Court File No.: A-102-20

**FEDERAL COURT OF APPEAL**

BETWEEN:

**AIR PASSENGER RIGHTS**

Applicant

– and –

**ATTORNEY GENERAL OF CANADA**

Respondent

– and –

**CANADIAN TRANSPORTATION AGENCY**

Intervener

---

# MOTION RECORD OF THE RESPONDING PARTY, AIR PASSENGER RIGHTS

**Attorney General of Canada's Informal Motion No. 1 (December 14, 2021) to Claim Privilege Over Portions of Two Documents**

---

**SIMON LIN**
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, British Columbia, V5C 6C6
Tel: 604-620-2666

*simonlin@evolinklaw.com*

**Counsel for the Applicant**,
**Air Passenger Rights**

TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice
Civil Litigation Section
50 O'Connor Street, Suite 300
Ottawa, ON K1A 0H8

**Sanderson Graham**
Tel: 613-296-4469
Fax: 613-954-1920
Email: *Sandy.Graham@justice.gc.ca*

**Counsel for the Respondent,**
**Attorney General of Canada**

AND TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, QC K1A 0N9

**Barbara Cuber**
Tel: 613-301-8322
Fax: 819-953-9269
Email: *Barbara.Cuber@otc-cta.gc.ca*
Email: *Servicesjuridiques.LegalServices@otc-cta.gc.ca*

**Counsel for the Intervener,**
**Canadian Transportation Agency**

**Table of Contents**

Court File No.: A-102-20

**FEDERAL COURT OF APPEAL**

BETWEEN:

**AIR PASSENGER RIGHTS**

Applicant

– and –

**ATTORNEY GENERAL OF CANADA**

Respondent

– and –

**CANADIAN TRANSPORTATION AGENCY**

Intervener

**AFFIDAVIT OF DR. GÁBOR LUKÁCS**
**(Affirmed: January 29, 2022)**

I, **DR. GÁBOR LUKÁCS**, of the City of Halifax in the Province of Nova Scotia, AFFIRM THAT:

1. I am the President and a Director of the Applicant, Air Passenger Rights. As such, I have personal knowledge of the matters to which I depose, except as to those matters stated to be on information and belief, which I believe to be true.

2. I have reviewed the redacted affidavit of Ms. Elizabeth Schmidt made on December 14, 2021 [**Schmidt Affidavit**] and respond as follows.

3. In response to paragraph 6 of the Schmidt Affidavit, I have searched the CTA's website. I verily believe the CTA Order referred to by Ms. Schmidt is CTA Order No. 2020-A-36, dated March 25, 2020. This Order was the only CTA decision or order relating to an exemption from the 120-day notice requirements under section 64 of the *Canada Transportation Act* from that time period. A copy of CTA Order No. 2020-A-36 is attached and marked as **Exhibit "A"**.

4. In response to paragraph 5 of the Schmidt Affidavit, Ms. Schmidt had omitted part of Ms. Valerie Lagacé's title at the CTA. I have also confirmed through a search of Government Electronic Directory Services [**GEDS**] that Ms. Lagacé's full title is "Senior General Counsel and Secretary." A copy of Ms. Lagacé's profile on GEDS is attached and marked as **Exhibit "B"**.

5. In further response to paragraph 5 of the Schmidt Affidavit, a heavily redacted version of the same document as in Exhibit "B" of the Schmidt Affidavit was previously released by the CTA under the *Access to Information Act* on December 23, 2020. A copy of the said document released by the CTA on December 23, 2020 is attached and marked as **Exhibit "C"**. Exhibit "B" to the Schmidt Affidavit begins near the middle of the page in Exhibit "C" to this affidavit.

**AFFIRMED** remotely by Dr. Gábor Lukács at the City of Halifax, Nova Scotia before me at the City of Coquitlam, British Columbia on January 29, 2022, in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*.

_____
Commissioner for Taking Affidavits

**Simon (Pak Hei) Lin, *Barrister & Solicitor***
**LSO #: 76433W**
4388 Still Creek Drive, Suite 237
Burnaby, BC V5C 6C6

_____
Dr. Gábor Lukács

Halifax, NS
Tel:
*lukacs@AirPassengerRights.ca*

## CERTIFICATE OF COMMISSIONER FOR TAKING AFFIDAVITS

I, Simon Lin, a Commissioner for taking Affidavits in Ontario, certify that:

1. This certificate is provided in accordance with the *COVID-19 Notice No. 2* of the Supreme Court of British Columbia.

2. On January 29, 2022, I commissioned the Affidavit of Dr. Gábor Lukács [**Deponent**] in this matter [**Affidavit**]. The Affidavit was commissioned remotely using video technology and a secure electronic signature platform, as permitted by the Law Society of Ontario and O. Reg. 431/20, *Administering Oath or Declaration Remotely*.

3. I was satisfied that the process was necessary because it was medically unsafe, for reasons associated with COVID-19, for the Deponent and a commissioner to be physically present together.

4. The Affidavit was loaded in PDF format by the commissioner onto a secure electronic signature platform, which:

    a. does not permit the Deponent to add or remove any of the pages;

    b. required both the commissioner and Deponent to apply their initials on each page of the Affidavit; and

    c. required both the commissioner and Deponent to apply their electronic signatures where a signature is required.

5. The Deponent was emailed a link to the platform to securely sign the Affidavit, Thereafter, the following process was followed while the commissioner and Deponent was connected via video technology:

    a. The Deponent showed me the front and back of the Deponent's current government-issued photo identification [**ID**], which I have retained screenshots of.

    b. I compared the video image of the Deponent and the information on the ID and was satisfied that it was the same person.

    c. The copy of the Affidavit before the commissioner and Deponent were on the same electronic platform and are identical.

    d. I administered the oath to the Deponent who affirmed/swore to the truth of the facts in the Affidavit and the Deponent applied their electronic signature.

January 29, 2022

Signature of Simon Lin
Commisioner for Taking Affidavits

This is **Exhibit "A"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 29, 2022

_____

Signature

CANADIAN TRANSPORTATION AGENCY

5



# Order No. 2020-A-36

An erratum was issued on March 26, 2020.

March 25, 2020

**APPLICATION by Air Canada also carrying on business as Air Canada rouge and as Air Canada Cargo (Air Canada), pursuant to subsection 80(1) of the *Canada Transportation Act*, S.C. 1996, c. 10, as amended (CTA), for a temporary exemption from the advance notice requirements of section 64 of the CTA.**

**Case number:** 20-02973

## BACKGROUND

On March 11, 2020, the World Health Organization assessed the outbreak of COVID-19 as a pandemic. Since the outbreak of the virus, a number of countries, including Canada, have issued travel bans, restrictions, or advisories.

On March 18, Air Canada applied to the Canadian Transportation Agency (Agency) for a temporary exemption from the provisions of section 64 of the CTA to permit it to suspend the operation of air services between points in Canada, as it considers necessary, without having to provide the normal 120 days of notice and engage in the consultations required by the CTA and the Air Transportation Regulations, SOR/88-58, as amended (ATR (Air Transportation Regulations)).

## LEGISLATIVE FRAMEWORK

Section 64 of the CTA requires, in part, that a licensee not implement a proposal to discontinue a domestic service referred to in subsection 64(1) of the CTA until the expiry of 120 days, or any shorter notice period that the Agency may specify by order, and that the licensee provide elected officials of the relevant municipal or local government with an opportunity to meet with the licensee to discuss the impacts of the proposed reduction or discontinuation of service.

Subsection 14(1) of the ATR (Air Transportation Regulations) provides that, for the purposes of subsection 64(1) of the CTA, a licensee proposing to discontinue or to reduce the frequency of a

domestic service shall give notice of the proposal to the Agency, the Minister of Transport and the minister responsible for transportation in the province or territory where the area to be affected is located. Additionally, the licensee is required to advise holders of domestic licences operating in the area to be affected by the proposal and the persons resident therein, by publishing a notice in newspapers with the largest circulation in that area in each official language. 6

# SUBMISSIONS BY AIR CANADA

Air Canada states that as a result of the magnitude of the COVID-19 crisis, it must manage the financial viability of its network, and that doing so may require suspension or cancellation of routes between two points in Canada.

Air Canada further states that, because of the fluidity of the COVID-19 crisis, it seeks a blanket exemption from the provisions of section 64 of the CTA because there is simply no time to publish the prescribed public notices and undertake the associated consultations.

Air Canada submits that in the current circumstances, it is impossible and impractical to comply with the notice and consultation provisions.

Air Canada requests that the authorization remain in effect until the end of the COVID-19 crisis or until such time as the Agency sees fit.

In light of the urgent nature of the situation, Air Canada requests expedited treatment of the present application.

# ANALYSIS AND DETERMINATION

The exemption request, if granted, would temporarily permit Air Canada to reduce or discontinue domestic air services immediately on routes where it would normally be required to provide a 120-day advance notice and engage with local officials.

The notice provisions required by the CTA are intended to ensure that communities with limited air service, including remote communities, are made aware enough in advance of any proposed reductions in or discontinuances of air services to their community, in order to permit them to plan for the event, including potentially seeking alternative air carriers to provide air services. Carriers operating in the area are also made aware and can consider whether to provide replacement air services.

The impact of the COVID-19 pandemic is significant and continues to evolve as air carriers try to adjust to travel restrictions and rapidly dropping passenger volumes and revenues.

The Agency finds that in light of the extraordinary circumstances related to the COVID-19 pandemic and the urgency of the situation, compliance by Air Canada and other air carriers with section 64 is impractical at the present time. That said, the Agency also finds that it would not be desirable to permit the permanent, as opposed to temporary, discontinuation of domestic air services without advance notice and consultation.

# CONCLUSION

7

Pursuant to section 28 and paragraph 80(1)(c) of the CTA, the Agency exempts all air carriers who hold a domestic licence from the provisions of section 64 of the CTA until June 30, 2020, on the condition that once the exemption ends, air carriers who have taken advantage of the exemption to temporarily reduce or suspend services on certain routes will immediately resume those services and follow all of the requirements of section 64 of the CTA if they wish to reduce or eliminate any services on a permanent basis.

In addition, the exemption may be lifted by the Agency in respect of a particular route or community, should the Agency find that as a result of the exemption, the cessation of service on a certain route has caused or is likely to cause a community to become so isolated that it does not have access to critical services and goods. In such an instance, service would have to resume and the carrier providing the service would be required to comply with section 64 before discontinuing it.

On or before June 30, 2020, the Agency will determine if the exemption should end on that date or be extended to a later date.

## Member(s)

Scott Streiner
Elizabeth C. Barker

Back to rulings



**Date modified:**
2020-03-25

This is **Exhibit "B"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 29, 2022

_____

Signature

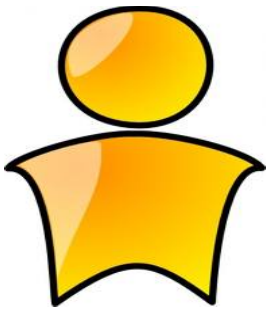
Government of Canada / Gouvernement du Canada

9

Home ➜ Department Listing ➜ Browse Organization ➜ Person Information

# Person Information

## Valérie Lagacé - Senior General Counsel and Secretary



**Telephone :** 613-719-9670
**Email :** Valerie.Lagace@otc-cta.gc.ca

15 rue Eddy
Gatineau, Quebec K1A 0N9
Canada

### Organizations

- Canada
  - Canadian Transportation Agency
    - Enabling Services Branch
      - Legal Services

10

**Date modified:**

2020-10-10

This is **Exhibit "C"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 29, 2022

_____

Signature

**Nadine Landry**

**From:** Sébastien Bergeron
**Sent:** Friday, March 20, 2020 7:30 PM
**To:** Alysia Lau
**Cc:** Lesley Robertson
**Subject:** TR: EC March 20 - Decisions and Follow-ups

Praises for you, Alysia (see below) ! Have a great weekend to you two !

Seb

**Sébastien Bergeron**
Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca |Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

**De :** Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
**Envoyé :** 20 mars 2020 17:00
**À :** Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
**Objet :** RE: EC March 20 - Decisions and Follow-ups

Great work, Alysia. [redacted]

Thanks,

S

**From:** Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
**Sent:** Friday, March 20, 2020 4:49 PM
**To:** Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
**Subject:** TR: EC March 20 - Decisions and Follow-ups

Scott, [redacted]

**Pages 2 to / à 3**

**are withheld pursuant to sections**

**sont retenues en vertu des articles**

**21(1)(a), 21(1)(b)**

**of the Access to Information Act**

**de la Loi sur l'accès à l'information**

Court File No.: A-102-20

**FEDERAL COURT OF APPEAL**

BETWEEN:

**AIR PASSENGER RIGHTS**

Applicant

– and –

**ATTORNEY GENERAL OF CANADA**

Respondent

– and –

**CANADIAN TRANSPORTATION AGENCY**

Intervener

# WRITTEN REPRESENTATIONS OF THE RESPONDING PARTY

## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. On this informal motion, the Attorney General of Canada [**AGC**] seeks to claim privilege over two documents that were prepared near the time period when the draft of the impugned Statement on Vouchers was first circulated.

2. The two documents cannot be considered in isolation from the factual matrix. The relevance of these documents is self-evident when viewed in the context of the chronology that led up to the Statement on Vouchers, as summarized at paragraphs 18-48 of the Applicant's Written Representations for the January 17, 2022 motion.

3. The Applicant submits that the AGC's claim of privilege for the first document does not meet the requisite test for claiming legal advice privilege, and the second document does not meet the requirements for deliberative secrecy. Notably, both grounds would require the claiming party to have consistently treated the information as confidential. The evidence demonstrates the contrary, and the privilege claims must fail.

## B. AGC's Legal Advice Privilege Claim for the March 20, 2020 EC Summary

4. The first privilege claim is for a portion of a summary prepared after a March 20, 2020 Executives Committee [**EC**] meeting for the CTA's executives [**March 20 EC Summary**].[1] The AGC claims legal advice privilege for a deliverable that was assigned to Ms. Valérie Lagacé, the Secretary and Senior General Counsel for the CTA. That particular deliverable had a deadline of March 23, 2020, the next business day.

### *(1) Ms. Lagacé's Statutory Role as the Secretary of the CTA*

5. Although Ms. Lagacé holds the title of Senior General Counsel, she was also the CTA's Secretary.[2] The Secretary is a statutorily-mandated role, and is responsible for maintaining the records for the CTA.[3] In addition to this statutory-mandated role, Ms. Lagacé is the head of the CTA's "Enabling Services Branch," which comprises the following departments: (1) Legal Services, (2) Secretariat and Registrar Services, (3) Financial Services and Asset Management, (4) Workforce and Workplace Services, and (5) Information and Technology Management Services.[4]

6. Ms. Lagacé was actively involved in the drafting and publication of the Statement on Vouchers, including attending meetings and sending or receiving correspondences in that regard.[5] Ms. Lagacé had provided specific comments on the draft of the Statement on Vouchers,[6] and no legal advice privilege was asserted by the CTA or the AGC. Ms. Lagacé had also been directing the Secretariat department to assist in preparing the Statement on Vouchers for publication.[7]

---

1 Schmidt Affidavit (Dec. 14, 2021), Exhibit "B" [AGC's Privilege Motion, p. 26].
2 Lukács Affidavit (Jan. 29, 2022), Exhibit "B" [Tab 1B, p. 8].
3 *Canada Transportation Act*, ss. 19-22 [Tab 3, p. 25].
4 Lukács Affidavit (Jan. 16, 2022), Exhibit "AZ" [Show Cause Motion Record (**SCMR**), p. 258].
5 Lukács Affidavit (Jan. 16, 2022), Exhibits "L" & "U"-"AA" [SCMR, pp. 87 & 119-140].
6 Lukács Affidavit (Jan. 16, 2022), Exhibit "U" [SCMR, p. 119].
7 Lukács Affidavit (Jan. 16, 2022), Exhibit "V" [SCMR, p. 122].

*(2) The CTA's Previous Assertions regarding the March 20 EC Summary*

7. Previously, the CTA had released a heavily redacted version of the March 20 EC Summary in response to a request under the *Access to Information Act* [***ATIA***].[8]

8. For the March 20 EC Summary in the *ATIA* response, the CTA **had not** asserted legal advice privilege. Rather, the CTA only made redactions based on two provisions of the *ATIA*: s. 21(1)(a) (advice or recommendations by or for a government institution) and s. 21(1)(b) (consultations and deliberations between government employees).

*(3) The Surrounding Circumstances of the March 20 EC Summary*

9. The March 20 EC Summary marked a major step leading up to the Statement on Vouchers. At the Friday March 20 EC meeting, Ms. Marcia Jones (CTA's then Chief Strategy Officer) was originally assigned to "[p]repare and circulate draft statement with respect to air passenger refunds and vouchers during COVID-19" by next week.[9] However, at the end of that day, Mr. Scott Streiner (the CTA's then Chairperson) instructed her to "remove the 'refunds and vouchers' item, since we're not quite sure yet what will be done on this front or how."[10]

10. Although drafting a Statement on Vouchers was no longer on the to-do list, a slew of activity ensued the weekend of March 21-22, 2020, including Mr. Streiner meeting with Transport Canada and unidentified third parties about the Statement on Vouchers.[11] Early morning on Sunday March 22, 2020, Mr. Streiner circulated a draft of the Statement on Vouchers.[12] It remains unclear what caused Mr. Streiner to change his mind or who authored the first draft of the Statement on Vouchers.

---

[8] Lukács Affidavit (Jan. 29, 2022), Exhibit "C" [Tab 1C, p. 11].
[9] Lukács Affidavit (Jan. 16, 2022), Exhibit "K" [SCMR, p. 84].
[10] *Ibid.*
[11] Lukács Affidavit (Jan. 16, 2022), Exhibit "T" [SCMR, p. 116].
[12] Lukács Affidavit (Jan. 16, 2022), Exhibit "L" [SCMR, p. 87].

### C. AGC's Deliberative Secrecy Claim for a Draft Air Canada Decision

11. For the second document, the AGC claims deliberative secrecy of a draft decision involving Air Canada [**Draft AC Decision**].[13] The Draft AC Decision is likely a draft for Order No. 2020-A-36, dated March 25, 2020, that is publicly available on the CTA's website, and is the only CTA decision or order relating to an exemption from the 120-day notice requirements under "s. 64" of the *Canada Transportation Act* from that time period.[14]

12. The AGC tendered no evidence to demonstrate that the Draft AC Decision was consistently treated as confidential and not shared with third parties. Furthermore, on a balance of probabilities, it is more likely that Ms. Jones shared the AC Draft Decision's content with third parties.

(a) At 12:54PM on March 22, 2020, Mr. Streiner sent the Draft AC decision and the Statement on Vouchers to Ms. Jones with subject line "Current Drafts" and he indicated that it was "[a]s background for your call," without any context.[15]

(b) The "call" referenced by Mr. Streiner **was not** the CTA's executive's call that morning, because Mr. Streiner's email was sent at 12:54PM, more than two hours *after* the CTA's 10:30AM internal call.[16]

(c) Instead, Mr. Streiner was likely referring to Ms. Jones's communication with a Transport Canada Assistant Deputy Minister that weekend,[17] and Mr. Streiner authorized Ms. Jones to share the content of the Draft AC Decision during that communication.

---

[13] Schmidt Affidavit (Dec. 14, 2021), Exhibit "C" [AGC's Privilege Motion, p. 29].
[14] Lukács Affidavit (Jan. 29, 2022), para. 3 and Ex. "A" [Tabs 1 and 1A, pp. 1 and 4].
[15] Schmidt Affidavit (Dec. 14, 2021), Exhibit "C" [AGC's Privilege Motion, p. 31].
[16] Lukács Affidavit (Jan. 16, 2022), Exhibit "L" [SCMR, p. 87].
[17] Lukács Affidavit (Jan. 16, 2022), Exhibit "T" [SCMR, p. 116].

## PART II – STATEMENT OF THE POINTS IN ISSUE

13. The issues to be decided on this motion are:

(a) Whether the portion of the March 20 EC Summary for Ms. Lagacé could be subject to legal advice privilege.

(b) Whether deliberative secrecy could still be claimed for some or all of the Draft AC Decision, a decision that is already in the public domain.

## PART III – STATEMENT OF SUBMISSIONS

14. When the Court is considering claims of confidentiality or privilege, the Court is tasked with upholding the open court principle and ensuring that non-confidential information is not lumped together with confidential information that is worthy of protection.[18]

### A. The March 20 EC Summary is Not Subject to Legal Advice Privilege

15. The Applicant submits that this Court should review the unredacted copy of the March 20 EC Summary (which is not available to the Applicant) and consider its relevance as part of the whole factual matrix involving the Statement on Vouchers. The March 20 EC meeting was clearly when the Statement on Vouchers was likely first discussed and the drafting of that statement was assigned.[19]

16. The test for legal advice privilege is not in dispute. The subject communications must meet four criteria: (1) it must have been between a client and solicitor; (2) it must be one in which legal advice is sought or offered; (3) it must have been intended to be confidential; and (4) it must not have had the purpose of furthering unlawful conduct.[20]

---

[18] *Leahy v. Canada (CI*, 2012 FCA 227 at paras. 51-53 [Tab 5, p. 41].
[19] Lukács Affidavit (Jan. 16, 2022), Exhibit "K" [SCMR, p. 84].
[20] *Solosky v. The Queen*, [1980] 1 SCR 821 at para. 28 [Tab 7, p. 78].

17. The burden of establishing legal advice privilege lies with the AGC, who seeks to invoke the privilege. The AGC's say-so does not discharge that burden.[21] While this Court invited the AGC to tender affidavit evidence in support of its claim of privilege,[22] the AGC's affidavit contains no evidence capable of supporting privilege.

18. The Court must carefully scrutinize claims of legal advice privilege, on a case-by-case basis, to ensure that the redacted contents fall within the four cumulative criteria above **and** that the content of those communications are not "policy advice" or any other work that is outside of a legal counsel's duties or responsibilities.[23]

19. The AGC's claims for legal advice privilege in this case must be closely scrutinized, because Ms. Lagacé holds many portfolios other than the role of legal counsel.[24] Ms. Lagacé was also involved in providing policy-related advice and/or other assistance throughout the drafting of the Statement on Vouchers.[25]

20. Furthermore, there are strong grounds to find that confidentiality on the basis of legal advice privilege **was not** consistently asserted for the March 20 EC Summary. In response to an *ATIA* request, the CTA had clearly claimed redactions on various other grounds, but **not** legal advice privilege.[26] There is no evidence whatsoever from the AGC or the CTA explaining their change of heart, nor why legal privilege was not claimed initially. This late-arriving claim for privilege must be viewed with caution.

---

[21] *Bernard v. PSAC*, 2017 FCA 35 at para. 13 [Tab 4, p. 29].
[22] Reasons for Order (Oct. 15, 2021), para. 29.
[23] *Pritchard v. Ontario (HRC)*, 2004 SCC 31 paras. 19-20 [Tab 6, p. 65].
[24] Lukács Affidavit (Jan. 16, 2022), Exhibit "AZ" SCMR, p. 258].
[25] Lukács Affidavit (Jan. 16, 2022), Exhibits "L" & "U"-"AA" [SCMR, pp. 87 & 119-140].
[26] Lukács Affidavit (Jan. 29, 2022), Exhibit "C" [Tab 1C, p. 11].

## B. The Draft AC Decision is Not Subject to Deliberative Secrecy

21. The Applicant notes that the AGC had redacted the Draft AC Decision in its entirety, despite the AGC having acknowledged that the Draft AC Decision was ultimately issued.[27] Although the AGC did not reveal the file number for the publicized decision, it is apparent that the decision was 2020-A-36.[28] To the extent that any of the contents from the Draft AC Decision were already in the public domain, there is **no basis** to claim deliberative secrecy for those portions.

22. Ms. Schmidt's affidavit does not demonstrate that the CTA had kept the Draft AC Decision consistently confidential. In fact, Mr. Streiner's email confirms that he was providing to Ms. Jones a draft of a decision that was in the process of being decided, and that the purpose was for Ms. Jones to use it "as a background for your call"[29] with third parties.

23. Ms. Jones was not a Member of the CTA, had no role in the CTA's formal decision-making process, and was the conduit between the CTA, airlines, and/or Transport Canada.[30] Of note, there is a paper trail of Ms. Jones having meetings with Transport Canada that same weekend about the Statement on Vouchers, a document that is attached to the same email as the Draft AC Decision.[31]

24. If, as expected based on her role, Ms. Jones's "call" involved any non-CTA individuals, then any potential claim to deliberative secrecy would have effectively been waived. There cannot be claims to deliberative secrecy when the CTA has not kept its own deliberations confidential. The AGC adduced no evidence capable of supporting the conclusion that Ms. Jones's "call" was internal to the CTA only.

---

[27] AGC's Written Representations, para. 16.
[28] Lukács Affidavit (Jan. 29, 2022), Exhibit "A" [Tab 1A, p. 4].
[29] Schmidt Affidavit (Dec. 14, 2021), Exhibit "C" [AGC's Privilege Motion, p. 31].
[30] Lukács Affidavit (Jan. 16, 2022), Exhibits "G", "H", "J", "T", and "AL" [SCMR, pp. 73, 75, 81, 117, and 173].
[31] Lukács Affidavit (Jan. 16, 2022), Exhibit "T" [SCMR, p. 117].

25. The surrounding circumstances of the Draft AC Decision are also irregular, and warrant further scrutiny. The CTA's *Code of Conduct for Members* states that CTA Members shall not disclose information about a case that is being decided.

> (31) Members shall not disclose information about a case or discuss any matter that has been or is in the process of being decided by them or the Agency, except as required in the performance of, and in the circumstances appropriate to, the formal conduct of their duties. [...][32]

26. Lastly, there is an easy answer to the AGC's claim that the Draft AC Decision is irrelevant because the released version of the Draft AC Decision is not subject of judicial review. Both Mr. Streiner and Ms. Jones saw it fit to associate both the Draft AC Decision **and** the Statement on Vouchers in the same email chains on separate occasions.[33] This *ipso facto* shows some connection between these two documents.

27. It cannot be ruled out at this point that Air Canada may have been involved in the Statement on Vouchers, since Mr. Streiner and Ms. Jones dealt with both the Draft AC Decision and the Statement on Vouchers in tandem. It still remains to be determined who or what caused Mr. Streiner to change his mind to draft and publish the Statement on Vouchers on March 22, when he parked the idea on March 20. Although Transat sent an urgent plea to Mr. Streiner in the afternoon of March 22, 2020,[34] that plea arrived *after* Mr. Streiner had already circulated a first draft of the Statement on Vouchers.[35]

28. Considering that the AGC has redacted the Draft AC Decision in its entirety, even portions that have already been made public, it is very difficult for the Applicant to make specific submissions on relevance. However, the Applicant would urge the Court to scrutinize the contents of the Draft AC Decision, particularly the **Microsoft Word comments therein**, to verify if there are any ties to the Statement on Vouchers.

---

[32] Lukács Affidavit (Jan. 16, 2022), Exhibit "D" [SCMR, p. 54].
[33] Schmidt Affidavit (Dec. 14, 2021), Exhibit "C" [AGC's Privilege Motion, p. 31].
[34] Lukács Affidavit (Jan. 16, 2022), Exhibit "S" [SCMR, p. 110].
[35] Lukács Affidavit (Jan. 16, 2022), Exhibit "L" [SCMR, p. 87].

## PART IV – ORDER SOUGHT

29. The Responding Party, Air Passenger Rights, is seeking an Order:

(a) dismissing the Attorney General of Canada's claim for privilege on the March 20 EC Summary and the Draft AC Decision; and

(b) such further and other relief or directions as the counsel may request and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 29, 2022

**SIMON LIN**
**Counsel for the Applicant,**
**Air Passenger Rights**

## PART V – LIST OF AUTHORITIES

### Statutes and Regulations

*Canada Transportation Act*, S.C. 1996, c. 10,
ss. 19-21

### Case Law

*Bernard v. PSAC*, 2017 FCA 35

*Leahy v. Canada (Minister of Citizenship and Immigration)*, 2017 FCA 27

*Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31

*Solosky v. R*, [1980] 1 S.C.R. 821

CANADA

CONSOLIDATION

CODIFICATION

# Canada Transportation Act

# Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to December 23, 2021

Last amended on June 10, 2020

À jour au 23 décembre 2021

Dernière modification le 10 juin 2020

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

**(a)** the sittings of the Agency and the carrying on of its work;

**(b)** the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and

**(c)** the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament.

**a)** ses séances et l'exécution de ses travaux;

**b)** la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

**c)** le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

## Head Office

### Head office

**18 (1)** The head office of the Agency shall be in the National Capital Region described in the schedule to the *National Capital Act*.

### Residence of members

**(2)** The members appointed under subsection 7(2) shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within any distance of it that the Governor in Council determines.

1996, c. 10, s. 18; 2007, c. 19, s. 5; 2008, c. 21, s. 61.

## Siège de l'Office

### Siège

**18 (1)** Le siège de l'Office est fixé dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale*.

### Lieu de résidence des membres

**(2)** Les membres nommés au titre du paragraphe 7(2) résident dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale* ou dans la périphérie de cette région définie par le gouverneur en conseil.

1996, ch. 10, art. 18; 2007, ch. 19, art. 5; 2008, ch. 21, art. 61.

## Staff

### Secretary, officers and employees

**19** The Secretary of the Agency and the other officers and employees that are necessary for the proper conduct of the business of the Agency shall be appointed in accordance with the *Public Service Employment Act*.

### Technical experts

**20** The Agency may appoint and, subject to any applicable Treasury Board directive, fix the remuneration of experts or persons who have technical or special knowledge to assist the Agency in an advisory capacity in respect of any matter before the Agency.

## Personnel

### Secrétaire et personnel

**19** Le secrétaire de l'Office et le personnel nécessaire à l'exécution des travaux de celui-ci sont nommés conformément à la *Loi sur l'emploi dans la fonction publique*.

### Experts

**20** L'Office peut nommer des experts ou autres spécialistes compétents pour le conseiller sur des questions dont il est saisi, et, sous réserve des instructions du Conseil du Trésor, fixer leur rémunération.

## Records

### Duties of Secretary

**21 (1)** The Secretary of the Agency shall

**(a)** maintain a record in which shall be entered a true copy of every rule, order, decision and regulation of the Agency and any other documents that the Agency requires to be entered in it; and

## Registre

### Attributions du secrétaire

**21 (1)** Le secrétaire est chargé :

**a)** de la tenue du registre du texte authentique des règles, arrêtés, règlements et décisions de l'Office et des autres documents dont celui-ci exige l'enregistrement;

**(b)** keep at the Agency's office a copy of all rules, orders, decisions and regulations of the Agency and the records of proceedings of the Agency.

**b)** de la conservation, dans les bureaux de l'Office, d'un exemplaire des règles, arrêtés, règlements, décisions et procès-verbaux de celui-ci.

**Entries in record**

**(2)** The entry of a document in the record referred to in paragraph (1)(a) shall constitute the original record of the document.

**Original**

**(2)** Le document enregistré en application de l'alinéa (1)a) en constitue l'original.

**Copies of documents obtainable**

**22** On the application of any person, and on payment of a fee fixed by the Agency, the Secretary of the Agency or, in the absence of the Secretary, the person assigned by the Chairperson to act in the absence shall issue under the seal of the Agency to the applicant a certified copy of any rule, order, regulation or any other document that has been issued by the Agency.

**Copies conformes**

**22** Le secrétaire de l'Office, ou la personne chargée par le président d'assurer son intérim, délivre sous le sceau de l'Office, sur demande et contre paiement des droits fixés par celui-ci, des copies certifiées conformes des règles, arrêtés, règlements ou autres documents de l'Office.

**Judicial notice of documents**

**23 (1)** Judicial notice shall be taken of a document issued by the Agency under its seal without proof of the signature or official character of the person appearing to have signed it.

**Admission d'office**

**23 (1)** Les documents délivrés par l'Office sous son sceau sont admis d'office en justice sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

**Evidence of deposited documents**

**(2)** A document purporting to be certified by the Secretary of the Agency as being a true copy of a document deposited or filed with or approved by the Agency, or any portion of such a document, is evidence that the document is so deposited, filed or approved and, if stated in the certificate, of the time when the document was deposited, filed or approved.

**Preuve**

**(2)** Le document censé être en tout ou en partie la copie certifiée conforme, par le secrétaire de l'Office, d'un document déposé auprès de celui-ci, ou approuvé par celui-ci, fait foi du dépôt ou de l'approbation ainsi que de la date, si elle est indiquée sur la copie, de ce dépôt ou de cette approbation.

## Powers of Agency

**Policy governs Agency**

**24** The powers, duties and functions of the Agency respecting any matter that comes within its jurisdiction under an Act of Parliament shall be exercised and performed in conformity with any policy direction issued to the Agency under section 43.

**Agency powers in general**

**25** The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

## Attributions de l'Office

**Directives**

**24** Les attributions de l'Office relatives à une affaire dont il est saisi en application d'une loi fédérale sont exercées en conformité avec les directives générales qui lui sont données en vertu de l'article 43.

**Pouvoirs généraux**

**25** L'Office a, à toute fin liée à l'exercice de sa compétence, la comparution et l'interrogatoire des témoins, la production et l'examen des pièces, l'exécution de ses arrêtés ou règlements et la visite d'un lieu, les attributions d'une cour supérieure.

2017 CAF 35, 2017 FCA 35
Federal Court of Appeal

Bernard v. PSAC

2017 CarswellNat 1490, 2017 CarswellNat 443,
2017 CAF 35, 2017 FCA 35, 276 A.C.W.S. (3d) 308

# ELIZABETH BERNARD (Applicant) and PUBLIC SERVICE ALLIANCE OF CANADA and TREASURY BOARD (Respondents)

David Stratas J.A.

Judgment: February 16, 2017
Docket: A-425-16

Counsel: Elizabeth Bernard (written), for herself
Caroline Engmann (written), for Respondent, Treasury Board
Amanda Montague-Reinholdt (written), for Respondent, Public Service Alliance of Canada

***David Stratas J.A.*:**

1 The applicant has applied for judicial review of a decision of the Public Service Labour Relations and Employment Board. The applicant filed a request for disclosure of documents from the Board under Rule 317 of the *Federal Courts Rules*, SOR/98-106. Under Rule 318, the Board has objected to disclosing certain documents. It says the documents are covered by legal professional privilege.

2 By direction, another judge of this Court asked for submissions on whether disclosure of these documents is necessary to allow the applicant to file an affidavit in support of her judicial review. The parties have provided their submissions. The Court thanks the parties.

3 Both the applicant and the Attorney General of Canada (representing the Board) correctly state that if the documents are covered by legal professional privilege, the applicant cannot see them. It is apparent from the parties' submissions, particularly those of the applicant, that the real dispute is whether the documents in fact are privileged.

4 The Board has only asserted that the documents are privileged. It says that "the Applicant has not provided any plausible or cogent basis to doubt the veracity or legitimacy of the Board's claim

to privilege based on the description provided by Board Counsel." In effect, the Board is telling the applicant she should just trust counsel's description.

5 In response, the applicant suggests that this insufficient. She basically asks, "Where's the evidence that supports the assertion of legal professional privilege?"

6 The applicant's question is salient and well-founded in law. The general rule is that a court can act only on the basis of evidence. Legal professional privilege may be a very important matter and "must remain as close to absolute as possible" (see *R. v. Lavallee, Rackel & Heintz*, 2002 SCC 61, [2002] 3 S.C.R. 209 (S.C.C.)), but this does not relieve litigants of the need to prove its existence in a particular case.

7 In *Kabul Farms Inc. v. R.*, 2016 FCA 143 (F.C.A.), this Court put it this way (at para. 38):

> The general rule is that this Court can only act on evidence in the record before it unless some exception applies. Two exceptions are legislative provisions that create factual presumptions and the doctrine of judicial notice as discussed in authorities such as *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458.

8 In *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161, 483 N.R. 275 (F.C.A.), this Court expressed this same principle (at paras. 79-80):

> We start with a fundamental general principle: facts must be proven by admissible evidence: see *R. v. Schwartz*, [1988] 2 S.C.R. 443 at pp. 476-77, 55 D.L.R. (4th) 1; *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, 392 D.L.R. (4th) 563 at para. 20; *Canada v. Kabul Farms Inc.*, 2016 FCA 143at para. 38. Put another way, a court can act only on the basis of facts proven by admissible evidence or evidence whose admissibility has not been contested: *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548at paras. 26-27.
>
> There are rarely-occurring exceptions to this. These include circumstances where facts are subject to judicial notice (see, *e.g.*, *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458), facts are deemed or presumed by legislation to exist, facts have been found in previous proceedings in circumstances where they bind the court (see, *e.g.*, *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460), and facts have been stipulated or agreed to.

See also *Canada (Minister of Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, 474 N.R. 268 (F.C.A.) at paras. 18-23; *Canadian Copyright Licensing Agency v. Alberta*, 2015 FCA 268, [2016] 3 F.C.R. 19 (F.C.A.) at para. 20.

9 This sort of issue has arisen before in the context of a Rule 318 objection: *Lukács v. Canadian Transportation Agency*, 2016 FCA 103 (F.C.A.), an authority also useful regarding the Court's remedial flexibility in dealing with the objection; see also *Canadian Copyright Licensing Agency*

*v. Alberta*, 2015 FCA 268, [2016] 3 F.C.R. 19 (F.C.A.), an authority offering general guidance on Rules 317 and 318 and how they work procedurally in the broader context of a judicial review.

10 *Lukács* is most relevant here. It tells us that in some cases an objection to disclosure under Rule 318 can indeed be dealt with on the basis of an exchange of letters containing submissions, nothing more. In such cases evidence does not need to be filed: sometimes, for example, the parties agree on the facts relevant to the objection and so there is no need for evidence to be filed; sometimes the facts set out in their submissions letters concerning the Rule 318 objection are not in dispute; sometimes, given the nature of the objection, there is no need for a factual basis other than the Rule 317 request itself.

11 But *Lukács* also tells us that sometimes the facts are in dispute and so evidence must be filed.

12 In *Lukács* this Court explained the relevant principles in the following way (at paras. 8- 10):

> Now to objections under Rule 318(2). Where the relevant administrative decision- maker, here the Agency, objects under Rule 318(2) to disclosing some or all of the material requested under Rule 317 and the applicant does not dispute the objection, then the material is not transmitted. However, if, as here, the applicant disputes the objection, either the applicant or the administrative decision-maker may ask the Court for directions as to how the objection should be litigated: see Rule 318(3).
>
> In response to a request for directions, the Court may determine that the objection cannot succeed solely on the basis of the reasons given by the administrative decision-maker under Rule 318(2). In that case, it may summarily dismiss the objection and require the administrative decision-maker to transmit the material under Rule 318(1) within a particular period of time.
>
> In cases where the Rule 318(2) objection might have some merit, the Court can ask for submissions from the parties on a set schedule. But sometimes the Court will need more than submissions: in some cases, there will be real doubt and complexity and sometimes evidence will have to be filed by the parties to support or contest the objection. In cases like these, the Court may require the administrative decision-maker to proceed by way of a written motion under Rule 369. That Rule provides for motion records, responding motion records and replies, and also the deadlines for filing those documents. The motion records require supporting affidavits and written representations.

13 In this case, the applicant does not accept that the documents are privileged. The burden of proving the documents are privileged lies on the Board. The say-so of the Board does not discharge that burden.

14 Even if we accepted the say-so of the Board, it does not go far enough. The Board says the documents were sent to and from its legal services branch. That's fine as far as it goes. But that alone does not establish legal professional privilege. For example, the dominant purpose of the creation of the documents must be proven. The dominant purpose may be something other than providing legal advice, such as the communication of general Board business.

15 In this case, the Board was asked to supply submissions, nothing more. It was not allowed to file evidence. Further, the issue on which it was asked to file submissions was whether disclosure of the documents is necessary for the applicant to prepare her affidavit in support of her application for judicial review. In substance, the Board has never had an opportunity to file evidence on the existence of the privilege. And the applicant also has not had an opportunity to file evidence on that issue and, if necessary, cross-examine on the evidence offered by the Board.

16 The solution, as counselled by *Lukács*, is for the Board to bring a motion under Rule 369 for an order upholding its Rule 318 objection, *i.e.*, its claim of legal professional privilege. The Board is the proper party to bring the motion as it bears the burden of proving its claim of legal professional privilege. The motion process solves the problems identified in the preceding paragraph: it allows the parties a full opportunity to file evidence and, if necessary, to test it.

17 An order will issue requiring the Board to bring a motion if it intends to maintain its Rule 318 objection. The order will also regulate ancillary matters. When the filings are complete, the motion may be returned to me for determination.

18 Before concluding, I note that the style of cause appears to be irregular. Under Rule 303(2), the government respondent should be the Attorney General of Canada, not the Treasury Board. Unless the parties persuade me to the contrary in their written representations on the motion, I shall also amend the style of cause.

*Order accordingly.*

2012 CAF 227, 2012 FCA 227
Federal Court of Appeal

Leahy v. Canada (Minister of Citizenship and Immigration)

2012 CarswellNat 3419, 2012 CarswellNat 5145, 2012 CAF 227, 2012 FCA 227, [2012] A.C.F. No. 1158, [2012] F.C.J. No. 1158, 12 Imm. L.R. (4th) 179, 221 A.C.W.S. (3d) 1009, 438 N.R. 280, 47 Admin. L.R. (5th) 1

# Timothy Edw. Leahy, Appellant and The Minister of Citizenship and Immigration, Respondent

Eleanor R. Dawson, Johanne Trudel, David Stratas JJ.A.

Heard: April 26, 2012
Judgment: September 4, 2012
Docket: A-302-11

Proceedings: reversing *Leahy v. Canada (Minister of Citizenship and Immigration)* (2011), 2011 FC 1006, 2011 CarswellNat 3334, 100 Imm. L.R. (3d) 7, 2011 CarswellNat 5013, 2010 CF 1006, 36 Admin. L.R. (5th) 130, 395 F.T.R. 260 (Eng.) (F.C.)

Counsel: Mr. Timothy E. Leahy, for Appellant
Ms A. Leena Jaakkimainen, Ms Nicole Paduraru, for Respondent

***Per curiam*:**

**Introduction**

1 The appellant, Mr. Timothy Leahy, appeals from a decision of the Federal Court, reported as [*Leahy v. Canada (Minister of Citizenship and Immigration)*] 2011 FC 1006, 395 F.T.R. 260 (Eng.) (F.C.) , rendered in connection with Mr. Leahy's application under section 41 of the *Privacy Act*, R.S.C., 1985, c. P-21 (Act) for judicial review of a decision of Citizenship and Immigration Canada (CIC). CIC, in a decision letter dated February 19, 2009, refused Mr. Leahy's request for access to certain information under the Act (Privacy Request) based on the third-party information and solicitor-client privilege exemptions found in sections 26 and 27 of the Act. A judge of the Federal Court (Applications Judge) dismissed Mr. Leahy's application and ordered him to pay costs to the respondent.

2 Two principal issues are raised on this appeal. One is procedural, the other is substantive in nature.

3 The procedural issue concerns the proper scope and format of confidential evidence and submissions made to the Court on behalf of a government institution in respect of documents or information disclosed to the Court on a confidential basis, but not disclosed to the person who has requested access to such information.

4 The substantive issue concerns the nature of the information which should be provided to a reviewing court in order for it to be able to properly review a decision made under the Act to withhold personal information from a requester.

5 The other issue to be considered is whether CIC erred in the circumstances of this case by limiting the scope of Mr. Leahy's Privacy Request.

6 For the reasons which follow, we have decided that the appeal should be allowed with costs, and that Mr. Leahy's Privacy Request should be remitted to the respondent for redetermination by a different decision-maker in accordance with these reasons. We have reached this decision on the basis of the failure of CIC to provide an evidentiary basis sufficient to permit this Court, or the Federal Court, to properly review the decision to withhold access to personal information from Mr. Leahy.

**Factual Background**

7 The relevant facts are set out in detail in the decision of the Federal Court. The following facts are sufficient for the purpose of the issues to be decided.

8 Mr. Leahy was at all material times a lawyer with Forefront Migration Ltd. In that capacity, he represented or advised persons in conjunction with immigration proceedings or applications. In 2007, CIC decided that Mr. Leahy was not an "authorized representative" as then defined in section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

9 Section 2 of the Regulations provided that:

> "authorized representative" means a member in good standing of a bar of a province, the Chambre des notaires du Québec or the Canadian Society of Immigration Consultants incorporated under Part II of the *Canada Corporations Act* on October 8, 2003.
>
> [emphasis added]
>
> « représentant autorisé » Membre en règle du barreau d'une province, de la Chambre des notaires du Québec ou de la Société canadienne de consultants en immigration constituée aux termes de la partie II de la *Loi sur les corporations canadiennes* le 8 octobre 2003.
>
> [Non souligné dans l'original.]

10 CIC decided Mr. Leahy was not an "authorized representative" after it discovered that the appellant's status was listed by the Law Society of Upper Canada (LSUC) as "Not Practicing Law — Employed". For the purposes of the LSUC this category describes "a lawyer who is employed by an organization ... and *who does not provide legal services*" [emphasis added]. From this information, CIC concluded that the appellant was not a "member in good standing" of his bar association since, by not providing legal services, he was exempt from contributing to the compulsory professional liability insurance plan. We need not, and do not, decide whether this interpretation is correct.

11 The practical result that flowed from CIC's conclusion about Mr. Leahy's status was that he was no longer able to provide services to his clients.

12 On September 25, 2007, the International Region of CIC issued Operational Instruction 07-040 (RIM) to all visa offices requiring them to "send Mr. Leahy a letter simply stating that the Visa Office will have no further contact with him" and to advise Mr. Leahy's clients of the situation and inform them "on how to proceed with their application" (tribunal record, appeal book volume 2, tab 7, page 2361).

13 Subsequently, on January 15, 2008, CIC reversed its previous position through Operational Bulletin 046. It issued Operational Instructions 08-002 (RIM) which authorized visa offices to resume dealing with Mr. Leahy as he had regained "authorized representative" status (tribunal record, appeal book volume 2, tab 7, page 2368). This about-face occurred after CIC received information from the LSUC indicating that Mr. Leahy was now listed as a "member in private practice" and thus obliged to contribute to the liability insurance plan (tribunal record, appeal book volume 2, tab 7, page 2370).

14 These events caused a string of administrative and legal proceedings to be initiated by Mr. Leahy against CIC, including his Privacy Request, made pursuant to section 12 of the Act. This Privacy Request formed the basis of Mr. Leahy's application for judicial review in the Federal Court and his appeal in this Court.

15 Section 12 of the Act in its relevant part reads:

> 12. (1) Subject to this Act, every individual who is a Canadian citizen or 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
>
> (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.
>
> [emphasis added]
>
> 12. (1) Sous réserve des autres dispositions de la présente loi, tout citoyen canadien et tout résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés* ont 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.
>
> [Non souligné dans l'original.]

16 In his Privacy Request, Mr. Leahy sought the following:

> [...] copies of all items, emanating from, or received by, CIC and pertaining to me, directly or indirectly. My request encompasses correspondence, emails, telephone messages and any other recorded items. The initial time-frame is from 1 January 2007 and extends to the date this request is executed and includes NHQ, visa-posts, CPC's, CIC's, etc. Partial disclosure would be acceptable and probably preferable; *i.e.*, disclosure from NHQ file(s), followed by specific visa-posts, etc.
>
> (tribunal record, appeal book volume 2, tab 7, page 1)

17 After an initial assessment, Peter Maynard, the access to information and privacy (ATIP) administrator in charge of the Privacy Request, determined that it did not meet the requirements of section 12. In his view, for CIC to process the request, Mr. Leahy had to provide "sufficiently specific information" to allow CIC to locate the materials (see paragraph 12(1)(*b*) of the Act), such as the names, titles, locations or other information to identify the employees involved. Moreover, in Mr. Maynard's view, the scope of the search should be limited to communications from January 1, 2007 to May 16, 2008, *i.e.* the date the Privacy Request was received rather than the date on which it would eventually be fulfilled.

18 On May 22, 2008, Mr. Maynard wrote to Mr. Leahy advising that the Privacy Request had been received and would be treated as covering the period from January1, 2007 to May 16, 2008. Mr. Maynard also advised that the request was on hold because Mr. Leahy had not provided sufficiently specific information on the location of the information to render it reasonably retrievable. Mr. Leahy was asked to provide the names of employees, their specific titles, their

locations and other identifying information in order to allow the materials to be reasonably located (tribunal record, appeal book volume 2, tab 7, page 3).

19 Mr. Maynard's request was met by the following answer from Mr. Leahy who maintained his position as to the content and time-frame of his request:

> [...] you start with Legal, seeking direction from someone there. I am sure that you can find someone who can direct you to the NHQ [National Headquarters] cabal orchestrating a worldwide campaign to destroy my company and me, including, but not limited to, sending a memorandum to various, if not all, visa-posts ordering direct interference with our clients.
>
> (tribunal record, appeal book volume 2, tab 7, page 4)

20 Need we say that this reply was of no particular assistance to Mr. Maynard? Having found that it would be unreasonable to go to every Citizenship and Immigration office around the world, including over 80 overseas missions, 43 Canadian CIC offices, 4 Case Processing Centres and CIC National Headquarters (public affidavit of John Warner, appeal book volume 1, tab 6 at paragraph 26), CIC determined that the search's scope would be limited to the National Headquarters and that May 16, 2008 would be the end date as, otherwise, the Privacy Request would require an ongoing process of consultations. As a result, Mr. Maynard reformulated the Privacy Request in these terms:

> I (Timothy LEAHY) am requesting copies of all items, emanating from, or received by, CIC and pertaining to me, directly or indirectly. My request encompasses correspondence, emails, telephone messages and any other recorded items. The initial time-frame is from 1 January 2007, until May 16, 2008.
>
> (tribunal record, appeal book volume 2, tab 7, page 6)

21 On June 11, 2008, Mr. Leahy received written notice that his Privacy Request could not be processed within the 30-day statutory limit imposed pursuant to section 14 of the Act (tribunal record, appeal book volume 2, tab 7, page 42). In view of Mr. Leahy's international client base, external consultations were necessary to comply with his Privacy Request. Consequently, the time limit was extended for the 30-day maximum provided by paragraph 15(*a*)(ii) of the Act. Mr. Leahy acquiesced to the extension.

22 In the end, Mr. Leahy's Privacy Request led CIC to collect approximately 1,030 pages of documents. Five hundred and twenty-one pages were duplicate copies. Therefore, in substance, 509 pages were responsive to the Privacy Request. On February 19, 2009, Mary-Anne McManus, Acting Manager of the CIC ATIP Division, released to Mr. Leahy 87 pages, advising him as follows:

> The processing of your request is now complete and I am pleased to enclose the documents requested. Certain information contained on the exempted pages qualifies for exemption pursuant to sections 26 and 27 of the [Act].
>
> (tribunal record, appeal book volume 2, tab 7, page 2360)

23 Unsatisfied with this partial disclosure, Mr. Leahy exercised his rights under section 29 of the Act. He complained to the Privacy Commissioner that: (a) CIC had improperly applied exemptions to his Privacy Request; and (b) failed to provide him with access to information held at NHQ (public affidavit of John Warner, appeal book volume 1, tab 6).

24 Following an investigation into the complaint, the Assistant Privacy Commissioner concluded that the complaint was not well-founded. In her Report of Findings, she first addressed the documents withheld by CIC pursuant to section 26 of the Act, which provides that:

> 26. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) about an individual other than the individual who made the request, and shall refuse to disclose such information where the disclosure is prohibited under section 8.
>
> 26. Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) qui portent sur un autre individu que celui qui fait la demande et il est tenu de refuser cette communication dans les cas où elle est interdite en vertu de l'article 8.

25 She stated "[o]ur review of the information at issue confirmed that the exempted information was not the complainant's information" (public affidavit of John Warner, appeal book volume 1, tab 6).

26 Continuing on to section 27 of the Act, which permits a government institution's head to decline to disclose material covered by solicitor-client privilege, the Assistant Privacy Commissioner advised that she carefully reviewed the matter and confirmed CIC's decision not to disclose the documents at issue based on either solicitor-client or litigation privilege.

27 On July 6, 2010, Mr. Leahy commenced his application for judicial review pursuant to section 41 of the Act. Section 41 reads:

> 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.

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.

28 Subsequently, Mr. Leahy was provided with additional records as follows:

- October 29, 2010: 22 pages
- February 23, 2012: 2 pages
- March 23, 2012: 11 pages

**The Judgment of the Federal Court**

29 After setting out the various contentions advanced by Mr. Leahy both in his notice of application and his memorandum of fact and law, the Applications Judge reviewed the background facts. He then set out the issues before the Court and summarized the parties' written submissions.

30 The Applications Judge went on to discuss the standard of review to be applied when reviewing decisions under sections 26 and 27 of the Act. Relying upon the decision of our Court in *Blank v. Canada (Minister of Justice)*, 2010 FCA 183, 409 N.R. 152 (F.C.A.) (*Blank*), a case which dealt with the standard of review to be applied to the review of a claim of solicitor-client privilege under section 23 of the *Access to Information Act*, R.S.C., 1985, c. A-1 (ATIA), he concluded that the Court must apply the correctness standard to review whether the withheld information falls within the section 26 or 27 exemptions, and the standard of reasonableness to the discretionary refusal to release exempted information. (See *Blank*, at paragraph 16).

31 The remaining issues as rephrased by the Applications Judge were:

a. Did the respondent err by limiting the scope of the request?

b. Did the respondent err by limiting the access request to a specific period of time?

c. Did the respondent err by delaying disclosure past the statutory required time-frame?

d. Did the respondent err by exempting certain information from disclosure pursuant to section 26 of the *Privacy Act*?

e. Did the respondent err by exempting certain information from disclosure pursuant to section 27 of the *Privacy Act*?

32 On appeal to this Court, Mr. Leahy takes particular issue with the Applications Judge's findings on questions 1, 4 and 5).

33 Regarding the first issue, the Applications Judge found that given the appellant's failure to provide more specific information when invited to do so, the decision to limit the terms of the Privacy Request was correct (reasons for judgment at paragraph 46). Moreover, it was also correct not to include material under the control of other governmental institutions because the Privacy Request had been directed only to CIC (reasons for judgment at paragraph 49).

34 Regarding the second issue concerning the period covered by the Privacy Request, the Applications Judge held that "[a]n end date to the disclosure period is necessary in order for disclosure to be completed in a timely fashion. Were the end date of disclosure to be the date that disclosure is made, then the process of completing consultations might never end" (reasons for judgment at paragraph 52). Mr. Leahy does not directly attack this finding, and he made no written or oral submissions on this issue. Instead, as explained below, he seeks an order compelling disclosure of records created between January 1, 2007 (the start date referenced in the Privacy Request) and the date disclosure is made.

35 We have not ordered that any disclosure be made. In light of the nature of the remedy we order, and in the absence of submissions from the parties on the issue of the period properly covered by the Privacy Request, it is not necessary or appropriate for us to deal with this issue.

36 Mr. Leahy does not address the third issue concerning the lateness of the response to the Privacy Request. In any event, paragraph 58 of the reasons below serves as a full answer to the question posited:

> This judicial review only relates to the refusal to allow access to certain exempted material which was refused under sections 26 and 27 of the Act. There is no need to review the respondent's delay in disclosure and deemed refusal of information which was subsequently disclosed on February 19, 2009.

37 As to the fourth issue and CIC's asserted exemptions under section 26 of the Act, the Applications Judge stated: "I have reviewed the materials and determined that each instance correctly involves the personal information of a third party" (reasons for judgment at paragraph 60).

38 Finally, the Applications Judge turned his mind to the materials allegedly exempt from disclosure pursuant to section 27 of the Act. Relying on the decision of the Supreme Court of Canada in *Blank v. Canada (Department of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319

(S.C.C.) (*Blank SCC*), he found that the solicitor-client privilege protection under section 27 of the Act includes both legal advice (or solicitor-client) privilege and litigation privilege (reasons for judgment at paragraph 63). This finding is not contested.

39 This being said, after the Applications Judge stated that he had reviewed the documents at issue in light of the principles applicable to solicitor-client privilege, he found that "[t]he vast majority of the documents under review deal with the seeking and rendering of legal advice. [...] These communications were made by counsel acting in their capacity as lawyers, not in another capacity providing policy advice" (reasons for judgment at paragraph 72). The Applications Judge also found that privilege had not been waived as the "information sharing was to remain confidential and [that it] was never shared with third parties outside of the Client Department of Citizenship and Immigration" (client) (reasons for judgment at paragraph 72). In the case of information sharing between non-lawyers, it was found to "[fit] comfortably within the 'continuum of communication' between the Department of Justice and members of its client" (reasons for judgment at paragraph 72).

40 The Applications Judge also looked at the documents exempted from disclosure by CIC based on litigation privilege. He held that litigation between the parties was not only apprehended but had materialized as several of the actions initiated by Mr. Leahy against the respondent were pending at the time of disclosure and shared a common thread. These documents met the test set out in *Blank* (reasons for judgment at paragraph 75).

41 The Applications Judge also found that there were no documents which CIC should have severed and partially disclosed (reasons for judgment at paragraph 78).

42 Finally, the Applications Judge addressed Mr. Leahy's submission that solicitor-client privilege does not apply where the communication has the purpose of furthering unlawful conduct or where the party seeking disclosure can demonstrate an actionable wrong by the other party. He wrote:

> However, the burden to demonstrate a claim of wrongdoing rests with the applicant [...] and he has not met this burden in this case. He has not demonstrated any unlawful conduct or actionable wrong on the part of the respondent.
>
> (reasons for judgment at paragraph 79)

43 In the end, the Applications Judge held that CIC correctly found that the withheld information fell within sections 26 and 27 of the Act and that its discretionary decision not to disclose the exempt material was reasonable. Therefore, the Applications Judge dismissed Mr. Leahy's application for judicial review with costs to the respondent.

**The Procedural Issue**

44 The record on this appeal initially consisted of:

> i. an appeal book, in two volumes, containing, among other things, the public affidavit of the CIC deponent (Mr. John Warner) and copies of the documents released to Mr. Leahy; and
>
> ii. a confidential appeal book, in eight volumes, containing, among other things, the confidential affidavit sworn by Mr. Warner and copies of the documents not disclosed to Mr. Leahy.

45 A confidentiality order issued by the Federal Court permitted the respondent to file in that court both a confidential affidavit and a confidential record containing the documents which CIC had not released to Mr. Leahy. Rule 152(3) of the *Federal Courts Rules* provides that a confidentiality order issued by the Federal Court continues for the duration of any appeal of the proceeding. Thus, the Federal Court confidentiality order continued to have effect and it permitted the respondent to file the confidential appeal book in this Court.

46 Subsequent to the filing of the appeal books, the appellant filed his memorandum of fact and law. The respondent Minister then filed two memoranda of fact and law, one confidential and one not confidential. The confidential memorandum of fact and law was filed pursuant to the direction of Justice Layden-Stevenson.

47 The contents of the confidential record were problematic. We discuss below the inadequacy of the evidentiary record. For the purpose of the procedural issue, the contents of the confidential record were problematic because the confidential affidavit of Mr. Warner contained information that demonstrably was not confidential and the confidential memorandum of fact and law similarly contained information and submissions that were not confidential in nature.

48 Accordingly, on February 7, 2012, the Court issued a direction that stated in relevant part:

> The Court makes the following requests of the parties in advance of the hearing of the appeal now scheduled for February 27, 2012:
>
> [...]
>
> 3. The confidential memorandum of fact and law filed by the respondent contains information and submissions which are not confidential in nature. Counsel for the respondent is requested to remedy this forthwith, and in any event by no later than February 16, 2012. This will require the respondent to file either a redacted version of the confidential memorandum of fact and law or an amended confidential memorandum of fact and law that does not contain information or submissions which can be provided in the public hearing. It will also require the respondent to file either an amended public memorandum of fact and law or a

supplementary public memorandum of fact and law that contains all of the information and submissions the respondent wishes to advance that can be addressed in the public hearing.

49 In response, counsel for the respondent filed a public supplementary memorandum of fact and law and an amended confidential memorandum of fact and law.

50 When the appeal came on for hearing on February 27, 2012, the Court expressed its view that the amended confidential memorandum of fact and law continued to contain information and submissions which were not confidential in nature.

51 As the Court explained at that time, an overbroad claim of confidentiality is wrong at law for at least two reasons.

52 First, it is a fundamental principle that proceedings of Canadian courts are open and accessible to the public. The open court principle extends to the affidavit evidence and the written submissions filed on judicial review. Any restriction on the presumption of openness should only be permitted when:

> (a) such a restriction is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not present the risk; and
>
> (b) the salutory effects of the restriction outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of each party to a fair and public hearing, and the efficacy of the administration of justice.
>
> (*Vancouver Sun, Re*, 2004 SCC 43, [2004] 2 S.C.R. 332 (S.C.C.) at paragraphs 22 to 31)

There is no justification for placing non-confidential information or submissions in a confidential document. To do so violates the open court principle.

53 Second, fairness requires that a party know the case to be met. An overbroad claim to confidentiality that prevents the opposite party from knowing as much as possible about the evidence and the submissions made to the Court improperly impairs the opposite party's ability to respond to the case. Put simply, an overbroad claim of confidentiality is inconsistent with the duty of procedural fairness.

54 For these reasons, on February 27, 2012, the Court adjourned this application on the following terms:

> 1. The hearing of this appeal is adjourned. The appeal is now set down for hearing at 180 Queen Street West, 7th Floor, Toronto, Ontario, commencing at 9:30 a.m., on Thursday, April 26, 2012, for a duration not to exceed 2 hours and 30 minutes.

2. The respondent shall, on or before March 23, 2012, serve and file a supplementary appeal book containing a redacted version of the confidential affidavit of John Warner.

3. The respondent shall, on or before March 23, 2012, serve and file redacted and unredacted versions of his amended memorandum of fact and law. The unredacted version of the amended memorandum of fact and law shall not exceed 45 pages in length. Any references to the confidential appeal books will be by reference to the ATIP numbers as found in volumes 1 to 4 of the confidential appeal books.

4. The appellant may serve and file, on or before April 12, 2012, a supplementary memorandum of fact and law. The supplementary memorandum of fact and law shall respond to any new matters raised in the respondent's redacted amended memorandum of fact and law, and shall not exceed 10 pages.

5. The costs of this appearance are reserved, to be dealt with following the hearing of the appeal.

55 In consequence, the respondent served and filed a properly redacted public version of the confidential affidavit of John Warner and both public redacted and confidential unredacted versions of his memorandum of fact and law. The appellant then filed a supplementary memorandum of fact and law.

56 In future, we would encourage counsel for government institutions to consider the use of redacted and unredacted affidavits and memoranda of fact and law in applications of this type. In the present case, this enabled the appellant to receive the maximum disclosure of the evidence and submissions, while still protecting information alleged to be exempt from disclosure.

57 Having dealt with the procedural issue, we now turn to the positions of the parties on the substantive issues.

**Positions of the Parties**

58 On appeal to this Court, the appellant initially raised six grounds of complaint with regards to the reasons below. In a nutshell, the appellant argued that the respondent wilfully refused to comply with its statutory obligations and arbitrarily limited its search to the National Headquarters. As a result, he disagreed with the Applications Judge's finding as to the Privacy Request's scope and his conclusions pertaining to the section 26 and 27 exemptions.

59 In particular, Mr. Leahy made the following two arguments:

(1) The Applications Judge "failed in his duty when he upheld the exemptions despite not identifying who actually exempted the material or citing to any evidence that an informed Minister asserted privilege" (appellant's memorandum of fact and law at paragraph 21). He

"abdicated his judicial responsibility by deferring to the unknown bureaucrat who claimed the exemption" (appellant's memorandum of fact and law at paragraph 22). He also did not look into the manner in which the discretion was exercised;

(2) The Applications Judge misapplied *Blank* and erred by finding there to be no evidence of illegal activity on the part of CIC.

60 In his supplemental submissions Mr. Leahy argued that:

[The Applications Judge] failed to identify (a) who made the decision to withhold, (b) whether that person was authorized to make that decision, (c) who asserted privilege, (d) whether that person (who should be the Minister himself) was properly informed before doing so and (e) whether consideration was given to releasing the material despite its being privileged. He did not do so because no such evidence was ever adduced.

61 The appellant sought various remedies, including once again the disclosure of materials held by the Immigration and Refugee Board, an independent government institution listed separately in the Act's schedule. The orders sought are:

a. an order compelling the respondent to disclose all materials, documents, items, etc. contained in any and all files, under whatever name and located in any of the respondent's entities, including the [Immigration and Refugee Board], be they located in Ottawa, in any local Canadian agency/bureau/board/centre/office, etc. or in any post abroad, wherein Mr. Leahy is the subject, object or is referenced and which item was recorded from January 2007 until the date the disclosure is made;

b. an order prohibiting the respondent from asserting privilege over any such item relating to (a) any improper conduct, (b) any effort (i) to deprive Mr. Leahy or his firm, Forefront Migration Ltd., of any client, or (ii) to separate them from a client; (c) to impede Mr. Leahy from earning a living; or (d) any effort to treat their clients unfavourably owing to Mr. Leahy's assistance;

c. an order imposing a sixty-day deadline for full disclosure and a penalty of $500/- per day thereafter until full disclosure occurs; and

d. an order of costs to the applicant in an amount of no less than $10,000.

62 CIC, for its part, entirely supported the legal and factual findings of the Applications Judge. At the hearing of this appeal, the panel members raised concerns about the lack of evidence with respect to (a) the identity of the person or persons properly authorized to exempt documents under the Act or to release them despite their confidential content; and (b) the manner in which the discretion to disclose information was exercised.

63 Addressing these concerns, counsel for the respondent fairly conceded that the evidence on the issue of delegation could have been clearer but that inferences could be drawn from the evidence. Initially, we were asked to infer from the fact that Ms. McManus signed the letter transmitting the documents released under the Act that she was the decision-maker. Later, we were asked to infer from the statement in Mr. Warner's affidavit "I was the officer who had final carriage of the applicant's request under s. 12 of the Privacy Act" that Mr. Warner had made the decision.

64 Counsel for the respondent also relied upon the Delegation Order signed by the then Minister pursuant to section 73 of the Act, by which she authorized the officers and employees of CIC whose positions were set out in an attached schedule to carry out those of her powers, duties or functions under the Act that were listed therein (joint book of authorities at tab 6).

65 Counsel for the respondent went on to concede that there was no evidence before the Court to show that the decision-maker was properly instructed about the required elements of solicitor-client or litigation privilege and that the evidence was silent as to the manner in which the discretion to release or not release information was exercised. Counsel for the respondent acknowledged that on the basis of the affidavit evidence one could not tell whether the discretion to release information was informed by the proper legal principles. Nor was there evidence concerning the steps taken to keep the information confidential. Once again, counsel for the respondent invited the Court to infer from the content of documents at issue that they arose within the context of a legal matter and were kept confidential.

66 Having reviewed the positions of the parties, we will turn to a general overview of the Act and its basic architecture, emphasizing the interpretative principles applicable to sections 26 and 27. Then, we will discuss where it vests decision making power and briefly describe how documents are classified within government departments.

**Overview of the Act**

***a) Access generally***

67 Access to information and the concomitant value of privacy have been addressed legislatively across Canadian jurisdictions. While these regimes vary slightly, as a general matter, each bestows a right to access government information, enunciates a series of exceptions to this right and outlines the procedural aspects of managing access requests. Many jurisdictions appoint Commissioners to oversee enforcement and spell out dispute resolution mechanisms.

68 Most provincial statutes address access to information and privacy in the same statute. In contrast, at the federal level, access and privacy rights are spread across the ATIA and the Act, collectively the "Access Statutes" (they were considered together by Parliament as Bill C-43 and enacted simultaneously as Schedules I and II to S.C. 1980-81-82-83, c. 111). Thus, either the ATIA

or the Act may come into play depending on the specific circumstances of a case. Nevertheless, the Access Statutes are meant to be a "seamless code" and must be construed harmoniously according to a "parallel interpretation model": *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, [1997] S.C.J. No. 63 (S.C.C.) at paragraphs 45 and 51; *Canada (Information Commissioner) v. Canadian Transportation Accident Investigation & Safety Board*, 2006 FCA 157, [2007] 1 F.C.R. 203 (F.C.A.) at paragraph 35; *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner*, 2003 SCC 8, [2003] 1 S.C.R. 66 (S.C.C.) at paragraph 22. Accordingly, principles developed in the case law under ATI A are relevant to the interpretation and application of the Act.

69 The ATIA provides a general right to access government institutions' records (section 4). This is designed to reflect the general principle of open access to government information: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 (S.C.C.) at paragraph 16. The dividing line between the Access Statutes is the "personal information" definition in the Act. Pursuant to subsection 19(1) of the ATIA, personal information is subject to a mandatory exemption from disclosure unless it accords with the Act. Very broadly, personal information is information about an identifiable individual that is recorded in any form (see section 3 of the Act.). This Court has held that "personal information" must be given a broad and generous interpretation: *Canadian Transportation* at paragraph 34.

70 An application to obtain personal information must be made under the Act, as it provides access rights separate from those under the ATIA. In this case, it is common ground that Mr. Leahy is seeking information about himself and so he properly applied under the Act.

***b) Architecture of the Act***

71 The Act's purposes are twofold: to protect personal information held by government institutions and to provide individuals with a right to access information about themselves (section 2). To achieve these ends, the Act obliges the government institutions listed in its schedule (together with certain Crown corporations (section 3)) to limit the collection, use and disclosure of personal information, and gives citizens and permanent residents the right to accesspersonal information about themselves in the government's hands.

72 The right to access personal information in the government's control is contained in section 12, partially reproduced above. Section 12, however, is subject to sections 18 to 28, which exempt the government from its duty to disclose in a variety of circumstances. These exemptions fall into two categories. Some are based on the type of personal information involved. In these instances, information is exempt from disclosure if it falls into the prescribed class: see, *e.g.*, section 21 (international affairs and national defence) and section 22 (law enforcement or investigations). The exemptions at issue in this appeal, third-party personal information (section 26) and solicitor-client privilege (section 27), fall into this category. Others require the institution to be satisfied

that disclosure would result in a particular consequence, for example, a threat to the safety of individuals (section 25).

73 Unlike the Act, the ATIA purpose provision (section 2) specifically references the necessity that access exceptions be "limited and specific". The Federal Court has held that the two purpose provisions have "the same general effect": *Canada (Information Commissioner) v. Canada (Immigration & Refugee Board)*, [1997] F.C.J. No. 1812, 140 F.T.R. 140 (Fed. T.D.)at paragraph 34. Given that one of the Act's objectives is to provide individuals with access to personal information about themselves, courts have generally interpreted exceptions narrowly: *Lavigne v. Canada (Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773 (S.C.C.) at paragraph 30. Exceptions should be limited and specific, and it is incumbent on the government to justify the secrecy: *Royal Canadian Mounted Police Commissioner* at paragraph 21. In effect, there is a reverse onus on the government to show that personal information sought by an individual is *not* subject to disclosure: *Canadian Assn. of Elizabeth Fry Societies v. Canada (Minister of Public Safety)*, 2010 FC 470, [2011] 3 F.C.R. 309 (F.C.) at paragraph 51; see also section 47 of the Act. Any ambiguity in the exemptions must be interpreted in favour of access: *Rubin v. Canada (Minister of Transport)*, [1997] F.C.J. No. 1614, 221 N.R. 145 (Fed. C.A.) at paragraph 24.

74 A corollary of the fact that access exceptions must be limited is that only authorized delegates may deny disclosure. The process of properly delegating decision-making authority under the Act will be discussed below.

75 Judicial resolution of access disputes under the Act is a two-step process. If access is denied, the applicant may, as Mr. Leahy did, complain to the Privacy Commissioner who is appointed under the Act (section 53). While the Privacy Commissioner has broad investigatory powers (section 34), her remedial powers are limited to making non-binding findings and recommendations addressed to government institutions' heads (section 35; see also *Murdoch v. Royal Canadian Mounted Police*, 2005 FC 420, [2005] 4 F.C.R. 340 (F.C.). If an access request has been refused, a complainant may bring an application for judicial review in the Federal Court within 45 days of the Privacy Commissioner releasing her investigative report (section 41). Lodging a complaint with the Privacy Commissioner is a condition precedent to applying for judicial review (*Cunha v. Minister of National Revenue*, [1999] F.C.J. No. 667, 164 F.T.R. 74 (Fed. T.D.) at paragraph 9) and, as a remedy, the Court is limited to ordering disclosure of material wrongly withheld: *Connolly v. Canada Post Corp.*, [2000] F.C.J. No. 1883 (Fed. T.D.), affirmed 2002 FCA 50, [2002] F.C.J. No. 185 (Fed. C.A.). The procedure for such applications is set out in section 51.

***c) Section 26: third-party personal information***

76 While the thrust of the appeal is the exemption asserted by CIC pursuant to section 27, it is worthwhile noting that section 26 embodies the principle that, while an individual has the right

to access information about themselves, this right does not extend to information about others. Section 26 has two aspects: a mandatory exemption from disclosure if disclosure is prohibited under section 8 of the Act and a discretion to decline disclosure.

77 In *Mislan v. Minister of National Revenue*, [1998] F.C.J. No. 704, 148 F.T.R. 121 (Fed. T.D.), Justice Rothstein described section 26 as follows at paragraph 13:

> Under section 26 the right of the person making the request under subsection 12(1) to access his or her own personal information is subject to the requirement on, or the exercise of discretion by, the head of the government institution not to disclose information about another person.

78 Additionally, and significantly, when relying on section 26, the government institution must satisfy the Court that it conducted a discretionary balancing of the competing interests involved which is imported by virtue of paragraph 8(2)(*m*) of the Act (*Cemerlic v. Canada (Solicitor General)*, 2003 FCT 133, [2003] F.C.J. No. 191 (Fed. T.D.) at paragraph 33), which reads:

> 8. (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> [...]
>
> (*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.
>
> 8. (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants:
>
> . . .
>
> *m*) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution:
>
> (i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,
>
> (ii) l'individu concerné en tirerait un avantage certain.

***d) Section 27: solicitor-client privilege***

79 The thrust of the appeal is the exemption asserted by CIC under section 27. Section 27 reads:

> 27. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) that is subject to solicitor-client privilege.
>
> 27. Le responsable d'une institution fédérale peut refuser la communication des renseignements personnels demandés en vertu du paragraphe 12(1) qui sont protégés par le secret professionnel qui lie un avocat à son client.

80 Section 27 exempts material covered by solicitor-client privilege from disclosure. In *Blank SCC*, the Supreme Court confirmed that the ATIA's analogous provision also applied to material covered by litigation privilege. Since the two statutes must be applied as a seamless code, it follows that the Act must also cover material subject to litigation privilege: *Elomari c. Agence spatiale canadienne*, 2006 FC 863, [2006] F.C.J. No. 1100 (F.C.) at paragraph 34.

81 As the exemption is discretionary its application, in effect, results in two decisions amenable to judicial review: first, whether the material sought is in fact privileged under common law principles (*Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89, [1998] F.C.J. No. 794 (Fed. C.A.) at paragraph 23) and, second, whether the discretion to decline disclosure was reasonably exercised (*Canadian Jewish Congress v. Canada (Minister of Employment & Immigration)* (1995), [1996] 1 F.C. 268, [1995] F.C.J. No. 1456 (Fed. T.D.) at paragraph 23).

82 The common law on solicitor client privilege and litigation privilege is most complex and is constantly evolving. Those making decisions about whether a document falls within the exemption under section 27 of the Act must understand and apply this common law.

***e) Decision-making authority under the Act***

83 Responsibility for administering the Act is split between the "designated minister" and the head of the government institution: sections 3 and 3.1 of the Act.For present purposes, it is sufficient to note that the heads of government institutions are listed in the *Privacy Act Heads of Government Institutions Designation Order*, SI/83-114, and handle day-to-day management of personal information and access requests. In the case of CIC, the responsible Minister is the head.

84 Significantly, heads decide whether to decline disclosing personal information based on an exemption. As judicial reviews under the Act are limited to situations where applicants have been refused access (section 41), as a practical matter, the decision-maker being reviewed in the Federal Court will always be the head or their authorized delegate.Pursuant to section 73 of the Act, the head may, by order, designate one or more employees to perform any of their functions under the Act. Such designations must be by valid order, and officials cannot implicitly assume a right to act in the head's name: *Société de transport de la communauté urbaine de Montréal v. Canada (Minister of the Environment)* (1986), [1987] 1 F.C. 610, [1986] F.C.J. No. 712 (Fed. T.D.) at paragraph 21.

85 Heads must table an annual report to Parliament outlining their administration of the Act (section 72). *Treasury Board Implementation Bulletin No. 107* (the "Bulletin") outlines the mandatory content of these reports. Notably, the Bulletin requires institutions to file a copy of the delegation order indicating what powers the head has delegated and to whom.

86 The practical result is this: to determine who made a particular decision under the Act, an applicant must locate the institution's annual privacy report and review the delegation order. In the case of CIC, decisions are delegated to entire classes of employees according to the nature of the particular decision to be made under the Act. Decisions to exempt information from disclosure under section 26 may be made by any "access to information and privacy officer" (classified as a PM-03) within the Ministry. To refuse disclosure based on section 27, however, the decision-maker must be an "access to information and privacy administrator" (classified as a PM-04) (see joint book of authorities at tab 6 for the relevant delegation order.)

87 This being said, we noted at the hearing that most documents were stamped "Protected" and sought further information from counsel for the respondent regarding the classification of protected information. As such, a few remarks about documents classification are in order.

***f) Documents Classification***

88 It appears that within government departments, information is classified according to internal security and information management policies. These include the *Security Organization and Administration Standard* (Security Policy) and the *Guidelines for Employees of the Government: Information Management Basics* (Guidelines), and collectively (Policies).

89 The initial dividing line between confidential and non-confidential information is whether it is "classified" or "protected". Pursuant to the Guidelines, classified information relates to national interests and concerns defence or broad issues such as political and economic stability. Protected information relates to sensitive personal, private and business information. The following chart illustrates these categories and their various classifications (collectively, Classifications):

| ***Classified information*** | ***Protected information*** |
|---|---|
| *Top secret*: A very limited amount of compromised information could cause *exceptionally grave injury* to the national interest. | *Protected C:* Compromise of a very limited amount of information could result in *exceptionally grave injury*, such as loss of life. |
| *Secret*: Compromise could cause *serious injury* to the national interest. | *Protected B*: Compromise could result in *grave* injury, such as loss of reputation or competitive advantage. |
| *Confidential*: Compromise could cause *limited injury* to the national interest. | *Protected A*: Compromise could result in *limited injury*. |

90 The Classifications are meant to loosely mirror the exemptions in the Access Statutes. At section 4.3, the Security Policy describes this relationship as follows:

> [...] Identifying sensitive information relates directly to the exemption and exclusion criteria of the Access to Information Act and Privacy Act, which establish the legal authority for the information departments may refuse to the public.
>
> Parliament has determined the information described in the exemption criteria to be important either to preserving the national interest or to protecting other interests for which the government assumes an obligation.
>
> [...]
>
> In identifying information in need of additional safeguards, departments are not required to determine definitively whether specific items would actually be exempt under these Acts. [...] Rather, departments should be satisfied that various types of information could reasonably be expected to qualify for exemption. [...]
>
> The present security system is based on the notion that the government should not be using human and financial resources on additional safeguards for information unless it falls within the exemption or exclusion criteria of the Access to Information Act and the Privacy Act.

91 The connection between the Classifications and the Access Statutes is readily apparent. For example, classified information is more likely to be exempt from disclosure under section 21 of the Act and section 15 of the ATIA (international affairs and defense). Protected information will almost inevitably be personal information as defined in the Act and thus subject to the restrictions in section 8. However, the Classifications themselves are not referenced in the Access Statutes. In fact, by its very terms, the Security Policy recognizes that:

> A decision to deny access to a record, or any part of it, must be based solely on the exemption provisions of the Acts as they apply at the time of the request. A decision to deny access must not be based on security classification or designation, however recently it may have been assigned.
>
> [emphasis added]
>
> (section 12.4)

92 Additionally, this Court has recognized that Treasury Board policies are not binding and are, at best, an aid to interpretation: *Canada (Information Commissioner) v. Canada (Minister of Citizenship & Immigration)*, 2002 FCA 270, [2003] 1 F.C. 219 (Fed. C.A.) at paragraph 37. Consequently, the Policies and a document's classification are only tangentially relevant to a reviewing court's role and are of limited legal significance.The fact that a document was

classified in a particular manner cannot dictate its treatment under the Access Statutes or in court proceedings.

***f) The role of the courts in access applications***

93 Having provided an overview of the Act, it is apposite to note briefly the role of the courts in applications brought under the Act or the ATIA. In *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security)*, 2010 SCC 23, [2010] 1 S.C.R. 815 (S.C.C.) the Court wrote at paragraph 1:

> Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.

94 The function of a reviewing court is to adjudicate disputes, insuring that a proper balance is struck between these two competing values. Courts must ensure appropriate government accountability, while at the same time protecting democratic values and effective governance.

95 We now turn to consideration of the substantive issues.

**Consideration of the Substantive Issues**

***a) The standard of review***

96 As explained above, the Federal Court held that the correctness standard of review applies to the decisions under sections 26 and 27 of the Act that the information sought falls within the statutory exemptions. It held that the reasonableness standard of review applies to exercises of discretion not to release information that falls within these exemptions.

97 The Federal Court went on, without any analysis, to apply the correctness standard of review to the decision to limit the scope of the Privacy Request (reasons for judgment at paragraphs 46 and 47).

98 With respect to the decisions under sections 26 and 27 of the Act, we agree that correctness is the standard for decisions that the information falls within these statutory exemptions: *Canada (Information Commissioner) v. Canada (Minister of Citizenship & Immigration)*, cited above, at paragraph 59; *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner*, cited above, at paragraph 19. Although these cases concerned decisions under the ATIA, the Act is similarly worded and structured.

99 We also agree that the reasonableness standard of review applies to exercises of discretion not to release information that falls within these exemptions. Such decisions, heavily fact-based

with a policy component, normally warrant deference: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.).

100 However, as will be seen, in this case the standard of review is immaterial to the decisions under sections 26 and 27 of the Act. As explained below, the evidentiary record before us is so thin that we cannot properly assess whether the decisions were correct or reasonable. Among other things, we cannot tell from the record who applied the exemptions to the documents, what definition of those exemptions was used, and what consideration was given to the exercise of discretion. Without that basic information, we cannot assess the correctness or the reasonableness of the decisions made. In short, this Court has been prevented from discharging its role on judicial review.

101 With respect to the remaining issue, as explained above, Mr. Leahy asserts that the scope of the Privacy Request was improperly limited because:

i. CIC limited the Privacy Request to documents located at its National Headquarters; and

ii. The Applications Judge allowed CIC to exclude documents in the possession of the Immigration and Refugee Board.

102 The first question required the CIC decision-maker to consider whether Mr. Leahy had provided sufficiently specific information about the location of the requested information so as to make the information reasonably retrievable. This is again a heavily fact-based question that warrants deference: *Dunsmuir*, cited above.

103 The second question required the Judge to interpret the Act. This is a question of law which the Judge was required to decide correctly: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) at paragraph 8.

***b) Alleged reviewable errors by CIC***

*(i) The scope of the Privacy Request*

104 We first consider Mr. Leahy's submission that CIC committed reviewable errors concerning the scope of the Privacy Request. As mentioned above, he asserts that there were two errors.

105 The first asserted error is said to be CIC's error in limiting the scope of the Privacy Request to documents located at its National Headquarters.

106 Paragraph 12(1)(*b*) and subsection 13(2) of the Act require a person requesting access to personal information to provide sufficiently specific information on the location of the information so that the government institution can reasonably retrieve the information.

107 On receipt of the Privacy Request CIC took the position that Mr. Leahy had failed to provide sufficiently specific information about the location of the requested information to render it reasonably retrievable. CIC then gave Mr. Leahy the opportunity to provide more specific information. Mr. Leahy's reply is quoted at paragraph 19 above.

108 Mr. Warner provided evidence that:

> 8. In assessing the applicant's reply, Mr. Maynard determined that the applicant had not provided the information requested. He noted in the ATIP tracking system that "according to the Act, the request, 'shall provide sufficient detail to enable an experienced employee of the institution, with a reasonable effort to identify the record' and locate what he is looking for. To suggest that we go to all 92 Visa posts is unreasonable." Hence it was determined that the scope of the search would be restricted to the National Headquarters.
>
> [...]
>
> 10. The Privacy request was therefore framed as follows:
>
> > I (Timothy Leahy) am requesting copies of all items, emanating from, or received by, CIC and pertaining to me, directly or indirectly. My request encompasses correspondence, emails, telephone messages and any other recorded items. The initial time frame is from 1 January 2007, until May 16, 2008.
>
> 11. On June 2, 2008, this Request was sent to International Region (IR), Immigration branch (IMM), Operational Management and Coordination (OMC), Case Management (CMB) and Department Secretariat. International Region was tasked with this request as they are responsible for the operations of the overseas visa offices. Immigration Branch is involved in any policy decisions affecting the processing of applications both in Canada and overseas. OMC is responsible for program delivery, while CMB is responsible for providing advice and guidance in the processing of high profile or contentious cases and managing all litigation involving the Department. Departmental Secretariat is responsible for all official correspondence sent out by the department. Attached as exhibit "B" is a copy of the call out notice for the Request.
>
> [...]
>
> 26. As noted above, the scope of the Request was determined after the applicant was advised that the original description was too broad. The original request covered every Citizenship and Immigration office around the world, including over 80 overseas missions, 43 CIC offices in Canada, 4 Case Processing Centres, along with CIC National Headquarters. Within the immigration database, the Field Operation Support System (FOSS), there are in excess of 5,000,000 million lines of text. Similarly, there is a separate Computer Assisted Immigration

> Processing System (CAIPS) database at every visa office around the world. Running queries in this number of offices and on this many databases to locate any reference to the applicant was considered unreasonable.
>
> (Affidavit of John Warner, volume 1 Appeal Book at Tab 6)

109 In our view, given Mr. Leahy's failure to provide more specific information, CIC's decision to limit the scope of the Privacy Request was reasonable. As for the extent to which CIC limited the Privacy Request, Mr. Warner's affidavit demonstrates that the decision fell within a range of possible outcomes that was defensible on the facts and the law.

110 The second asserted error is said to be the Judge's error in allowing CIC to exclude from the scope of the Privacy Request documents in the possession of the Immigration and Refugee Board.

111 Subsection 13(2) of the Act requires a request for access to be made to the government institution that has control of the information.

112 Specifically, subsection 13(2) of the Act states:

> 13. (2) A request for access to personal information under paragraph 12(1)(*b*) shall be made in writing to the government institution that has control of the information and shall provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.
>
> [emphasis added]
>
> 13. (2) La demande de communication des renseignements personnels visés à l'alinéa 12(1)*b*) se fait par écrit auprès de l'institution fédérale de qui relèvent les renseignements; elle doit contenir sur leur localisation des indications suffisamment précises pour que l'institution puisse les retrouver sans problèmes sérieux.
>
> [Non souligné dans l'original.]

113 The Judge found CIC did not err by excluding information possessed by the Immigration and Refugee Board because:

> 49 The IRB operates separately from CIC and is also considered a separate government institution under Schedule 3 of the *Privacy Act*. As the applicant directed his section 12 access request only to the Department of Citizenship and Immigration, it was correct for the respondent to limit the disclosure to that institution.

114 In our view, the Applications Judge's interpretation of the Act was correct. The phrase "government institution" used in subsection 13(2) of the Act is defined in section 3 as follows:

"government institution" means

(a) any department or ministry of state of the Government of Canada, or any body or office, listed in the schedule, and

(b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act.

[emphasis added]

« institution fédérale »

a) Tout ministère ou département d'État relevant du gouvernement du Canada, ou tout organisme, figurant à l'annexe;

b) toute société d'État mère ou filiale à cent pour cent d'une telle société, au sens de l'article 83 de la Loi sur la gestion des finances publiques.

[Non souligné dans l'original.]

115 The Immigration and Refugee Board is a body listed in the schedule to the Act. As such, any request for documents in its control should have been made directly to the Immigration and Refugee Board.

*(ii) CIC's decisions under sections 26 and 27 of the Act*

116 We now turn to Mr. Leahy's submissions that CIC's decisions under sections 26 and 27 of the Act were subject to reviewable error. As mentioned above, the evidentiary basis before us is inadequate to determine this issue.

117 The role of the reviewing court on judicial review is well-known. It is to enforce the rule of law: *Dunsmuir* at paragraphs 27 to 33. Broadly speaking, this means that the reviewing court must ensure that the administrative decision-maker has embarked upon the task entrusted to it and has carried it out in a legally acceptable way.

118 The standard of review dictates how exacting the Court should approach its role. Under the standard of review of correctness, the Court ensures that the law has been correctly ascertained and applied to the correct facts of the case. Under the standard of review of reasonableness, the Court accords the administrative decision-maker deference, allowing it to reach outcomes within a range of acceptability and defensibility on the facts and the law.

119 Under either the reasonableness or correctness standard of review, the reviewing court needs basic information to carry out its role. For example, who was the administrative decision-maker and what was taken into account in reaching a decision not to release information? Unless that is

known, the reviewing court cannot assess whether the administrative decision-maker has embarked upon the task entrusted to it and has carried it out in a legally acceptable way. In correctness review, the reviewing court must have sufficient information in the record in order to reach its own decision.

120 For these reasons and perhaps others, the Supreme Court has insisted that the decisions of administrative decision-makers, viewed in light of the record before them, must be transparent and intelligible: *Dunsmuir*, *cited above*, at paragraph 47.

121 If the reasons for decision are non-existent, opaque or otherwise indiscernible, and if the record before the administrative decision-maker does not shed light on the reasons why the administrative decision-maker decided or could have decided in the way it did, the requirement that administrative decisions be transparent and intelligible is not met: *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.) at paragraphs 14 and 15 (adequacy of reasons is to be assessed as part of the process of substantive review and is to be conducted with due regard to the record; *P.S.A.C. v. Canada Post Corp.*, 2011 SCC 57, [2011] 3 S.C.R. 572 (S.C.C.) and *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.) (within limits, the decision can be upheld on the basis of the reasons that could have been given).

122 Any reviewing court upholding a decision whose bases cannot be discerned would blindly accept the decision, abdicating its responsibility to ensure that it is consistent with the rule of law.

123 In this case, the decision letter, signed by Ms. McManus, merely asserts the exemptions that apply. No further reasons are given. The record consists of a relatively thin affidavit, documents that have been produced to the appellant, and documents that have been withheld from the appellant.

124 This material does not provide us with the basic information we need in order to discharge our role. There are several examples.

125 First, as explained above, under the Act, it is the "head" of the institution or his or her authorized delegate who is to decide whether exemptions apply and, if so, whether the information should nevertheless be produced to the requester. The record shows that a number of people were involved in reviewing and assessing the documents and making recommendations and that the decision letter was signed by Ms. McManus. The record is silent as to who made the relevant decisions and no satisfactory inference may be drawn from the record.

126 There is no problem with the decision-maker seeking the assistance of others and considering their recommendations. But in the end, under the statute, the "head" or their authorized delegate is to make the decision.

127 But in this case, we do not even know who the decision-maker was.

128 Second, we are told that information has been withheld on the basis of solicitor-client privilege and litigation privilege. But nowhere in the record is there any indication of what the decision-maker thought these concepts meant. Did the decision-maker properly understand these concepts? We do not know.

129 Related to this is the involvement of others to review the documents and make recommendations to the decision-maker. Were these persons properly instructed concerning the requirements of solicitor-client privilege and litigation privilege?

130 Third, it is entirely appropriate for the reviewing court to examine the documents that have been withheld, draw appropriate inferences and use those inferences to assess whether the decision-maker made any reviewable error. But those inferences can take the reviewing court only so far.

131 For example, in this case, some of the documents said to be covered by solicitor-client privilege appear to concern legal advice. However, more information is necessary. Were the documents maintained in confidence? Were the authors, the recipients, or both lawyers?

132 Other documents do not appear to concern legal advice, and the record is silent as to which, if any, documents are said to attract litigation privilege.

133 Fourth, under the Act, the decision-maker must assess whether any of the exemptions to disclosure apply to the information sought. But that is not the end of the analysis. Even though an exemption applies, the decision-maker nevertheless can exercise his or her discretion to disclose the material: *Attaran v. Canada (Minister of Foreign Affairs)*, 2011 FCA 182, [2011] F.C.J. No. 730 (F.C.A.).

134 At a minimum, the reasons or the record should show that the decision-maker was aware of this discretion to release exempted information and exercised that discretion one way or the other.

135 In this case, there is nothing in the reasons or the record on this point.

136 These deficiencies in the information provided to the Federal Court rendered it impossible for the Federal Court or this Court to carry out their respective roles.

137 In this case, the Crown vigorously maintained that there was no reviewable error in the decisions. This may be so, but this Court cannot decide the matter. In the circumstances of this case explained above, with such little information in the reasons and the record, that is equivalent to an assertion that this Court should just accept the decisions, not test them. In effect, the Crown's

submission is "trust us, we got it right." Acceptance of that submission is inconsistent with our role on judicial review.

***c) Postscript***

138 We wish to emphasize that our decision will not change how government institutions go about satisfying requests for information, assuming that those requests are conducted in accordance with the Act.

139 Instead, our decision affects only in a relatively small way how decision letters might be drafted, the possible content of any supporting affidavit, and the record that might be placed before the reviewing court.

140 During oral argument, we described to counsel for the respondent the sort of information, discussed in these reasons, a reviewing court needs in order to discharge its role. We indicated that it is customary in cases like this, as happened in this case, for sensitive information to be placed in a confidential record. We asked whether there would be some practical obstacle, undue burden or other negative consequence associated with the provision of information of the sort discussed in these reasons. Counsel for the respondent identified none.

141 To reiterate, all that is needed is sufficient information for a reviewing court to discharge its role. In cases like this, this can be achieved by ensuring that there is information in the decision letter or the record that sets out the following: (1) who decided the matter; (2) their authority to decide the matter; (3) whether that person decided both the issue of the applicability of exemptions and the issue whether the information should, as a matter of discretion, nevertheless be released; (4) the criteria that were taken into account; and (5) whether those criteria were or were not met and why.

142 In many cases, in perhaps no more than a few lines, the decision letter can address items (1), (2) and (3).

143 Similarly, it is an easy matter for the decision letter to address item (4). This could be accomplished by referring to a single case that sets out the criteria, or to an internal policy statement or instructional document used by the decision-maker and those making recommendations to the decision-maker. Normally, reviewing courts do not take judicial notice of internal policy statements or instructional documents, so if these are relevant, they should be identified and appended to the supporting affidavit.

144 As for item (5), this may be evident from the documents themselves which have not been disclosed to the requester but which have been included in a confidential record, or from any annotations made on the documents when information is expunged which appear in the public record. On occasion, a supporting affidavit can be sworn. It can supply additional information that

is not evident in the record and known to the decision-maker. For example, with respect to the documents said to be covered by solicitor-client privilege in this case, the affidavit should have identified which persons are lawyers and dealt with whether the confidentiality of the documents was maintained.

145 In this regard, counsel should be mindful of the limitations of supporting affidavits on judicial review. They cannot be used as an after-the-fact means of augmenting or bootstrapping the reasons of the decision-maker. They may point out factual and contextual matters that are not evident elsewhere in the record that were obviously known to the decision-maker. They can also provide the reviewing court with general orienting information, such as how the request for information was handled, how the documents were gathered, and how the task of assessment was conducted. See generally *Sellathurai v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FCA 255, [2009] 2 F.C.R. 576 (F.C.A.) at paragraphs 45 to 47; *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299, 425 N.R. 341 (F.C.A.) at paragraphs 40 to 42; *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297 (F.C.A.).

**Conclusion**

146 As expressed above, it may be that some or all of the documents were properly withheld from Mr. Leahy. We are unable to render a decision on this view of the paucity of evidence before us. In that circumstance, it would be inappropriate to order the disclosure of any document. Instead, we remit to a different decision-maker for redetermination in accordance with these reasons the matter of whether exemptions apply to all or part of the documents at issue and, if so, whether a discretion should be exercised in favour of release.

147 For these reasons, the appeal will be allowed and the judgment of the Federal Court is set aside. Making the judgment that the Federal Court should have made, the application for judicial review is allowed and the matter of whether exemptions apply to all or part of the documents and, if so, whether a discretion should be exercised in favour of release is remitted for redetermination by a different decision-maker in accordance with these reasons. The appellant is entitled to costs both here and in the Federal Court, such costs to include the costs of the February 27, 2012 appearance in this Court.

*Appeal allowed.*

2004 SCC 31
Supreme Court of Canada

Pritchard v. Ontario (Human Rights Commission)

2004 CarswellOnt 1885, 2004 CarswellOnt 1886, 2004 SCC 31, [2004] 1 S.C.R. 809, [2004] S.C.J. No. 16, 12 Admin. L.R. (4th) 171, 19 C.R. (6th) 203, 2004 C.L.L.C. 230-021, 33 C.C.E.L. (3d) 1, 47 C.P.C. (5th) 203, 49 C.H.R.R. D/120, 72 O.R. (3d) 160 (note), J.E. 2004-1087, REJB 2004-61849

# Colleen Pritchard, Appellant v. Ontario Human Rights Commission, Respondent and Attorney General of Canada, Attorney General of Ontario, Canadian Human Rights Commission and Manitoba Human Rights Commission, Interveners

Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps, Fish JJ.

Heard: March 23, 2004
Oral reasons: March 23, 2004
Written reasons: May 14, 2004
Docket: 29677

Proceedings: additional reasons to *Pritchard v. Ontario (Human Rights Commission)* (2004), 2004 CarswellOnt 1874, 2004 CarswellOnt 1875 (S.C.C.)**Proceedings: affirming *Pritchard v. Ontario (Human Rights Commission)* (2003), 2003 CarswellOnt 182, 22 C.C.E.L. (3d) 201, 27 C.P.C. (5th) 223, 167 O.A.C. 356, 223 D.L.R. (4th) 85, 63 O.R. (3d) 97 (Ont. C.A.)**reversing *Pritchard v. Ontario (Human Rights Commission)* (2002), 2002 CarswellOnt 4626 (Ont. Div. Ct.)**Proceedings: affirming *Pritchard v. Ontario (Human Rights Commission)* (2001), 2001 CarswellOnt 2423, 148 O.A.C. 260, (sub nom. *Pritchard v. Ontario (Human Rights Commission) (No. 2))* 40 C.H.R.R. D/261 (Ont. Div. Ct.)**

Counsel: Geri Sanson and Mark Hart for appellant
Anthony D. Griffin and Hart Schwartz for respondent
Christopher M. Rupar for intervener Attorney General of Canada
Leslie M. McIntosh for intervener Attorney General of Ontario
Andrea Wright and Monette Maillet for intervener Canadian Human Rights Commission
Aaron L. Berg for intervener Manitoba Human Rights Commission

***Major J.*:**

## I. Introduction

1 The appellant, Ms Colleen Pritchard, filed a human rights complaint with the respondent Ontario Human Rights Commission, against her former employer Sears Canada Inc., alleging gender discrimination, sexual harassment and reprisal. The Commission decided, pursuant to s. 34(1)(b) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, not to deal with her complaint. The appellant sought judicial review and brought a motion for production of all documents that were before the Commission when it made its decision, including a legal opinion provided to the Commission by in-house counsel.

2 The motions judge, MacFarland J. of the Divisional Court, ordered production and a three-judge panel of that court later upheld that decision. The Ontario Court of Appeal overturned the decision, holding instead that the opinion was privileged. The appeal was dismissed with reasons to follow.

## II. Factual Background

3 The appellant's employment with Sears was terminated on July 19, 1996. In January 1997 she filed a human rights complaint alleging that she had been subjected to gender discrimination, sexual harassment and reprisal. With regard to reprisal, the complaint alleged that the appellant was denied re-employment for an advertised position in December 1996 because of earlier complaints she made to the Commission (in 1994) regarding sexual harassment and discrimination, and Sears' failure to deal with the issues she raised appropriately.

4 On January 20, 1998, the Commission decided, pursuant to s. 34(1)(b) of the Code, not to deal with most of the appellant's complaint. The Commission was of the view that the appellant had acted in bad faith in bringing the complaint because she had previously signed a release, which expressly released Sears from any claims under the Code.

5 In particular, it stated that she released Sears from any claims relating to her employment, including "any claims for severance or termination pay under the *Employment Standards Act* or claims under the *Human Rights Code*." In exchange for the release, the appellant was paid her statutory entitlement under the *Employment Standards Act*, R.S.O. 1990, c. E.14, plus two weeks' salary.

6 On June 23, 1998, the Commission decided, pursuant to an application by the appellant for reconsideration under s. 37 of the Code, not to deal with the termination issues; in essence, they upheld the January 20 decision not to address most of the complaint.

7 On October 28, 1998, the appellant commenced an application for judicial review of the Commission's decisions. The Commission did not defend the application. Instead, it provided the

court and the appellant with a letter from its legal counsel setting out the reasons why it would not defend the application and why the entire complaint should be remitted for investigation. The Commission also offered to settle the matter, over the objections of Sears. The Superior Court of Justice, Divisional Court, quashed the Commission's decisions, finding that the Commission had misinterpreted the meaning of "bad faith" and had applied the wrong criteria in its reconsideration ((1999), 45 O.R. (3d) 97 (Ont. Div. Ct.)). The matter was remitted back to the Commission for a redetermination under s. 34 of the Code. An appeal by Sears was dismissed.

8 In its consideration of the complaint anew, the Commission again exercised its discretion under s. 34(1)(b) of the Code not to deal with most of the appellant's complaint. On December 20, 2000, the Commission issued its decision not to deal with it based on a set of reasons that were strikingly similar to the first, again claiming that the appellant acted in bad faith. On January 11, 2001, the appellant brought a second application for judicial review. The notice sought to quash the Commission's second decision on the basis of jurisdictional error, including excess of jurisdiction, denial of procedural fairness, and violations of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

9 In the context of this second judicial review application, the appellant requested production of various documents, including a legal opinion provided to the Commissioners. The Commission refused the request for documents, and the appellant brought a motion before MacFarland J. of the Superior Court requesting "all information - both oral and written - which was placed before the Commission for its consideration of her complaint which resulted in the Commission's decision under s. 34(1)(b) of the Code."

**III. Judicial History**

10 On July 6, 2001, MacFarland J., of the Superior Court of Justice, Divisional Court, granted the appellant's motion and ordered production of all the documents, including the legal opinion which had been prepared by in-house counsel for the Commission ((2001), 148 O.A.C. 260 (Ont. Div. Ct.)). Six months later, on January 10, 2002, a three-judge panel of the Divisional Court ([2002] O.J. No. 1169 (Ont. Div. Ct.)) heard the expedited appeal on the sole issue of the production of the legal opinion, and confirmed MacFarland J.'s order. Neither of the lower courts was provided with a copy of the legal opinion at issue.

11 On January 29, 2003, the Ontario Court of Appeal allowed the appeal, set aside the lower court orders pertaining to the legal opinion, and ordered that the copies of the legal opinion which had been filed with the appellate court be sealed ((2003), 63 O.R. (3d) 97 (Ont. C.A.)).

**IV. Relevant Statutory Provisions**

12 While this appeal can be decided on the basis of case law alone, ss. 34, 37 and 39 of the Code provide the context in which the Commission made its decisions. For convenience, these sections are reproduced below.

> 34.(1) Where it appears to the Commission that,
>
> (a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;
>
> (b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;
>
> (c) the complaint is not within the jurisdiction of the Commission; or
>
> (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay,
>
> the Commission may, in its discretion, decide to not deal with the complaint.
>
> (2) Where the Commission decides to not deal with a complaint, it shall advise the complainant in writing of the decision and the reasons therefor and of the procedure under section 37 for having the decision reconsidered.
>
> . . . . .
>
> 37.(1) Within a period of fifteen days of the date of mailing the decision and reasons therefor mentioned in subsection 34(2) or subsection 36(2), or such longer period as the Commission may for special reasons allow, a complainant may request the Commission to reconsider its decision by filing an application for reconsideration containing a concise statement of the material facts upon which the application is based.
>
> (2) Upon receipt of an application for reconsideration the Commission shall as soon as is practicable notify the person complained against of the application and afford the person an opportunity to make written submissions with respect thereto within such time as the Commission specifies.
>
> (3) Every decision of the Commission on reconsideration together with the reasons therefor shall be recorded in writing and promptly communicated to the complainant and the person complained against and the decision shall be final.
>
> . . . . .
>
> 39(6) A member of the Tribunal hearing a complaint must not have taken part in any investigation or consideration of the subject-matter of the inquiry before the hearing and shall not communicate directly or indirectly in relation to the subject-matter of the inquiry with any person or with any party or any party's representative except upon notice to and

> opportunity for all parties to participate, but the Tribunal may seek legal advice from an advisor independent of the parties and in such case the nature of the advice shall be made known to the parties in order that they may make submissions as to the law.

**V. Issues**

13 The sole issue in this appeal is whether the Court of Appeal erred in overturning the decision of the motions judge ordering production of the legal opinion. The question is whether a legal opinion, prepared for the Ontario Human Rights Commission by its in-house counsel, is protected by solicitor-client privilege in the same way as it is privileged if prepared by outside counsel retained for that purpose.

**VI. Analysis**

***A. Solicitor-Client Privilege Defined***

14 Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function: see *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.), at para. 46.

15 Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at p. 837, as "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice, and (iii) which is intended to be confidential by the parties." Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not: see *Solosky*, *supra*, at p. 834.

16 Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established." The scope of the privilege does not extend to communications (1) where legal advice is not sought or offered, (2) where it is not intended to be confidential, or (3) that have the purpose of furthering unlawful conduct: see *Solosky*, *supra*, at p. 835.

17 As stated in *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (S.C.C.), at para. 2:

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex

> web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.

The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction.

18 In *R. v. Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209, 2002 SCC 61 (S.C.C.), this Court confirmed that the privilege must be nearly absolute and that exceptions to it will be rare. Speaking for the Court on this point, Arbour J. reiterated what was stated in *McClure*, *supra*:

> *. . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis*. [emphasis in original]

(Arbour J. in *Lavallee*, *supra*, at para. 36, citing Major J. in *McClure*, *supra*, at para. 35)

19 Solicitor-client privilege has been held to arise when in-house government lawyers provide legal advice to their client, a government agency: see *R. v. Shirose*, [1999] 1 S.C.R. 565 (S.C.C.), at para. 49. In *Shirose*, the appellant police officers sought access to the legal advice provided to the RCMP by the Department of Justice and on which the RCMP claimed to have placed good faith reliance. In identifying solicitor-client privilege as it applies to government lawyers, Binnie J. compared the function of public lawyers in government agencies with corporate in-house counsel. He explained that where government lawyers give legal advice to a "client department" that traditionally would engage solicitor-client privilege, and the privilege would apply. However, like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege.

20 Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered: *Shirose*, *supra*, at para. 50.

21 Where solicitor-client privilege is found, it applies to a broad range of communications between lawyer and client as outlined above. It will apply with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is "in-house" does not remove the privilege, or change its nature.

***B. The Common Interest Exception***

22 The appellant submitted that solicitor-client privilege does not attach to communications between a solicitor and client as against persons having a "joint interest" with the client in the subject-matter of the communication. This "common interest" or "joint interest" exception does not apply to the Commission because it does not share an interest with the parties before it. The Commission is a disinterested gatekeeper for human rights complaints and, by definition, does not have a stake in the outcome of any claim.

23 The common interest exception to solicitor-client privilege arose in the context of two parties jointly consulting one solicitor. See *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), *per* Martin J.A. at p. 245:

> The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication . . . .

24 The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame interest" as Lord Denning M.R. described it in *Buttes Gas & Oil v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (Eng. C.A.), at p. 483. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue here.

25 The Commission neither has a trust relationship with, nor owes a fiduciary duty to, the parties appearing before it. The Commission is a statutory decision-maker. The cases relied on by the appellant related to trusts, fiduciary duty, and contractual obligations. These cases are readily distinguishable and do not support the position advanced by the appellant. The common interest exception does not apply to an administrative board with respect to the parties before it.

26 The appellant relied heavily on the decision of the New Brunswick Court of Appeal in *Melanson v. New Brunswick (Workers' Compensation Board)* (1994), 146 N.B.R. (2d) 294 (N.B. C.A.). In that case, the court ordered a new hearing based on a failure by the Workers' Compensation Board to observe procedural fairness in the processing of the appellant's claim. The court held that several significant errors were made at the review committee level, negating the review committee's duty to act fairly. Among these errors were the failure to provide the

appellant with its first decision, the decision to turn the appellant's claim into a test case without her knowledge and partly at her expense, and the introduction of new evidence not disclosed to the appellant. For these reasons the court, in its *ratio*, concluded that "the taint at the intermediate level of the Review Committee has irrevocably blemished the proceedings" (para. 31). Other comments made by the Court of Appeal, pertaining to the production of legal opinions, were *obiter dicta*. The proper approach to legal opinions is to determine if they are of such a kind as would fall into the privileged class. If so, they are privileged. To the extent that *Melanson* is otherwise relied on is error.

***C. Application to the Case at Bar***

27 As stated, the communication between the Commission and its in-house counsel was protected by solicitor-client privilege.

28 The opinion provided to the Commission by staff counsel was a *legal opinion*. It was provided to the Commission by in-house or "staff" counsel to be considered or not considered at their discretion. It is a communication that falls within the class of communications protected by solicitor-client privilege. The fact that it was provided by in-house counsel does not alter the nature of the communication or the privilege.

29 There is no applicable exception that can remove the communication from the privileged class. There is no common interest between this Commission and the parties before it that could justify disclosure; nor is this Court prepared to create a new common law exception on these facts.

30 With respect, the motions judge erred in following the comments made by the New Brunswick Court of Appeal in *obiter dicta* in *Melanson* and in ordering production of the legal opinion.

31 Procedural fairness does not require the disclosure of a privileged legal opinion. Procedural fairness is required both in the trial process and in the administrative law context. In neither area does it affect solicitor-client privilege; both may coexist without being at the expense of the other. In addition, the appellant was aware of the case to be met without production of the legal opinion. The concept of fairness permeates all aspects of the justice system, and important to it is the principle of solicitor-client privilege.

32 Section 10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, provides:

> 10. When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

33 Legislation purporting to limit or deny solicitor-client privilege will be interpreted restrictively: see *Lavallee*, *supra*, at para. 18. Solicitor-client privilege cannot be abrogated by inference. While administrative boards have the delegated authority to determine their own procedure, the exercise of that authority must be in accordance with natural justice and the common law.

34 Where the legislature has mandated that the record must be provided in whole to the parties in respect of a proceeding within its legislative competence and it specifies that the "whole of the record" includes opinions provided to the administrative board, then privilege will not arise as there is no expectation of confidentiality. Beyond that, whether solicitor-client privilege can be violated by the express intention of the legislature is a controversial matter that does not arise in this appeal.

35 Section 10 of the *Judicial Review Procedure Act*, in any event, does not clearly or unequivocally express an intention to abrogate solicitor-client privilege, nor does it stipulate that the "record" includes legal opinions. As such, "record of the proceedings" should not be read to include privileged communications from Commission counsel to the Commission.

**VII. Disposition**

36 The communication between the Ontario Human Rights Commission and its in-house counsel is protected by solicitor-client privilege. It was a communication from a professional legal advisor, the Commission's in-house counsel, in her capacity as such, made in confidence to her client, the Commission. Accordingly, this appeal is dismissed and the decision of the Ontario Court of Appeal is confirmed. There is no order for costs as against the parties before this Court. Any order of costs pertaining to the judicial review should properly be considered by the Divisional Court undertaking the review.

*Order accordingly.*

*Ordonnance en conséquence.*

1979 CarswellNat 4
Supreme Court of Canada

Solosky v. R.

1979 CarswellNat 4, 1979 CarswellNat 630, [1979] S.C.J. No. 130,
[1980] 1 S.C.R. 821, [2003] A.C.S. No. 63, 105 D.L.R. (3d) 745,
16 C.R. (3d) 294, 30 N.R. 380, 4 W.C.B. 177, 50 C.C.C. (2d) 495

# SOLOSKY v. R.

Laskin C.J.C., Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

Heard: June 13, 1979
Judgment: December 21, 1979

Counsel: *R. Price, Q.C.*, and *D. P. Cole*, for appellant.
*E. Bowie* and *J.-P. Malette*, for the Crown.

***Dickson, J. (Laskin C.J.C., Martland, Ritchie, Pigeon, Beetz, Pratte* and *McIntyre JJ.* concurring):**

1 This case concerns the censorship of prisoners' mail and the right of an inmate of a federal penitentiary to communicate in confidence with his solicitor. The appellant, imprisoned at Millhaven Institution, commenced an action in the Federal Court [[1977] 1 F.C. 663, 33 C.C.C. (2d) 21, 73 D.L.R. (3d) 464, affirmed [1978] 2 F.C. 632, 41 C.C.C. (2d) 49, 86 D.L.R. (3d) 316, 22 N.R. 34] for a declaration that "properly identified items of correspondence directed to and received from his solicitor shall henceforth be regarded as privileged correspondence and shall be forwarded to their respective destinations unopened".

## I

### *Prison Disciplinary Regime*

2 The penitentiary authorities rely upon the following statutes and regulations as authorizing restrictions upon the personal correspondence of prison inmates. Section 660(1) of the Criminal Code, R.S.C. 1970, c. C-34, provides that a sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced. Section 29(1) of the Penitentiary Act, R.S.C. 1970, c. P-6, empowers the Governor in Council to make regulations for the custody, treatment, training, employment, and discipline of inmates, and, generally, for carrying into effect the purposes and provisions of the Penitentiary Act. Section

29(3) authorizes the Commissioner of Penitentiaries to make rules, known as commissioner's directives, for the custody, treatment, training, employment, and discipline of inmates, and the good government of penitentaries.

3 Pursuant to the foregoing, Penitentiary Service Regulations, SOR/62-90 [now C.R.C. 1978, vol. 13, c. 1251], were passed, which provide, in part, as follows:

> **Institutional Heads**
>
> 1.12(1) [now s. 5(1)] The institutional head is responsible for the direction of his staff, the organization, safety and security of his institution and the correctional training of all inmates confined therein ...
>
> **Visiting and Correspondence**
>
> 2.17 [now s. 27] The visiting and correspondence privileges that may, in accordance with directives, be permitted to inmates shall be such as are, in all the circumstances, calculated to assist in the reformation and rehabilitation of the inmate.
>
> **Censorship**
>
> 2.18 [now s. 28] In so far as practicable the censorship of correspondence shall be avoided and the privacy of visits shall be maintained, but nothing herein shall be deemed to limit the authority of the Commissioner to direct or the institutional head to order censorship of correspondence or supervision of visiting to the extent considered necessary or desirable for the reformation and rehabilitation of inmates or the security of the institution.

4 It will be observed then that the regulations, the validity of which are not challenged by the appellant, expressly recognize the authority of the institutional head of a penitentiary to order censorship of inmate correspondence to the extent considered necessary or desirable for the security of the institution. These regulations are implemented by commissioner's directive 219 (as amended following the date of issuance of the statement of claim in these proceedings, but prior to the date of trial). The following paragraphs are pertinent to the present inquiry:

> **Directive**
>
> 5. a. Penitentiary staff shall promote and facilitate correspondence between inmates and their families, friends, and other individuals and agencies who can be expected to make a contribution to the inmate's rehabilitation within the institution and to assist in his subsequent and eventual return to the community ...
>
> c. Subject to the provisions of paragraph 14 every inmate shall be permitted to correspond with any person, and shall be responsible for the contents of every article of correspondence

> of which he is the author. There shall be no restriction to the number of letters sent or received by inmates, unless it is evident that there is mass production.

Section 5(*d*) makes provision for inspection for contraband, in these terms:

> d. Subject to the provisions of paragraph 8, every item of correspondence to or from an inmate may be opened by institutional authorities for inspection for contraband.

Censorship, dealt with in s. 7, is defined as any examination (other than for the express purpose of searching for contraband) and includes the reading, reproducing, extracting, or withdrawing of inmate correspondence. Section 7(*b*) makes the point that censorship in any form is to be avoided, but reserves to the Commissioner of Penitentiaries and to the Institutional Director the authority to censor for one of two purposes, the rehabilitation of the inmate, or the security of the institution. Section 7(*b*) reads:

> b. Censorship of correspondence in any form shall be avoided, but nothing herein shall be deemed to limit the authority of the commissioner to direct, or the Institutional Director to order, censorship of correspondence in any form, to the extent considered necessary or desirable for the rehabilitation of the inmate or the security of the institution. (PSR 2. 18). Any form of censorship shall be undertaken only with the approval of the Institutional Director.

The directive seeks to maintain the confidentiality of the contents of correspondence. Section 7(*c*) states that only authorized staff shall be allowed to read inmate mail, when necessary, and further provides that no comments, other than those required for official duties, shall be made to other members of the staff on the contents of the correspondence.

5 Section 8 of directive 219 speaks of "privileged correspondence", defined as "properly identified and addressed items directed to and received from" any of a lengthy list of persons including, among others, members of the Senate, members of the House of Commons, members of provincial legislatures, and provincial ombudsmen. Conspicuous is the absence of any reference to inmates' legal representatives. Privileged correspondence is forwarded to the addressee unopened with the proviso that in exceptional cases, where institutional staff suspect contraband in such privileged correspondence, the commissioner's approval shall be obtained before it is opened. Section 8 clearly countenances the maintenance of uncensored channels of mail for complaints and grievances. But the restricted listing of destinations assures that the channels through which grievances pass are limited to internal procedures (Solicitor General, Commissioner of Penitentiaries, Correctional Investigator) or political outlets (Members of Parliament and Senators). Lawyers are mentioned in s. 10(*c*) of directive 219, "Use of Telephone and Telegraph", which reads:

> c. In urgent cases where lawyers call their inmate clients, and wish to communicate privately with them, the institutional authorities shall ask the lawyer to leave his name and telephone

number and, following verification of the lawyer's identity, a call shall originate from the institution.

For the purposes of trial, an agreed statement of facts was filed. Paragraphs 4 and 5 of the statement are in the following terms:

> 4. Pursuant to section 6 paragraph (b) [s. 7(b), as amended,] of Directive No. 219, John Dowsett, Director of Millhaven Institution has ordered that William (Billy) Solosky's mail be opened and read. This order has been applied to mail originating from his solicitor David Cole.
>
> 5. William (Billy) Solosky's mail is being read because it is John Dowsett's opinion that William (Billy) Solosky's conduct, activities and attitude cause him to believe that attention should be paid to his incoming and outgoing correspondence. Those letters which are deemed to be significant with respect to the security of the institution are being brought to the attention of John Dowsett.

Paragraph 5 of the statement of defence clarifies any obscurity in para. 5 of the agreed statement of facts. The statement of defence reads "The security of the Millhaven Institution has required that the plaintiff's mail be opened."

**II**

***Judicial History***

6 Addy J., at trial, was of the view that solicitor-and-client privilege, upon which the appellant founds his case, can be claimed only document by document, and that each document is privileged only to the extent that it meets the criteria which would support the privilege. Whether a letter does in fact contain a privileged communication cannot be determined until it has been opened and read. There is no logical or legal justification for permitting correspondence which appears to have emanated from, or to be addressed to, a solicitor to enjoy any special aura of protection. Addy J. relied upon these propositions in dismissing the appellant's action, with costs. He buttressed his conclusion by the argument that in this situation it would be too easy for a person to obtain envelopes and letterheads bearing the name and title of a read or fictitious solicitor, and equally as easy for a prisoner to camouflage the true identity of an addressee.

7 The appellant appealed to the Federal Court of Appeal. In that court, his counsel amended the pleadings to request a declaration "... that henceforth all properly identified items of solicitor-client correspondence should be forwarded to their respective destinations unopened". The revised form of declaration differs little from that appearing in the amended statement of claim. Both are defective, at least to this extent — it is not every item of correspondence passing between solicitor and client to which privilege attaches, for only those in which the client seeks the advice

of counsel in his professional capacity, or in which counsel gives advice, are protected. That a privilege may not encompass all solicitor-and-client communications is clearly illustrated by the correspondence exhibited in the present case. Some of the letters concerned the appellant's parole review. Others merely contained criticism of the administration, information about other inmates and prison gossip. One letter enclosed a second letter, with the request that the second letter be forwarded to a named magazine for publication.

8 The Federal Court of Appeal dismissed the appeal, holding that a declaration that *all correspondence* between the appellant and his solicitor be declared privileged would extend considerably the ambit of the solicitor/client privilege as it is generally known and understood. To grant the declaration sought would be to give to the appellant an extension of the privilege afforded to the ordinary citizen. As a second ground for rejecting the appeal, the court held that by issuing an order relating to correspondence not yet written, the court would be granting relief on the basis of purely hypothetical issues, and in futura. Assuming jurisdiction, the case was not one where jurisdiction should be asserted.

**III**

***Declaratory Relief***

9 At the opening of the appeal in this court, counsel for the appellant moved to substitute, for the prayer for relief in the statement of claim, a declaration that the order of the director of Millhaven Institution that the appellant's mail be opened and read "insofar as it has been applied to mail originating from his solicitor, David Cole, and to mail written by the plaintiff to his solicitor, David Cole, is not authorized by law". The amended form of prayer seems to have been conceived with a view to meeting the point, taken by the Federal Court of Appeal, that the relief earlier sought would relate to letters not yet written.

10 With great respect for the views expressed in the Federal Court of Appeal, I do not think that the important issues raised in these proceedings should be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

11 Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.

12 The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of *Russian Commercial & Indust. Bank v. Br. Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438 (H.L.), in which parties to a contract sought assistance in construing it, the court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

13 In *Pyx Granite Co. Ltd. v. Ministry of Housing and Loc. Govt.*, [1958] 1 Q.B. 554, [1958] 1 All E.R. 625, reversed [1960] A.C. 260, [1959] 3 All E.R. 1 (H.L.), on other grounds, Denning L.J. described the declaration in these general terms (p. 571):

> ... if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

14 The jurisdiction of the court to grant declaratory relief was again stated, in the broadest language, in *Pharmaceutical Society of Great Britain v. Dickson*, [1970] A.C. 403, [1968] 2 All E.R. 686 (H.L.), a case in which the applicant sought a declaration that a proposed motion of the pharmaceutical society, if passed, would be ultra vires its objects and in unreasonable restraint of trade. In the course of his judgment, Lord Upjohn stated, at p. 433:

> A person whose freedom of action is challenged can always come to the court to have his rights and position clarified, subject always, of course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case.

15 In the instant case, *Mellstrom v. Garner*, [1970] 1 W.L.R. 603, [1970] 2 All E.R. 9 (C.A.), was cited in the Federal Court of Appeal in support of the proposition that courts will not grant declarations regarding the future. There, a chartered accountant and former partner of the defendant sought a declaration as to the true construction of the agreement by which the partnership had been dissolved. The plaintiff asked whether, having regard to a clause in the agreement, he would be in breach were he to solicit clients or business of the "continuing partners". Karminski L.J. held that declarations concerning the future ought to be approached with considerable reserve. Since neither the plaintiff nor the defendants had broken the provisions of the clause in question or sought to do so, there was no useful purpose to be gained in granting the declaration. The application was dismissed. That is a very different case from the present one.

16 As Hudson suggests in his article "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dalhousie L.J. 706, p. 708:

> The declaratory action is discretionary and two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.

The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise. As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and "hypothetical" rights, and, on the other hand, a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as "future rights" (p. 710)

17 Here there can be no doubt that there is a real, and not a hypothetical, dispute between the parties. The declaration sought is a direct and present challenge to the censorship order of the Director of Millhaven Institute. That order, so long as it continues, from the past through the present and into the future, is in controversy. The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself deprive the remedy of its potential utility in resolving the dispute over the director's continuing order.

18 Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case.

19 The determination of the right of prison inmates to correspond freely and in confidence with their solicitors is of great practical importance; although, admittedly, any such determination relates to correspondence not yet written.

20 However poorly framed the prayer for relief may be, even as twice amended, the present claim is clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege. It is not directed to the characterization of specific and individual items of correspondence. If the appellant is entitled to a declaration, it is within this court's discretion to settle the wording of the declaration: see de Smith, Judicial Review of Administrative Action, 3rd ed. (1973), p. 431. Further, s. 50 of the Supreme Court Act, R.S.C. 1970, c. S-19, allows the court to make amendments necessary to a determination of the "real issue", without application by the parties.

**IV**

***Solicitor-Client Privilege***

21 As I have indicated, the main ground upon which the appellant rests his case is solicitor-client privilege. The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice. As Jackett C.J.F.C. aptly stated in *Re Shell Can. Ltd.*, [1975] F.C. 184, 29 C.R.N.S. 361, 18 C.P.R. (2d) 70, 22 C.C.C. (2d)

70 at 78-79, 55 D.L.R. (3d) 713 (sub nom. *Re Director of Investigation & Research and Shell Can. Ltd.*) (C.A.):

> ... the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.

22 The history of the privilege can be traced to the reign of Elizabeth I: see *Berd v. Lovelace* (1577), Cary 62, 21 E.R. 33 (Ch.), and *Dennis v. Codrington* (1579), Cary 100, 21 E.R. 53 (Ch.). It stemmed from respect for the "oath and honour" of the lawyer, duty bound to guard closely the secrets of his client, and was restricted in operation to an exemption from testimonial compulsion. Thereafter, in stages, privilege was extended to include communications exchanged during other litigation, those made in contemplation of litigation, and finally any consultation for legal advice, whether litigious or not. The classic statement of the policy grounding the privilege was given by Brougham L.C. in *Greenough v. Gaskell* (1833), 1 My. & K. 98, 39 E.R. 618 at 620-21:

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.
>
> But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

The rationale was put this way by Jessel M.R. in *Anderson v. Bank of B.C.* of B.C. (1876), 2 Ch.D. 644 at 649 (C.A.):

> The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for

it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

23 Wigmore on Evidence, McNaughton revision (1961), vol. 8, para. 2292, p. 554, framed the modern principle of privilege for solicitor-client communications, as follows:

> *Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.*

24 There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach: *O'Shea v. Woods*, [1891] P. 286 at 289 (C.A.). More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is *R. v. Cox* (1884), 14 Q.B.D. 153 (C.C.R.), in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment.'"

25 Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a courtroom. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits: see *Re Director of Investigation & Research and Can. Safeway Ltd.*, [1972] 3 W.W.R. 547, 6 C.P.R. (2d) 41, 26 D.L.R. (3d) 745 (B.C.S.C.); *Re Shell Can. Ltd.*, supra; *Re Presswood and Internat. Chemalloy Corpn.* (1975), 11 O.R. (2d) 164, 36 C.R.N.S. 322, 25 C.P.R. (2d) 33, 65 D.L.R. (3d) 228 (H.C.); *Re Borden and R.* (1975), 13 O.R. (2d) at 249, 30 C.C.C. (2d) at 337, 70 D.L.R. (3d) at 580, affirmed on other grounds 13 O.R. (3d) 248, 30 C.C.C. (2d) 373, 70 D.L.R. (3d) 579 (C.A.); *Re BX Dev. Ltd. and R.; Charleston Resources Ltd. (N.P.L.) v. R.*, [1976] 4 W.W.R. 364, 31 C.C.C. (2d) 14, 70 D.L.R. (3d) 366 (B.C.C.A.); *Re B. and R.* (1977), 36 C.C.C. (2d) 235 (Ont. Prov. Ct.).

26 While there is no question that the Canadian courts have been moving towards a broader concept of solicitor-client privilege, I do not think the concept has been stretched far enough to save the appellant's case. Although there has been a move away from treating solicitor-client privilege as a rule of evidence that can only be asserted at the time the privileged material is sought to be introduced as evidence, the move from rigid temporal restrictions has not gone as far as the appellant contends. In the factum of the appellant, it is suggested that the privilege has come to be recognized as a "fundamental principle", more properly characterized as a "rule of property". The cases cited in support of this proposition, however, all involved search warrants that caught

documents to which the privilege unquestionably attached. In those cases, such as *Re Borden and R.*, supra, the search warrant led to the seizure of documents believed "to afford evidence". If privilege were to attach to the documents, then such material could not afford evidence at trial and hence the evidentiary connection remained. The judgments can be rationalized as merely shifting the time at which the privilege can be asserted. As the comment by Kasting in "Recent Developments in the Law of Solicitor-Client Privilege" (1978), 24 McGill L.J. 115, suggests, the shift away from the strict rule-of-evidence-at-trial approach has taken place by logical extensions. Chasse, in his annotation "The Solicitor-Client Privilege and Search Warrants" (1977), 36 C.R.N.S. 349, asserts that the privilege is being looked upon "as more akin to a rule of property rather than merely as a rule of evidence" (p. 350), but the privilege, in my view, is not yet near a rule of property. That is what the privilege must become if the appellant is to succeed.

27 There is no suggestion in the materials in the case at bar that the authorities intend to employ the letters or extracts obtained therefrom as evidence in any proceeding of any kind. Much as one might well wish to analogize from the search warrant cases to the censorship order here impugned, as a form of blanket search warrant upon the appellant's mail, the order cannot be characterized as being directed to obtaining or affording evidence in any proceeding. Without the evidentiary connection, which the law now requires, the appellant cannot invoke the privilege.

28 As Addy J. notes, privilege can be claimed only document by document, with each document being required to meet the criteria for the privilege: (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

29 The complication in this case flows from the unique position of the inmate. His mail is opened and read, not with a view to its use in a proceeding, but by reason of the exigencies of institutional security. All of this occurs within prison walls and far from a court or quasi-judicial tribunal. It is difficult to see how the privilege can be engaged, unless one wishes totally to transform the privilege into a rule of property, bereft of an evidentiary basis.

30 In my view, the statutory disciplinary régime, which I have earlier described, does not derogate from the common law doctrine of solicitor and client privilege, as presently conceived, but the appellant is seeking in this appeal something well beyond the limits of the privilege, even as amplified in modern cases.

**V**

31 In aid of his main submission, resting upon privilege, counsel for the appellant argued faintly that the Penitentiary Service Regulations and commissioner's directive should not be construed

and applied so as to abrogate, abridge, or infringe any of the rights or freedoms recognized in the Canadian Bill of Rights, R.S.C. 1970, App. III, by ss. 1(*b*) (the right of the individual to equality before the law and the protection of the law), 1(*d*) (freedom of speech) and 2(*c*)(ii) (the right of a person arrested or detained to retain and instruct counsel without delay). The authorities relied upon by counsel were, in the main, breathalyzer cases dealing with the right of a motorist to communicate with his counsel in private and without delay. These, and other cases cited, give little assistance to the resolution of the issue now before the court, due to the difference in factual context and relevant considerations. The question in this case is whether the appellant's right to retain and instruct counsel is incompatible with the right of prison authorities to prevent threat to the security of the institution. In my view, there is no such incompatibility provided the exercise of authority is not greater than is necessary to support the security interest. This, as I read it, is precisely the effect of s. 7(*b*) of Directive 219.

32 With respect to s. 1(*b*) of the Bill of Rights, it has been held by this court that equality before the law does not require "that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective": Martland J., giving the unanimous reasons of this court in *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376 at 382, 52 D.L.R. (3d) 383, 3 N.R. 484.

33 It is difficult to attack the validity of Penitentiary Service Reg. 2.18 or Directive 219 with a freedom of speech argument, having regard to the will of Parliament, as reflected in the Penitentiary Act and in the Penitentiary Service Regulations, which preserves a limited right of censorship by penitentiary authorities in the interests of security and, at the same time, affords inmates a right to communicate freely through uncensored channels with members of Parliament and provincial legislatures, and the many persons listed in s. 8 of Directive 219.

**VI**

34 One may depart from the current concept of privilege and approach the case on the broader basis that: (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client; and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law.

35 In that context, the court is faced with the interpretation of the Penitentiary Service Regulations and Commissioner's Directive 219. Regulation 2.18, as earlier noted, undoubtedly reserves the authority of the institutional head to order censorship of correspondence to the extent considered necessary or desirable for the security of the institution. As a general rule, I do not think it is open to the courts to question the judgment of the institutional head as to what may, or may not, be necessary in order to maintain security within a penitentiary. On the other hand, it is to be noted

that Penitentiary Service Reg. 2.18 and Commissioner's Directive 219 speak in general terms, in their reference to the reading of correspondence and to other forms of censorship, without express mention of solicitor-client correspondence. the right to privacy in solicitor-client correspondence has not been expressly taken away by the language of the regulations and the directive.

36 Most prisons are sufficiently remote that the mail constitutes the prime means of communication to an inmate's solicitor. Nothing is more likely to have a "chilling" effect upon the frank and free exchange and disclosure of confidences, which should characterize the relationship between inmate and counsel, than knowledge that what has been written will be read by some third person, and perhaps used against the inmate at a later date. I do not understand counsel for the Crown to dispute the importance of these considerations.

37 The result, as I see it, is that the court is placed in the position of having to balance the public interest in maintaining the safety and security of a penal institution, its staff and its inmates, with the interest represented by insulating the solicitor-client relationship. Even giving full recognition to the right of an inmate to correspond freely with his legal adviser, and the need for minimum derogation therefrom, the scale must ultimately come down in favour of the public interest. But the interference must be no greater than is essential to the maintenance of security and the rehabilitation of the inmate.

38 The difficulty is in ensuring that the correspondence between the inmate and his solicitor, whether within the doctrine of solicitor-client privilege or not, is not cloaking the passage of drugs, weapons, or escape plans. There must be some mechanism for verification of authenticity. That seems to be generally accepted. Yet, no one has so far suggested what third party mechanism might be adopted, or by what authority the courts could impose such a mechanism upon penitentiary authorities.

39 Counsel for the Crown submits there are three alternative interpretations of the scope of Regs. 2.17 and 2.18 which may govern the extent of the authority of the institutional head in dealing with an envelope which appears to have originated from a solicitor, or to be addressed to a solicitor, in circumstances where the institutional head has reason to believe that the unrestricted and unexamined passage of mail to or from the particular inmate in question represents a danger to the safety and security of the institution:

40 (a) he may nonetheless permit the letter to be delivered unopened and unexamined to the inmate;

41 (b) he may suspend the inmate's privilege to receive mail, in respect of that letter, pursuant to Regs. 2.17 and 2.18 of the Penitentiary Service Regulations;

42 (c) he may order that the envelope be subject to opening and examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege.

43 Counsel contends that to interpret the regulations as requiring the first of these alternatives is to leave the institutional head without the authority he requires to control the potential passage of contraband, or of correspondence which may endanger the safety of the institution, under the guise of confidential communications passing between inmate and solicitor. I agree. I would also reject the second as providing no solution. I agree that the third alternative represents that interpretation of the scope of the regulations which permits to an inmate the maximum opportunity to communicate with his solicitor through the mails that is consistent with the requirement to maintain the safety and security of the institution.

44 In my view, the "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that: (i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should be read only if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the bona fides of the communication; and (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication. Section 7(*c*) of Directive 219 underlines this point.

45 The appellant has failed to establish entitlement to a declaration in any of the three forms he has advanced in these proceedings. The appeal must be dismissed. The respondent is entitled to costs in this court.

***Estey J.*** **(concurring in the result):**

46 I have had the opportunity of reading the reasons for judgment of my brother Dickson, and I concur therein. I only wish to add to item (iii) in his cata logue of considerations in the interpretation of the expression "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege." Item (iii) reads as follows:

> (iii) the letter should be read only if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to confirm the bona fides of the communication.

In my respectful view, any procedure adopted with reference to the scrutiny of letters passing from solicitor to client should, wherever reasonably possible, recognize the solicitor-client privilege long established in the law. Any mechanics adopted for their examination should, subject only to special circumstances indicating an overriding necessity for intervention by the authorities, safeguard communications flowing under the protection of the privilege so as to ensure that the privilege is left in a practical, workable condition; for example, a covering letter from a solicitor

forwarding a sealed communication which the solicitor states to be a communication of legal advice should ordinarily shield the enclosure from examination by the authorities. I would dispose of the appeal as proposed by Dickson J.

***Dickson J. (Laskin J.C.C., Martland, Ritchie, Pigeon, Beetz, Pratte et McIntyre JJ.* concourant):**

47 Cette affaire porte sur la censure du courrier des prisonniers et sur le droit d'un détenu d'un pénitencier fédéral de communiquer en confidence avec son avocat. L'appelant, détenu à l'institution de Millhaven, a intenté une action en Cour fédérale afin d'obtenir un jugement déclaratoire [[1977] 1 C.F. 663, 33 C.C.C. (2d) 21, 73 D.L.R. (3d) 464, affirmé [1978] 2 C.F. 632, 41 C.C.C. (2d) 49, 86 D.L.R. (3d) 316, 22 N.R. 34] portant que "[Traduction] la correspondance valablement identifiée comme adressée à son avocat et reçue de ce dernier soit désormais considérée comme communication privilégiée et soit remise aux destinataires concernés sans être ouverte".

**I**

***Le régime disciplinaire en milieu carcéral***

48 Les autorités pénitentiaires tirent leur pouvoir d'imposer des restrictions à la correspondance personnelle des détenus des Lois et du règlement qui suivent. L'article 660(1) du Code criminel, S.R.C. 1970, c. C-34, prévoit qu'une sentence d'emprisonnement doit être purgée conformément aux dispositions et règles qui régissent l'institution où le prisonnier est incarcéré. L'article 29(1) [modifié par 1976-77, c. 53, art. 44] de la Loi sur les pénitenciers, S.R.C. 1970, c. P-6, donne au gouverneur en conseil le pouvoir d'édicter des règlements relatifs à la garde, au traitement, à la formation, à l'emploi et à la discipline des détenus et, de façon générale, à la réalisation des objets de la Loi sur les pénitenciers et à l'application de ses dispositions. L'article 29(3) donne au Commissaire des pénitenciers le pouvoir d'établir des règles, connues sous le nom d'"instructions du commisaire", concernant la garde, le traitement, la formation, l'emploi et la discipline des détenus et la direction judicieuse des pénitenciers.

49 Le Règlement sur le service des pénitenciers, DORS/62-90 [maintenant C.R.C. 1976, vol. 13, c. 1251], a été adopté en application des dispositions qui précèdent. Il prévoit notamment ce qui suit:

> **Chefs d'institutions**
>
> 1.12(1) [maintenant l'art 5(1)] Le chef d'institution est responsable de la direction de son personnel, de l'organisation, de la sûreté et de la sécurité de son institution, y compris la formation disciplinaire des détenus qui y sont incarcérés ...
>
> **Visites et correspondance**

2.17 [maintenant l'art. 27] Les privilèges concernant les visiteurs et la correspondence, qui peuvent conformément aux directives être accordés aux détenus, doivent être tels qu'en toutes circonstances ils contribuent à la rééducation et à la réadaptation du détenu.

**Censure**

2.18 [maintenant l'art. 27] Dans la mesure où cela est pratique, la censure de la correspondence doit être évitée et l'intimité des visites doint être respectèe, mais rien aux présentes ne doit être considéré comme limitant l'autorité du comissaire de reglementer, ou du chef d'une institution d'ordonner, la censure de la correspondance ou la surveillance des visites selon les modaités tenues pour nécessaires ou utiles à la rééducation et à la réadoption des détenus ou à la sécurité de l'institution.

50 Il convient de noter que le reglement, dont la validité n'est pas contestée par l'appelant, reconnaît expressément le pouvoir du chef d'une institution pénitentiaire d'ordonner la censure de la correspondance des détenus selon les modalités tenues pour nécessaires ou utiles à la sécurité de l'institution. La directive du commissaire 219 (modifiée postérieurement à la date de la signification de la déclaration dans les présentes procédures mais antérieurement à la date de l'instruction) met en application ce règlement. Les paragraphes suivants s'appliquent en l'espèce:

**Directive**

5.(*a*) La correspondance entre les détenus et leurs parents, leurs amis et les autres personnes et organismes doit être encouragée par le personnel pénitentiaire lorsque la communication est nécessaire ou désirable, et spécialement lorsque l'on croit qu'elle peut contribuer à la réadaptation du détenu ...

(*c*) Sous réserve du paragraphe 14, chaque détenu sera autorisé à correspondre avec qui il voudra et sera responsable du contenu de chaque envoi qu'il expédiera. Aucune restriction ne sera imposée quant au nombre de lettres envoyées ou reçues par les détenus, à moins qu'il ne soit évident qu'il y ait production en masse.

L'article 5(*d*) prévoit l'inspection de la correspondance pour prévenir la contrebande:

(*d*) Sous réserve du paragrape 8, chaque pièce de correspondance envoyée ou reçue par une détenu peut être ouverte par la direction de l'institution qui est chargée de prévenir l'introduction d'objets de contrebande.

La censure signifie, aux termes de l'art. 7, tout examen (autre que dans le but exprès de chercher des objets de contrebande) et comprend la lecture, la reproduction, l'extraction ou l'interception de la correspondance des détenus. L'article 7(*b*) établit la règle que la censure, sous quelque forme qu'elle soit, doit être évitée, mais réserve au Commissaire des pénitenciers et au directeur de

l'institution le pouvoir de censurer dans l'un des deux buts suivants, la réadaptation sociale du détenu ou la sécurité de l'institution. L'article 7(*b*) se lit comme suit:

> (*b*) On évitera de censurer la correspondance sous quelque forme qu'elle soit, mais rien dans la présente ne sera considéré comme limitant l'autorité du Commissaire ou du directeur de l'institution d'ordonner la censure de la correspondance sous quelque forme qu'elle soit, lorsque cette mesure sera jugée nécessaire ou souhaitable pour la réadaptation sociale du détenu ou la sécurité de l'institution (art. 2.18 du RSP). Toute forme de censure ne sera entreprise que sur l'approbation du directeur de l'institution.

La directive cherche à maintenir le caractère confidentiel du contenu de la correspondance. L'article 7(*c*) prévoit que seul le personnel autorisé pourra lire le courrier des détenus, si nécessaire, et prévoit en outre qu'aucune observation sur son contenu autre que celles que commande l'exercice de fonctions officielles ne sera faite à d'autres membres du personnel.

51 L'article 8 de la directive 219 définit la "correspondance privilégiée" comme celle "se rapportant à des pièces dont les identificateurs et adresses sont indiqués comme il se doit et dont la destination ou la provenance" se rattache à l'une des nombreuses catégories de personnes énumérées, notamment, les sénateurs, les députés fédéraux, les députés provinciaux et les ombudsmen provinciaux. L'absence de toute mention des conseillers juridiques des détenus est frappante. La correspondance privilégiée est envoyée au destinataire sans avoir été ouverte sous réserve qu'en des cas exceptionnels où le personnel de l'establissement soupçonne qu'un envoi privilégié contient des objets de contrebande, on obtienne l'approbation du commissaire avant de l'ouvrir. L'article 8 consacre clairement le maintien de canaux non censurés pour la correspondance relative aux plaintes et aux griefs, mais l'énumération restreinte des destinataires assure que les canaux empruntés par les griefs débouchent seulement sur les procedures internes (Solliciteur général, Commissaire des pénitenciers, Enquêteur correctionnel) ou les politiciens (députés et sénateurs). L'article 10(*c*) de la directive 219, intitulé "Usage du téléphone et du télégraphe", fait mention des avocats:

> (*c*) Dans des cas urgents où des avocats appellent leurs clients détenus et désirent communiquer en privé avec eux, les autorités de l'institution demanderont à l'avocat de laisser son nom et son numéro de téléphone et, après une vérification de l'identité de l'avocat, un appel proviendra de l'institution.

Aux fins du procès, un exposé conjoint des faits a été déposé, dont les par. 4 et 5 se lisent comme suit:

> [Traduction]

> 4. Conformément à l'art. 6 [art. 7(*b*), modifié] de la directive 219, John Dowsett, directeur de l'institution de Millhaven, a ordonné que le courrier de William (Billy) Solosky soit ouvert et lu. Cet ordre a été appliqué au courrier en provenance de son avocat, Me David Cole.
>
> 5. Le courrier de William (Billy) Solosky doit être lu parce que John Dowsett est d'avis que la conduite, les activités et l'attitude de Solosky justifient une surveillance de son courrier à l'envoi et à la réception. Les lettres qui sont réputées présenter un intérêt pour la sécurité de l'établissement sont portés à l'attention de John Dowsett.

Le paragraphe 5 de la défense dissipe toute ambiguïté du par. 5 de l'exposé conjoint des faits. La défense precise que "[Traduction] La sécurité de l'institution de Millhaven exige que le courrier du demandeur soit ouvert."

**II**

***L'historique judiciaire***

52 En première instance, Addy J. était d'avis que le privilège entre avocat et client, sur lequel l'appelant s'appuie en l'espèce, ne peut être invoqué que pour chaque document pris individuellement et qu'un document est privilégié uniquement quand il répond aux critères qui permettent d'appuyer le privilège. On ne peut pas déterminer si une lettre contient effectivement une communication privilégiée avant de l'avoir ouverte et lue. Il n'y a aucune justification logique ou juridique à ce que la correspondance, qui semble provenir d'un avocat ou lui être addressée, jouisse d'une aura protectrice particulière. Addy J. s'est fondé sur ces propositions pour rejeter l'action de l'appelant, avec dépens. Il fonde sa conclusion sur l'argument que dans ce cas il serait trop facile à quiconque de se procurer des enveloppes et du papier à en-tête avec les nom titre d'un avocat, réel ou imaginaire, et également aussi facile pour un détenu de camoufler l'identité véritable d'un destinataire.

53 L'appelant a interjeté appel devant la Cour d'appel fédérale. Son avocat a modifié les procédures écrites afin d'obtenir un jugement déclaratoire portant que. "[Traduction] désormais, toute la correspondance valablement identifiée comme échangée entre l'avocat et son client soit remise aux destinataires concernés sans être ouverte" [p. 633]. Cette nouvelle formulation diffère très peu de celle de la déclaration amendée. Les deux sont imparfaites, au moins dans la mesure où le privilège ne se rattache pas à toute la correspondance échangée entre un avocat et son client, car seules sont protégées les communications en vertu desquelles le client consulte son avocat à titre professionnel ou en vertu desquelles ce dernier lui donne un avis. La correspondance produit en l'espèce illustre clairement qu'un privilège ne peut pas englober toutes les communications entre un avocat et son client. Certaines lettres traitent de l'examen de la libération conditionnelle de l'appelant. D'autres contiennent simplement des critiques de l'administration, des renseignements

sur d'autres détenus et des potins de la prison. L'une des lettres renferme une seconde lettre avec une note qui en demande la transmission à une revue désignée afin d'y être publiée.

54 La Cour d'appel fédérale a rejeté l'appel au motif qu'un jugement qui déclarerait privilégiée *toute la correspondance* échangée entre l'appelant et son avocat élargirait de façon considérable la portée du privilège entre avocat et client tel qu'on le comprend généralement. Accorder la déclaration demandée équivaudrait à donner à l'appelant une extension du privilège dont bénéficie le citoyen ordinaire. Comme second motif de rejet de l'appel, la cour a conclu qu'en délivrant un ordre relatif à de la correspondance non encore écrite, elle accorderait un redressement fondé sur des questions purement hypothétiques, et por l'avenir. En supposant que la cour ait compétence, il ne s'agit pas d'une affaire où elle devrait l'exercer.

**III**

***Le jugement déclaratoire***

55 Au début de l'audition devant cette cour, l'avocat de l'appelant a demandé que le redressement requis dans la déclaration soit remplacé par un jugement déclaratoire portant que l'ordre du directeur de l'institution de Millhaven d'ouvrir et de lire le courrier de l'appelant "[Traduction] quand il a été appliqué au courrier provenant de son avocat, Me David Cole, et à celui expédié par le demandeur à son avocat, Me David Cole, n'est pas légal". Cette modification semble vouloir répondre au point soulevé par la Cour d'appel fédérale que le redressement sollicité auparavant se rapporterait à des lettres non encore écrites.

56 Avec égards pour l'opinion exprimée en Cour d'appel fédérale, je n'estime pas que les questions importantes soulevées dans ces procédures doivent dépendre de l'énoncé particulier de la demande de redressement, ni de l'argument que la question est hypothétique.

57 Le jugement déclaratoire est un recours qui n'est pas restreint par la forme ni limité par le fond et qui appartient à des personnes ayant un lien juridique dont découle une "véritable question" à trancher concernant leurs intérêts respectifs.

58 Les principes qui guident le tribunal dans l'exercice de sa compétence en matière de jugement déclaratoire ont été maintes fois exposés. Dans une affaire ancienne, *Russian Commercial & Indust. Bank c. Br. Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438 (C.L.), où les parties à un contrat ont demandé une aide pour l'interpréter, la cour a affirmé qu'un jugement déclaratoire peut être accordé lorsque des questions réelles, et non fictives ou théoriques, sont soulevées. Lord Dunedin a formulé le critère suivant (à la p. 448):

> [Traduction]

> La question doit être réelle et non théorique, celui qui la soulève doit avoir un intérêt réel à le faire et il doit pouvoir présenter un adversaire valable, c'est-à-dire quelqu'un ayant un intérêt véritable à s'opposer à la déclaration sollicitée.

59 Dans *Pyx Granite Co. Ltd. c. Ministry of Housing & Loc. Govt.*, [1958] 1 Q.B. 554, [1958] 1 All E.R. 625, infirmé [1960] A.C. 260, [1959] 3 All E.R. 1 (C.L.), pour d'autres motifs, Denning L.J. décrit la nature du jugement déclaratoire en ces termes (p. 571):

> [Traduction]
>
> ... s'il existe une question de fond que quelqu'un a un intérêt réel à soulever, et quelqu'un d'autre à s'y opposer, alors le tribunal a le pouvoir discrétionnaire de la résoudre par voie de jugement déclaratoire, ce qu'il fera si c'est justifié.

60 La compétence du tribunal de rendre des jugements déclaratoires a encore été énoncée, en termes trés généraux, dans l'arrêt *Pharmaceutical Society of Great Britain c. Dickson*, [1970] A.C. 403, [1968] 2 All E.R. 686 (C.L.). Dans cette affaire, le requérant sollicitait un jugement portant qu'une proposition de la société pharmaceutique, advenant son adoption, outrepasserait les objets de la société et constituerait une limitation injustifiée du commerce. Lord Upjohn s'est exprimé en ces termes dans son jugement, à la p. 433:

> [Traduction]
>
> Une personne dont la liberté d'action est contestée peut toujours s'adresser au tribunal afin de faire éclaircir ses droits et sa situation, toujours sous réserve, bien entendu, du droit du tribunal dans l'exercice de sa discrétion judiciaire, de refuser le redressement demandé dans les circonstances de l'affaire.

61 L'arrêt *Mellstrom c. Garner*, [1970] 1 W.L.R. 603, [1970] 2 All E.R. 9 (C.A.), a été cité en Cour d'appel fédérale à l'appui de la proposition que les tribunaux n'accordent pas de jugements déclaratoires sur des questions concernant le futur. Un comptable agréé, ancien associé des défendeurs, y demandait un jugement déclaratoire sur la bonne interprétation de la convention de dissolution de la société. Le demandeur voulait savoir si, vu une clause de la convention, solliciter pour son compte des clients ou des affaires des "associés restant" constituait une violation de la convention. Karminski L.J. a conclu que les jugements déclaratoires sur des questions concernant le futur doivent être abordés avec beaucoup de réserve. Puisque ni le demandeur ni les défendeurs n'avaient violé les dispositions de la clause en question ni cherché à le faire, il ne servait à rien d'accorder le jugement déclaratoire. La requête a été rejetée. Cette affaire est très différente de la présente espèce.

62 Comme le laisse entendre Hudson dans son article intitulé "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dalhousie L.J. 706 à la p. 708:

[Traduction]

> Le jugement déclaratoire est de nature discrétionnaire et les deux facteurs qui vont influencer le tribunal dans l'exercice de son pouvoir discrétionnaire sont l'utilité du redressement, s'il est accordé, et la probabilité dans ce cas qu'il puisse régler les questions en litige entre les parties.

Le premier facteur vise la "réalité du litige". Il est clair qu'un jugement déclaratoire n'est normalement pas accordé lorsque le litige est passé et est devenu théorique ou lorsque le litige n'est pas encore né et ne naîtra probablement pas. Toutefois, comme Hudson le souligne, il faut faire la distinction entre d'une part un jugement déclaratoire qui vise des droits "futurs" et des droits "hypothétiques" et, d'autre part, un jugement déclaratoire qui peut être "[Traduction] applicable sur-le-champ" lorsqu'il détermine les droits des parties au moment de la décision ainsi que les implications et conséquences indissociables de ces droits, ce qu'on appelle les "droits futurs" (p. 710).

63 En l'espèce, il ne fait aucun doute qu'il existe entre les parties un litige réel et non un litige hypothétique. Le jugement déclaratoire sollicité attaque directement et maintenant l'ordre de censure du directeur de l'institution de Millhaven. Cet ordre, tant qu'il reste en vigueur, du passé au présent et dans l'avenir, est contesté. Le fait qu'un jugement déclaratoire accordé aujourd'hui ne puisse réparer les maux passés ou puisse toucher aux droits futurs ne prive pas le recours de son utilité potentielle dans la solution du litige découlant de l'ordre permanent du directeur.

64 Une fois admis qu'il existe un litige réel et qu'accorder un jugement est discrétionnaire, alors la seule autre question à ré soudre est de savoir si le jugement déclaratoire est à même de régler, de façon pratique, les questions en l'espèce.

65 Déterminer le droit d'un détenu de correspondre librement et en confidence avec son avocat est d'une importance pratique considérable même si, de l'aveu général, pareille détermination se rapporte à de la correspondance non encore écrite.

66 Aussi mal rédigée que puisse être la demande de redressement, même avec ses deux modifications, la présente réclamation vise clairement les procédures de traitement du courrier en prison et le recours à cet égard au privilege entre avocat et client. Elle ne porte pas sur la caractérisation de pièces de correspondance précises et individuelles. Si l'appelant a droit à un jugement déclaratoire, il relève du pouvoir discrétionnaire de cette cour d'en fixer l'énoncé: voit de Smith, Judicial Review of Administrative Action, 3e èd. (1973), p. 431. De plus, l'art. 50 de la Loi sur la Cour suprême, S.R.C. 1970, c. S-19, donne à la cour le pouvoir de faire les amendements nécessaires pour statuer sur la "véritable question", sans que demande en ait été faire par les parties.

**IV**

***Le privilège entre avocat et client***

67 Comme je l'ai déjà indiqué, le moyen principal sur lequel l'appelant se fonde est le privilège entre avocat et client. La notion des communications privilégiées entre avocat et client est depuis longtemps reconnue comme essentielle à la bonne administration de la justice. Comme Jackett J.C.C.F. l'a dit avec justesse dans *Re Shell Can. Ltd.*, [1975] C.F. 184 à la p. 193, 29 C.R.N.S. 361, 18 C.P.R. (2d) 155, 22 C.C.C. (2d) 70, *(*sub nom. *Re Directeur des Enquêtes et Recherches et Shell Can. Ltd.)* 55 D.L.R. (3d) 713 (C.A.):

> ... la protection civile et criminelle, que nos principes de droit accordent à l'individu est subordonnée à l'assistance et aux conseils que l'individu reçoit d'hommes de loi sans aucune crainte que la divulgation pleine et entière de tous ses actes et pensées à son conseiller juridique puisse de quelque façon être connue des tiers de manière à être utilisée contre lui.

68 L'histoire du privilège remonte au règne d'Élizabeth I: voir *Berd c. Lovelace* (1577), Cary 62, 21 E.R. 33 (Ch.), et *Dennis c. Codrington* (1579), Cary 100, 21 E.R. 53 (Ch.). Il découle alors du respect "[Traduction] du serment et de l'honneur" de l'avocat, tenu de garder étroitement les secrets de son client, et est limité, dans son application, à une exemption de l'obligation de témoigner. Par la suite et progressivement, le privilege est élargi afin d'inclure les communications échangées au cours d'autres litiges, celles faites en vue d'un litige et enfin toute consultation juridique, sur une question litigieuse ou non. L'énoncé classique du principe sur lequel repose le privilège a été fait par Brougham L.C. dans *Greenough c. Gaskell* (1833), I My. & K. 98, 39 E.R. 618 à la p. 620:

> [Traduction]
>
> Le fondement de cette règle n'est pas difficile à trouver. Ce n'est ni la conséquence (comme on l'a quelquefois dit) d'une importance particulière que le droit attribue aux affaires des juristes, ni le résultat de dispositions particulières leur accordant une protection (même s'il n'est certes pas tellement facile de voir pourquoi on a refusé le même privilege à d'autres personnes et, plus particulièrement, aux médecins).
>
> Mais c'est en considération des intérêts de la justice, qui ne peuvent être respectés, et de l'administration de la justice, qui ne peut suivre son cours, sans l'aide d'hommes de loi versés dans la théorie générale du droit, les règles de procédure devant les tribunaux et les matières touchant les droits et les obligations, qui font l'objet de toutes les procédures judiciaires. Si le privilège n'existait pas du tout, chacun devrait s'en remettre à ses propres ressources en matière juridique. Privée de toute assistance professionnelle, une personne ne s'aventurerait pas à consulter un spécialiste ou oserait seulement divulguer partiellement l'affaire à son conseil.

69 Jessel M.R. dans *Anderson c. Bank of B.C.* (1876), 2 Ch. D. 644 à la p. 649 (C.A.), traite de ce principe en ces termes:

[Traduction]

L'objet et le sens de la règle sont les suivants: puisqu'en raison de la complexité et de la difficulté de nos principes de droit, seuls des hommes de l'art sont qualifiés pour s'occuper d'un litige, il est absolument nécessaire qu'un homme, pour faire valoir ses droits ou pour se défendre contre une réclamation indue, ait recours à des avocats en titre. Ceci étant absolument nécessaire, il l'est autant, pour reprendre une expression familière, qu'il soit capable de dire ce qu'il a sur le coeur à celui qu'il consulte en vue d'intenter des procédures ou de prouver le bien-fondé de sa défense à l'encontre de la réclamation de tiers; qu'il ait une confiance illimitée dans son mandataire, homme de l'art, et que ses communications à ce dernier soient tenues secrètes, sauf s'il consent à renoncer à son privilège (car il s'agit du sien et non de celui du mandataire), qu'il puisse mener de façon appropriée son litige.

70 Wigmore on Evidence, McNaughton revision (1961), vol. 8, par. 2292, p. 554, formule comme suit le principe moderne du privilège des communications entre avocat et client:

[Traduction]

Lorsque l'on consulte un conseiller juridique en titre, les communications qui se rapportent à la consultation et que le client a faites en confidence font l'objet à son instance d'une protection permanente contre toute divulgation par le client ou le conseiller juridique, sous réserve de la renonciation à cette protection.

71 Le privilège connaît des exceptions. Il ne s'applique pas aux communications qui n'ont trait ni à la consultation juridique ni à l'avis donné, c'est-à-dire, lorsque l'avocat n'est pas consulté en sa qualité professionnelle. De même, le privilège ne se rattache pas à une communication qui n'est pas censée être confidentielle: *O'Shea c. Wood*, [1891] P. 286 à la p. 289 (C.A.). Plus significantif, si un client consulte un avocat pour pouvoir perpétrer plus facilement un crime ou une fraude, alors la communication n'est pas privilégiée et il importe peu que l'avocat soit une dupe ou un participant. L'arrêt classique est *R. c. Cox* (1884), 14 Q.B.D. 153 (C.C.R.), où Stephen J. s'exprime en ces termes (p. 167): "[Traduction] Une communication faite en vue de servir un dessein criminel ne 'relève pas de la portée ordinaire des services professionnels' ".

72 Une jurisprudence récente a placé la doctrine traditionnelle du privilège sur un plan nouveau. Le privilège n'est plus considéré seulement comme une règle de preuve qui fait fonction d'écran pour empêcher que des documents privilégés ne soient produits en preuve dans une salle d'audience. Les tribunaux, peu disposés à restreindre ainsi la notion, ont élargi son application bien au-delà de ces limites: voir *Director of Investigation & Research c. Can. Safeway Ltd.*, [1972] 3 W.W.R. 547, 6 C.P.R. (2d) 41, 26 D.L.R. (3d) 745 (C.S.C.-B.); *Re Shell Can. Ltd.*, supra; *Re Presswood et Internat. Chemalloy Corpn.* (1975), 11 O.R. (2d) 164, 36 C.R.N.S. 322, 25 C.P.R. (2d) 33, 65 D.L.R. (3d) 228 (H.C.); *Re Borden et R.* (1975), 13 O.R. (2d) à la p. 249, 30 C.C.C. (2d)

à la p. 337, 70 D.L.R. (3d) à la p. 580, affirmé sur d'autres motifs 13 O.R. (2d) 248, 30 C.C.C. (2d) 337, 70 D.L.R. (3d) 579 (C.A.); *BX Dev. Ltd. c. R.; Charleston Resources Ltd. (N.P.L.) c. R.*, [1976] 4 W.W.R. 364, 31 C.C.C. (2d) 14, 70 D.L.R. (3d) 366, (C.A.C.-B); *Re B. et R.* (1977), 36 C.C.C. (2d) 235 (C.P. Ont.).

73 Même s'il ne fait aucun doute que les tribunaux canadiens s'orientent vers une notion plus large du privilège entre avocat et client, je n'estime pas que la notion ait été suffisamment étendue pour donner gain de cause à l'appelant. Bien qu'il y ait eu un mouvement qui tende à éloigner le privilège entre avocat et client de la règle de preuve qui ne peut être invoquée qu'au moment où l'on tente de produire des documents privilégiés, cet éloignement des restrictions temporelles rigides ne va pas aussi loin que le prétend l'appelant. Dans son factum, il allègue que le privilège est maintenant reconnu comme un "principe fondamental", plus justement qualifié de "règle de propriété". Toutefois, les décisions citées à l'appui de cette proposition mettent toutes en cause des mandats de perquisition qui avaient permis la saisie de documents auxquels s'appliquait indiscutablement le privilège. Dans ces affaires comme, par exemple, *Re Borden et R.*, supra, le mandat de perquisition a conduit à la saisie de documents susceptibles "[Traduction] de fournir une preuve". Si le privilège devait s'appliquer aux documents, alors ceux-ci ne pourraient être produits au procès et le lien avec la preuve subsisterait donc. On peut expliquer ces décisions en disant qu'elles ne font que déplacer le moment où l'on peut faire valoir le privilège. Comme le souligne Kasting dans son article "Recent Developments in the Law of Solicitor-Client Privilege" (1978), 24 McGill L.J. 115, l'éloignement de la conception stricte de règle-de-preuve-au-procès s'est effectué par développements logiques. Chasse, dans son article "The Solicitor-Client Privilege and Search Warrants" (1977), 36 C.R.N.S. 349, affirme que le privilège est considéré "[Traduction] comme plus apparenté à une règle de propriété qu'à une simple régle de preuve" (p. 350), mais le privilège, à mon avis, est encore très loin de constituer une règle de propriété. C'est ce qu'il doit devenir pour que l'appelant ait gain de cause.

74 Rien ne permet de conclure des pièces diposées au dossier de la présente affaire que les autorités ont l'intention d'utiliser les lettres ou des extraits de ces lettres comme preuve au cours de procédures. Quand bien, même l'on souhaiterait pouvoir faire une analogie entre les affaires de mandats de perquisition et l'ordre de perquisition général relatif au courrier de l'appelant, il reste que l'on ne peut considérer que cet ordre a été rendu en vue d'obtenir ou de fournir une preuve au cours de procédures. A défaut du lien avec la preuve, actuellement exigé en droit, l'appelant ne peut invoquer le privilège.

75 Comme le souligne Addy J., le privilège ne peut être invoqué que pour chaque document pris individuellement, et chacun doit répondre aux critères du privilège: (i) une communication entre un avocat et son client; (ii) qui comporte une consultation ou un avis juridiques; et (iii) que les parties considèrent de nature confidentielle. Le juge doit lire les lettres afin de décider si le privilège s'y rattache, ce qui exige, à tout le moins, qu'elles relèvent de la juridication d'un tribunal.

Enfin, le privilège vise à empêcher leur utilisation ou divulgation injustifiée et non simplement leur ouverture.

76 En l'espèce, la complication découle de la situation unique du détenu. Son courrier est ouvert et lu en raison des exigences de la sécurité de l'institution et non en vue d'être utilisé dans des procédures judiciaires. Tout ceci se passe à l'intérieur de la prison et, par conséquent, loin d'un tribunal ou d'un organisme quasi judiciaire. Il est difficile de voir comment cela met en jeu le privilège, à moins que l'on veuille totalement le transformer pour en faire une règle de propriété, dépouillée de tout fondement dans la preuve.

77 A mon avis, le régime disciplinaire établi par la législation, que j'ai décrit précédemment, ne déroge pas à la doctrine de common law portant sur le privilège entre avocat et client, dans sa conception actuelle, mais l'appelant cherche en l'espèce quelque chose qui va bien au-delà des limites du privilège malgré l'élargissement que lui ont donné les décisions récentes.

**V**

78 A l'appui de son allégation principale qui repose sur le privilège, l'avocat de l'appelant a fait timidement valoir que le Règlement sur le service des pénitenciers et la directive du commissaire ne doivent pas être interprétés et appliqués de manière à supprimer, restreindre ou enfreindre l'un quelconque des droits ou libertés reconnus dans la Déclaration canadienne des droits, S.R.C. 1970, App. III, aux termes de l'art. 1*b*) (le droit de l'individu à l'égalité devant la loi et à la protection de la loi), de l'art. 1*d*) (la liberté de parole) et de l'art. 2*c*)(ii) (le droit d'une personne arrêtée ou détenue de retenir et constituer un avocat sans délai). La jurisprudence invoquée par l'appelant porte principalement sur des affaires d'alcootest qui traitent du droit d'un automobiliste de communiquer avec son avocat en privé et sans délai. Ces décisions, ainsi que d'autres citées, ne sont pas d'un grand secours pour résoudre la question litigieuse ici, vu la différence au niveau des faits et des considérations pertinentes. La question en l'espèce est de savoir si le droit de l'appelant de retenir et constituer un avocat est incompatible avec le droit des autorités carcérales d'empêcher que soit menacée la sécurité de l'institution. A mon avis, il n'y a pas d'incompatibilité à la condition que l'exercice du pouvoir n'aille pas au-delà de ce qui est nécessaire dans l'intérêt de la sécurité. C'est précisément l'effet, selon moi, de l'art. 7*b*) de la directive 219.

79 En ce qui concerne l'art. 1*b*) de la Déclaration, cette cour a jugé que l-égalité devant la loi n'exige pas "que toutes les lois fédérales doivent s'appliquer de la même manière à tous les individus. Une loi qui vise une catégorie particulière de personnes est valide si elle est adoptée en cherchant l'accomplissement d'un objectif fédéral régulier": Martland J., qui a rendu le jugement unanime de cette cour dans *Prata c. Ministre de la Main-d'oeuvre et de l'Immigration*, [1976] 1 R.S.C. 376 à la p. 382, 52 D.L.R. (3d) 383, 3 N.R. 484.

80 Il est dificile de contester la validité de l'art. 2.18 du Règlement sur le service des pénitenciers ou de la directive 219 en faisant valoir la liberté de parole, vu la volonté du Parlement, exprimée

dans la Loi sur les pénitenciers et dans le Règlement sur le service des pénitenciers, de réserver aux autorités pénitentiaires un droit limité de censure dans l'intérêt de la sécurité et, en même temps, de donner aux détenus le droit de communiquer librement par l'intermédiaire de canaux non censurés avec les députés fédéraux et provinciaux et les nombreuses autres personnes énumérées à l'art. 8 de la directive 219.

**VI**

81 On peut s'écarter de la notion actuelle du privilège et aborder l'affaire dans une optique plus large, savoir: (i) le droit de communiquer en confidence avec son conseiller juridique est un droit civil fondamental, fondé sur la relation exceptionnelle de l'avocat avec son client; et (ii) une personne emprisonnée conserve tous ses droits civils autres que ceux dont elle a été expressément ou implicitement privée par la loi.

82 Dans ce contexte, la cour fait face à l'interprétation du Règlement sur le service des pénitenciers et de la directive du commissaire 219. L'article 2.18 du règlement, comme on l'a déjà noté, réserve indubitablement au directeur de l'institution le pouvoir d'ordonner la censure de la correspondance selon les modalités tenues pour nécessaires ou utiles à la sécurité de l'institution. En règle générale, je n'estime pas qu'il est loisible aux tribunaux de mettre en doute le jugement du chef de l'institution sur ce qui peut être nécessaire ou non au maintien de la sécurité dans un pénitencier. Par contre, il convient de noter que l'art. 2.18 du Règlement sur le service des pénitenciers et la directive du commissaire 219 traitent en termes généraux de la lecture de la correspondance et d'autres formes de censure sans mentionner expressément la correspondance entre avocat et client. Le droit au secret en ce qui concerne la correspondance entre avocat et client n'a pas été expressément enlevé par les termes du règlement et de la directive.

83 La plupart des prisons sont suffisamment à l'écart pour que le courrier constitue le moyen principal de communication d'un détenu avec son avocat. Rien ne peut probablement autant "glacer" l'échange et la divulgation franches et libres de confidences, qui devraient caractériser les rapports entre un détenu et son avocat, que de savoir que ce qui a été écrit sera lu par un tiers, et peut-être utilisé à l'encontre du détenu ultérieurement. Je ne comprends pas pourquoi le ministère public conteste l'importance de ces considérations.

84 Il en résulte, selon moi, que la cour se trouve dans l'obligation de peser l'intérêt public qui veut le maintien de la sécurité et de la sûreté de l'institution carcérale, de son personnel et de ses détenus, et l'intérêt représenté par la protection de la relation avocat-client. Même si l'on reconnaît pleinement le droit d'un détenu de correspondre librement avec son conseiller juridique et la nécessité d'en déroger au minimum, la balance doit, en fin de compte, pencher en faveur de l'intérêt public. Mais l'intervention ne doit pas aller au-delà de ce qui est essentiel au maintien de la sécurité et à la réadaptation du détenu.

85 La difficulté est de s'assurer que la correspondance entre le détenu et son avocat, qu'elle relève ou non de la doctrine du privilège entre avocat et client, ne dissimule pas la transmission de drogues, d'armes ou de plans d'évasion. Il faut un mécanisme pour en vérifier l'authenticité. Il semble que ce soit généralement admis. Pourtant, personne n'a encore suggéré quel mécanisme de contrôle par un tiers pourrait être adopté ni en vertu de quel pouvoir les tribunaux pourraient l'imposer aux autorités pénitentiaires.

86 L'avocat du ministère public fait valoir trois interprétations possibles de la portée des art. 2.17 et 2.18 du règlement, qui peuvent déterminer l'étendue du pouvoir du chef d'une institution face à une enveloppe qui paraît provenir d'un avocat ou lui être adressée, dans les cas où il a des motifs de croire que la transmission sans restriction et sans examen du courrier adressé à un détenu en particulier ou envoyé par ce dernier présente un risque pour la sécurité et la sûreté de l'institution:

87 a) il peut quoi qu'il en soit permettre que la lettre soit livrée au détenu sans avoir été ouverte et examinée;

88 b) il peut suspendre le privilège du détenu de recevoir du courrier, relativement à cette lettre, conformêment aux art. 2.17 et 2.18 du Règlement sur le service des pénitenciers; ou

89 c) il peut ordonner que l'enveloppe soit ouverte et examinée dans la mesure minimale jugée nécessaire pour établir si son contenu relève effectivement du privilège entre avocat et client.

90 L'avocat fait valoir qu'appliquer la première interprétation au règlement revient à enlever au chef de l'institution le pouvoir dont il a besoin pour contrôler la transmission éventuelle d'objets de contrebande ou de courrier qui puisse mettre en danger la sécurité de l'institution, sous le couvert du caractère confidentiel de communications entre un détenu et son avocat. Je suis d'accord. Je suis également d'avis de rejeter la deuxième interprétation, parce qu'elle n'offre aucune solution. Je conviens que la troisième présente l'interprétation de la portée du règlement qui donne à un détenu le maximum de possibilités de communiquer avec son avocat par courrier, tout en étant compatible avec le maintien de la sécurité de l'institution.

91 A mon avis, la "mesure minimale jugée nécessaire pour établir si son contenu relève effectivement du privilège entre avocat et client" doit être interprétée de manière que: (i) le contenu d'une enveloppe puisse être inspecté pour déceler la contrebande; (ii) dans des cas limités, la communication puisse être lue pour s'assurer qu'elle renferme effectivement une communication à caractère confidentiel entre l'avocat et son client aux fins de consultation ou d'avis juridiques; (iii) la lettre ne soit lue que s'il existe des motifs raisonnables et probables de croire le contraire et, dans ce cas, uniquement dans la mesure nécessaire pour déterminer la bonne foi de la communication; et (iv) le fonctionnaire compétent du pénitencier qui examine l'enveloppe, après s'être assuré que cette dernière ne renferme rien qui enfreigne la sécurité, ait l'obligation légale de garder la communication confidentielle. L'article 7*c*) de la directive 219 souligne ce point.

92 L'appelant n'a pas réussi à établir son droit à un jugement déclaratoire selon l'une des trois formules qu'il a mises de l'avant dans ces procédures. Le pourvoi doit être rejeté. L'intimée a droit à ses dépens dans cette cour.

***Estey J.*** **(concourant dans le résultat):**

93 J'ai eu l'avantage de lire les motifs de jugement de mon collègue Dickson, et j'y souscris. Je désire simplement faire un commentaire sur le point (iii) figurant dans sa liste des considérations afférentes à l'interprétation de la phrase "dans la mesure minimale jugée nécessaire pour établir si son contenu relève effectivement du privilège entre avocat et client". Le point (iii) porte que:

> (iii) la lettre ne soit lue que s'il existe des motifs raisonnables et probables de croire le contraire et, dans ce cas, uniquement dans la mesure nécessaire pour déterminer la bonne foi de la communication.

A mon avis, toute procédure visant l'examen de lettres échangées entre un avocat et son client devrait, lorsque c'est raisonnablement possible, reconnaître le privilège entre avocat et client depuis longtemps ancré dans nos principles de droit. Tout mécanisme adopté en vue de leur examen devrait, sous réserve uniquement de circonstances spéciales indiquant la nécessité primordiale de faire intervenir les autorités, sauvegarder les communications qui passent sous la protection du privilège de façon à garantir qu'il reste utile et utilisable; par exemple, une lettre explicative d'un avocat dans laquelle se trouve une communication scellée que l'avocat déclare être un avis juridique devrait ordinairement protéger cette communication de tout examen par les autorités. Je suis d'avis de régler le pourvoi comme le propose Dickson J.

*Appeal dismissed.*