the contents of any record within a class of records referred to in paragraphs (1)(a) to (f).

Limitation

(3) Subsections (1) and (2) do not apply in respect of any record requested under this Act that contains information about the contents of any record within a class of records referred to in paragraphs (1)(a) to (f),

(*a*) where disclosure of the record is authorized by the Prime Minister of Canada or a person delegated by the Prime Minister to so authorize or pursuant to guidelines established by the Prime Minister; or

(*b*) where a request is made under this Act for access to the record, or to a record that contains information about the contents of the record, more than twenty years after the record came into existence.

Definition of "Council"

(4) For the purposes of this section, "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Advice, etc.

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

(*a*) advice or recommendations developed by or for a government institution or a Minister of the Crown,

(*b*) an account of consultations or deliberations involving officials or

Documents contenant des renseignements sue les documents du Cabinet

(2) Le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements relatifs à la teneur des documents qui font partie des catégories visées aux alinéas (1)a) à f).

Exceptions

(3) Les paragraphes (1) et (2) ne s'appliquent pas aux documents qui font partie des catégories visées aux alinéas (1)a) à f) et, selon le cas:

a) dont le premier ministre du Canada ou une personne qu'il délègue à cet effet autorise la communication ou dont la communication est autorisée en vertu de directives du premier ministre;

b) dont la date est antérieure de plus de vingt ans à celle de la demande de communication des documents en question ou de documents contenant des renseignements relatifs à leur teneur.

b) à un document de travail visé à l'alinéa (2)*b*), dans les cas où les décisions auxquelles il se rapporte ont été rendues publiques ou, à défaut de publicité, ont été rendues quatre ans auparavant.

Définition de « Conseil »

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

Avis, etc.

21. (1) Le responsable d'une institution fédérale peut refuser la communication de

employees of a government institution, a Minister of the Crown or the staff of a Minister of the Crown,

(*c*) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto;

(*d*) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,

if the record came into existence less than twenty years prior to the request.

[…]

documents datés de moins de vingt ans lors de la demande et contenant :

a) des avis ou recommandations élaborés par ou pour une institution fédérale ou un ministre de la Couronne;

b) des comptes rendus de consultations ou délibérations où sont concernés des cadres ou employés d'une institution fédérale, un ministre de la Couronne ou le personnel de celui-ci;

[…]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-555-05
STYLE OF CAUSE:	THE INFORMATION COMMISSIONER OF CANADA and THE MINISTER OF ENVIRONMENT OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 3, 2006
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN J.
DATED:	OCTOBER 17, 2006

APPEARANCES:

Mr. Daniel Brunet Ms. Diane Thérrien	FOR THE APPLICANT
Mr. Christopher Rupar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Daniel Brunet Ottawa, Ontario	FOR THE APPLICANT
Mr. John H. Sims, Q.C. Ottawa, Ontario	FOR THE RESPONDENT