2024 01G 0937

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

NEIL BOSE, THE PRESIDENT AND VICE-CHANCELLOR *PRO TEMPORE* OF MEMORIAL UNIVERSITY OF NEWFOUNDLAND

APPLICANT

AND:

MICHAEL HARVEY in his capacity as THE INFORMATION AND PRIVACY COMMISSIONER OF NEWFOUNDLAND & LABRADOR

FIRST INTERVENOR

AND:

MATTHEW BARTER, THE ACCESS TO INFORMATION REQUESTER AND COMPLAINANT BEFORE THE COMISSIONER

SECOND INTERVENOR

AND:

GENESIS GROUP INC.

THIRD INTERVENOR

AND:

C-CORE

FOURTH INTERVENOR

A CASE-MANAGED PROCEEDING BEFORE THE HONOURABLE JUSTICE STACK

BOOK OF AUTHORITIES FILED IN SUPPORT OF BRIEF OF MEMORIAL UNIVERSITY OF NEWFOUNDLAND

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2024 01G 0937
Date of Filing Document:	September 14, 2024
Name of Party Filing or Person:	Neil Bose, The President and Vice-Chancellor *Pro Tempore* of Memorial University of Newfoundland
Application to which Document being filed relates:	Originating Application pursuant to section 50(2)(a) of the *Access to Information and Protection of Privacy ATIPPA, 2015*, c A-1.2
Statement of Purpose in filing:	To support the above-noted Originating Application

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Tab 1

Date: 20020730
Docket: 99/27
Decision No.: 2002 NFCA 43

2002 NFCA 43 (CanLII)

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

ARCHEAN RESOURCES LTD. APPELLANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND, AS REPRESENTED BY THE HONOURABLE THE MINISTER OF FINANCE FOR THE PROVINCE OF NEWFOUNDLAND FIRST RESPONDENT

AND:

HER MAJESTY'S ATTORNEY GENERAL FOR NEWFOUNDLAND SECOND RESPONDENT

Coram: O'Neill, Marshall and Green, JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division 1998 St. J. No. 3645

Appeal Heard: September 14, 2000
Judgment Rendered: July 30, 2002

Reasons for judgment by Green, J.A.
Concurred judgment by Marshall, J.A.
Reasons for judgment by O'Neill, J.A.

Counsel for the Appellant: Colm Seviour
Counsel for the First and Second Respondents: Greig Crockett

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Green, J.A.:

[1] The issue in this appeal involves a determination as to whether "the right to engage in mining operations" in s. 9(1)(a) of the **Mining and Mineral Rights Tax Act**, R.S.N. 1990, c. M-16 encompasses the rights of a licensee under a licence to explore for minerals issued under the **Mineral Act**, R.S.N. 1990, c. M-12. On the answer to that question turns the ability of the province to impose an annual tax of 20% on royalties to be received by the appellant, Archean Resources Ltd, from the operator of any mine developed with respect to the Voisey's Bay mineral deposits in Labrador.

[2] Archean sought a declaration from the Trial Division that, on a proper interpretation of the applicable legislation, the net smelter royalty it had negotiated with Diamond Fields Resources Inc (DFRI) in consideration for the assignment by Archean to DFRI of Archean's mineral exploration licence, at a time when the Voisey's Bay deposits had not been discovered, was not subject to the province's royalty tax. The trial judge concluded, applying a "modern" purposive approach to interpretation, that the royalties were payable as a result of a grant to DFRI of "the right to engage in mining operations" and thus attracted tax under s. 9(1)(a). His decision is reported at (1999), 174 Nfld & P.E.I.R. 183. On appeal, Archean argues that the trial judge erred in his analysis and application of the proper principles of statutory interpretation to the applicable legislation.

BACKGROUND

[3] Archean is a Newfoundland prospecting company engaged in the business of mineral exploration. Its principals are Albert Chislett and Chris Verbiski, the co-discoverers of the nickel-copper-cobalt ore bodies at Voisey's Bay, Labrador.

[4] In the early 1990's Archean acquired a number of exploration licences and began exploration in the Voisey's Bay area. Pursuant to s. 23 of the **Mineral Act**, those licences conferred on Archean "the exclusive right to explore for minerals" in the areas described in the licence for a period of 5 years. They did not, however,

confer any right to remove minerals except for the limited purposes of sampling, assaying and testing. Section 24 of the **Act** recognized the assignability of the licences to other persons.

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[5] In 1993, before the discovery of the Voisey's Bay ore bodies, Archean granted an option to DFRI to purchase "an undivided 100 percent right, title and interest" in the lands covered by the exploration licences in return for consideration which included a 3 percent net smelter royalty on any subsequent mineral production from those lands. The option was exercised in 1995 and thereafter, pursuant to the option agreement, DFRI acquired all the rights of the licensee under the exploration licences, with Archean retaining no interest in the lands covered by them. Instead, Archean became entitled to the royalties provided for in the agreement.

[6] Because the Voisey's Bay ore deposit is not yet developed, no royalty payments have been made. It is a matter of public knowledge that the current holder of the rights relating to the deposit is now in the process of securing a mining lease from the provincial government pursuant to s.31 of the **Mining Act**. It was because Archean contemplated the sale to a third party of its contractual right to the royalty payments that, in order to remove any doubt as to its tax position, a declaration was sought from the Court that the royalty payments were not subject to s. 9(1)(a) of the **Mining and Mineral Rights Tax Act**.

[7] Under the scheme of the **Mining Act**, only the holder of an exploration licence may apply for a mining lease. It is the lease which confers upon the lessee "the exclusive right to develop, extract, remove, deal with, sell, mortgage, or otherwise dispose of" all unalienated minerals in, on or under the land covered by the lease (s. 31(5)(a)). Before that point, no actual mining extraction activity can be undertaken. To protect a licensee, however, subsections 31(2),(3) and (4) provide that a licensee who properly applies for a lease during the currency of the licence, and has complied with the conditions of the licence, properly surveys the area and completes all assessment work required for the first three years of the licence, has "a right to the issuing of a mining lease" for a reasonable period not exceeding 25 years.

THE TRIAL JUDGMENT

[8] As noted, Archean applied to the Trial Division for a declaration that the royalty payments to which it was entitled once the Voisey's Bay mine became producing were not subject to taxation under s. 9(1)(a) of the **Mining and Mineral Rights Tax Act**. The applicable portion of the charging provision reads as follows:

> 9. (1) A person who receives from
>
> (a) an operator, contractor or other person during a financial year money by way of rental, royalty or similar payment for the grant ... of the right to engage in mining operations;
>
> is liable for and shall pay to the minister [of Finance] ... an annual tax of 20% of the net revenue received in consideration of the grant of the right during that financial year.

[9] The key question, it will be seen, is whether the royalty to be received by Archean was in consideration of "the grant ... of the right to engage in mining operations". Archean argued that because it acquired the royalty for the transfer only of exploration licences, which in themselves did not allow for the extraction or removal of the minerals, it could not be said that the royalty was given in return for "the right to engage in mining operations". It followed, it submitted, that the royalty was not subject to tax.

[10] The trial judge rejected this interpretation. He concluded that Archean's situation was within the "mischief" to which the **Mining and Mineral Rights Tax Act** was directed. In defining what the mischief that was being remedied by the legislation was, he placed considerable reliance on the **Report of the Royal Commission on Mineral Revenue** (1974), which is generally regarded as the impetus for the legislative reforms reflected in the **Act** enacted in the following year, as well as on statements by the minister who introduced the Bill in the House. Applying a "remedial and liberal construction", he reasoned:

> [44] ... [M]ining cannot occur at Voisey's Bay or even be contemplated, unless an operator holds a mining lease. Mining leases can only be granted on the basis of the exploration licences transferred from Archean and cannot otherwise be obtained. I am satisfied therefore that in reality the right to engage in mining operations was in fact the benefit received by the optionee when the option was exercised and the transfers completed. In no other way of which I am aware, could that most basic element of the right to mine, be obtained.

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> [45] The position is equally clear when viewed from the perspective of the buyer. What did Diamond Fields ... really purchase with their payment of significant sums of money and their agreement to pay the royalty. In my opinion at the heart of the transaction was the right to obtain a mining lease and thus 'the right to engage in mining operations'. Conditions will necessarily apply, but the right to engage in mining operations is now theirs and under the legislative scheme there was no other manner by which that right could have been obtained.
>
> [46] For these reasons I must deny ... [Archean's] claim for a declaration ...

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ISSUES ON APPEAL

[11] Archean argues on appeal that the trial judge erred in applying an improper interpretative approach to the determination of the meaning and scope of s. 9(1)(a). In particular Archean argues that the proper principle of interpretation is the "plain meaning" rule, i.e. that statutory language should be given its plain and ordinary grammatical meaning and that in the absence of ambiguity resort to other interpretive devices or principles, or to extrinsic aids, is unnecessary and inappropriate. Applying that approach will yield an interpretation, it is argued, that will recognize that an exploration licence, which does not carry with it the right to extract minerals, cannot on a plain reading of the language in the section encompass a right to engage in mining operations.

[12] Alternatively, Archean argues that resort to other interpretive devices and extrinsic aids, even if appropriate, would, if properly employed, lead to the same result.

[13] Finally, Archean argues that, at most, the scope of the provision is subject to reasonable uncertainty and factual ambiguity resulting from a lack of explicitness and that the principle that ambiguities are to be resolved in favour of the taxpayer dictates that the issue should be resolved in Archean's favour.

ANALYSIS

[14] The primary submission of the appellant is that, applying a plain meaning principle of construction, the words of s. 9(1), which impose a tax on consideration given for "the right to engage in mining operations", do not encompass the rights held by an exploration licensee, which merely involve the right to apply for a lease if certain pre-conditions are satisfied. The argument is that the words of s. 9(1) plainly do not encompass the broader, more amorphous, rights under a mining licence (namely, a contingent, conditional and future right to apply for the right to engage in mining operations) and that, accordingly, that should be the end of the matter. Counsel for the appellant relied on, among other cases, the decision of the Supreme Court of Canada in **R. Multiform Manufacturing Co.** (1990), 79 C.R. (3d) 390 in support of this position. There, Lamer C.J. said at p. 394:

> When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. There is no need for further construction when Parliament has clearly expressed its intention in the words it has used in the statute. As Maxwell stated ...:
>
> > If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences.

[15] Other decisions of the Supreme Court, decided both before and after the **Multiform** decision, stress what appears to be a more contextual and purposive approach to interpretation. For example, in **Stubart Investments Limited v. The Queen** (1984), 10 D.L.R. (4d) 1, Estey J. adopted, at p. 32, Dreidger's formulation of the "modern rule", taken from the second edition of his text, *The Construction of Statutes*, as follows:

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

[16] This formulation has also been adopted by the Court in cases decided subsequent to **Multiform**. See, **Re Rizzo & Rizzo Shoes Ltd.** [1998] 1 S.C.R. 27 and **R. v. Gladue** [1999] 1 S.C.R. 688.

[17] In reality, however, there is no real inconsistency between these two approaches. Even **Multiform** only suggests falling back on plain language where "there is nothing to modify, alter or qualify the language which the statutes

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contains". To determine, in any given case, whether there is anything that potentially could modify or qualify the plain words, it will be necessary to examine more than the actual language of the provision being construed. **Multiform** itself, therefore, implicitly recognizes that interpretation involves more than a blinkered focus solely on the words used. Rarely will context have no role to play in giving meaning to the sterile words that are employed, given the general plasticity of language. **Multiform** does not speak to the situation where, as is often the case, there are other indicators of meaning that, considered reasonably, might have the effect of modifying or qualifying one's first impression from the initial reading of the words alone.

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[18] The argument of the appellant that the "proper principle" of interpretation is that "in cases of clear and unambiguous statutory language, the scheme, object and intention of Parliament as adverted to in **Stubart** are apparent and yield the proper meaning based on the plain and ordinary meaning of the statutory language" no longer (if it ever did) represents the proper approach to statutory interpretation. The "scheme, object and intention of Parliament" must be gleaned, not only from the words used, whether ambiguous or not, but from a broad range of other additional sources of meaning. All sources of meaning must be analyzed in an integrated fashion to determine what the scope of a particular legislative act is and how it should be fairly applied in a given case.

[19] The starting point for interpretation of any statute enacted by the legislature of this province is the legislature's own directive to the courts as found in s. 16 of the **Interpretation Act**:

> Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation or provision according to its true meaning.

[20] What is noteworthy about this provision is that it applies to *all* legislative acts regardless of subject matter. It draws no distinction between social reform legislation, taxation statutes, legislation that deals with or affects property rights, or penal laws or statutes that affect personal or common law rights, to name a few types of statutes that from time to time have been said to attract special interpretative treatment. It eliminates special approaches, by way of presumptions

of strict or other specialized construction, to the interpretation of certain types of statutes and not to others.

[21] It also contains no reference to that fictional notion of "intention of the legislature", the ascertainment of which is often expressed to be the ultimate goal of statutory interpretation. Of course, it is idle to speak in any realistic way of the intention of the legislature as a collectivity. It does not exist. The reality is that a majority of legislators, perhaps for differing reasons and with differing motivations, and influenced by our parliamentary tradition of executive control of the legislature, coalesce to create a formal legislative act which is then consigned, once the formalities of its adoption are complied with, to the courts for application, in cases of doubt, to individual fact situations. Legislation, by virtue of its nature, the manner in which it comes into being, and by virtue of the fact that it generally operates prospectively, must of necessity be expressed in generalized language. Not every fact scenario that could be potentially engaged by the subject of the legislation can be anticipated. Even the most detailed legislative provision cannot purport to address specifically all situations that might potentially be affected or caught by its reach. One need only refer to litigation that arises out of the application of income tax legislation for verification of this observation

[22] Instead of mandating some fictionalized search for a collective "legislative intention", s. 16 directs the court to consider every provision "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. This requires a consideration, as an integral part of the interpretive exercise, of the problem or "mischief" to which the legislature directed its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court's general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. The end result is to arrive at a "true" meaning. That inevitably requires an examination of more than the bare words of the legislative enactment that is in issue, no matter how clear or unambiguous they may at first blush appear. The surrounding text, the interrelation of other related statutes, the social and legislative context in which the provision was enacted, and other extrinsic aids are all sources to be consulted in this exercise. Obviously, if the bare words of the relevant provision appear to be straightforward and seem on their face to admit of only one meaning, they may end up controlling the result, but even in such a case, it is not sufficient to stop the interpretive exercise at this "plain"

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meaning; s. 16 requires that at the very least this plain meaning be given a "reality check" by being tested against other relevant sources of meaning to ensure that there is not some nuance or variation in the normal or apparent meaning that might indicate a different meaning in the particular context under consideration. "True" meaning is not plain meaning; it is a conclusion arrived at by reconciling all the appropriate indicators of meaning that the court is directed to consider.

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[23] In truth therefore, s. 16 enunciates a principle of harmonization in which the courts are directed, in cases of dispute, to adopt and apply an interpretation that fairly reconciles the language used in the enactment with the broader objects of the legislation so as to achieve the general goal, or to rectify the mischief, to which the legislative act appears to have been directed. That exercise determines the general ambit of impact of the legislative act and provides the basis for the court to conclude whether the particular fact situation before it should fall inside our outside that ambit.

[24] I do not propose to analyze all of the Supreme Court and other appellate decisions that have been cited. It is sufficient to say that I agree with counsel for the respondent in this case that those decisions that are often cited as supporting an exclusively plain meaning approach to interpretation can generally be explained as involving situations where reliance on "plain meaning" is expressed as a conclusion as to meaning only after considering other interpretive sources such as legislative purpose, the mischief to be addressed, context and legislative and social history. "Plain meaning" becomes a euphemism for "the only reasonable interpretation" after the first impressions flowing from the words used have been tested against other indicators of meaning. As McLachlin J. observed in **Opetchesaht Indian Band v. Canada** (1997), 147 D.L.R. (4th) 1 (SCC) at pp. 22-23, "a court should only be satisfied with the plain meaning of a statute where that meaning is clear *and consistent with a purposive reading of the statute as a whole.*" [Emphasis added].

[25] In reality, the rhetoric of plain meaning and other formalistic approaches to interpretation often mask a broader hidden analysis. Ruth Sullivan, in "Statutory Interpretation in the Supreme Court of Canada" (1998-99), 30 Ottawa L.R. 175 argues that the plain meaning (textualist) approach as well as an intentionalist approach (nominally involving a search, including sources beyond the bare words, for legislative intent) do not provide an adequate explanation for the role of the courts in statutory interpretation. She argues that there should be a more explicit

recognition of the role that judges play in adapting and applying legislative provisions to specific fact situations. She suggests a "pragmatic" theory of interpretation that:

> ...emphasizes the importance of the legislative text and the importance of legislative intent, but places final responsibility for the outcome on the shoulders of the interpreting judges. On this theory, the judicial task in interpretation is properly characterized not as giving effect to the meaning of the text or the intention of the legislature, but as solving the interpretive problem in an appropriate and acceptable way. (p. 178)

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[26] The process of interpretation then becomes an exercise in finding appropriate justifications for a fair and reasonable result in the circumstances of the particular case in a way that respects the important values of society within the context of the legislative directive that has been given. It recognizes that, within those parameters, "the outcomes of interpretation disputes are appropriately determined by judges, not legislatures" (p. 185) and provides a more realistic explanation of the current practice of Canadian courts without resort to linguistic or legal fictions. It recognizes that resolving particular interpretative disputes involves assigning appropriate weight to various factors to arrive at a result that conforms to the legislative text and broad legislative purpose while at the same time producing an outcome that is just and reasonable. According to Professor Sullivan, "assigning appropriate weight to these factors and balancing them against one another is the essence of the judicial function in interpretation" (p. 184).

[27] This description of the interpretative function is reflected in the third edition of *Driedger*, authored by Professor Sullivan, at p. 132:

> ...the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

[28] Such an approach, with which I agree, recognizes a limited role for the courts in law-making as they flesh out the skeleton of the legislation in the context of specific fact situations that may not have been anticipated or adverted to by the legislators when adopting generalized text for the purpose of furthering broad

policy objectives. The courts, whose *raison d'etre* is the resolution of specific disputes in a just and fair manner according to law, have necessarily been assigned the role, both constitutionally and by the legislature itself through its directive in s. 16 of the **Interpretation Act**, of deciding interpretative disputes in a manner that is generally perceived as fair and reasonable. In performing that function, they must of course have regard to the actual legislative text and the reasonable inferences which the court draws as to the overall objective, or parameters of operation, of the legislation. In so doing, the court pays respect to the principle of deference to the legislative will.

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[29] The greater the precision and circumstance-specific the text and the clearer the indicators of legislative objective, the more controlling will those factors be with respect to an outcome in a particular case. In the end, however, the court must seek to reconcile the text and the legislative objectives with a result that is perceived to be fair and just in the particular circumstances of the individual case. It is in this latter context that notions of general fairness, and common law, social and constitutional values are engaged and are sought to be harmonized with the other factors of text and legislative objective.

[30] What have been often regarded as sub-rules of statutory construction or presumptions of legislative intent are in reality ways in which the courts attempt to achieve fairness in application of a legislative provision in a particular case. For example, whether one talks of strict construction of taxing statutes against the taxing authority or a rule that resolves ambiguity in favour of a taxpayer, the reason for such "rules" is that in many cases it would be perceived as unfair to a taxpayer, who orders his or her financial affairs on what appears to be a clear or reasonable construction of a legislative provision, to impose, after the fact, an interpretation that could not clearly have been anticipated in advance. Rather than talk in terms of presumptions or sub-rules, which in themselves have fictional qualities about them, it is better to consider directly whether a particular text-based construction offends these general notions of fairness in the factual circumstances of the particular case. As Sullivan points out, conducting an analysis in terms of presumptions of legislative intent (such as, the presumptions that the legislature intends to comply with the **Charter**, or does not intend an absurdity, or that it does not intend to unduly interfere with property or other common law rights, to name a few), and thereby achieving a narrowing of generalized text, effectively "mutes judicial responsibility and makes it less likely that these presumptions will be

critically examined" (p. 225) and "tends to empty the notion of 'legislative intent' of real significance or force".

[31] To those who would argue that this approach is inconsistent with legislative supremacy and the notion that judges are mere appliers, not makers, of law, Sullivan has the following, in my view persuasive, answer:

> [The pragmatic approach to interpretation] ... requires judges to acknowledge and justify the other factors that influence their judgments ... [and] ... it requires judges to address the crucial problem of weight. ... Pragmatism is more persuasive because it asks judges to attribute only as much weight to the text as it can bear having regard to considerations like relative clarity, and only as much weight to legislative intention as it can bear having regard to the cogency of the inferences that can be drawn from reading the text in context and from extrinsic evidence. Pragmatism expects judges to also rely on other, judicially-noticed factors but only to the extent such reliance is warranted having regard to the relevance and importance of these other factors. The clearer the text, the more compelling the evidence of specific legislative intent, the harder it will be to justify departure from those constraints and the more compelling the other factors will have to be.
>
> Another virtue of pragmatism is that it offers a better way of characterizing the separation of powers between legislatures and courts. Under traditional versions of the separation doctrine, the legislature makes the law and the court's job is to apply that law to particular facts. Under the pragmatic approach, the legislature makes statutes and the court's job is to resolve disputes in accordance with the law. With this approach, statutes are the primary but not the sole source of law. ... In a common law jurisdiction, supplemental law consists of the rest of the statute book, the common law and the evolving legal tradition which draws on current social and political values as well as those of the past.
>
> The final virtue of pragmatism is that it reconciles the reality of judicial choice with the imperatives of democracy. ... [E]ven if it were possible, it would be wrong for courts to apply the directives of the legislature mechanically and blindly to particular facts. Courts must act as mediators to ensure that disputes are resolved in ways that respect *all* the values of constitutional democracy. ...
>
> The pragmatic account of statutory interpretation is often resisted because it is thought to give too much discretion to unelected judges, contrary to both democratic principle and the rule of law. <u>But in truth, pragmatism does not "give" judges additional discretion; it merely acknowledges the discretion they have, and must have, to resolve interpretation disputes. The only real question is</u>

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> whether we are content with formalism or would rather know the "real" reasons for a decision. [Underlining added]

[32] In other words, while it is the legislature that initiates the law-making process, it must be recognized that law-making is not accomplished in a vacuum; it is designed to have practical application. In cases of dispute as to application in a given case, the legislature consigns to the courts, as the constitutionally-accepted forum for the arbitration of disputes, the role of resolving particular disputes in a fair and reasonable way, taking into account what the legislature has attempted to accomplish by its legislative act.

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[33] It is necessary now to consider how this approach to interpretation affects the result in this case.

[34] The trial judge's approach to interpretation in this case is summarized in the following paragraph from his judgment:

> [21] I therefore propose to interpret section 9 and the Mining and Mineral Rights Tax Act as a whole, according to the contemporary or modern approach which is also in my opinion the approach mandated by the Interpretation Act. To do so it is proper for me to consider materials touching on the objectives of the Act and the objectives of the Legislature in enacting its provisions. To put it another way, was there a "mischief" which the Legislature was attempting to rectify. For these purposes I am entitled to have recourse to the report of a Royal Commission on mineral revenues and to a lesser and very limited extent, to a statement as to the objects of the legislation as expressed by the Minister of Mines and Energy in 1975 during debate in the House of Assembly.

[35] He rejected a "plain meaning" approach to interpretation in the following words:

> [39] Can it then be said that in 1995 Archean transferred to Diamond Fields and its successors, "the right to engage in mining operations" in the context of the Act. At first blush and on a narrow construction of the wording, one might conclude that because an exploration license is one entity and a mining lease is another, that the transfer was not the transfer of the right to engage in mining operations. However, after review and reflection, I have concluded otherwise.

[36] The trial judge quoted extensively from the **Report of the Royal Commission on Mineral Revenue** (1974) although he acknowledged that all of the recommendations of that Commission were not necessarily embodied in the ensuing legislation.

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[37] He concluded:

> [40] The historical background of mining concessions in this province as provided by the .... Royal Commission and a reading of the legislation which followed, makes it clear that the legislative provisions for exploratory licences, mining leases and the tax on royalties, were designed to avoid the undesirable practices of the past whereby concession holders received substantial royalty payments from mine operators, without tax liability. These payments were described as unearned royalties, and it was such royalties at which the legislation was aimed.
>
> [41] Archean was essentially a prospector. It sold its exploration licences to Diamond Fields for cash, shares and the right to receive a royalty of 3.0% on net smelter returns. It now proposes to sell its contractual right to receive the 3.0% royalty, which is the only right which it now has, to a prospective purchaser. Without the tax liability under section 9, it appears to me that Archean or its purchaser/successor would be in the same position as were the receivers of unearned royalties prior to 1975.
>
> . . . . . .
>
> [43] Clearly the objects of the legislation are that unearned royalties derived from mining operations within the province, shall be subject to a specific tax regime in addition to taxes of general application."

[38] The trial judge did not accede to the argument made on behalf of Archean that the focus of the comments in the Royal Commission Report on "unearned royalties" and on the scope of s. 9 was limited to taxation of existing concession holders who had bartered their rights in the past to other operators in return for royalties which had escaped taxation. He apparently took the view, a view with which I agree, that focus on the ills of the past with respect to the non-taxation of specific concession holders was merely the motivation or justification for recommending a new taxation regime that would not allow for the repeat of situations where people could trade on the non-renewable mineral resources of the province without paying a fair return to the province for that privilege.

[39] The trial judge concluded that the language employed in s. 9 broadly construed in accordance with s. 16 of the **Interpretation Act**, could, and should, encompass a situation where the rights of a licence holder, as opposed to holder of an actual mining lease, are granted or transferred in return for a royalty payment. This conclusion was primarily influenced by the fact that under the legislative scheme the only way, short of an express grant by the legislature, in which a right to engage in mining operations could be obtained, was through the prior acquisition of an exploration licence and the fulfillment of the conditions associated with that licence. He recognized the reality that an exploration licence which has resulted in the discovery of commercial ore has significant value precisely because the holder of it controls the mechanism by which a mining lease can be obtained. While it is true that the "right" of the holder of a licence to the issuing of a mining lease pursuant to s. 31 of the **Mineral Act**, can only be exercised if he or she fulfills certain ancillary conditions, the fulfillment of those conditions (such as completion of previous assessment work and the provision of surveys and markings) is within the control of the holder of the licence.

[40] The licence holder therefore has it within his or her power to exercise the right to obtain a lease, which cannot be arbitrarily refused in the discretion of the Minister, and, in the words of s. 31(5)(a) of the **Mineral Act**, acquire "the exclusive right to develop, extract, remove, deal with, sell, mortgage, or otherwise dispose of all the unalienated minerals, or those specified in the lease, in, on or under the land described in the lease". While the licence itself confers no right to remove minerals except for very limited purposes (s. 23(2) of the **Mineral Act**) the licence in effect is the key that enables the benefits of a mining lease to be unlocked.

[41] Counsel for Archean nevertheless argues that the words "grant of the right to engage in mining operations" in s. 9(j)(a) of the **Mining and Mineral Rights Tax Act** admit of only one reasonable interpretation, namely, that they are clearly referable to a **present** grant of an **existing** right that would have the benefit of conferring upon the recipient a **present** entitlement to carry on mineral extraction activities". I do not agree. The question in reality is whether a licencee's "right to the issuing of a mining lease" within s. 31(2) of the **Mineral Act** is the equivalent of "the right to engage in mining operations" in s. 9(1)(a) of the **Mining and Mineral Rights Tax Act**. As noted, the ability of a licencee to obtain a mining

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lease (and the right to "develop, extract, remove, deal with, mortgage, or otherwise dispose of" the minerals in s. 31(5)(a) of the **Mineral Act**) is dependent solely on matters within the control of the licencee; it does not depend on the discretionary decision of the government. Provided the licencee has complied with the terms of the licence and submits a proper application with appropriate survey, there is a "right" to a lease and, by extension, a right to engage in mining operations.

[42] Because the licencee has the legal means to compel the issuance of a lease, which carries with it the right to extract minerals, it can be said, without torturing or stretching the language, that he has a right to engage in mining operations, albeit at some time in the future. While it is true that the right cannot be exercised at that moment, that is, at any time during the currency of the licence and before a lease is issued, it is nevertheless a present right in a similar way to rights in property and trust law that may be vested in interest but only enjoyable at a later time.

[43] In a sense, the "right to engage in mining operations" in s. 9(1)(a) of the **Mining and Mineral Rights Tax Act** can be said to be broader in its formulation than the "right to develop, extract, remove ... minerals" in s. 31(5)(a) of the **Mineral Act**. I agree with counsel for the respondents that the notion of "engaging" in mining operations is a larger concept than that of extracting minerals. The "right to engage" connotes possible commencement or arrangement of affairs in the future rather than the actual development or extraction. The phrase "right to extract minerals" is specifically used in other parts of the legislation. See, for example, the definition of "operator" in s. 2(j) of the **Mining and Mineral Rights Tax Act**, which defines an operator as a person who "(i) has the right to extract minerals, and (ii) carries out mining operations ..." The use of the different phrase "right to engage in mining operations" in s. 9(1)(a) is some indication that a different and broader concept was contemplated, instead of a reference strictly to an existing mining lease and the present right to extract minerals, as was submitted by counsel for Archean.

[44] Finally, as far as the textual analysis in the context of the legislation itself goes, it is not without significance that s. 8 of the **Mining and Mineral Rights Tax Act** appears to allow an operator to deduct from its net income derived from mining operations, for the purpose of paying a tax on the right to mine, the amount of royalties paid to a person "for the grant of the right to engage in mining operations". Thus it appears that if a mining company employs a separate prospecting company to stake claims and then takes a transfer of the licence under

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which the claims were staked in return for a royalty payment to the prospector, it can deduct the royalty so paid as an expense, for the purposes of calculating the tax it would otherwise pay on the right to mine. The amount of tax that would otherwise be payable by the mining company would therefore be reduced. It would be odd if the province were to be thereby deprived of such tax revenue in the hands of the mining company and still not be able to recoup it in the hands of the person to whom the royalties were paid. Otherwise the overall return to the province would not be maximized.

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[45] In light of the recommendation of the Royal Commission which led to the new legislation that "all persons who derive income from mining [should] become subject to tax" and in light of my conclusion that one of the objects of the legislation is to take account of the societal imperative of a fair return to the owner of the resource (the province) in s. 9's provision for incremental shares of royalties payable by ultimate concession holders on the exploitation of the resource, it would be inconsistent with such broad objectives to interpret the words in s. 9(1)(a) in the narrow manner advocated by Archean. I agree with counsel for the respondents that the effect of Archean's argument would lead to an unreasonable and impractical result, namely that a person transferring a licence the day before it matured into a lease would not pay tax, while the same person transferring the licence a day after it had matured, by fulfillment of the conditions for the issuance of a lease, would pay tax. This would easily lead to a formalistic manipulation of the documentation and its timing to avoid tax that might otherwise be payable. It would frustrate the overall intent of the legislation.

[46] I conclude, therefore, that the reasoning of the trial judge that the right to engage in mining operations encompasses the right pursuant to a licence to obtain a mining lease is not inconsistent with the text of the legislation when read in its proper context. It is also consistent with the broad objective sought to be achieved by the legislation as a remedy for the ills identified by the Royal Commission report that precipitated it. The interpretation given by the trial judge can therefore be justified in terms of its plausibility (its compliance with the legislative text) and its efficacity (its promotion of the broad legislative purpose). In my view, it is an interpretation that is also acceptable in the sense that the outcome is reasonable and just. It ensures that people who trade on the non-renewable mineral resources of the province pay a fair return to the province. Whilst in some cases it would be unfair to give to a taxation statute an interpretation at variance from that which might reasonably be relied upon by the taxpayer in ordering his or her affairs, this

is not one of those cases. It is highly unlikely that Archean would not have engaged in its search for minerals in this case if it knew in advance that the tax imposed under s. 9 might potentially apply to it. Nor has it been suggested that Archean would only have contemplated the sale of its right to the royalties to a third person if they were not subject to any tax.

[47] This is not a case where the social and legal values of protection of vested property rights affect the fairness of the result arrived at by the trial judge. The nature of this legislation is that it attempts to obtain for the province a fair return for non-renewable resources that are owned by the province.

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SUMMARY AND CONCLUSION

[48] The interpretation applied by the trial judge, and his decision resulting therefrom, can be justified in terms of its consistency and promotion of the broad purpose of the legislation and is not inconsistent with the language of the legislative text, when read in proper context. Furthermore, in the circumstances of this case the outcome is not unreasonable or unjust.

[49] Therefore the appeal should be dismissed with costs to the respondents.

J. D. Green, J.A.

Marshall, J.A.

[50] I concur fully with the reasons of Green J.A. I feel compelled, however, on behalf of him and myself to add one further comment.

[51] Since reception of the final draft reasons from our former colleague, and the provision of our reasons amounting to a response to it, we have been made aware of the insertion in it of the final four paragraphs. Tempted as we are to respond in detail to this cursory explanation of the circumstances surrounding the timing of

the filing of the judgments in this case, and the attribution of responsibility therefor, we have decided it is more appropriate to refrain from doing so.

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W.W. Marshall, J.A.

O'Neill, J.A.:

[52] This is an appeal from a decision of the Trial Division ordering that a declaration be issued as requested by the respondents, the defendants at trial, that the "Net Smelter Royalty" payable to the appellant, the plaintiff at trial, is taxable under s. 9(1)(a) of the **Mining and Mineral Rights Tax Act**, R.S.N. 1990, c. M.-16 (the **Act)**.

[53] The facts are not in dispute.

[54] The Appellant, Archean Resources Ltd. ("Archean") is and was a Newfoundland prospecting company, engaged in the business of mineral exploration. Archean's principals, Albert Chislett and Chris Verbiski, are the co-discoverers of the Voisey's Bay nickel-copper-cobalt ore bodies (the "Voisey's Bay Property").

[55] Archean holds a contractual royalty entitling it to receive 3% of net smelter returns respecting mineral production from the Voisey's Bay Property ("the Net Smelter Royalty").

[56] Archean acquired the Net Smelter Royalty pursuant to a mineral option agreement, (the Labrador Option Agreement), in consideration of the transfer of certain mineral exploration licences to Diamond Fields Resources Inc. ("DFRI"). The Net Smelter Royalty entitlement under the Labrador Option Agreement was itself negotiated and concluded in 1993.

[57] The mineral licences covering the Voisey's Bay Property were acquired by DFRI upon exercise of the option conferred by the Labrador Option Agreement.

[58] The position of the Respondents is that the Net Smelter Royalty is taxable under Section 9(1)(a) of the **Act**.

[59] It is Archean's contention that because it acquired the Net Smelter Royalty for the transfer or "grant" of mineral exploration licences, and the transferred mineral licences did not carry with them "the right to engage in mining operations", Archean is not subject to the Section 9(1)(a) royalty tax.

[60] Archean has been and continues to be approached by parties interested in purchasing the Net Smelter Royalty. It contends that the respondents' position on its taxability has a negative impact on the Net Smelter Royalty's valuation.

[61] Archean sought a declaration in the Court below that the Net Smelter Royalty was not taxable under Section 9(1)(a) of the **Act**.

[62] The learned trial judge found that on a "remedial and liberal construction", Archean's sale or transfer of its mineral exploration licences to DFRI for cash, shares and the right to receive the 3% royalty constituted the grant of a right to engage in mining operations, within the meaning of Section 9(1)(a) of the **Act.** The trial judge based his finding on:

> (i) mining of the Voisey's Bay Property can only occur under mining leases issued on the basis of exploration licences transferred from Archean;
>
> (ii) in reality it was the right to obtain a mining licence and thus the right to engage in mining operations which was received when the option was exercised and the exploration licence transfers completed; and
>
> (iii) DFRI's payment of significant sums of money, the transfer of shares, and their agreement to pay the Net Smelter Royalty was, in substance, payment for the right to engage in mining operations which could only be obtained through mineral exploration licences.

[63] The parties have agreed that the issue before the Court is whether the trial judge erred in his interpretation and findings which allowed the conclusion that

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Archean's Net Smelter Royalty was taxable under s. 9(1)(a) of the **Act**. This issue can be broken down as follows:

(a) Applying appropriate statutory interpretation principles, can it be said that Archean's transfer of mineral exploration licences to DFRI, in consideration of which it acquired the Net Smelter Royalty, constitutes the grant of a right to engage in mining operations within the meaning of s. 9(1)(a) of the Act so as to make the Net Smelter Royalty taxable?

(b) Alternatively, in the event that the trial judge's interpretative approach properly referenced extrinsic materials such as the 1974 Report of the Royal Commission on Mineral Revenue, was Archean within the mischief to which the Act was directed, and, in particular, is Archean properly classified as an earner of unearned income?

(c) Alternatively, in the event that the trial judge's interpretation is a sustainable one, is Archean entitled to avail of a presumption that, where a taxing statute is not explicit, reasonable uncertainty resulting from a lack of explicitness in the statute should be resolved in its favour because the interpretation contended for by Archean is a reasonable one.

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Was there a grant of "the right to engage in mining operations" within the meaning of s. 9(1)(a) of the Act?

[64] Sections 2(g), 2(j), and 9(1)(a) of the **Act** are:

(2) In this Act

(g) "mining operations" means the extraction or production within the province of minerals up to and including primary crushing and includes the transportation, handling, storing, distribution and sale of those minerals, but does not include processing;

(j) "operator" means a person who

(i) has the right to extract minerals, and

(ii) carries out mining operations on or under lands within the province;

9(1) A person who receives from

> (a) an operator, contractor or other person during a financial year money by way of rental, royalty or similar payment for the grant to the operator, contractor or other person of the right to engage in mining operations; or
>
> .....
>
> is liable for and shall pay to the minister in the manner and at the time set out in this Act an annual tax of 20% of the net revenue received in consideration of the grant of the right during that financial year.

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[65] In his analysis of the principles to be applied in the interpretation of statutes, and, in particular to the interpretation of the **Act**, a taxing statute, the trial judge referred to s. 16 of the **Interpretation Act**, c. 1-19 R.S.N., to Pierre-André Côté's **The Interpretation of Legislation in Canada**, Second Edition, and to **Driedger on The Construction of Statutes,** Third Edition, by Ruth Sullivan, two authoritative texts.

[66] The **Interpretation Act,** and particularly s. 16 thereof, is the authority which must always be employed in the interpretation of the statutes of this Province. Section 16 is as follows:

> Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.

[67] In **Côté** at pp. 409-10, is the following:

> Should taxation statutes be interpreted today in the same way as other legislation, or are they still subject to the special rules of strict or literal interpretation? Several reasons suggest that the traditional method should be abandoned. The exclusively literal approach to interpretation is on the wane; the real meaning of words can only be discovered by reading them in their context, and therefore in the light of the legislation's objectives. The traditional idea that tax statutes only serve for the collection of revenue is obsolete. Taxation legislation is frequently a means of social and economic intervention. In the context of the modern welfare state, the nature of taxation has changed ....

> In order to reflect accurately recent taxation case law, it is necessary to distinguish between literal and strict interpretation. As a rule, taxation statutes are no longer subject to a strictly literal construction. They are interpreted in the same way as other types of legislation (according to the contextual, purposive or historical approach, etc.) But if after a thorough effort there are still reasonable doubts as to the enactment's meaning, the statute will generally be applied to limit its effect and favour the tax payer.

[68] In **Driedger,** at p. 131, the modern rule of statutory interpretation is set out:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

[69] The trial judge concluded from his perusal of the authorities that the traditional strict and literal interpretation of taxing statutes has "yielded to the doctrine that taxing statutes are to be treated in the same manner as other legislation, with the proviso that in cases of reasonable doubt, the enactment is construed in favour of the subject".

[70] The appellant acknowledges in its argument that the literal approach to the interpretation of statutes no longer applies and that the "proper interpretative approach to taxing statutes" is that stated in **Stubart Investments Ltd. v. The Queen** (1984), 10 D.L.R. 1 (S.C.C.), but that the approach mandated there is "nevertheless subject to the 'plain meaning' rule that when statutory language is clear, it should be given its plain and ordinary meaning, and resort to interpretative devices or extrinsic aids is inappropriate".

[71] In **Stubart,** Estey J. for the majority of the Supreme Court of Canada said at p. 32:

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> While not directing his observations exclusively to tax statutes, the learned author of *Construction of Statutes,* 2nd Ed. (1983), at p. 87, E.A. Dreidger, put the modern rule succinctly:
>
> > Today there is only one principle or approach, namely, the words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[72] In support of its position, however, the appellant refers to **R. v. Multiform Manufacturing Co. Ltd.** (1990), 79 C.R. (3d) 390, a decision of the Supreme Court of Canada, decided some five years after **Stubart**. There, Lamer C.J.C., for the Court said at p. 394:

> When the courts are called upon to interpret a statute, their task is to discover the intention of Parliament. When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. There is no need for further construction when Parliament has clearly expressed its intention in the words it has used in the statute. As Maxwell stated in The Interpretation of Statutes, 12th ed. (1969), at pp. 28-29:
>
> > If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases.

[73] The appellant also referred, in support of its position, inter alia, to **R. v. McCraw**, [1991] 3 S.C.R. 72, **Sunnyside Nursing Home v. Builders Contract Management Ltd.**, [1990] 5 W.W.R., 289 (Sask. C.A.) and **R. v. Wonderland Gifts Ltd.** (1996), 140 Nfld. & P.E.I.R. 219, a decision of this Court. In **Wonderland Gifts**, Marshall J.A. of this Court said:

> ... where a legislative provision is clear and plain, the meaning governs and the courts may not, under the guise of interpretation, second guess the wisdom of the legislature by adopting implausible constructions not in harmony with its intent and object or attempt to fill gaps in the legislative scheme.

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Later, Marshall J.A., on p. 231, adopted the words of Denning L.J. in **Asher v. Seaford Court Estates**, [1949] 2 K.B. 481 (C.A.) on the obligation placed upon a trial judge in interpreting a statute where there is an ambiguity:

> He must set to work on the constructive task of finding the intention of Parliament, and he must do so not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature.

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[74] The appellant's position was that the language of s. 9(1)(a) is "clear and unambiguous" and does "not admit of the remedial and liberal construction imposed by" the trial judge. Further, it argued that the statutory provisions applicable to the required analysis were themselves, "plain and unambiguous".

[75] By way of summary, Archean's submission was that "in cases of clear and unambiguous statutory language, the scheme, object and intention of Parliament as adverted to in **Stubart** are apparent and yield the proper meaning based on the plain and ordinary meaning of the statutory language".

[76] Although **Multiform** might appear to support the Archean argument, the passage quoted still directs the court "to discover the intention of Parliament". Further, the words must be "clear and unambiguous", which is not here the case. Even if they were, then that principle has not been followed by the Supreme Court in subsequent cases and the contemporary principle as set out in **Stubart** and followed in **Rizzo and Gladue** to which reference will be made later has certainly replaced it.

[77] The appellant has also argued that the "remedial and liberal" interpretation approach ignores the presumption that the legislature does not intent to encroach upon the private property rights of subjects. I cannot see any merit to this argument in the particular circumstances here. The main purpose of the Act is stated clearly in its full title: An Act To Impose Taxes On Income From Mining Operations Within The Province And On Income Obtained Or Derived From Persons Holding Rights To Mine". That purpose is manifested in s. 9 of the Act where clearly, persons or institutions are to pay a tax. Whether the person liable to pay the tax is the appellant is another question. Certainly, there is a clear intention that taxes be paid and hence a clear intention to affect rights.

[78] For the respondent, it was argued that the "plain meaning" approach, isolated from the whole context of the legislation, no longer commands respect. Counsel for the respondent relied on the principle set out in at p. 430 of **Driedger**:

> It is sometimes said that the courts should not look to extrinsic materials, even though the materials otherwise would be admissible, unless the legislation to be interpreted is ambiguous or unclear. It is arguable that this constraint is pointless and misleading and should be abandoned.
>
> The constraint is pointless because, given the plasticity of language and the complexity of law, virtually all legislation is ambiguous in that it is susceptible of more than one reading. There is little point in a test that virtually all legislation meets. The constraint also is misleading in that it perpetuates the empty rhetoric of the plain meaning rule. Under current judicial practice, to say that a provision is not ambiguous, that its meaning is clear or "plain", is a conclusion reached at the end of interpretation, not a threshold test. It is a judgment that can appropriately be made only in light of all the available evidence of legislative meaning.

[79] The whole thrust of this argument is that the plain meaning of a word, words or expressions, however "plain" they may appear to be, can only be ascertained when looked at and examined in the light of the context in which they are used which must include the whole purpose and object of the statute in which they appear. This argument finds further support in **R. v. Adams**, [1995] 4 S.C.R. 707. There, Sopinka J., for the Supreme Court of Canada, said at p. 719:

> In approaching the interpretation of any statutory provision, it is prudent to keep in mind the simple but fundamental instruction offered by the court in *Reigate Rural District Council v. Sutton District Water Co.* (1908), 99 L.T.R. 168 (K.B.), at p. 170, and affirmed by this Court in *Hirsch v. Protestant Board of School Commissioners*, [1926] S.C.R. 246:
>
> > ... it is always necessary in construing a statute, and in dealing with the words you find in it, to consider the object with which the statute was passed, because it enables one to understand the meaning of the words introduced into the enactment.
>
> This well settled rule of statutory interpretation has continued to be followed by this Court to the present time.

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[80] The respondents' position is that the words at issue in s. 9 of the Act are general ordinary words which have not been given nor have they acquired any particular meaning in the context of the mineral rights regime in this jurisdiction and the court then must define and interpret that meaning in accordance with the modern or pragmatic methodology. Counsel for the respondent also referred the Court to **Rizzo & Rizzo Shoes Ltd. (Re),** [1998] 1 S.C.R. 27 where Iacobucci J. for the court said, at p. 41, with respect to the interpretation of statutes:

> ... Elmer Driedger in *Construction of Statutes*, (2nd ed., 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > ... Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[81] In **R. v. Gladue**, [1999] 1 S.C.R. 688, the Court was considering an amendment to the **Criminal Code** codifying, for the first time, the fundamental purpose and principles of sentencing and specifically dealing with s. 718.2(e), the effect of which the Court found was to alter the method of analysis to be used in determining a fit sentence for an aboriginal offender. The decision of the Court was delivered by Cory and Iacobucci JJ. The following is to be found at p. 704:

> As this Court has frequently stated, the proper construction of a statutory provision flows from reading the words of the provision in their grammatical and ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament. The purpose of the statute and the intention of Parliament, in particular, are to be determined on the basis of intrinsic and admissible extrinsic sources regarding the Act's legislative history and the context of its enactment: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at paras. 20-23; *R. v. Chartrand*, [1994] 2 S.C.R. 864 at p. 875; E.A. Driedger, *Construction of Statutes* (2nd Ed. 1983) at p. 87; *Driedger on the Construction of Statutes* (3rd Ed. 1994) by R. Sullivan, at p. 131.

In its decision the Court considered the wording of s. 718(2) and the general scheme of the part of the **Criminal Code** in which it appears, its legislative history, the social context surrounding its enactment, including the "overrepresentation" of aboriginal Canadians in penal institutions.

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[82] In my view, the law is clear that, faced with the task of interpreting words or expressions in a statute, the court or judge must, before coming to a conclusion as to what these specific words or expressions means, consider them in "their entire context, harmoniously with the scheme of the statute ... its purpose and the intention of the legislature". Further, the statute must be considered in the light of s. 16 of the **Interpretation Act** (assuming the court is dealing with a Newfoundland statute), which requires that the Act and every provision thereof be considered remedial and shall receive the liberal construction and interpretation that best assures the attainment of the objects of the Act and provisions, according to its true meaning.

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[83] The trial judge, having set out the facts and referred to the various rules of interpretation already canvassed, continued:

> I therefore propose to interpret section 9 and the Mining and Mineral Rights Tax Act as a whole, according to the contemporary or modern approach which is also in my opinion the approach mandated by the Interpretation Act. To do so it is proper for me to consider materials touching on the objectives of the Act and the objectives of the Legislature in enacting its provisions. To put it another way, was there a "mischief" which the Legislature was attempting to rectify. For these purposes I am entitled to have recourse to the report of a Royal Commission on mineral revenues and to a lesser and very limited extent, to a statement as to the objects of the legislation as expressed by the Minister of Mines and Energy in 1975 during debate in the House of Assembly.

[84] Clearly, the trial judge rejected the argument of the appellant that the plain meaning rule should be applied in the interpretation of the Act.

[85] The trial judge reviewed the pre-1975 mineral concession regime in the Province and set out some of the observations of the report of the "Royal Commission on Mineral Revenue" which was presented in December 1974. He concluded:

> It is clear from the Commission's observations and recommendations, that one of the major ills of the pre-1975 concession system was that the concession holders who had the right to explore and mine, but did not usually do so, were in receipt of significant sums of "unearned" income which was not subject to mining taxes. Though all of the recommendations of the Royal Commission were not embodied in the 1975 legislation, it is clear that the thrust of the recommendations gave rise

> to the taxing procedures provided for in the Mining and Mineral Rights Taxing Act and particularly in section 9.

[86] The trial judge also referred to Hansard, the record of debates in the House of Assembly, and quoted from a statement of the Minister of Mines and Energy in the House of Assembly, made during the debates on the Bill which would later become the Act:

> ... whereas the first part imposes a mining tax, the second part imposes what we would call a mineral rights tax.
>
> This is done, Mr. Speaker, in recognition of the fact as set out by the Royal Commission on Mineral Revenue that there was significant revenue being derived by certain companies who had originally held mining rights and who had transferred these to other companies, significant revenue being received by such companies that was not subject to the mining tax and where a government was not receiving a share of such revenue. So, we have put forth, incorporated the principle in this bill that in addition to the normal mining tax that both operators, and we will call them landlords, both operators and people who receive rentals, royalties and like payment from operating companies, that both of these types of companies or individuals should pay a mineral rights tax, a tax on revenue that they derived from the right to mine, the right to mine that they have obtained from the people of this Province.

The trial judge concluded that Hansard makes clear the intent to tax companies, such as the appellant, which receive royalties from "the right to mine".

[87] Counsel for the appellant had also argued that since the Act is a taxing statute, the burden of proof that tax was exigible lay with the government and cited **CUQ v. Corp. Notre-Dame De Bon-Secours,** [1994] 3 S.C.R. 3 in support of this position. The principle is set out in the decision of Gonthier J. at p. 15 where he said:

> According to the general rule which provides that the burden of proof lies with the plaintiff, in any proceeding it is for the party claiming the benefit of a legislative provision to show that he is entitled to rely on it. The burden of proof thus rests with the tax department in the case of a provision imposing a tax obligation and with the taxpayer in the case of a provision creating a tax exemption.

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While I agree with the principle, I cannot see its application here in light of the very clear findings made by the trial judge. Obviously, if at the end of his very thorough examination of the circumstances and the law, the trial judge was not able to decide whether Archean was liable for the tax, then since the burden of proof would be on the government, the tax on the royalty would not be applicable. Clearly, that is not the case here.

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[88] The trial judge, having referred to the "historical background of mining concessions" in the province as provided by the 1973 Royal Commission, and a reading of the legislation which followed, concluded that the legislative provisions for exploratory licences, mining licences and the tax on royalties were designed to avoid the undesirable practices of the past whereby concession holders received substantial royalty payments (described as "unearned royalties") from operators, without tax liability, and that it was these royalties at which the legislation was aimed.

[89] In his analysis, the trial judge stated, in my view correctly, that the interpretation of s. 9 of the Act was the real issue. He said:

> Can it then be said that in 1995 Archean transferred to Diamond Fields and its successors, "the right to engage in mining operations", in the context of the Act. At first blush and on a narrow construction of the wording, one might conclude that because an exploration licence is one entity and a mining lease is another, that the transfer was not the transfer of the right to engage in mining operations. However, after review and reflection, I have concluded otherwise.

[90] Earlier in his judgment, the trial judge had referred to the several provisions of the **Mineral Act**, R.S.N. 1990, c-M 12, and set out several of the relevant sections of that Act. He noted that the **Mineral Act** provided for a system whereby persons, on complying with stipulated procedures, could be granted exploration licences authorizing the recipient to engage in mineral exploration on specified areas. He noted that Archean obtained a significant number of exploration licences in areas of Labrador and had begun exploration. He added:

> It has been explained to me that exploration companies such as Archean rarely have the expertise and capital to develop promising fields and therefore they seek out or may be approached by, junior mining companies who may wish to purchase their interests. Such companies in turn seek to involve what are

referred to as senior mining companies, which have the technical and financial resources to develop mines.

The foregoing is what happened in the present case when it had been determined that "Voisey's Bay" is one of the most significant nickel/copper/cobalt deposits in the world.

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[91] Exploration licences are issued under s. 22 of the **Mineral Act**; that section is not relevant here. What is relevant however, is s. 23 of that act:

> 23.(1) Subject to the terms under which a licence is issued, the licensee has the exclusive right to explore for minerals, in, on or under the area of land described in the licence from the date of issuing for the period of
>
> (a) in the case of a licence covering lands open to staking, 5 years; and
>
> (b) in the case of a licence covering reserved lands, 4 years.
>
> (2) A licence confers no right to remove minerals except for the purpose of sampling, assaying and testing, and a licensee who removes or sells minerals in contravention of this section
>
> (a) commits a material breach of the terms of the licence; and
>
> (b) is guilty of an offence under this Act.

[92] It is not necessary to set out the various steps in the **Mineral Act** whereby mineral exploration licence may be obtained. Suffice it to say that, subject to the terms under which a licence is issued, the licencee has the exclusive right to explore for minerals in the area described in the licence but, as set out in s. 23(2), has no right to remove minerals except for "sampling, assaying and testing".

[93] Section 24 of the **Mineral Act** permits the transfer of an exploration licence and is as follows:

> 24. Nothing in this Act shall prevent the holder of a licence from transferring, assigning, mortgaging, pledging or conveying that licence to another person if section 6 is complied with, but a transfer, assignment, mortgage, pledge or conveyance of the minerals in, on or under part of the area covered by the licence is not valid unless the written approval of the minister is obtained and is filed with the document presented for registration under section 6.

Section 6 deals with the registration of, inter alia, transfers, assignments, mortgages and agreements relating to minerals and rights with respect thereto. It is not relevant for our purposes.

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[94] On what basis can it be said that Archean's transfer of its mineral exploration licences to DFRI, as permitted by s. 24 of the **Mineral Act**, was a "grant ... of the right to engage in mining operations", as contemplated by s. 9 of the Act, so as to attract tax on the royalty payable thereunder, which here would be when mining operations commence? Obviously, at the time the transfer was made to DFRI, nobody, including Archean, had the right to engage in mining operations on the lands covered by the exploration licences and it follows that, there being no right to engage in mining operations, there could be no grant of mining operations.

[95] Earlier in his decision, in considering the arguments of counsel, the trial judge had stated that although an exploration licence does not, in itself, entitle the holder of it to a mining lease, on compliance with s. 31 of the **Mineral Act**, which would include the licence holder having complied with all the terms of the licence during its currency, a mining lease would be granted.

[96] There is no suggestion that any of the requirements in s. 31 are not reasonably capable of completion by the holder of a licence. Further, upon compliance with the **Mineral Act**, the holder of the licence has under s. 31, "a right to the issuing of a mining lease ...".

[97] Clearly, the option agreement anticipated that on completion of the transfer of the exploration licences, mining operations would be carried on since part of the payment for the transfer, the royalty, could only come into existence on the carrying out of mining operations producing "net smelter returns". In effect then, what was being transferred from Archean for good and valuable consideration was the right, albeit after compliance with certain statutory provisions under the **Mineral Act**, to obtain a mining lease and "the right to engage in mining operations".

[98] With respect to the question posed by the appellant as to whether Archean was within the "mischief" to which the Act was directed and in particular, whether Archean can be properly classified as an earner of unearned income, it can fairly be said that that question has already been answered in the remedial and liberal

interpretation given to s. 9. True, as argued by the appellant, s. 9(1) was enacted "in response to the recommendations of the Royal Commission" to which reference has already been made. Archean argues, with some justification, that it is in a completely different position from that of the several companies and groups referred to earlier which had acquired mining rights from the Province and had granted or subleased them to mine operators in exchange for royalties and other consideration, which in effect, were "unearned". In that regard, Archean did not acquire a right to mine, it acquired prospecting or exploration rights and actually discovered a valuable mineral property. It could have, had it wished, applied for and obtained a mining lease. It chose to transfer its exploration licences to another group which would then enable that other group to apply for and obtain a mining lease. It was this choice which set up the right in Archean to receive, when mining operations would begin, a royalty.

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[99] Whether Archean would be a recipient of "unearned royalties" is not important for our purposes. The Act is cast broadly and imposes a tax on any person who receives "money by way of rental, royalty or similar payment" in consideration of a grant to another of "the right to engage in mining operations ...". The Act does not in any way limit the tax to those who had, in the past obtained mining concessions even though they had been identified by the commission as the principal reason why the Crown was not receiving appropriate revenues from mining operations in the Province.

[100] Although there were several references as set out earlier to concession holders as landlords, that word, in my view, was used in an illustrative sense and should not be taken as an indication that some property rights must be maintained before the tax becomes applicable under s. 9(1)(a) of the Act. The tax is payable on the royalty received even where that royalty is payable strictly on a contractual basis, as here.

[101] The third issue raised by the appellant in its factum can also be disposed of readily. I have already concluded, as did the trial judge, that the transfer of the exploration licence was a transfer of the right to engage in mining operations so as to bring Archean within the purview of s. 9 of the Act. Reference has already been made to the "first blush", "narrow construction", and "might conclude", statement by the trial judge. Certainly, on a proper interpretation of the Act, it cannot be said that there was any reasonable uncertainty resulting from lack of explicitness in the statute so that this Court could conclude that Archean was not liable for the tax.

[102] It follows, in my view, that Archean is liable to pay the tax on the net smelter royalty to be received by it when mining operations begin.

[103] A draft of these reasons for judgment was circulated to my colleagues on the panel on April 18, 2001. To this day, I have not received any comments on that draft. The draft of the reasons for judgment of my colleague Green, J.A., (now Green C.J.), with which Marshall, J.A. concurs, was delivered to me on July 29, 2002.

[104] I retired from the Court effective February 1, 2002. By virtue of s. 31, Judicature Act, R.S.N.L., 1990, c.J-4, I may give my reasons for judgment as if I had not retired, but only within six months of my retirement - July 31, 2002.

[105] Unfortunately, the time now remaining does not afford me sufficient opportunity to comment effectively on my colleague's draft or to revise my reasons should, on further reflection, I felt it necessary so to do. I note, with some satisfaction, that my colleague's reasons for judgment, as does mine, would dismiss the appeal with costs to the respondents.

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[106] I would dismiss the appeal. The respondents are entitled to their costs.

J.J. O'Neill, J.A.

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Tab 2

Information Commissioner of Canada *Appellant*

v.

Minister of National Defence *Respondent*

and

Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists *Interveners*

- and -

Information Commissioner of Canada *Appellant*

v.

Prime Minister of Canada *Respondent*

and

Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists *Interveners*

- and -

Information Commissioner of Canada *Appellant*

v.

Minister of Transport Canada *Respondent*

and

Canadian Civil Liberties Association, Canadian Newspaper Association,

Commissaire à l'information du Canada *Appelant*

c.

Ministre de la Défense nationale *Intimé*

et

Association canadienne des libertés civiles, Association canadienne des journaux, Ad IDEM/Canadian Media Lawyers Association et Association canadienne des journalistes *Intervenantes*

- et -

Commissaire à l'information du Canada *Appelant*

c.

Premier ministre du Canada *Intimé*

et

Association canadienne des libertés civiles, Association canadienne des journaux, Ad IDEM/Canadian Media Lawyers Association et Association canadienne des journalistes *Intervenantes*

- et -

Commissaire à l'information du Canada *Appelant*

c.

Ministre des Transports du Canada *Intimé*

et

Association canadienne des libertés civiles, Association canadienne des journaux,

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Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists *Interveners*

- and -

Information Commissioner of Canada *Appellant*

v.

Commissioner of the Royal Canadian Mounted Police *Respondent*

and

Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists *Interveners*

INDEXED AS: CANADA (INFORMATION COMMISSIONER) *v.* CANADA (MINISTER OF NATIONAL DEFENCE)

2011 SCC 25

File No.: 33300, 33299, 33296, 33297.

2010: October 7; 2011: May 13.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Access to information — Access to records — Request for Ministers' records located in ministerial offices — Whether records "under control of government institution" as provided in legislation — Access to Information Act, R.S.C. 1985, c. A-1, ss. 3, 4(1).

Access to information — Exemptions — Privacy — Personal information — Request for Prime Minister's agenda — Whether agenda constitutes "personal information" as defined in legislation — If so, whether agenda should nonetheless be disclosed because Prime Minister is "officer" of government institution — Access

Ad IDEM/Canadian Media Lawyers Association et Association canadienne des journalistes *Intervenantes*

- et -

Commissaire à l'information du Canada *Appelant*

c.

Commissaire de la Gendarmerie royale du Canada *Intimé*

et

Association canadienne des libertés civiles, Association canadienne des journaux, Ad IDEM/Canadian Media Lawyers Association et Association canadienne des journalistes *Intervenantes*

RÉPERTORIÉ : CANADA (COMMISSAIRE À L'INFORMATION) *c.* CANADA (MINISTRE DE LA DÉFENSE NATIONALE)

2011 CSC 25

N° du greffe : 33300, 33299, 33296, 33297.

2010 : 7 octobre; 2011 : 13 mai.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Accès à l'information — Accès à des documents — Demande de documents ministériels situés dans les bureaux de ministres — Les documents « relèvent-ils d'une institution fédérale » aux termes de la loi? — Loi sur l'accès à l'information, L.R.C. 1985, ch. A-1, art. 3, 4(1).

Accès à l'information — Exceptions — Protection des renseignements personnels — Renseignements personnels — Demande de communication de l'agenda du premier ministre — L'agenda constitue-t-il des « renseignements personnels » au sens de la loi? — Dans l'affirmative, l'agenda doit-il malgré tout être communiqué

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to Information Act, R.S.C. 1985, c. A-1, s. 19(1) — Privacy Act, R.S.C. 1985, c. P-21, s. 3.

These appeals bring together four applications by the Information Commissioner of Canada for judicial review of refusals to disclose certain records, requested almost a decade ago, under the *Access to Information Act*. The first three applications concern refusals to disclose records located within the offices of then Prime Minister Chrétien, then Minister of Defence Eggleton, and then Minister of Transport Collenette, respectively. The fourth application concerns the refusal to disclose those parts of the Prime Minister's agenda in the possession of the RCMP and PCO. The applications judge refused disclosure on the first three applications, but ordered it on the fourth. The Federal Court of Appeal overturned his decision on the fourth application only.

Held: The appeals should be dismissed.

Per McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.: Any refusal to disclose requested documents is subject to independent review by the courts on a standard of correctness. In turn, the standard of appellate review of the applications judge's decision on questions of statutory interpretation is also correctness. However, the standard of review of his decision on whether the requested documents were in fact under the control of the government institution is one of deference, provided the decision is not premised on a wrong legal principle and absent palpable and overriding error.

On the first three applications, the applications judge's reasons demonstrate that he conducted a full analysis of the statutes guided by well-established principles of statutory interpretation. At the conclusion of his analysis, the applications judge held that the words in s. 4(1) of the *Access to Information Act* mean that the PMO and the relevant ministerial offices are not part of the "government institution" for which they are responsible. The Federal Court of Appeal rightly held that the applications judge's analysis contains no error. The meaning of "government institution" is clear. No contextual consideration warrants the Court interpreting Parliament to have intended that

parce que le premier ministre est le « cadre » d'une institution fédérale? — Loi sur l'accès à l'information, L.R.C. 1985, ch. A-1, art. 19(1) — Loi sur la protection des renseignements personnels, L.R.C. 1985, ch. P-21, art. 3.

Les pourvois regroupent quatre demandes présentées par la Commissaire à l'information du Canada en vue d'obtenir la révision judiciaire d'un refus de communiquer certains documents réclamés il y a une dizaine d'années en vertu de la *Loi sur l'accès à l'information*. Les trois premières demandes concernent le refus de communiquer des documents qui se trouvaient respectivement au cabinet du premier ministre de l'époque, M. Chrétien, au cabinet du ministre de la Défense nationale de l'époque, M. Eggleton, et au cabinet du ministre des Transports de l'époque, M. Collenette. La quatrième demande concerne le refus de communiquer les parties de l'agenda du premier ministre qui se trouvent en la possession de la GRC et du BCP. Le juge de première instance a refusé la communication dans le cas des trois premières demandes, mais il l'a ordonnée dans le cas de la quatrième. La Cour d'appel fédérale n'a infirmé que sa décision relative à la quatrième demande.

Arrêt : Les pourvois sont rejetés.

La juge en chef McLachlin et les juges Binnie, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell : Le refus de communiquer les documents demandés est susceptible de recours indépendants devant les tribunaux selon la norme de la décision correcte. La norme de révision en appel applicable à la décision du juge de première instance relative aux questions d'interprétation des lois est également celle de la décision correcte. La norme de contrôle de sa décision quant à savoir si les documents demandés relèvent effectivement de l'institution fédérale est empreinte de déférence, pourvu que la décision ne soit pas fondée sur un principe juridique erroné ni entachée d'une erreur manifeste et dominante.

Dans le cas des trois premières demandes, les motifs du juge de première instance démontrent qu'il a procédé à une analyse approfondie des lois en se guidant sur des principes bien établis d'interprétation des lois. Au terme de son analyse, le juge a affirmé qu'il ressort des termes employés au par. 4(1) de la *Loi sur l'accès à l'information* que le CPM et les cabinets ministériels en cause ne font pas partie de l'« institution fédérale » dont ils sont responsables. La Cour d'appel fédérale a conclu à bon droit que l'analyse du juge de première instance n'est entachée d'aucune erreur. Le sens de l'expression « institution fédérale » est clair. Aucune considération d'ordre contextuel ne justifie la Cour de penser que le

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the definition of "government institution" include ministerial offices.

The question then becomes whether the requested records held within the respective ministerial offices are nonetheless "under the control" of their related government institutions within the meaning of s. 4(1) of the Act. The word "control" is an undefined term in the statute. As the applications judge made clear, the word must be given a broad and liberal meaning in order to create a meaningful right of access to government information. While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control. Thus, if the record requested is located in a Minister's office, this does not end the inquiry. Rather, this is the point at which a two-step inquiry commences. Step one acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. If the record requested relates to a departmental matter, however, the inquiry into control continues. Under step two, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. There is no presumption of inaccessibility for records in a minister's office. Further, this test does not lead to the wholesale hiding of records in ministerial offices. Rather, it is crafted to answer the concern. In addition, Parliament has included strong investigatory provisions that guard against intentional acts to hinder or obstruct an individual's right to access.

Applying this test to the material before him, the applications judge concluded that none of the requested records was in the control of a government institution. The conclusions he reached on the issue of control were open to him on the record and entitled to deference.

législateur voulait que les cabinets ministériels soient inclus dans la définition de l'expression « institution fédérale ».

Il s'agit alors de savoir si les documents demandés qui se trouvent dans les cabinets ministériels en question « relèvent » malgré tout de l'institution fédérale concernée au sens du par. 4(1) de la Loi. L'expression « relevant de » n'est pas définie dans la Loi. Ainsi que le juge de première instance l'a bien précisé, l'expression doit être interprétée d'une manière large et libérale pour assurer un droit d'accès efficace aux documents de l'administration fédérale. Bien que la possession matérielle du document joue de toute évidence un rôle important dans chaque cas, elle ne constitue pas un facteur déterminant sur la réponse à la question de savoir de qui ce document relève. Ainsi, si le document demandé se trouve au cabinet du ministre, l'analyse ne s'arrête pas là. C'est en fait à ce point qu'il convient d'entamer une analyse en deux étapes. La première étape se veut un mécanisme de tamisage utile. À cette étape, on se demande si le document se rapporte à une affaire ministérielle. Si tel n'est pas le cas, on ne pousse pas l'analyse plus loin. Si, toutefois, le document demandé se rapporte à une affaire ministérielle, l'analyse se poursuit. À la seconde étape, il faut tenir compte de tous les facteurs pertinents pour déterminer si l'institution fédérale pouvait raisonnablement s'attendre à obtenir sur demande une copie du document. Parmi ces facteurs, mentionnons la teneur réelle du document, les circonstances dans lesquelles il a été créé et les rapports juridiques qu'entretiennent l'institution fédérale et le détenteur du document. Le critère de l'attente raisonnable est objectif. Si, compte tenu de tous les facteurs pertinents, le cadre supérieur de l'institution fédérale devrait raisonnablement être en mesure d'obtenir une copie du document, le critère est satisfait et le document doit être communiqué, à moins qu'il ne soit assujetti à une exemption spécifique prévue par la loi. Il n'existe aucune présomption d'inaccessibilité des documents se trouvant au cabinet d'un ministre. De plus, ce critère ne conduit pas à une mise au secret générale des documents se trouvant dans les cabinets ministériels. Le critère est plutôt conçu de manière à éviter ce problème. Qui plus est, le législateur a prévu des dispositions d'enquête solides pour éviter toute tentative délibérée d'entraver le droit d'accès des citoyens.

Appliquant ce critère aux documents qui lui étaient soumis, le juge de première instance a conclu qu'aucun des documents demandés ne relevait d'une institution fédérale. Compte tenu du dossier, il lui était loisible de tirer les conclusions auxquelles il en est arrivé sur la question de savoir si les documents relevaient ou non d'une institution fédérale et il y a lieu de faire preuve de déférence envers ces conclusions.

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On the fourth application, it is agreed that the Prime Minister's agendas in the possession of the RCMP and the PCO were under the control of a "government institution". Records under the control of these institutions must be disclosed, subject to certain statutory exemptions. Section 19(1) of the *Access to Information Act* prohibits the head of a government institution from releasing any record that contains personal information as defined in s. 3 of the *Privacy Act*. However, s. 3(*j*) creates an exception by allowing for the disclosure of personal information where such information pertains to an individual who is or was an officer or employee of a government institution and where the information relates to the position or function of the individual. The applications judge held that the Prime Minister was an officer of PCO. In doing so, he relied upon the definitions of public officer found in the *Financial Administration Act* and the *Interpretation Act*. The Federal Court of Appeal rightly held that the applications judge erred in relying upon these definitions. It would be inconsistent with Parliament's intention to interpret the *Privacy Act* in a way that would include the Prime Minister as an officer of a government institution. Had Parliament intended the Prime Minister to be treated as an "officer" of the PCO pursuant to the *Privacy Act*, it would have said so expressly. Thus, the relevant portions of the Prime Minister's agenda under the control of the RCMP and the PCO fall outside the scope of the access to information regime.

Per LeBel J.: Ministers' offices are not listed in Schedule I of the Act, and accordingly they should not be considered "government institutions". Nonetheless, this conclusion cannot be the basis for an implied exception for political records. The fact that Ministers' offices are separate and different from government institutions does not mean that a government institution cannot control a record that is not in its premises. If a government institution controls a record in a Minister's office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head of the government institution must facilitate access to it on the basis of the two-part control test as stated in the reasons of Charron J. If the record holder is the Minister, the fact that his or her office is not part of the government institution he or she oversees may weigh in the balance. The reality that Ministers wear many hats must also be taken into account. A Minister is a member of Cabinet who is accountable to Parliament for the administration

Pour ce qui est de la quatrième demande, il est acquis aux débats que les agendas du premier ministre qui se trouvaient en la possession de la GRC et du BCP relevaient d'une « institution fédérale ». Les documents relevant de ces institutions doivent donc être communiqués, sous réserve de certaines exceptions prévues par la loi. Le paragraphe 19(1) de la *Loi sur l'accès à l'information* prescrit au responsable d'une institution fédérale de refuser la communication de documents contenant les renseignements personnels visés à l'art. 3 de la *Loi sur la protection des renseignements personnels*. L'alinéa *j*) de la définition de « renseignements personnels » figurant à l'art. 3 de cette dernière loi prévoit toutefois une exception en permettant la communication de renseignements personnels qui concernent un cadre ou employé, actuel ou ancien, d'une institution fédérale et qui portent sur son poste ou ses fonctions. Le juge de première instance a affirmé que le premier ministre était un cadre du BCP. Pour ce faire, il s'est fondé sur les définitions de l'expression « fonctionnaire public » que l'on trouve dans la *Loi sur la gestion des finances publiques* et la *Loi d'interprétation*. La Cour d'appel fédérale a jugé à juste titre que le juge avait commis une erreur en se fondant sur ces définitions. Il irait à l'encontre de la volonté du législateur d'interpréter la *Loi sur la protection des renseignements personnels* de manière à assimiler le premier ministre à un cadre d'une institution fédérale. Si le législateur fédéral avait voulu que le premier ministre soit assimilé à un « cadre » du BCP pour l'application de la *Loi sur la protection des renseignements personnels*, il l'aurait dit explicitement. Ainsi, les passages pertinents de l'agenda du premier ministre relevant de la GRC et du BCP échappent à l'application du régime d'accès à l'information.

Le juge LeBel : Les cabinets des ministres ne figurent pas à l'annexe I de la Loi, et ils ne doivent donc pas être considérés comme des « institutions fédérales ». Néanmoins, cette conclusion ne saurait justifier la création d'une exception implicite au sujet des documents politiques. Bien que les cabinets des ministres soient autonomes et différents des institutions fédérales, cette considération n'empêche pas un document qui ne se trouve pas dans les locaux d'une institution fédérale de relever de cette dernière. Si un document conservé au cabinet d'un ministre relève d'une institution fédérale, la Loi s'applique à ce document. En pareil cas, le responsable de l'institution fédérale doit faciliter l'accès au document conformément au critère en deux étapes relatif à l'expression « relevant de » formulé par la juge Charron. Si le ministre détient le document, le fait que son cabinet ne fasse pas partie de l'institution fédérale qu'il dirige peut être pris en considération. Il faut aussi tenir compte du fait que les ministres agissent

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of a government department, but is usually also a Member of Parliament in addition to being a member of a political party for which he or she performs various functions and, finally, a private person. It is conceivable that many records will not fall neatly into one category or another. The head of a government institution is responsible for determining whether such hybrid documents should be disclosed. The first step in the assessment is to consider whether the records fall within the scope of the Act. If they do, the head must then perform the second step of the assessment process: to determine whether the records fall under any of the exemptions provided for in the Act. Depending on which exemption applies, the head may or may not have the discretion to disclose the document.

A presumption that a Minister's records are beyond the scope of the Act would upset the balance between the head's discretionary powers and the Commissioner's powers of investigation. Such an interpretation of the Act would effectively leave the head of a government institution with the final say as to whether a given document was under the institution's control and would run counter to the purpose of the Act, according to which decisions on the disclosure of government information must be reviewed independently. This is crucial to the intended balance between access to information and good governance.

In the circumstances in which the records at issue in the first three applications were created and managed, a government institution would not have a reasonable expectation of obtaining them. These documents were therefore not under the control of a government institution. As for the records in the possession of the RCMP and PCO, even though they were under the control of a government institution, the heads of those institutions had an obligation to refuse to disclose them.

Cases Cited

By Charron J.

Referred to: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66; *Housen v. Nikolaisen*, 2002 SCC 33, [2002]

en plusieurs qualités. Un ministre est non seulement membre du Cabinet et responsable devant le Parlement de l'administration d'un ministère, mais il est aussi — dans la plupart des cas — un député, en plus d'appartenir à un parti politique pour le compte duquel il exerce différentes fonctions et, enfin, il demeure un particulier. Il se peut que bon nombre de documents ne relèvent pas clairement de l'une ou l'autre de ces catégories. Il appartient au responsable d'une institution fédérale de déterminer si ces documents mixtes qui se trouvent au cabinet d'un ministre doivent être communiqués. La première étape de cet examen consiste à établir si les documents tombent dans le champ d'application de la Loi. Si c'est le cas, le responsable doit alors, à la deuxième étape de l'examen, se demander s'ils sont assujettis à l'une des exemptions prévues à la Loi. Selon l'exemption applicable, le responsable peut disposer ou non du pouvoir discrétionnaire de communiquer le document.

Une présomption écartant les documents d'un ministre du champ d'application de la Loi romprait l'équilibre qui existe entre le pouvoir discrétionnaire du responsable et le pouvoir d'enquête du Commissaire. Si elle est retenue, cette interprétation de la Loi laisserait effectivement au responsable d'une institution fédérale le soin de décider en dernier ressort si un document donné relève de l'institution fédérale en cause et irait à l'encontre de l'objet de la Loi, soit que les décisions quant à la communication sont susceptibles de recours indépendants. La réalisation de cet objet est fondamentale pour le maintien de l'équilibre recherché entre l'accès à l'information et la bonne gouvernance.

Vu les circonstances dans lesquelles les documents en question dans les trois premières demandes ont été rédigés et gérés, une institution fédérale ne pourrait raisonnablement pas s'attendre à les obtenir. Les documents ne relevaient donc pas d'une institution fédérale. Quant aux documents que possèdent le BCP et la GRC, les responsables de ces institutions étaient tenus d'en refuser la communication même s'ils relevaient d'une institution fédérale.

Jurisprudence

Citée par la juge Charron

Arrêts mentionnés : *Ontario (Sûreté et Sécurité publique) c. Criminal Lawyers' Association*, 2010 CSC 23, [2010] 1 R.C.S. 815; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Canada (Commissaire à l'information) c. Canada (Commissaire de la Gendarmerie royale du Canada)*, 2003 CSC 8, [2003] 1 R.C.S. 66; *Housen c. Nikolaisen*, 2002

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2 S.C.R. 235; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Francis v. Baker*, [1999] 3 S.C.R. 250; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Canada Post Corp. v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320; *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110; *Privacy Commissioner (Can.) v. Canada Labour Relations Board* (2000), 257 N.R. 66; *Rubin v. Canada (Minister of Foreign Affairs and International Trade)*, 2001 FCT 440, 204 F.T.R. 313; *Canada (Attorney General) v. Information Commissioner (Can.)*, 2001 FCA 25, 268 N.R. 328; *Canada Post Corp. v. Canada (Minister of Public Works)*, 2004 FCA 286, 328 N.R. 98; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403.

By LeBel J.

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Canadian Charter of Rights and Freedoms, s. 2.

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Library and Archives of Canada Act, S.C. 2004, c. 11, s. 2 "government record", "ministerial record".

CSC 33, [2002] 2 R.C.S. 235; *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305; *Francis c. Baker*, [1999] 3 R.C.S. 250; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, 2005 CSC 26, [2005] 1 R.C.S. 533; *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773; *Société canadienne des postes c. Canada (Ministre des Travaux publics)*, [1993] 3 C.F. 320; *Société canadienne des postes c. Canada (Ministre des Travaux publics)*, [1995] 2 C.F. 110; *Canada (Commissaire à la protection de la vie privée du Canada c. Canada (Conseil canadien des relations du travail)*, 2000 CanLII 15487; *Rubin c. Canada (Ministre des Affaires étrangères et du Commerce international)*, 2001 CFPI 440 (CanLII); *Canada (Procureur général) c. Canada (Commissaire à l'information)*, 2001 CAF 25 (CanLII); *Société canadienne des postes c. Canada (Ministre des Travaux publics et des Services gouvernementaux)*, 2004 CAF 286 (CanLII); *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403.

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Arrêts mentionnés : *Ontario (Sûreté et Sécurité publique) c. Criminal Lawyers' Association*, 2010 CSC 23, [2010] 1 R.C.S. 815; *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773; *Robichaud c. Canada (Conseil du Trésor)*, [1987] 2 R.C.S. 84; *Béliveau St-Jacques c. Fédération des employées et employés de services publics inc.*, [1996] 2 R.C.S. 345; *Canada (Commissaire à l'information) c. Canada (Commissaire de la Gendarmerie royale du Canada)*, 2003 CSC 8, [2003] 1 R.C.S. 66; *Cie H.J. Heinz du Canada ltée c. Canada (Procureur général)*, 2006 CSC 13, [2006] 1 R.C.S. 441; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403; *Rubin c. Canada (Greffier du Conseil privé)*, [1996] 1 R.C.S. 6; *Société canadienne des postes c. Canada (Ministre des Travaux publics)*, [1995] 2 C.F. 110.

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Loi sur l'accès à l'information, L.R.C. 1985, ch. A-1, art. 2, 3 « institution fédérale », « responsable d'institution fédérale », 4, 6, 7 à 9, 13 à 26, 30(3), 35, 36, 37, 41, 42, 48, 49, 73.

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APPEAL from a judgment of the Federal Court of Appeal (Richard C.J. and Sexton and Sharlow JJ.A.), 2009 FCA 181, 393 N.R. 54, 310 D.L.R. (4th) 748, [2009] F.C.J. No. 693 (QL), 2009 CarswellNat 1523, reversing in part a judgment of Kelen J., 2008 FC 766, [2009] 2 F.C.R. 86, 326 F.T.R. 237, 87 Admin. L.R. (4th) 1, [2008] F.C.J. No. 939 (QL), 2008 CarswellNat 1979. Appeal dismissed.

Jessica R. Orkin, Marlys A. Edwardh, Laurence Kearley and *Diane Therrien*, for the appellant.

Christopher Rupar, Jeffrey G. Johnston and *Mandy Moore*, for the respondents.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Paul Schabas, for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian

Loi sur la gestion des finances publiques, L.R.C. 1985, ch. F-11, art. 2 « fonctionnaire public ».

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Jessica R. Orkin, Marlys A. Edwardh, Laurence Kearley et *Diane Therrien*, pour l'appelant.

Christopher Rupar, Jeffrey G. Johnston et *Mandy Moore*, pour les intimés.

Ryder Gilliland, pour l'intervenante l'Association canadienne des libertés civiles.

Paul Schabas, pour les intervenantes l'Association canadienne des journaux, Ad IDEM/Canadian

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Media Lawyers Association and the Canadian Association of Journalists.

The judgment of McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

CHARRON J. —

1. Overview

[1] These appeals bring together four applications by the Information Commissioner of Canada for judicial review of refusals to disclose certain records to a person who requested them under the *Access to Information Act*, R.S.C. 1985, c. A-1. The records, requested almost a decade ago, generally consist of agendas, notes and emails relating to the activities of then-Prime Minister Jean Chrétien, then-Minister of National Defence Art Eggleton, and then-Minister of Transport David Collenette.

[2] The first three applications concern refusals to disclose records located within the offices of the Prime Minister, the Minister of National Defence, and the Minister of Transport, respectively. Each record holder, jointly called the "Government" in these appeals, takes the position that his office is not subject to the *Access to Information Act*. The fourth application concerns the refusal to disclose those parts of the Prime Minister's agenda in the possession of the Royal Canadian Mounted Police ("RCMP") and the Privy Council Office ("PCO"). The record holders in this application agree that they are subject to the Act; they argue, however, that the information contained in the requested records is exempt from disclosure under s. 19(1) of the *Access to Information Act*, as it constitutes "personal information" within the meaning of s. 3 of the *Privacy Act*, R.S.C. 1985, c. P-21.

Media Lawyers Association et l'Association canadienne des journalistes.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell rendu par

LA JUGE CHARRON —

1. Aperçu général

[1] Les présents pourvois regroupent quatre demandes présentées par la Commissaire à l'information du Canada en vue d'obtenir la révision judiciaire d'un refus de communiquer certains documents à la personne qui les avait réclamés en vertu de la *Loi sur l'accès à l'information*, L.R.C. 1985, ch. A-1. Les documents en question, qui ont été demandés il y a une dizaine d'années, consistent de façon générale en des agendas, des notes et des courriels se rapportant aux activités du premier ministre de l'époque, Jean Chrétien, du ministre de la Défense de l'époque, Art Eggleton, et du ministre des Transports de l'époque, David Collenette.

[2] Les trois premières demandes concernent le refus de communiquer des documents qui se trouvaient respectivement au cabinet du premier ministre, au cabinet du ministre de la Défense nationale et au cabinet du ministre des Transports. Les détenteurs des documents, appelés collectivement « le gouvernement » dans les présents pourvois, soutiennent tous que leur cabinet respectif n'est pas assujetti à la *Loi sur l'accès à l'information*. La quatrième demande concerne le refus de communiquer les pages de l'agenda du premier ministre qui se trouvent en la possession de la Gendarmerie royale du Canada (« GRC ») et du Bureau du Conseil privé (« BCP »). Dans cette demande, tout en admettant qu'ils sont assujettis à la Loi, les détenteurs des documents affirment toutefois que les renseignements contenus dans les documents demandés sont soustraits à la communication par application du par. 19(1) de la *Loi sur l'accès à l'information*, étant donné qu'ils constituent des « renseignements personnels » au sens de l'art. 3 de la *Loi sur la protection des renseignements personnels*, L.R.C. 1985, ch. P-21.

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[3] The requester has the right, under s. 4 of the *Access to Information Act*, to be given access to "any record under the control of a government institution". On the first three applications, there is no issue that, by definition, "government institution" includes the PCO, the Department of National Defence, and the Department of Transport. The question is whether each government institution includes the office of the Minister who presides over it. In other words: Is the Prime Minister's office ("PMO") part of the PCO? Is the office of the Minister of National Defence part of the Department of National Defence? Is the office of the Minister of Transport part of the Department of Transport?

[4] Following a detailed analysis, Kelen J. of the Federal Court of Canada answered no to each question, holding that the respective entities were separate (2008 FC 766, [2009] 2 F.C.R. 86). In his view, the words of the statute read in their ordinary sense, in context, and harmoniously with the scheme of the Act and the intention of Parliament made this clear. Expert evidence on the functioning of government also supported this interpretation. He concluded that "no contextual consideration could warrant the Court interpreting Parliament to have intended the PMO to be part of the PCO for the purposes of the Act. The same is true with respect to ministers' offices not being part of the respective government institutions" (para. 77). In a brief oral judgment, Sharlow J.A., speaking for the Federal Court of Appeal, upheld Kelen J.'s interpretation of the statute on this point (2009 FCA 175, 393 N.R. 51 ("Decision 1")), and again in 2009 FCA 181, 393 N.R. 54 ("Decision 2").

[5] As the ministerial entities were held to be separate, a second question arose: Are the records requested, despite being physically located in

[3] En vertu de l'art. 4 de la *Loi sur l'accès à l'information*, l'auteur de la demande a droit à l'accès « aux documents relevant d'une institution fédérale ». Dans le cas des trois premières demandes, il est acquis aux débats que, par définition, le Bureau du Conseil privé, le ministère de la Défense nationale et le ministère des Transports sont des « institutions fédérales ». La question qui se pose est de savoir si le cabinet du ministre responsable de chacune de ces institutions fédérales fait lui aussi partie de cette institution fédérale. En d'autres termes, le cabinet du premier ministre (« CPM ») fait-il partie du BCP? Le cabinet du ministre de la Défense nationale fait-il partie du ministère de la Défense nationale? Et le cabinet du ministre des Transports fait-il partie du ministère des Transports?

[4] Au terme d'une analyse fouillée, le juge Kelen de la Cour fédérale du Canada a répondu par la négative à chacune de ces questions, estimant que les entités en cause étaient distinctes (2008 CF 766, [2009] 2 R.C.F. 86). À son avis, cette conclusion ressortait à l'évidence des termes de la Loi, lorsqu'on les interprète en tenant compte du contexte de la Loi et suivant le sens ordinaire qui s'harmonise avec l'esprit de la Loi et avec l'intention du législateur. Les témoignages des experts entendus au sujet des rouages du gouvernement appuyaient également cette interprétation. Il a conclu « qu'aucune considération contextuelle n'autorise la Cour à dire que le législateur voulait que le CPM soit considéré comme une partie intégrante du BCP aux fins de la Loi. Il en va de même pour les cabinets des ministres, qui ne font pas partie des institutions fédérales concernées » (par. 77). Dans un bref jugement prononcé à l'audience, la juge Sharlow, qui s'exprimait au nom de la Cour d'appel fédérale, a confirmé sur ce point l'interprétation que le juge Kelen avait faite de la Loi (2009 CAF 175 (CanLII) (« décision 1 »)), et de nouveau à 2009 CAF 181 (CanLII) (« décision 2 »).

[5] Comme les entités ministérielles ont été considérées comme distinctes, une autre question s'est posée, à savoir si les documents demandés

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the respective offices of the Prime Minister, the Minister of National Defence, or the Minister of Transport, nonetheless "under the control" of the related government institution within the meaning of s. 4 of the *Access to Information Act*?

[6] After surveying the jurisprudence, Kelen J. concluded that no single factor is determinative of whether a record is under the control of a government institution. However, the relevant factors could usefully be distilled into a two-part test that asks: (1) whether the contents of the document relate to a departmental matter; and (2) whether the government institution could reasonably expect to obtain a copy of the document upon request. If both questions are answered in the affirmative, the document is under the control of the government institution. Kelen J. considered the contents of the records and the circumstances in which they were created, and concluded that none of the records requested was under the control of the related government institution. The Federal Court of Appeal agreed with the control test proposed by Kelen J. It also upheld his decision regarding the requested records, stating that it was open to him to come to this conclusion "by drawing reasonable inferences from the evidence before him, as he did" (Decision 1, at para. 9).

[7] Thus, the answers provided by the courts below on the meaning of "government institution" and "control" effectively disposed of the first three applications in favour of the Government.

[8] In the fourth application, there is no dispute that the RCMP and the PCO are government institutions and that, subject to any exemption under the *Access to Information Act*, records under their control must be disclosed. While a number of exemptions were at issue in first instance, the question on this appeal is whether the records

« relevaient » de l'institution fédérale concernée au sens de l'art. 4 de la *Loi sur l'accès à l'information* malgré le fait qu'ils se trouvaient matériellement au cabinet du premier ministre ou à celui du ministre de la Défense nationale ou du ministre des Transports.

[6] Le juge Kelen a passé en revue la jurisprudence et a conclu qu'aucun facteur n'était à lui seul déterminant pour répondre à la question de savoir si un document relevait ou non d'une institution fédérale. Il a toutefois estimé que les facteurs pertinents pouvaient être utilement ramenés à un seul critère en deux volets, à savoir : (1) le contenu du document se rapporte-t-il à une affaire ministérielle? (2) L'institution fédérale en cause pourrait-elle raisonnablement s'attendre à obtenir une copie du document sur demande? Si la réponse à ces deux questions était affirmative, le document relevait selon lui de l'institution fédérale. Le juge Kelen a tenu compte du contenu des documents et des circonstances dans lesquelles ils ont été créés et a conclu qu'aucun des documents demandés ne relevait de l'institution fédérale concernée. La Cour d'appel fédérale a accepté le critère proposé par le juge Kelen pour déterminer si un document relevait ou non d'une institution fédérale. Elle a également confirmé la décision du juge Kelen en ce qui a trait aux documents réclamés, estimant qu'il était loisible au juge Kelen d'en arriver à cette conclusion « en tirant des inférences raisonnables à partir des éléments de preuve dont il était saisi, ce qu'il a fait d'ailleurs » (décision 1, par. 9).

[7] Ainsi, les réponses que les juridictions inférieures ont données au sujet du sens des expressions « institution fédérale » et « relevant de » ont eu pour effet de trancher les trois premières demandes en faveur du gouvernement.

[8] En ce qui concerne la quatrième demande, il est acquis aux débats que la GRC et le BCP sont des institutions fédérales et que, sous réserve des exceptions prévues par la *Loi sur l'accès à l'information*, les documents qui relèvent de ces institutions doivent être communiqués. Bien que plusieurs exceptions aient été en litige en première instance,

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requested consist of "personal information" within the meaning of s. 19(1) of the *Access to Information Act*. This provision prohibits the head of a government institution from disclosing "any record . . . that contains personal information as defined in section 3 of the *Privacy Act*". Under this provision, "personal information" "means information about an identifiable individual that is recorded in any form".

la question qui se pose dans le cadre du présent pourvoi est de savoir si les documents demandés constituent des « renseignements personnels » au sens du par. 19(1) de la *Loi sur l'accès à l'information*. Cette disposition prévoit que le responsable d'une institution fédérale est tenu de refuser la communication « de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels* », qui définit comme suit les « renseignements personnels » : « renseignements, quels que soient leur forme et leur support, concernant un individu identifiable ».

[9] The parties agree that the Prime Minister's agenda falls within the general definition of "personal information". However, s. 3 "personal information" (*j*) of the *Privacy Act* creates an exception by excluding from the scope of protection such information which pertains to "an individual who is or was an officer or employee of a government institution" and the information "relates to the position or functions of the individual". The exception seemingly reflects the view that federal officers or employees are entitled to less protection when the information requested relates to their position or function within the government. It is this exception that is arguably at play in the fourth application: the disclosure issue turns on the question of whether the Prime Minister is an "officer" of the PCO within the meaning of s. 3 "personal information" (*j*) of the *Privacy Act*.

[9] Les parties s'entendent pour dire que l'agenda du premier ministre répond à la définition générale des « renseignements personnels ». L'alinéa *j*) de la définition de « renseignements personnels » figurant à l'art. 3 de la *Loi sur la protection des renseignements personnels* prévoit toutefois une exception à cette règle en soustrayant à l'application de la protection les renseignements concernant « un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions ». Cette exception semble refléter l'opinion que les cadres et employés fédéraux ont droit à une protection moins étendue lorsque les renseignements demandés concernent leur poste ou les fonctions qu'ils exercent au sein du gouvernement. C'est cette exception qui serait vraisemblablement en jeu dans la quatrième demande. La réponse à la question de la divulgation dépend de celle que l'on donne à la question de savoir si le premier ministre est un « cadre » du BCP au sens de l'al. *j*) de la définition de « renseignements personnels » figurant à l'art. 3 de la *Loi sur la protection des renseignements personnels*.

[10] Kelen J. held that the Prime Minister was an "officer" of the PCO. In a separate judgment, the Federal Court of Appeal overturned his decision, finding that the conclusion reached in the related appeals about the separate nature of the PMO from the PCO governed here as well. Sharlow J.A. held that it would be "inconsistent with the intention of Parliament to interpret the *Privacy Act* in a way that would include the Prime Minister within the scope

[10] Le juge Kelen a conclu que le premier ministre était un « cadre » du BCP. Dans un jugement distinct, la Cour d'appel fédérale a infirmé sa décision, estimant que la conclusion tirée dans les appels connexes au sujet du caractère distinct du CPM par rapport au BCP s'appliquait également en l'espèce. La juge Sharlow a conclu « qu'il irait à l'encontre de l'intention du législateur d'interpréter la *Loi sur la protection des renseignements personnels*

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of the phrase 'officer of a government institution'" in s. 3 (Decision 2, at para. 8).

[11] The Commissioner appeals from the dismissal of each application. She urges the Court to hold that, as "heads" presiding over departments, the Prime Minister and the Ministers are part of these "government institutions" within the meaning of the *Access to Information Act*, when exercising *departmental functions*. Similarly, she argues that the Prime Minister is an "officer" of the PCO. Alternatively, if ministerial offices are held to be separate entities, the Commissioner argues that any record *relating to a departmental matter* is presumptively under the "control" of the government institution over which the Minister presides, regardless of its creation or location within the ministerial office. Thus, any such record must be disclosed, unless it is specifically exempt under the Act.

[12] While the Commissioner raises some specific issues regarding the interpretation in the courts below in support of her position, her arguments are grounded primarily in broad principles of constitutional law, political theory, democratic accountability, and ministerial responsibility. I note at the outset that these principles unquestionably form part of the context in which the *Access to Information Act* operates. The position advanced by the Commissioner also reflects a policy of democratic governance which Parliament could choose to adopt. However, as Kelen J. aptly noted in the introduction to his judgment:

> The question for the Court is not whether the documents should be accessible to the public under Canada's "freedom to information" law, but whether the documents are currently accessible to the public under Canada's existing law. The Court does not

de manière à ce que le premier ministre soit visé par l'expression "cadre d'une institution fédérale" telle qu'employée à l'alinéa *j*) de la définition de "renseignements personnels" figurant à l'article 3 de la *Loi sur la protection des renseignements personnels* » (décision 2, par. 8).

[11] La Commissaire a formé un pourvoi à l'encontre du rejet de chacune des demandes. Elle exhorte la Cour à statuer qu'en tant que « responsables » d'un ministère, le premier ministre et les ministres font partie des « institutions fédérales » en question au sens de la *Loi sur l'accès à l'information* lorsqu'ils exercent des *fonctions ministérielles*. Dans le même ordre d'idées, elle plaide que le premier ministre est un « cadre » du BCP. À titre subsidiaire, la Commissaire fait valoir, pour le cas où il serait jugé que les cabinets ministériels constituent des entités distinctes, que tout document *se rapportant à une affaire ministérielle* est présumé « relever » de l'institution fédérale dont le ministre est responsable, indépendamment de la façon dont le document a été créé ou de l'endroit où il se trouve aux bureaux du ministère en cause. Ce document doit donc être communiqué à moins de faire l'objet d'une exception expressément prévue par la Loi.

[12] Bien que la Commissaire soulève, à l'appui de sa thèse, certaines questions spécifiques au sujet de l'interprétation donnée par les juridictions inférieures, sa thèse repose principalement sur des principes généraux de droit constitutionnel, de théorie politique, de responsabilité démocratique et de responsabilité ministérielle. Je constate, d'entrée de jeu, que ces principes s'inscrivent incontestablement dans le cadre d'application de la *Loi sur l'accès à l'information*. La thèse de la Commissaire évoque également une politique de gouvernance démocratique que le Parlement pourrait choisir d'adopter. Toutefois, ainsi que le juge Kelen le fait observer à juste titre dans le préambule de son jugement :

> La question à laquelle la Cour doit répondre n'est pas de savoir si les documents devraient être accessibles au public au titre du droit canadien de la "liberté d'accès à l'information", mais de savoir si les documents sont actuellement accessibles au public en vertu

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legislate or change the law; it interprets the existing law (para. 3).

[13] Much as the courts below have concluded, it is my view that the interpretation advanced by the Commissioner on the meaning of "government institution", "control" and "officer" cannot be sustained under the existing statutes at issue. As the Government rightly argues, such interpretation would dramatically expand the access to information regime in Canada, a result that can only be achieved by Parliament.

[14] I would dismiss the appeals.

2. The Legislative Scheme

[15] As this Court recently stated, "[a]ccess 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" (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, *per* McLachlin C.J. and Abella J., at para. 1). These general principles are reflected in the federal access regime under the *Access to Information Act*. The purpose of the statute is expressly stated as follows:

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

[16] Thus, the statute expressly recognizes that information in the hands of government institutions "should be available to the public", but the right to access it is subject to "necessary exceptions".

du droit canadien existant. La Cour ne légifère pas ni ne modifie le droit; elle interprète le droit existant (par. 3).

[13] À l'instar des juridictions inférieures, j'estime que l'interprétation proposée par la Commissaire au sujet du sens des termes « institution fédérale », « relevant de » et « cadre » ne peut être retenue suivant le libellé actuel des lois en cause. Ainsi que le gouvernement l'affirme à juste titre, une telle interprétation aurait pour effet d'élargir considérablement la portée du régime d'accès à l'information au Canada, ce qui demeure l'apanage du législateur.

[14] Je suis d'avis de rejeter les pourvois.

2. Le régime législatif

[15] Ainsi que la Cour l'a récemment affirmé : « [l]'accès à l'information détenue par les institutions publiques peut accroître la transparence du gouvernement, aider le public à se former une opinion éclairée et favoriser une société ouverte et démocratique. Certains renseignements détenus par ces institutions doivent toutefois être protégés pour empêcher une atteinte à ces mêmes principes et promouvoir une bonne gouvernance » (*Ontario (Sûreté et Sécurité publique) c. Criminal Lawyers' Association*, 2010 CSC 23, [2010] 1 R.C.S. 815 (la juge en chef McLachlin et la juge Abella, par. 1)). Ces principes généraux trouvent un écho dans le régime fédéral d'accès à l'information prévu par la *Loi sur l'accès à l'information*, dont l'objet est expressément formulé comme suit :

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

[16] La Loi reconnaît donc explicitement le « droit du public à [la] communication » des renseignements que possèdent les institutions fédérales, tout en assujettissant ce droit à des « exceptions

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Before discussing the provisions at issue, I will briefly describe the legislative scheme.

[17] The right to "be given access to any record under the control of a government institution" is provided under s. 4(1). This broad right of access is expressly subject to other provisions of the *Access to Information Act*, but supersedes "any other Act of Parliament". What constitutes a "government institution" for the purposes of the statute is key to these appeals. The definition is set out in s. 3 and will be discussed more fully below.

[18] The process for accessing government information begins when a member of the public makes a request in writing for a record to a government institution (s. 6). The head of the government institution who receives a request must give written notice to the person who has requested the records as to whether or not access will be given in whole or in part within a reasonable time limit (ss. 7 to 9). Where the government institution refuses to give access to the records requested, it is required to provide notice to the requester that the records do not exist, or to expressly state the exemption it is relying upon in refusing to provide access to the records (ss. 10(1) to (3)). Further, the government institution must inform the requester of his or her "right to make a complaint to the Information Commissioner about the refusal" (s. 10(1)).

[19] If the requester elects to exercise this right and makes a complaint, the Commissioner is entitled to commence an investigation if she is "satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act" (s. 30(3)). Once the Commissioner commences an investigation, the *Access to Information Act* grants her significant investigatory powers (s. 36). If the Commissioner concludes that the complaint is well founded, a report is sent to the head of the government institution containing the findings of the investigation and any recommendations the Commissioner considers appropriate; the report

indispensables ». Mais avant d'aborder les dispositions en cause, je tiens à décrire brièvement le régime législatif.

[17] Le droit « à l'accès aux documents relevant d'une institution fédérale » est prévu au par. 4(1). Ce droit général d'accès est expressément reconnu, sous réserve des autres dispositions de la *Loi sur l'accès à l'information*, mais prime sur « toute autre loi fédérale ». Ce qui constitue une « institution fédérale » au sens de la Loi devient un point capital dans les présents pourvois. La définition de cette expression est énoncée à l'art. 3. Nous nous y attarderons plus longuement plus loin.

[18] La première démarche à accomplir pour obtenir la communication d'un document d'une institution fédérale consiste pour le simple citoyen à en faire la demande par écrit (art. 6). Le responsable de l'institution fédérale à qui est faite la demande est tenu d'aviser par écrit la personne qui a fait la demande de ce qu'il sera donné ou non communication totale ou partielle du document dans un délai raisonnable (art. 7 à 9). En cas de refus de communication, le responsable de l'institution fédérale doit aviser l'auteur de la demande que le document n'existe pas ou préciser la disposition sur laquelle il se fonde pour en refuser la communication (par. 10(1) à (3)). De plus, l'institution fédérale doit informer l'auteur de la demande de son droit « de déposer une plainte auprès du Commissaire à l'information » (par. 10(1)).

[19] Si l'auteur de la demande choisit d'exercer son droit de porter plainte, le Commissaire est habilité à ouvrir une enquête s'il « a des motifs raisonnables de croire qu'une enquête devrait être menée sur une question relative à la demande ou à l'obtention de documents en vertu de la présente loi » (par. 30(3)). Lorsque le Commissaire ouvre une enquête, la *Loi sur l'accès à l'information* lui confère de vastes pouvoirs d'enquête (art. 36). Dans les cas où il conclut au bien-fondé de la plainte, le Commissaire adresse au responsable de l'institution fédérale de qui relève le document un rapport dans lequel elle présente les conclusions de son enquête ainsi que les recommandations qu'elle juge

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may also include a request to be notified of any action taken to implement the recommendations or reasons why no such action has been or is proposed to be taken (s. 37(1)).

[20] If the government institution elects not to comply with the Commissioner's recommendations, the individual requesting the record may apply for judicial review pursuant to s. 41 of the *Access to Information Act*. The Commissioner may also apply for judicial review of the government's decision with the consent of the individual who initially requested the records (s. 42). The latter is what occurred here. The Government refused to disclose the information, and the requester complained to the Commissioner. Following her investigation, the Commissioner found the complaints to be well founded and made recommendations accordingly. The recommendations were not implemented by the Government, and the Commissioner brought these four applications for judicial review.

3. Judicial Review in the Courts Below

[21] The four applications for judicial review were combined in one hearing before the Federal Court. Before reviewing the relevant material, Kelen J. determined the appropriate standard of review in accordance with the principles set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Under *Dunsmuir*, courts may usefully first inquire whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be given to a particular category of questions. Second, where the first inquiry proves unfruitful, courts proceed to analyze the factors that make it possible to identify the proper standard of review (para. 62). Kelen J. ended the inquiry at the first step, holding that this Court's decision in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 ("*RCMP*"), determined in a satisfactory manner

indiquées; elle peut également demander au responsable de lui donner avis soit des mesures prises pour la mise en œuvre de ses recommandations, soit des motifs invoqués pour ne pas y donner suite (par. 37(1)).

[20] Si l'institution fédérale choisit de ne pas donner suite aux recommandations du Commissaire, la personne qui s'est vu refuser la communication du document demandé peut exercer un recours en révision de ce refus en vertu de l'art. 41 de la *Loi sur l'accès à l'information*. Le Commissaire peut aussi exercer lui-même ce recours en révision avec le consentement de la personne qui avait demandé le document au départ (art. 42). C'est ce qui s'est produit en l'espèce. Le gouvernement a refusé de communiquer les renseignements demandés et l'auteur de la demande a porté plainte devant la Commissaire. À la suite de son enquête, la Commissaire a conclu au bien-fondé de la plainte et elle a formulé des recommandations en conséquence. Le gouvernement n'a pas donné suite aux recommandations, à la suite de quoi la Commissaire a introduit les quatre présentes demandes de révision judiciaire.

3. Révision judiciaire devant les juridictions inférieures

[21] Les quatre demandes de révision judiciaire ont été réunies et ont été instruites ensemble lors d'une même audience devant la Cour fédérale. Avant d'examiner les documents en cause, le juge Kelen a arrêté la norme de contrôle appropriée conformément aux principes énoncés dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190. Suivant cet arrêt, le tribunal peut utilement vérifier en premier lieu si la jurisprudence établit déjà de manière satisfaisante le degré de déférence correspondant à une catégorie de questions en particulier. En second lieu, lorsque cette démarche se révèle infructueuse, le tribunal entreprend l'analyse des éléments qui permettent d'arrêter la bonne norme de contrôle (par. 62). Le juge Kelen a mis fin à l'analyse à la première étape, après avoir estimé que l'arrêt de notre Cour dans l'affaire *Canada (Commissaire à l'information) c. Canada (Commissaire de la Gendarmerie royale*

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that the questions raised in these four applications should be reviewed on a "correctness" standard (para. 36).

[22] The standard for judicial review of refusals by government institutions to disclose any requested documents under the *Access to Information Act* is not at issue in these appeals. Kelen J. rightly concluded that this Court authoritatively determined the matter in *RCMP*. Determining the appropriate standard of review requires courts to discern the intention of the legislature. Of particular note here is the fact that Parliament expressly states in s. 2(1) that one of the purposes of the *Access to Information Act* is to ensure that "decisions on the disclosure of government information should be reviewed independently of government". Moreover, the burden is put on the government to demonstrate on judicial review that it is authorized to refuse to disclose the records that were requested (s. 48). If the court concludes that the head of the institution does not have the legal authority to refuse to disclose the relevant records, the court may substitute its own decision and order the disclosure of the documents, subject to any conditions it may elect to impose (s. 49).

[23] In turn, Kelen J.'s decision is subject to appellate review in accordance with the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8-9 and 31-36. His decision on questions of statutory interpretation is reviewable on a standard of correctness. His decision on whether the requested documents were in fact under the control of the government institution, provided it is not premised on a wrong legal principle and absent palpable and overriding error, is entitled to deference. Although not expressly stated, it is apparent from reading both judgments in the Federal Court of Appeal below that Sharlow J.A. reviewed Kelen J.'s decision in accordance with the proper standard of appellate review. I will review the decisions under appeal using the same approach.

du Canada), 2003 CSC 8, [2003] 1 R.C.S. 66 (« l'arrêt *GRC* ») établissait de manière satisfaisante que le tribunal devait, pour l'examen des questions soulevées dans les quatre présentes demandes, appliquer la norme de la « décision correcte » (par. 36).

[22] La norme de révision judiciaire applicable au refus d'une institution fédérale de communiquer un document demandé en vertu de la *Loi sur l'accès à l'information* n'est pas en cause dans les présents pourvois. Le juge Kelen a conclu à bon droit que notre Cour avait tranché la question de façon péremptoire dans l'arrêt *GRC*. Pour arrêter la norme de contrôle appropriée, le tribunal doit discerner l'intention du législateur. Il convient en particulier de souligner que le législateur déclare explicitement au par. 2(1) de la *Loi sur l'accès à l'information* que celle-ci a notamment pour objet de faire en sorte que « les décisions quant à la communication [soient] susceptibles de recours indépendants du pouvoir exécutif ». En outre, dans le cadre de la révision judiciaire, la charge d'établir le bien-fondé du refus de communiquer le document demandé incombe à l'institution fédérale (art. 48). Si elle conclut que la Loi n'autorise pas le responsable de l'institution fédérale à refuser la communication du document demandé, la cour peut ordonner la communication de ce document aux conditions qu'elle juge indiquées (art. 49).

[23] La décision du juge Kelen peut, à son tour, faire l'objet d'une révision en appel conformément aux principes énoncés dans l'arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 8-9 et 31-36. La décision du juge Kelen sur les questions d'interprétation législative est susceptible de révision selon la norme de la décision correcte. Sa décision quant à savoir si les documents demandés relèvent effectivement de l'institution fédérale commande la déférence, sauf si elle est fondée sur un principe juridique erroné et si elle n'est pas entachée d'une erreur manifeste et dominante. Bien que cela ne soit pas déclaré expressément, il ressort à l'évidence des deux décisions de la Cour d'appel fédérale que la juge Sharlow a révisé la décision du juge Kelen en appliquant la bonne norme de révision en appel. Je vais examiner les décisions visées par les présents pourvois en suivant la même méthode.

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4. Analysis

4.1 *Issue 1: Is the Office of the Prime Minister, or a Minister, a "Government Institution" Within the Meaning of the Access to Information Act?*

[24] Subsection 4(1) of the *Access to Information Act* reads as follows:

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

(*a*) a Canadian citizen, or

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

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

[25] Under s. 3 of the Act:

"government institution" means

(*a*) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, 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*;

[26] Schedule I sets out a list of entities that are government institutions for the purposes of the *Access to Information Act*. This list includes the PCO, the Department of National Defence, the Department of Transport, and the RCMP. However, the PMO, the office of the Minister of National Defence and the office of the Minister of Transport are *not* expressly listed in Schedule I. The term "government institution" is similarly defined under the *Privacy Act*. The question becomes whether Parliament intended to implicitly include ministerial offices within the *Access to Information Act*.

4. Analyse

4.1 *Première question : Les cabinets du premier ministre ou d'un ministre sont-ils des « institutions fédérales » au sens de la Loi sur l'accès à l'information?*

[24] Le paragraphe 4(1) de la *Loi sur l'accès à l'information* est ainsi libellé :

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

a) les citoyens canadiens;

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

[25] L'article 3 de la Loi prévoit la définition suivante :

« institution fédérale »

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

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*.

[26] On trouve à l'annexe I de la *Loi sur l'accès à l'information* une liste des entités qui constituent des institutions fédérales au sens de la Loi. On trouve dans cette liste le BCP, le ministère de la Défense nationale, le ministère des Transports et la GRC. Toutefois, le CPM, le cabinet du ministre de la Défense nationale et le cabinet du ministre des Transports *ne* figurent *pas* expressément à l'annexe I. On trouve dans la *Loi sur la protection des renseignements personnels* une définition similaire de l'expression « institution fédérale ». La question qui se pose est donc de savoir si le législateur voulait que la *Loi sur l'accès à l'information* s'applique implicitement aux cabinets des ministres.

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[27] The proper approach to statutory interpretation has been articulated repeatedly and is now well entrenched. The goal is to determine the intention of Parliament by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute. In addition to this general roadmap, a number of specific rules of construction may serve as useful guideposts on the court's interpretative journey. Kelen J. instructed himself accordingly (paras. 43-49). He then conducted the following analysis:

- First, Kelen J. considered evidence from political scientists about how government actually works to determine the ordinary meaning of the term "government institution" according to the experts. He held that this evidence demonstrated that the PMO and the relevant ministerial offices are not part of the "government institution" for which they are responsible (paras. 50-52).

- Second, he noted that pursuant to s. 3 of the statute, the Minister is the "head" of his or her department. This fact supported the argument that the Ministers' offices and the PMO are part of their respective departments. However, he found that the PMO and the Ministers also have many other functions unrelated to the respective departments for which they are responsible (paras. 53-56).

- Third, he considered Hansard debates from 1981, which made it clear that Parliament intended that the *Access to Information Act* apply to information, in any form, held by *specified* government institutions. While the Commissioner agrees that Parliament did not intend the Act to apply to political documents, no exemption or exclusion for such political records is provided for in the Act. Kelen J. therefore reasoned that an interpretation of "government institution" that included the PMO and offices of the Ministers would dramatically extend the right of access. Parliament would not have intended such a "dramatic

[27] La méthode qu'il convient d'appliquer lorsqu'il s'agit d'interpréter une loi a été énoncée à de nombreuses reprises et elle est maintenant solidement établie. Il s'agit de rechercher la volonté du législateur en lisant les termes de la disposition dans leur contexte global, en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit et l'objet de la loi. Outre ces indications générales, un tribunal peut compter sur plusieurs règles spécifiques d'interprétation comme points de repère utiles. C'est la démarche qu'a suivie le juge Kelen (par. 43-49) pour ensuite procéder à l'analyse suivante :

- En premier lieu, le juge Kelen a examiné les témoignages de politologues au sujet des rouages de l'appareil gouvernemental afin de déterminer le sens ordinaire que les experts donnent à l'expression « institution fédérale ». Il a estimé que ces témoignages démontraient que le CPM et les cabinets des ministres concernés ne font pas partie de l'« institution fédérale » dont ils sont responsables (par. 50-52).

- Deuxièmement, le juge Kelen a fait observer que, suivant l'art. 3 de la Loi, le ministre est le « responsable » de son ministère. Ce fait appuyait l'argument voulant que les cabinets des ministres et le CPM font partie de leurs ministères respectifs. Il a toutefois jugé que le CPM et les ministres exercent maintes autres fonctions sans rapport avec les ministères dont ils sont responsables (par. 53-56).

- Troisièmement, il a examiné des extraits des Débats de la Chambre des communes de 1981 qui indiquaient clairement que le législateur voulait que la *Loi sur l'accès à l'information* s'applique à l'information, sous toutes ses formes, détenue par les institutions fédérales *nommément désignées*. Bien que la Commissaire admette que le législateur fédéral ne voulait pas que la Loi s'applique aux documents politiques, on ne trouve dans la Loi aucune exception ou exclusion en ce qui concerne cette catégorie de documents. Le juge Kelen a par conséquent expliqué qu'interpréter l'expression « institution fédérale » de manière à y inclure le CPM et les cabinets

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result" without express wording to that effect (paras. 57-60).

- Fourth, following the enactment of the *Access to Information Act*, the Information Commissioner's 1988-1989 Report to Parliament indicated that Ministers' offices were *not* subject to the provisions of the Act. The Commissioner adopted the same view in 1991, and again in 1997. These original interpretations confirm that the office of the Information Commissioner itself understood the intent of Parliament was not to include the PMO or a Minister's office in the government institutions listed in Schedule I of the Act (paras. 61-65).

- Fifth, since the time the Commissioner publicly urged Parliament to amend the legislation to clarify that the PMO and ministerial offices are subject to the Act, Parliament amended the Act several times, including recent amendments as part of the 2006 *Federal Accountability Act*, S.C. 2006, c. 9, and has not chosen to make this amendment. While Parliament's intention may not always be inferred from legislative silence, in this case, the silence is clear and constitutes relevant evidence of legislative intent: *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 42 (paras. 66-67).

- Sixth, the Latin maxim of statutory interpretation *expressio unius est exclusio alterius* ("to express one thing is to exclude another") supports the Government's view. If Parliament had intended to include the PMO and Ministers' offices in Schedule I, it would have referred to them expressly (para. 68).

- Seventh, the evidence at trial demonstrated that there have been many Ministers without a portfolio since Confederation. If the *Access to Information Act* was intended to apply to the offices of Ministers, the Act would not apply to a Minister without a portfolio because he or she

des ministres concernés élargirait considérablement le droit d'accès. Si le législateur avait voulu qu'il en soit ainsi, il aurait employé des mots explicites en ce sens (par. 57-60).

- Quatrièmement, à la suite de l'adoption de la *Loi sur l'accès à l'information*, le Commissaire à l'information a déclaré, dans le rapport soumis au Parlement pour 1988-1989, que les cabinets des ministres *n'*étaient *pas* assujettis aux dispositions de la Loi. Le Commissaire a repris ce point de vue en 1991, puis de nouveau en 1997. Ces interprétations initiales confirment que le bureau même du Commissaire déduisait que le législateur entendait ne pas inclure le CPM ou les cabinets des ministres dans les institutions fédérales énumérées à l'annexe I de la Loi (par. 61-65).

- Cinquièmement, depuis que le Commissaire a invité publiquement le législateur à modifier la Loi pour préciser que le CPM et les cabinets des ministres sont assujettis à la *Loi sur l'accès à l'information*, le législateur a modifié la Loi à plusieurs reprises, notamment à l'occasion de l'adoption récente de la *Loi fédérale sur la responsabilité*, L.C. 2006, ch. 9, sans toutefois apporter la précision demandée. Bien qu'on ne puisse pas toujours déduire l'intention du législateur du silence de la loi, le silence du législateur constituait en l'espèce une preuve claire et pertinente de son intention : *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, par. 42 (par. 66-67).

- Sixièmement, la maxime latine d'interprétation des lois *expressio unius est exclusio alterius* (« la mention de l'un implique l'exclusion de l'autre ») appuie la thèse du gouvernement. Si le législateur avait voulu inclure le CPM et les cabinets des ministres dans l'annexe I, il les aurait mentionnés explicitement (par. 68).

- Septièmement, la preuve présentée au procès démontrait qu'il y avait eu depuis la Confédération de nombreux ministres sans portefeuille. Si l'on avait voulu qu'elle s'applique aux cabinets des ministres, la *Loi sur l'accès à l'information* ne s'appliquerait pas aux ministres sans

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would not have a corresponding "government institution" set out in Schedule I. Such a result is absurd (para. 69).

- Eighth, the internal structure of the Act also provides insight on this question. Sections 21(1)(*a*), (*b*), (2)(*b*) and 26 of the *Access to Information Act* demonstrate that Parliament distinguished between a "government institution" and "a minister of the Crown". When drafting legislation, Parliament is assumed to have used words precisely and carefully, and so Parliament intended the terms to have different meanings (paras. 70-73).

- Ninth, provisions of the *Library and Archives of Canada Act*, S.C. 2004, c. 11, also draw a distinction between governmental records and ministerial records. The principle of consistent expression in statutory interpretation means that Parliament distinguishes between a "ministerial record" and a "departmental record" (paras. 74-76).

[28] At the conclusion of his analysis, Kelen J. held that the words in s. 4(1) of the *Access to Information Act* mean that the PMO and the relevant ministerial offices are *not* part of the "government institution" for which they are responsible. That is, the PMO cannot be interpreted as part of the PCO, the office of the Minister of National Defence is not part of the Department of National Defence, and the office of the Minister of Transport is not part of the Department of Transport.

[29] The Commissioner presents very little argument on any of the above-noted points. As I understand her submissions, she has only two specific complaints about the approach adopted by Kelen J. and affirmed by the Federal Court of Appeal. First, she argues that the applications judge erred in his use of expert evidence as an interpretative aid. Second, and somewhat related to the first point, she argues that the Federal Court of Appeal erred in relying on a non-existing "constitutional convention" for distinguishing between ministerial offices and their respective government departments. I

portefeuille puisque ceux-ci ne disposent pas d'une « institution fédérale » correspondante énumérée à l'annexe I, ce qui serait absurde (par. 69).

- Huitièmement, l'économie de la Loi donne également une idée sur la question. Il ressort des al. 21(1)*a*), *b*) et (2)*b*) et de l'art. 26 de la *Loi sur l'accès à l'information* que le législateur fait une distinction entre « institution fédérale » et « ministre ». Il faut supposer que, lorsqu'il rédige les lois, le législateur fédéral emploie les mots avec précision et avec soin. Le législateur entendait donc attribuer à ces termes des sens différents (par. 70-73).

- Neuvièmement, la *Loi sur la Bibliothèque et les Archives du Canada*, L.C. 2004, ch. 11, fait aussi une distinction entre un « document ministériel » et un « document fédéral ». La distinction que le législateur établit entre « document fédéral » et « document ministériel » consacre la présomption d'uniformité des expressions en matière d'interprétation des lois (par. 74-76).

[28] Au terme de son analyse, le juge Kelen affirme qu'il ressort des termes employés au par. 4(1) de la *Loi sur l'accès à l'information* que le CPM et les cabinets ministériels en cause *ne* font *pas* partie de l'« institution fédérale » dont ils sont responsables. Autrement dit, on ne saurait considérer que le CPM fait partie du BCP, que le cabinet du ministre de la Défense nationale fait partie du ministère de la Défense nationale et que le cabinet du ministre des Transports fait partie du ministère des Transports.

[29] La Commissaire a présenté très peu d'arguments sur l'un ou l'autre des points susmentionnés. Si j'ai bien compris sa thèse, les seuls reproches précis qu'elle adresse au sujet de la méthode retenue par le juge Kelen et confirmée par la Cour d'appel fédérale sont de deux ordres. Elle affirme tout d'abord que le juge de première instance a commis une erreur en se servant des témoignages des experts comme outil d'interprétation. En second lieu, ce qui se rattache quelque peu au premier point, elle soutient que la Cour d'appel fédérale a commis une erreur en se fondant sur une « convention constitutionnelle » inexistante pour établir une distinction

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will therefore deal specifically with these two arguments.

4.1.1 The Use of Expert Evidence

[30] After setting out the relevant principles of statutory interpretation, Kelen J. briefly considered the evidence tendered from "experts in government machinery" (para. 50). In particular, he examined the evidence of Mr. Nicholas d'Ombrain, Mr. Justice John Gomery, and a reference relied upon by Mr. d'Ombrain from the Honourable Robert Gordon Robertson, Clerk of the Privy Council and Secretary to the Cabinet from 1963 to 1975. Kelen J. summarized the gist of this evidence as follows, at paras. 50-51:

> While the two entities work closely together on some matters, the PMO is responsible for many matters unrelated to the PCO. The same is true with respect to the relationship between a minister's office and the department over which the minister presides.
>
> Accordingly, the evidence demonstrates that in the ordinary sense of the words in subsection 4(1) of the Act, the PMO and the relevant ministerial offices are not part of the "government institution" for which they are responsible.

[31] The Commissioner submits that reliance upon such expert evidence to interpret the *Access to Information Act* constitutes an error of law. She maintains that it was entirely appropriate for her office to consider expert political science evidence at the investigatory stage. However, opinion evidence is inadmissible in the courtroom to prove the ordinary meaning of legislative terms, "as the interpretation and articulation of domestic law lies at the very heart of the judicial function" (A.F., at para. 110). She contends that this approach confirms that both courts below "viewed the central issue of the reach of a 'government institution' as a question of fact, to be determined primarily if not entirely on the basis of expert evidence" (para. 112). She argues further that the courts below "did not at any point seek to determine what was included within a 'government institution' as a matter of law"; rather, they simply accepted the "assertion that a ministerial office is separate from

entre les divers cabinets ministériels et les ministères gouvernementaux respectifs auxquels ces cabinets correspondent. Je vais donc examiner spécifiquement ces deux moyens.

4.1.1 Recours à des témoignages d'experts

[30] Après avoir énoncé les principes d'interprétation législative applicables, le juge Kelen s'est brièvement arrêté sur le témoignage donné par des « experts de l'appareil gouvernemental » (par. 50). Il a notamment examiné le témoignage de M. Nicholas d'Ombrain et celui du juge John Gomery, en plus d'examiner les propos de M. Robert Gordon Robertson, greffier du Conseil privé et secrétaire du Cabinet de 1963 à 1975, rapportés par M. d'Ombrain. Le juge Kelen résume comme suit l'essentiel de ces témoignages, aux par. 50-51 :

> Les deux entités travaillent en étroite collaboration dans certains dossiers, mais le CPM est chargé de nombreuses affaires qui ne concernent pas le BCP. Il en va de même de la relation entre le cabinet d'un ministre et le ministère que dirige ce même ministre.
>
> Par conséquent, la preuve démontre que, selon le sens ordinaire des mots employés au paragraphe 4(1) de la Loi, le CPM et les cabinets des ministres ne font pas partie de l'« institution fédérale » dont ils sont responsables.

[31] La Commissaire affirme qu'en se fondant sur le témoignage de ces experts pour interpréter la *Loi sur l'accès à l'information*, le juge a commis une erreur de droit. Elle maintient qu'il convenait parfaitement que le Commissariat tienne compte du témoignage de politologues à l'étape de l'enquête, mais qu'un témoignage d'opinion n'est pas admissible en justice pour faire la preuve du sens courant des termes de la loi, [TRADUCTION] « étant donné que l'interprétation et l'articulation du droit interne se situent au cœur même de la fonction juridictionnelle » (m.a., par. 110). Elle soutient que cette façon de procéder permet d'affirmer que les deux juridictions inférieures « ont considéré la question centrale de la portée d'une "institution fédérale" comme une question de fait devant être jugée principalement, voire totalement, à la lumière de témoignages d'experts » (par. 112). Elle ajoute que les juridictions inférieures « n'ont jamais cherché à préciser ce que la notion d'"institution

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the department over which the Minister presides" (para. 112).

[32] In response, the Government first observes that the Commissioner's position on this point is "particularly curious", as the expert evidence generated by the Commissioner's office and compiled for her investigation was used extensively to support her recommendations and then placed in the record before the Federal Court (R.F., at para. 103). In any event, the Government submits that expert evidence can be properly used as an interpretative aid in discerning the ordinary meaning of words by Parliament when such evidence is relevant and reliable: *Francis v. Baker*, [1999] 3 S.C.R. 250, at para. 35; and *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 47. Further, Kelen J.'s reasons demonstrate that the expert evidence played a limited role in his analysis. He did not rely on any expert opinion on the meaning of the words used by Parliament as contended, given that no such opinion was tendered by the witnesses. He considered this evidence, rather, to situate the interpretative exercise in its proper context, an approach which was then correctly upheld by the Federal Court of Appeal.

[33] I agree with the Government. No objection was raised in respect of this evidence in first instance, not surprisingly in my view, as consideration of expert evidence in the context of these applications was entirely appropriate. It is also apparent from Kelen J.'s reasons that he merely relied upon the expert evidence tendered by both parties to better appreciate the day-to-day workings of the government and to situate his interpretation of the *Access to Information Act* within its proper context. Further, Kelen J.'s meticulous analysis of the law belies any contention that he "viewed the central issue of the reach of a 'government institution' as a question of fact"

fédérale" englobait en droit » et qu'elles se sont plutôt contentées d'accepter [TRADUCTION] « l'assertion qu'un cabinet ministériel est distinct du ministère dont le ministre est responsable » (par. 112).

[32] En réponse, le gouvernement fait tout d'abord observer que la thèse de la Commissaire sur ce point est [TRADUCTION] « d'autant plus curieuse » que, pour appuyer ses recommandations, la Commissaire a utilisé abondamment les témoignages d'experts recueillis par le Commissariat à l'information en vue de l'enquête de la Commissaire et qu'elle les a ensuite versés au dossier soumis à la Cour fédérale (m.i., par. 103). En tout état de cause, le gouvernement affirme que l'on peut régulièrement utiliser les témoignages des experts pour faciliter l'interprétation afin de discerner le sens courant des termes employés par le législateur lorsque ces témoignages sont pertinents et fiables : *Francis c. Baker*, [1999] 3 R.C.S. 250, par. 35; et *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, 2005 CSC 26, [2005] 1 R.C.S. 533, par. 47. Il ressort par ailleurs des motifs du juge Kelen que les témoignages d'experts ont joué un rôle limité dans son analyse. Contrairement à ce qu'on a affirmé, le juge Kelen ne s'est fondé sur aucune opinion d'expert pour déterminer le sens des termes employés par le législateur, puisque les témoins n'ont formulé aucune opinion en ce sens. Il a plutôt tenu compte de ces témoignages pour situer l'exercice d'interprétation dans son contexte, une méthode que la Cour d'appel fédérale a eu raison de confirmer par la suite.

[33] Je suis d'accord avec le gouvernement. Aucune objection n'a été soulevée au sujet de ces témoignages en première instance, ce qui à mon avis n'a rien d'étonnant, puisqu'il était parfaitement acceptable de tenir compte de ces témoignages d'experts dans le contexte des présentes demandes. Il ressort également de ses motifs que le juge Kelen a simplement recouru aux témoignages d'experts présentés par les deux parties pour mieux comprendre les rouages du gouvernement et pour être en mesure de situer son interprétation de la *Loi sur l'accès à l'information* dans le bon contexte. Par ailleurs, l'analyse méticuleuse que le juge Kelen a faite des règles de droit infirme tout argument qu'il

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(A.F., at para. 112). His reasons demonstrate, rather, that he conducted a full analysis of the text, guided by well-established principles of statutory interpretation. I see no merit to the Commissioner's argument on the alleged misuse of expert evidence.

[TRADUCTION] « considér[ait] la question centrale de la portée d'une "institution fédérale" comme une question de fait » (m.a., par. 112). Ses motifs démontrent plutôt qu'il a procédé à une analyse approfondie du texte, en se guidant sur des principes bien établis d'interprétation des lois. L'argument de la Commissaire au sujet du présumé mauvais usage qui a été fait des témoignages d'experts est mal fondé à mon avis.

4.1.2 Alleged Reliance on a Non-Existing Constitutional Convention

[34] Along the same lines, the Commissioner takes issue with Sharlow J.A.'s characterization of the distinction between ministerial offices and their respective government departments as a "well understood convention" (Decision 1, at para. 7; Decision 2, at para. 7). The Commissioner focuses a significant portion of her argument on the legal criteria for a constitutional convention and takes the position that none is met here. She therefore argues that this phrase demonstrates that the Federal Court of Appeal "erroneously accorded constitutional weight to a disputed, ill-defined and inconsistently followed practice" (A.F., at para. 116).

[35] The Government responds that the Commissioner used the term "convention" in her material in the courts below simply to describe an understanding of the roles and duties of Ministers and government institutions. The Government submits that, similarly, when Sharlow J.A. used the phrase "well understood convention", it is clear from the context that she was simply referring to the day-to-day workings or "conventions" of government.

[36] Again, I agree with the Government on this point. I find no support at all in the record for the suggestion that Sharlow J.A. was actually referring to constitutional conventions in their legal sense.

4.1.2 Présumé recours à une convention constitutionnelle inexistante

[34] Dans le même ordre d'idées, la Commissaire s'oppose à la conclusion de la juge Sharlow selon laquelle la distinction qui existe entre le cabinet d'un ministre et le ministère correspondant repose sur une « convention bien établie » (décision 1, par. 7; décision 2, par. 7). La Commissaire axe une partie importante de son argumentation sur les critères légaux régissant l'existence d'une convention constitutionnelle et elle adopte le point de vue qu'aucun de ces critères n'a été respecté en l'espèce. Elle soutient par conséquent que cette expression démontre que la Cour d'appel fédérale [TRADUCTION] « a accordé par erreur une valeur constitutionnelle à un usage contesté, mal défini et qui n'est pas suivi de façon constante » (m.a., par. 116).

[35] Le gouvernement rétorque que la Commissaire n'emploie le terme « convention » dans les documents qu'elle a soumis aux juridictions inférieures que pour évoquer une compréhension du rôle et des attributions des ministres et des institutions fédérales. Le gouvernement ajoute, dans le même ordre d'idées, qu'il ressort clairement du contexte que, lorsqu'elle emploie l'expression « convention bien établie », la juge Sharlow fait simplement allusion aux rouages ou aux « conventions » régissant le fonctionnement du gouvernement.

[36] J'abonde là encore dans le sens du gouvernement. Je ne trouve rien au dossier qui appuie l'idée que la juge Sharlow faisait effectivement allusion à des conventions constitutionnelles au sens juridique de cette expression.

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4.1.3 "Function-Based" Approach Advocated by the Information Commissioner

[37] Except for the above-noted specific complaints about the use of expert evidence and the reliance on government "conventions", the Commissioner's arguments are grounded primarily in broad principles of constitutional law, political theory, democratic accountability, and ministerial responsibility. The Commissioner expounds on these principles in considerable detail and submits that "the right of access and apparatus created by [the *Access to Information Act* was] meant [by Parliament] to be integrated into these legal rules" and "to function as a supplementary mechanism to ensure accountability for the exercise of executive power" (A.F., at para. 102). She therefore urges the Court to adopt a "function-based analysis" so as to create a dividing line between a Minister's departmental functions on the one hand and non-departmental functions on the other. She explains in her factum that this "analysis is easily translated into the scheme" of the *Access to Information Act* in respect of the ministerial offices at issue in the following manner (A.F., at para. 150):

> . . . a record is subject to [the *Access to Information Act*], regardless of its physical form or location, where it was created by or on behalf of a Minister to document or give effect to a Minister's exercise of departmental powers, duties or functions, or relies directly on departmental staff in order to exercise the Minister's departmental powers, duties or functions. By contrast, the record is not subject to [the *Access to Information Act*] if it is created by the Minister or exempt staff for political or non-departmental purposes. Similarly, if the Minister or exempt staff receive information from departmental staff, and then generate further records for political, non-departmental purposes, the additions are not subject to [the *Access to Information Act*].

[38] The Commissioner further submits that a similar analysis could be adopted in relation to Ministers of State "[t]o the extent that a Minister of State exercises the powers, duties and functions of a department", and also "in relation to government institutions other than departments that fall within

4.1.3 Approche « fonctionnelle » préconisée par la Commissaire à l'information

[37] Hormis les griefs précis déjà mentionnés en ce qui a trait au recours à des témoignages d'experts et à des « conventions » gouvernementales, la thèse de la Commissaire repose principalement sur des principes généraux de droit constitutionnel, de théorie politique, de responsabilité démocratique et de responsabilité ministérielle. La Commissaire disserte longuement sur ces principes et affirme que [TRADUCTION] « le législateur entendait que le droit d'accès et le mécanisme créés par [la *Loi sur l'accès à l'information*] soient intégrés dans ces principes juridiques » et « qu'ils servent de mécanisme supplétif pour assurer que le pouvoir exécutif rende compte de la façon dont il exerce ses pouvoirs » (m.a., par. 102). La Commissaire exhorte par conséquent la Cour à adopter dans son analyse une « approche fonctionnelle » de manière à tracer une ligne de démarcation entre, d'une part, les fonctions ministérielles du ministre et, d'autre part, ses fonctions non ministérielles. Elle explique dans son mémoire qu'[TRADUCTION] « il est facile de transposer cette analyse à l'économie » de la *Loi sur l'accès à l'information* pour ce qui est du cabinet ministériel en litige de la manière suivante (m.a., par. 150) :

> [TRADUCTION] . . . un document est assujetti à [la *Loi sur l'accès à l'information*] indépendamment de son aspect physique ou du lieu où il se trouve, s'il a été créé par le ministre ou en son nom pour documenter l'exercice que le ministre fait de ses attributions ministérielles ou pour donner effet à cet exercice, ou s'il s'en remet directement au personnel ministériel pour exercer les attributions du ministre. En revanche, un document échappe à l'application de la [*Loi sur l'accès à l'information*] s'il est créé par le ministre ou par des membres de son personnel exonéré à des fins non politiques ou non ministérielles. De même, si le ministre ou le personnel exonéré reçoit des renseignements du personnel ministériel et crée ensuite d'autres documents à des fins politiques ou non ministérielles, ces nouveaux renseignements ne sont pas assujettis à [la *Loi sur l'accès à l'information*].

[38] La Commissaire plaide qu'on pourrait adopter une analyse similaire dans le cas des ministres d'État [TRADUCTION] « [d]ans la mesure où un ministre d'État exerce les attributions d'un ministère » de même que « dans le cas des institutions fédérales autres que les ministères qui relèvent

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the portfolio responsibilities of a given Minister (or Minister of State)" (A.F., at paras. 152-53).

[39] The Government submits that the "function-based" approach advocated by the Commissioner renders the list of institutions detailed in Schedule I essentially meaningless. Her approach is entirely focused on the nature and content of the record and, as such, conflates the issue of defining "government institution" with the issue of how one determines which entity has "control" of a specific record. Moreover, although the Commissioner recognizes that political and non-departmental matters would not be subject to release under the Act, the statute provides no exemption for such records. Her attempt to remedy this deficiency by conceptually building it into a function-based definition of "government institution" goes "well beyond any concept of statutory interpretation recognized by this or any other Court" (R.F., at para. 129).

[40] I agree with the Government. None of the broad principles relied upon by the Commissioner is contentious in these appeals. In my respectful view, nor are they particularly helpful in answering the questions of statutory interpretation at issue. For example, the Commissioner relies heavily on the quasi-constitutional characterization of the *Access to Information Act*. (See *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, where the Court affirmed this status in respect of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), and the *Privacy Act* (paras. 23-25).) She argues that, as such, the purpose of the Act becomes of paramount importance in the interpretative exercise, and that the legislation should be interpreted broadly in order to best promote the principles of responsible government and democratic accountability. While I agree that the *Access to Information Act* may be considered quasi-constitutional in nature, thus highlighting its important purpose, this does not alter the general principles of statutory interpretation. The fundamental difficulty with the

des responsabilités rattachées au portefeuille d'un ministre (ou ministre d'État) déterminé » (m.a., par. 152-153).

[39] Le gouvernement affirme que l'approche « fonctionnelle » préconisée par la Commissaire vide à toutes fins utiles de son sens la liste des institutions énumérées à l'annexe I. La Commissaire axe entièrement son approche sur la nature et le contenu du document, confondant ainsi la question de la définition d'« institution fédérale » avec celle de savoir comment on s'y prend pour déterminer de quelle entité « relève » un document précis. Qui plus est, bien que la Commissaire reconnaisse que les documents politiques ou non ministériels échappent à l'obligation de communication prévue par la Loi, cette Loi ne prévoit pas d'exceptions dans le cas de ces documents. La tentative que fait la Commissaire pour combler cette lacune en incorporant conceptuellement dans la Loi une définition fonctionnelle de l'expression « institution fédérale » [TRADUCTION] « va bien au-delà de tout concept d'interprétation des lois reconnu par notre Cour ou par toute autre juridiction » (m.i., par. 129).

[40] J'abonde dans le sens du gouvernement. Aucun des principes généraux cités par la Commissaire n'est controversé dans les présents pourvois. À mon humble avis, ces principes ne sont pas non plus particulièrement utiles pour trancher les questions d'interprétation des lois en cause. Par exemple, la Commissaire table fortement sur le fait que la *Loi sur l'accès à l'information* a été qualifiée de loi quasi constitutionnelle (voir l'arrêt *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773, dans lequel la Cour a reconnu un statut de loi quasi constitutionnelle à la *Loi sur les langues officielles*, L.R.C. 1985, ch. 31 (4e suppl.), et à la *Loi sur la protection des renseignements personnels* (par. 23-25)). Elle affirme que l'objet de la Loi acquiert de ce fait une importance capitale lorsqu'il s'agit d'interpréter la Loi et que celle-ci devrait être interprétée d'une manière libérale pour mieux promouvoir les principes de gouvernement responsable et de responsabilité démocratique. Bien que je sois d'accord avec l'appelante pour dire que la *Loi sur l'accès à l'information* peut être considérée comme une loi de

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Commissioner's approach to the interpretation of the term "government institution" is that she avoids any direct reference to the legislative provision at issue. The Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted.

[41] It is important to recall that Parliament's statement of purpose in s. 2 of the Act recognizes that exceptions to public accessibility are "necessary". For example, in s. 21, Parliament has recognized the need for confidential advice to be sought by and provided to a Minister and, consequently, records in a government institution offering such advice are exempt from disclosure at the discretion of the head of the institution. The advice provided to a Minister may come from a variety of sources and may pertain to a broad range of matters, including matters relating to the department over which the Minister presides. Some of these matters may have a political dimension and some may not. Similarly, the policy rationale for excluding the Minister's office altogether from the definition of "government institution" can be found in the need for a private space to allow for the full and frank discussion of issues. As the Government rightly submits: "It is the process of being able to deal with the distinct types of information, including information that involves political considerations, rather than the specific contents of the records" that Parliament sought to protect by not extending the right of access to the Minister's office (R.F., at para. 82). Of course, not all documents in a Minister's office are excluded from the scope of the Act. As we shall see, despite its physical location in a ministerial office, any document which is "under the control" of the related, or any other, government institution is subject to disclosure.

nature quasi constitutionnelle — ce qui fait ressortir l'importance de son objet —, j'estime que cette qualification ne change en rien les principes généraux d'interprétation des lois. Le problème fondamental que comporte la méthode d'interprétation de l'expression « institution fédérale » que préconise la Commissaire réside dans le fait qu'elle évite de citer directement la disposition législative en cause. La Cour ne peut faire fi des termes que le législateur a effectivement employés et récrire le texte de loi en fonction de sa propre opinion sur la façon dont l'objet de la loi pourrait être mieux favorisé.

[41] Il importe de se rappeler qu'à l'art. 2 de la Loi, le législateur reconnaît, dans l'énoncé de l'objet de la Loi, que les exceptions au droit du public à la communication sont « indispensables ». Par exemple, à l'art. 21, le législateur reconnaît le besoin qu'ont les ministres de solliciter et de recevoir des avis confidentiels de sorte que les documents d'une institution fédérale qui contiennent de tels avis sont soustraits à la communication, à la discrétion du responsable de l'institution. Les avis qui sont fournis à un ministre peuvent provenir de diverses sources et peuvent concerner une vaste gamme de questions, notamment des questions se rapportant au ministère dont le ministre est responsable. Certaines de ces questions peuvent revêtir une dimension politique et d'autres, non. Dans la même veine, la raison de principe qui justifie d'exclure complètement le cabinet d'un ministre de la définition d'« institution fédérale » peut résider dans la nécessité de prévoir un espace privé où il est possible de débattre ouvertement et franchement de certaines questions. Comme le soutient à juste titre le gouvernement, [TRADUCTION] « ce n'est pas le contenu précis des documents, mais bien le processus permettant de traiter divers types de renseignements, y compris ceux qui comportent des considérations politiques », que le législateur a cherché à protéger en s'abstenant d'élargir le droit d'accès au cabinet d'un ministre (m.i., par. 82). Bien entendu, certains documents se trouvant au cabinet d'un ministre n'échappent pas à la portée de la Loi. Comme nous le verrons, un document « relevant de » l'institution fédérale concernée ou de toute autre institution fédérale est sujet à divulgation même s'il se trouve physiquement à l'intérieur du cabinet d'un ministre.

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[42] The functional approach advocated by the Commissioner not only creates the problem identified by Kelen J. that some Ministers would be covered by the Act, whereas others would not. It also ignores the practical difficulty of carving out a political class exemption when none is provided in the Act. If a Minister's office is a government institution, all records under its control would be subject to release under the Act, unless expressly exempted or excluded by the Act. The proposal of carving out "political" documents based on an analysis of their content is easier said than done. As the Government notes, "records in a Minister's office are not neatly arranged into clearly defined 'political', 'constituent' and 'departmental' piles. The intermingling of these issues and facts is what makes the Minister's office unique. The simplistic approach of 'carving out' political records is unrealistic" (R.F., at para. 88).

[42] L'approche fonctionnelle préconisée par la Commissaire crée non seulement le problème déjà évoqué par le juge Kelen, en l'occurrence le fait que certains ministres seraient assujettis à la Loi alors que d'autres ne le seraient pas, mais elle méconnaît aussi les difficultés pratiques engendrées par l'exclusion des renseignements politiques alors que la Loi ne prévoit aucune catégorie de ce genre. Si le cabinet d'un ministre constitue une institution fédérale, tous les documents qui en relèvent devraient être communiqués conformément à la Loi, sauf s'ils sont expressément exemptés ou exclus par la Loi. L'idée d'exclure les documents « politiques » en se fondant sur l'analyse de leur contenu est plus facile à évoquer qu'à réaliser. Ainsi que le gouvernement le signale, [TRADUCTION] « les documents qui se trouvent au cabinet du ministre ne sont pas soigneusement classés en piles portant la claire mention "politique", "électeurs" et "affaires ministérielles". L'entrelacement de ces questions et de ces faits confère un caractère unique au cabinet du ministre. La solution simpliste consistant à "exclure" les documents politiques n'est pas réaliste » (m.i., par. 88).

[43] Of course, Parliament could have opted for a different access scheme. However, it did not. Kelen J.'s interpretative analysis contains no error. The meaning of "government institution" is clear. In my view, the courts below rightly concluded that no contextual consideration warrants the Court interpreting Parliament to have intended that the definition of "government institution" include ministerial offices. I would not give effect to this ground of appeal.

[43] Le législateur aurait bien sûr pu opter pour un régime d'accès à l'information différent. Mais ce n'est pas ce qu'il a fait. L'analyse interprétative du juge Kelen n'est entachée d'aucune erreur. Le sens de l'expression « institution fédérale » est clair. À mon avis, c'est à bon droit que les juridictions inférieures ont conclu qu'aucune considération d'ordre contextuel ne justifie la Cour de penser que le législateur voulait que les cabinets ministériels soient inclus dans la définition de l'expression « institution fédérale ». Je ne retiendrais donc pas ce moyen d'appel.

4.2 *Issue 2: Are the Records Requested, Despite Their Physical Location in the Respective Ministerial Offices, "Under the Control" of the Related Government Institution Within the Meaning of Section 4 of the Access to Information Act?*

4.2 *Deuxième question : Les documents demandés « relèvent »-ils de l'institution fédérale concernée au sens de l'art. 4 de la Loi sur l'accès à l'information malgré le fait qu'ils se trouvent matériellement dans les cabinets ministériels en question?*

[44] In light of my conclusion regarding the first issue, the question then becomes whether the requested records held within the respective

[44] Vu ma conclusion sur la première question, il s'agit maintenant de savoir si les documents demandés qui se trouvent dans les cabinets ministériels

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ministerial offices are nonetheless "under the control" of their related government institutions within the meaning of s. 4(1) of the Act. Kelen J. concluded that they were not, and the Federal Court of Appeal upheld his decision. The Commissioner appeals from this conclusion.

[45] None of the Commissioner's arguments is directed at the findings of fact made by Kelen J. regarding the particular records requested. The success of the Commissioner's appeal on this point is dependent, rather, on whether the Court accepts her proposed test for determining what constitutes "control" for the purposes of access under the Act. As I will explain, the test for control proposed by the Commissioner is entirely focussed on the function or content of the record and, in substance, is essentially the same as the test she proposes for defining a "government institution". Consequently, much for the reasons stated above, the Commissioner's interpretation of the word "control" cannot be sustained as it finds no support in the wording of the Act.

[46] First, I will review the control test adopted by the courts below.

[47] The word "control" is an undefined term in the statute. Its meaning has been judicially considered in a number of cases, and Kelen J. turned to this jurisprudence for guidance. In particular, he reviewed the following cases: *Canada Post Corp. v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320 (T.D.); *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (C.A.); *Privacy Commissioner (Can.) v. Canada Labour Relations Board* (2000), 257 N.R. 66 (F.C.A.); *Rubin v. Canada (Minister of Foreign Affairs and International Trade)*, 2001 FCT 440, 204 F.T.R. 313; *Canada (Attorney General) v. Information Commissioner (Can.)*, 2001 FCA 25, 268 N.R. 328; and *Canada Post Corp. v. Canada (Minister of Public Works)*, 2004 FCA 286, 328 N.R. 98. From this jurisprudence, Kelen J. gleaned

en question « relèvent » malgré tout de l'institution fédérale concernée au sens du par. 4(1) de la Loi. Le juge Kelen a répondu par la négative à cette question, et la Cour d'appel fédérale a confirmé sa décision. La Commissaire se pourvoit contre cette conclusion.

[45] Aucun des arguments de la Commissaire ne porte sur les conclusions de fait tirées par le juge Kelen au sujet des documents demandés. Le succès du pourvoi de la Commissaire sur ce point dépend plutôt de la réponse à la question de savoir si la Cour accepte le critère qu'elle propose pour déterminer si un document « relève » d'une institution fédérale au sens de la Loi et doit de ce fait être communiqué. Comme je vais l'expliquer, le critère proposé par la Commissaire pour déterminer si un document « relève » d'une institution fédérale est entièrement axé sur la fonction ou le contenu du document et correspond essentiellement au critère qu'elle propose pour définir une « institution fédérale ». En conséquence, en grande partie pour les motifs déjà exposés, l'interprétation que la Commissaire donne de l'expression « relevant de » ne peut être retenue parce qu'elle ne trouve aucun appui dans le libellé de la Loi.

[46] Je vais d'abord examiner le critère adopté par les juridictions inférieures au sujet de la notion véhiculée par l'expression « relevant de ».

[47] L'expression « relevant de » n'est pas définie dans la Loi. Les tribunaux se sont penchés sur sa signification dans plusieurs affaires et le juge Kelen a puisé dans cette jurisprudence pour trouver des pistes de solution. Il a notamment examiné les décisions suivantes : *Société canadienne des postes c. Canada (Ministre des Travaux publics)*, [1993] 3 C.F. 320 (1re inst.); *Société canadienne des postes c. Canada (Ministre des Travaux publics)*, [1995] 2 C.F. 110 (C.A.); *Canada (Commissaire à la protection de la vie privée du Canada) c. Canada (Conseil canadien des relations du travail)*, 2000 CanLII 15487 (C.A.F.); *Rubin c. Canada (Ministre des Affaires étrangères et du Commerce international)*, 2001 CFPI 440 (CanLII); *Canada (Procureur général) c. Canada (Commissaire à l'information)*, 2001 CAF 25, 268 N.R. 328, et *Société canadienne*

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a number of principles, which I will paraphrase as follows.

[48] As "control" is not a defined term in the Act, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are "under the control of a government institution", courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control, and "*de jure*" as well as "*de facto*" control. While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the meaning of a word such as "control" with the aid of dictionaries. The *Canadian Oxford Dictionary* defines "control" as "the power of directing, command (under the control of)" (2001, at p. 307). In this case, "control" means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient" basis, or a "*de facto*" basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the Act (paras. 91-95).

[49] In applying these principles to the records at issue, Kelen J. articulated the following test, at para. 93:

des postes c. Canada (Ministre des Travaux publics et des Services gouvernementaux), 2004 CAF 286 (CanLII). Le juge Kelen a dégagé de cette jurisprudence un certain nombre de principes, que je vais paraphraser comme suit.

[48] L'expression « relevant de » n'est pas définie dans la Loi. Il convient donc de lui donner son sens ordinaire ou le plus répandu. Par ailleurs, pour conférer un droit d'accès efficace aux documents de l'administration fédérale, il convient d'interpréter cette expression de façon libérale et généreuse. Le législateur aurait pu, s'il l'avait voulu, limiter cette notion au pouvoir de « disposer » des documents en question, c'est-à-dire au pouvoir de s'en débarrasser. Or, il ne l'a pas fait. Pour savoir si des documents « relèvent d'une institution fédérale », les tribunaux se sont demandé s'ils en relèvent de façon « ultime » ou « immédiate », « complète » ou « partielle », « temporaire » ou « permanente » ou encore « *de jure* » ou « *de facto* ». L'expression doit être interprétée de la manière la plus large possible, mais elle ne saurait être étendue plus que de raison. Les tribunaux peuvent déterminer le sens d'une expression comme « relevant de » avec l'aide de dictionnaires. Le *Grand Robert de la langue française* (version électronique) définit « relever de » comme suit : « (Choses). Être du ressort de . . . (ressortir), dépendre de . . . (en parlant d'un fait). » Le *Canadian Oxford Dictionary* définit comme suit le terme anglais « *control* » employé dans la version anglaise de la Loi : [TRADUCTION] . . . pouvoir de diriger, autorité (relevant de) (2001, p. 307). Dans la présente affaire, l'expression « relevant de » signifie qu'un haut fonctionnaire de l'institution fédérale en cause (autre que le ministre) exerce un certain pouvoir de direction ou une autorité à l'égard d'un document, même si ce n'est qu'un pouvoir « partiel », « temporaire » ou « *de facto* ». Le contenu des documents et les circonstances dans lesquelles ils ont été établis permettront de dire s'ils relèvent d'une institution fédérale pour les besoins de leur communication aux termes de la Loi (par. 91-95).

[49] Pour appliquer ces principes aux documents en litige, le juge Kelen a articulé le critère suivant, au par. 93 :

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Upon review by the Court, if the content of a document in the PMO or the offices of the Ministers of National Defence and Transport relates to a departmental matter, and the circumstances in which the document came into being show that the deputy minister or other senior officials in the department could request and obtain a copy of that document to deal with the subject-matter, then that document is under the control of the government institution. [Emphasis deleted.]

[50] The Federal Court of Appeal agreed with this test, holding that, in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request? (Decision 1, at paras. 8-9).

[51] As I understand her arguments, the Commissioner does not take issue with any of the principles Kelen J. gleaned from his review of the relevant jurisprudence. Indeed, she substantially adopts these principles in her factum at para. 168 and rightly so. Those principles should inform the analysis. Her complaint lies, rather, with how these principles were distilled into the two-step inquiry described above. She submits that the courts below have erred in law by essentially reducing the legal inquiry concerning "control" to two seemingly simple factual questions — whether the record relates to a departmental matter and whether senior members of the departmental staff could request and obtain a copy of the record. She submits that these factual indicia can be too easily manipulated by government actors to avoid releasing documents that validly fall within the scope of the Act. In particular, she submits that the "mechanism of a hypothetical 'request'" under step two of the test is weak and unacceptable as it "inappropriately relies on past practices and prevalent expectations, rather than the legal relationships at issue" (A.F., at para. 169). Put more colloquially, she argues that if this Court adopts the control test articulated in the courts below, the Minister's office may effectively

Après examen, si le contenu d'un document en la possession du CPM, du cabinet du ministre de la Défense nationale ou du cabinet du ministre des Transports se rapporte à une affaire ministérielle, et si les circonstances dans lesquelles le document a été créé montrent que le sous-ministre ou les autres hauts fonctionnaires du ministère pourraient demander et obtenir une copie de ce document pour traiter l'affaire, la Cour est d'avis que ce document relève de l'institution fédérale. [Soulignement omis.]

[50] La Cour d'appel fédérale a accepté ce critère en précisant que, dans le contexte des présentes affaires dans lesquelles l'institution n'a pas le document en sa possession matérielle, le document relèvera quand même de l'institution fédérale si l'on répond par l'affirmative aux deux questions suivantes : (1) Le contenu du document se rapporte-t-il à une affaire ministérielle? (2) L'institution fédérale pourrait-elle raisonnablement s'attendre à obtenir une copie du document sur demande? (décision 1, par. 8-9).

[51] Si je comprends bien ses arguments, la Commissaire ne s'oppose à aucun des principes que le juge Kelen a dégagés de son examen de la jurisprudence pertinente. Elle les fait d'ailleurs essentiellement siens dans son mémoire au par. 168 et c'est à raison qu'elle le fait. Ces principes devraient guider l'analyse. Son grief porte plutôt sur la façon dont ces principes ont été exprimés dans l'analyse en deux étapes décrite précédemment. Elle affirme que les juridictions inférieures ont commis une erreur de droit en réduisant l'analyse juridique de l'expression « relevant de » à deux questions factuelles apparemment simples : celle de savoir si le document se rapporte à une affaire ministérielle, et celle de savoir si des cadres supérieurs du ministère pourraient obtenir copie du document sur demande. Elle soutient que ces indices factuels peuvent être trop aisément manipulés par un représentant du gouvernement pour éviter de communiquer des documents qui devraient valablement l'être aux termes de la Loi. Elle prétend en particulier que le [TRADUCTION] « mécanisme de la "demande" hypothétique » prévu par le second volet du critère est faible et inacceptable « parce qu'il repose de façon inadmissible sur des usages du passé et sur des attentes actuelles plutôt que sur les rapports juridiques en cause »

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become a "black hole" used to shield certain sensitive documents that properly fall within the ambit of the *Access to Information Act* (A.F., at para. 162).

[52] I agree with the Commissioner that it would be an error to interpret the words "under the control" in a manner that allowed government actors to turn the Minister's office into a "black hole" to shelter sensitive records that should otherwise be produced to the requester in accordance with the law. However, as I will explain, I am not persuaded that the courts below erred as she contends. In essence, the Commissioner's complaint on this ground of appeal is based on the same criticism of the institutional distinction between the Minister and the department over which he or she presides argued under the first ground. This is readily apparent from the alternative test that she proposes. In order to counter the "black hole" problem, the Commissioner urges the Court to hold that a record in a Minister's office is under the control of the corresponding government institution when the following two conditions are met:

(a) the record was obtained or generated by the Minister or on his or her behalf; and

(b) the record documents or gives effect to the Minister's exercise of departmental powers, duties or functions, or relies directly on departmental staff in order to exercise the Minister's departmental powers, duties or functions. [A.F., at para. 172]

[53] As the Government rightly responds, the test for control proposed by the Commissioner effectively eliminates the need to consider the definition of "government institution". As the Government puts it in its factum: "If the function

(m.a., par. 169). Autrement dit, elle fait valoir que si notre Cour retient le critère de la notion véhiculée par l'expression « relevant de » que les juridictions inférieures ont formulé, le cabinet du ministre peut effectivement devenir une sorte d'« oubliette » permettant la mise au secret de certains documents délicats qui devraient être communiqués sur demande aux termes de la *Loi sur l'accès à l'information* (m.a., par. 162).

[52] Je suis d'accord avec la Commissaire pour dire que l'on aurait tort d'interpréter l'expression « relevant de » d'une manière qui permettrait aux représentants du gouvernement de transformer le cabinet du ministre en une « oubliette » permettant de mettre à l'abri des documents délicats que l'on devrait autrement communiquer à l'auteur de la demande pour respecter la Loi. Toutefois, ainsi que je vais l'expliquer, je ne suis pas persuadée que les juridictions inférieures ont commis l'erreur que la Commissaire leur reproche. Le grief que la Commissaire articule en ce qui concerne ce moyen d'appel repose essentiellement sur la même critique que celle qu'elle formule à l'appui de son premier moyen relativement à la distinction institutionnelle entre le ministre et le ministère dont il est responsable. Cette similitude ressort à l'évidence du critère qu'elle propose à titre subsidiaire. Pour contrer le problème de l'« oubliette », la Commissaire exhorte la Cour à juger que tout document se trouvant au cabinet d'un ministre relève de l'institution fédérale correspondante dès lors que les deux conditions suivantes sont réunies :

[TRADUCTION]

a) le document a été obtenu ou créé par le ministre ou en son nom;

b) le document traite de l'exercice que le ministre fait de ses attributions ministérielles ou donne effet à cet exercice, ou s'en remet directement au personnel ministériel pour exercer les attributions du ministre. [m.a., par. 172]

[53] Ainsi que le gouvernement rétorque à juste titre, le critère que propose la Commissaire au sujet de la notion véhiculée par l'expression « relevant de » a pour effet d'écarter la nécessité de tenir compte de la définition de l'expression « institution

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or content of the record determines control, then it does not matter if the record is in a government institution or a Minister's Office, as they are the same entity for the purposes of determining 'control'" (R.F., at para. 179). I agree. A decision on the issue of control based almost exclusively on the content of the record would have the effect of extending the reach of the Act into the Minister's office where, as discussed earlier, Parliament has chosen not to go.

[54] Further, the Commissioner's argument on the deficiency of the control test crafted by the courts below presupposes that the two-part distillation of the test, particularly as articulated by the Federal Court of Appeal, is not intended to fully capture the principles upon which the test was crafted. I do not read the judgments below as having that effect. As Kelen J. made clear, the notion of control must be given a broad and liberal meaning in order to create a meaningful right of access to government information. While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control. Thus, if the record requested is located in a Minister's office, this does not end the inquiry. The Minister's office does not become a "black hole" as contended. Rather, this is the point at which the two-step inquiry commences. Where the documents requested are not in the physical possession of the government institution, the inquiry proceeds as follows.

[55] Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that

fédérale ». Ainsi que le gouvernement l'explique dans son mémoire : [TRADUCTION] « Si c'est son rôle ou son contenu qui détermine si un document relève ou non d'une institution fédérale, il est alors indifférent qu'il se trouve dans une institution fédérale ou au cabinet d'un ministre, puisqu'il s'agit de la même entité lorsqu'il s'agit de savoir de qui ce document "relève" » (m.i., par. 179). Je suis du même avis. Une décision sur la question de savoir de qui relève un document qui reposerait presque exclusivement sur le contenu du document aurait pour effet d'élargir la portée de la Loi en y englobant le cabinet des ministres alors que, comme nous l'avons déjà vu, le législateur a choisi de soustraire les cabinets des ministres à l'application de la Loi.

[54] Par ailleurs, l'argument qu'avance la Commissaire au sujet des lacunes que comporterait le critère de la notion véhiculée par l'expression « relevant de » qui a été élaboré par les juridictions inférieures, et notamment par la Cour d'appel fédérale, présuppose que le fait que ce critère a été scindé en deux volets n'est pas censé rendre pleinement compte des principes sur le fondement desquels il a été élaboré. Selon mon interprétation, les jugements des juridictions inférieures n'ont pas cet effet. Ainsi que le juge Kelen l'a bien précisé, l'expression « relevant de » doit être interprétée d'une manière large et libérale pour assurer un droit d'accès efficace aux documents de l'administration fédérale. Bien que la possession matérielle du document joue de toute évidence un rôle important dans chaque cas, elle ne constitue pas un facteur déterminant sur la réponse à la question de savoir de qui ce document relève. Ce n'est donc pas parce que le document demandé se trouve au cabinet du ministre que l'analyse s'arrête là. Le cabinet du ministre ne devient pas l'« oubliette » où les documents sont relégués comme on l'a prétendu. C'est en fait à ce point qu'il convient d'entamer l'analyse en deux étapes. Si l'institution fédérale n'a pas la possession matérielle des documents demandés, l'analyse procède de la façon suivante.

[55] La première étape de ce critère se veut un mécanisme de tamisage utile. À cette étape, on se demande si le document se rapporte à une affaire ministérielle. Si tel n'est pas le cas, on ne pousse

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the *Access to Information Act* is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.

[56] Under step two, *all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the *Access to Information Act* (A.F., at para. 169). The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.

[57] My colleague LeBel J. agrees with this control test, but takes exception to the creation of "an implied presumption that the public does not have a right of access to records in a Minister's office" (para. 76). With respect, his concern is founded on a misinterpretation of these reasons. There is no presumption of inaccessibility. As LeBel J. rightly notes, at para. 91:

The fact that Ministers' offices are separate and different from government institutions does not mean that a government institution cannot control a record

pas l'analyse plus loin. La Commissaire reconnaît que la *Loi sur l'accès à l'information* ne vise pas à englober les affaires non ministérielles se trouvant en la possession des ministres fédéraux. Si le document demandé se rapporte à une affaire ministérielle, l'analyse se poursuit pour déterminer s'il relève ou non de l'institution fédérale.

[56] À la seconde étape, il faut tenir compte de *tous* les facteurs pertinents pour déterminer si l'institution fédérale pourrait raisonnablement s'attendre à obtenir une copie du document sur demande. Parmi ces facteurs, mentionnons la teneur réelle du document, les circonstances dans lesquelles il a été créé et les rapports juridiques qu'entretiennent l'institution fédérale et le détenteur du document. La Commissaire a raison de dire qu'on ne peut s'attendre à obtenir une copie du document en se fondant [TRADUCTION] « sur des usages du passé et sur des attentes actuelles » sans lien avec la nature et le contenu du document, sur les rapports juridiques qui existent effectivement entre l'institution fédérale et le détenteur du document ou sur des pratiques visant à se dérober à l'application de la *Loi sur l'accès à l'information* (m.a., par. 169). Le critère de l'attente raisonnable est objectif. Si, compte tenu de tous les facteurs pertinents, le cadre supérieur de l'institution fédérale *devrait* raisonnablement être en mesure d'obtenir une copie du document, le critère est satisfait et le document doit être communiqué, à moins qu'il ne soit assujetti à une exemption spécifique prévue par la loi. Pour l'application du critère, le mot « pourrait » doit être interprété dans le même sens.

[57] Mon collègue le juge LeBel souscrit à ce critère de la notion véhiculée par l'expression « relevant de », mais il s'inscrit en faux contre le fait de créer « implicitement une présomption qui priverait le public de tout droit d'accès aux documents se trouvant au cabinet d'un ministre » (par. 76). En toute déférence, sa crainte repose sur une mauvaise interprétation des présents motifs. Il n'existe aucune présomption d'inaccessibilité. Comme le fait remarquer à bon droit le juge LeBel au par. 91 :

Bien que les cabinets des ministres soient autonomes et différents des institutions fédérales, cette considération n'empêche pas un document qui ne se trouve pas

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that is not in its premises. If a government institution controls a record in a Minister's office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head must facilitate access to it on the basis of the procedure and the limits specified in the Act.

[58] I agree. Conversely, if a document is under the control of the Minister's office and *not* under the control of the related, or any other, government institution, it does not fall within the purview of the *Access to Information Act*. If one views this result as creating a factual "presumption of inaccessibility", or alternatively an implied exemption for political records, in my respectful view, it is a consequence that inevitably flows from the fact that Ministers' offices are not government institutions within the meaning of the Act, a conclusion with which LeBel J. agrees.

[59] Thus, the test articulated by the courts below, properly applied, does not lead to the wholesale hiding of records in ministerial offices. Rather, it is crafted to answer the concern. In addition, as the Government rightly notes, Parliament has included strong investigatory provisions that guard against intentional acts to hinder or obstruct an individual's right to access. My colleague reviews some of these investigatory powers. It is true, as he points out, that the statutory power to enter any "government institution" would not allow the Commissioner to enter a Minister's office. However, again here, it seems to me that this result inevitably flows from the limited scope of the term "government institution" and must be taken to have been intended by Parliament. I disagree with my colleague that this limitation on the Commissioner's powers effectively leaves the Minister as head of the government institution with the final say as to whether a given document is under the control of a government institution (para. 109). The Commissioner has significant powers of investigation that include the authority to "summon and enforce the appearance of persons", including Ministers, "and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems

dans les locaux d'une institution fédérale de relever de cette dernière. Si un document conservé au cabinet d'un ministre relève d'une institution fédérale, la Loi s'applique à ce document. En pareil cas, le responsable doit faciliter l'accès au document conformément à la procédure et aux limites prescrites par la Loi.

[58] Je suis d'accord sur ce point. À l'inverse, un document relevant du cabinet d'un ministre mais *non* de l'institution fédérale concernée ou de toute autre institution fédérale ne tombe pas sous le coup de la *Loi sur l'accès à l'information*. Si l'on considère que cette règle crée, dans les faits, une « présomption d'inaccessibilité » ou, subsidiairement, une exemption implicite applicable aux documents politiques, j'estime en toute déférence que cette règle découle inévitablement du fait que les cabinets des ministres ne sont pas des institutions fédérales au sens de la Loi, une conclusion à laquelle souscrit le juge LeBel.

[59] En conséquence, une application appropriée du critère articulé par les juridictions inférieures ne conduit pas à une mise au secret générale des documents se trouvant dans les cabinets ministériels. Le critère est plutôt conçu de manière à éviter ce problème. Qui plus est, ainsi que le gouvernement le fait observer avec raison, le législateur a prévu des dispositions d'enquête solides pour éviter toute tentative délibérée d'entraver le droit d'accès des citoyens. Mon collègue passe en revue certains de ces pouvoirs d'enquête. Comme il le souligne, le pouvoir légal du Commissaire de pénétrer dans les locaux d'une « institution fédérale » ne lui permettrait certes pas d'entrer dans le cabinet d'un ministre. Mais là encore, il me semble que cette règle découle inévitablement de la portée limitée du terme « institution fédérale », et qu'on doit présumer que telle était l'intention du législateur. Je ne suis pas d'accord avec mon collègue pour dire que cette restriction des pouvoirs du Commissaire laisse bel et bien le ministre, en qualité de responsable de l'institution fédérale, décider en dernier ressort si un document donné relève de cette institution (par. 109). Le Commissaire dispose de pouvoirs d'enquête considérables, notamment celui d'« assigner et de contraindre des témoins », y compris des ministres, « à comparaître devant lui,

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requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record": s. 36(1)(*a*). Further, as an additional safeguard, any refusal to disclose requested records is subject to independent review by the courts on a standard of correctness.

[60] In the result, I agree with the Federal Court of Appeal that the two questions posed by Kelen J. were adequate to determine whether the records requested in the three applications at issue were under the control of a government institution. It is also clear from his detailed analysis that he considered all relevant factors on an objective basis, as discussed above. Applying this test to the material before him, he concluded that none of the requested records was in the control of a government institution. In brief, he disposed of the first three applications on the following bases.

[61] First, the Prime Minister's agendas were not under the control of the PCO. The agendas were created by the Prime Minister's exempt staff and were always in possession of the Prime Minister or his exempt staff. No "government institution" had physical possession of the records or the right to obtain them.

[62] Second, the Minister of Transport's unabridged and abridged agendas were not under the control of a government institution. The unabridged agendas were always in the possession of the Minister's office and were not provided to the Deputy Minister or anyone else in the government institution. The abridged agendas were in the possession of the government institution for a limited time, but were not kept after the relevant date and there was no expectation that the Minister's office would provide the agendas for a second time.

[63] Third, the notebooks held in the Minister of National Defence's office were not under the control of the Department of National Defence. They were

à déposer verbalement ou par écrit sous la foi du serment et à produire les pièces qu'il juge indispensables pour instruire et examiner à fond les plaintes dont il est saisi, de la même façon et dans la même mesure qu'une cour supérieure d'archives » : al. 36(1)*a*). De plus, à titre de garantie supplémentaire, tout refus de communication des documents demandés peut faire l'objet d'un examen judiciaire indépendant selon la norme de la décision correcte.

[60] Je suis donc d'accord avec la Cour d'appel fédérale pour dire que les deux questions posées par le juge Kelen permettaient de déterminer si les documents réclamés dans les trois demandes en litige relevaient d'une institution fédérale. Il ressort également de son analyse détaillée que le juge Kelen a tenu compte de tous les facteurs pertinents de façon objective comme nous l'avons déjà vu. Appliquant ce critère aux documents qui lui étaient soumis, le juge Kelen a conclu qu'aucun des documents demandés ne relevait d'une institution fédérale. En bref, il a tranché les trois premières demandes sur le fondement suivant.

[61] En premier lieu, le juge Kelen a conclu que les agendas du premier ministre ne relevaient pas du BCP. Les agendas avaient été créés par des membres du personnel exonéré du premier ministre et ils demeuraient toujours en la possession du premier ministre ou de son personnel exonéré. Aucune « institution fédérale » n'avait la possession matérielle des documents ou le droit de les obtenir.

[62] Deuxièmement, les copies abrégées ou non abrégées des agendas du ministre des Transports ne relevaient pas d'une institution fédérale. Les agendas originaux demeuraient toujours en la possession du cabinet du ministre et ils n'étaient communiqués ni au sous-ministre ni à personne d'autre au sein de l'institution fédérale. Les agendas abrégés se trouvaient en la possession de l'institution fédérale pour une période de temps limitée, mais ils n'étaient pas conservés après la date en cause et personne ne s'attendait à ce que le cabinet du ministre communique les agendas une seconde fois.

[63] Troisièmement, les blocs-notes détenus par le cabinet du ministre de la Défense nationale ne relevaient pas du ministère de la Défense nationale.

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created and maintained by exempt staff for their personal use and would not have been produced to government officials. While the Minister relied upon his exempt staff for taking notes of meetings, he himself never looked at the notes. The emails also were not under the control of the Department of National Defence. They did not contain substantive information about departmental matters.

[64] As stated earlier, the Commissioner presents virtually no argument in respect of the findings of fact made by Kelen J. I agree with the Federal Court of Appeal that the conclusions reached by Kelen J. on the issue of control were open to him on the record and entitled to deference.

[65] I would not give effect to the second ground of appeal on the issue of control. Consequently, I would dismiss the Commissioner's appeals on the first three applications with costs.

[66] On the fourth application, it is agreed that the Prime Minister's agendas in the possession of the RCMP and the PCO were under the control of a "government institution" for the purposes of the *Access to Information Act*. Therefore, this brings us to the final issue.

4.3 *Issue 3: Are the Prime Minister's Agendas at Issue Exempt or Excluded From Disclosure Pursuant to Section 19 of the Access to Information Act and Section 3(j) of the Privacy Act?*

[67] The definition of "government institution" is the same under both the *Access to Information Act* and the *Privacy Act*. The RCMP and the PCO are specifically listed in Schedule I and,

Ils étaient créés et conservés par le personnel exonéré pour son usage personnel et ils n'auraient pas été communiqués aux fonctionnaires du gouvernement. Même si le ministre comptait sur son personnel exonéré pour prendre des notes lors des rencontres, il ne consultait jamais lui-même ces notes. Les courriels ne relevaient pas non plus du ministère de la Défense nationale. Ils ne renfermaient pas de renseignements de fond portant sur des affaires ministérielles.

[64] Comme nous l'avons déjà précisé, la Commissaire n'invoque pratiquement aucun argument au sujet des conclusions de fait tirées par le juge Kelen. Je suis d'accord avec la Cour d'appel fédérale pour dire que, compte tenu du dossier, il était loisible au juge Kelen de tirer les conclusions auxquelles il en est arrivé sur la question de savoir si les documents relevaient ou non d'une institution fédérale. J'estime également qu'il y a lieu de faire preuve de déférence envers ces conclusions.

[65] Je ne retiendrais pas le second moyen d'appel en ce qui concerne la question de savoir si les documents relevaient ou non d'une institution fédérale. En conséquence, je suis d'avis de rejeter avec dépens les pourvois formés par la Commissaire sur les trois premières demandes.

[66] Sur la quatrième demande, il est acquis aux débats que les agendas du premier ministre qui se trouvaient en la possession de la GRC et du BCP relevaient d'une « institution fédérale » au sens de la *Loi sur l'accès à l'information*. Ce qui nous amène donc à la dernière question à trancher.

4.3 *Troisième question : Les agendas en cause du premier ministre sont-ils soustraits à la communication en vertu de l'art. 19 de la Loi sur l'accès à l'information et de l'al. j) de la définition de « renseignements personnels » figurant à l'art. 3 de la Loi sur la protection des renseignements personnels?*

[67] La définition d'« institution fédérale » est la même dans la *Loi sur l'accès à l'information* et dans la *Loi sur la protection des renseignements personnels*. La GRC et le BCP sont expressément nommés

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as such, are government institutions. Records under their control must be disclosed, subject to certain statutory exemptions. Section 19(1) of the *Access to Information Act* prohibits the head of a government institution from releasing any record that contains "personal information as defined in section 3 of the *Privacy Act*". However, s. 3(*j*) creates an exception by allowing for the disclosure of personal information where such information pertains to "an individual who is or was an officer or employee of a government institution" and where the information in question "relates to the position or functions of the individual". In short, the s. 3(*j*) exception will apply, and those parts of the Prime Minister's agenda that relate to his job must be disclosed, if the Prime Minister is an "officer . . . of a government institution".

à l'annexe I et ils constituent donc des institutions fédérales. Les documents relevant de la GRC et du BCP doivent donc être communiqués, sous réserve de certaines exceptions prévues par la Loi. Le paragraphe 19(1) de la *Loi sur l'accès à l'information* prévoit que le responsable d'une institution fédérale est tenu de refuser la communication de documents « contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels* ». L'alinéa *j*) de la définition de « renseignements personnels » figurant à l'art. 3 de cette dernière Loi prévoit toutefois une exception en permettant la communication de renseignements personnels qui concernent « un cadre ou employé, actuel ou ancien, d'une institution fédérale » et qui portent « sur son poste ou ses fonctions ». Bref, l'exception prévue à cet alinéa joue si le premier ministre est un « cadre [. . .] d'une institution fédérale », auquel cas les passages de l'agenda du premier ministre qui portent sur son poste doivent être communiqués.

[68] Under both statutes, the "head" of a government institution includes "in the case of a department or ministry of state, the member of the Queen's Privy Council for Canada". The Prime Minister is the head of the PCO under this definition. The term "officer", however, is not defined. The question is whether the Prime Minister as "head" of a government institution is also an "officer" of that institution.

[68] Sous le régime des deux lois en question, le « responsable » d'une institution fédérale comprend « [l]e membre du Conseil privé de la Reine pour le Canada sous l'autorité duquel est placé un ministère ou un département d'État ». Le premier ministre est le responsable du BCP au sens de cette définition. Le terme « cadre » n'est cependant pas défini. La question qui se pose est celle de savoir si le premier ministre, en tant que « responsable » d'une institution fédérale, est également un « cadre » de cette institution.

[69] Kelen J. held that he was. In reaching this conclusion, he relied upon the definition of "public officer" found in the *Financial Administration Act*, R.S.C. 1985, c. F-11, s. 2, which includes "a minister of the Crown and any person employed in the federal public administration". He also relied on the definition of "public officer" in the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 2, which includes "any person in the federal public administration who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or on whom a duty is imposed by or under an enactment" (para. 107).

[69] Le juge Kelen a répondu par l'affirmative à cette question. Pour en arriver à cette conclusion, il s'est fondé sur la définition de l'expression « fonctionnaire public » que l'on trouve dans la *Loi sur la gestion des finances publiques*, L.R.C. 1985, ch. F-11, art. 2, en l'occurrence : « Ministre ou toute autre personne employée dans l'administration publique fédérale ». Il s'est également fondé sur la définition de « fonctionnaire public » de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, art. 2, en l'occurrence : « Agent de l'administration publique fédérale dont les pouvoirs ou obligations sont prévus par un texte » (par. 107).

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[70] The Federal Court of Appeal reversed this finding, holding that Kelen J. "erred in law in importing into the *Privacy Act* the definitions of 'public officer' from statutes dealing with different subjects that use that term in different contexts" (Decision 2, at para. 5). In its view, "[t]he same understanding about the special governmental role of the Prime Minister" discussed in the first three applications "would have formed part of the foundation for the drafting of the *Privacy Act*" (para. 8). The Federal Court of Appeal concluded that it would be inconsistent with Parliament's intention to interpret the *Privacy Act* in a way that would include the Prime Minister as an officer of a government institution.

[71] I agree with the Federal Court of Appeal that Kelen J. erred in relying on the definition of "public officer" in two other statutes. It is clear that the definition of "public officer" found in the *Financial Administration Act* is a broad definition which deals with an unrelated subject and operates in a different context. The definition contained in the *Interpretation Act* could arguably be relevant, as s. 3(1) states: "Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act". However, I find no support for incorporating the definition of "public officer" in this context. First, while there may be overlap between the two terms, the term "public officer" used in the *Interpretation Act* is simply not the same as the term "officer . . . of a government institution" used in the *Privacy Act*. Second, the definition "public officer" is contained in the list of definitions under s. 2 of the *Interpretation Act*, which is expressly stated to apply "[i]n this Act". The definition is not repeated in the definitions contained in s. 35, which conversely, apply "[i]n every enactment". Finally, the *Interpretation Act* itself differentiates between a "public officer" and a "minister of the Crown" (see, e.g., s. 24). In my view, the Federal Court of Appeal rightly concluded that the meaning of "officer of a

[70] La Cour d'appel fédérale a infirmé cette conclusion en jugeant que le juge Kelen « a commis une erreur de droit en important dans la *Loi sur la protection des renseignements personnels* la définition de "fonctionnaire public" de lois portant sur des sujets différents et qui emploient cette expression dans des contextes différents » (décision 2, par. 5). À son avis, « [l]a rédaction de la *Loi sur la protection des renseignements personnels* aurait été inspirée en partie de cette même compréhension [retenue dans les trois premières demandes] de la fonction du premier ministre au sein du gouvernement » (par. 8). La Cour d'appel fédérale a conclu qu'il irait à l'encontre de la volonté du législateur d'interpréter la *Loi sur la protection des renseignements personnels* de manière à assimiler le premier ministre à un cadre d'une institution fédérale.

[71] Je suis d'accord avec la Cour d'appel fédérale pour dire que le juge Kelen a commis une erreur en se fondant sur la définition de l'expression « fonctionnaire public » donnée par deux autres lois. Il est évident que la définition de l'expression « fonctionnaire public » que l'on trouve dans la *Loi sur la gestion des finances publiques* est une définition large qui porte sur un tout autre objet et qui s'applique dans un contexte différent. On pourrait soutenir que la définition que donne la *Loi d'interprétation* est pertinente, si l'on tient compte du libellé du par. 3(1) qui dispose : « Sauf indication contraire, la présente loi s'applique à tous les textes, indépendamment de leur date d'édiction. » Je ne vois toutefois rien qui justifierait d'incorporer la définition de « fonctionnaire public » dans ce contexte. En premier lieu, bien que les acceptions du terme « cadre » et de l'expression « fonctionnaire public » puissent se recouper, cette dernière expression, telle qu'elle est employée dans la *Loi d'interprétation*, n'est tout simplement pas la même que l'expression « cadre [. . .] d'une institution fédérale » que l'on trouve dans la *Loi sur la protection des renseignements personnels*. En deuxième lieu, la définition de « fonctionnaire public » se trouve dans la liste des définitions qui sont prévues à l'art. 2 de la *Loi d'interprétation*, et qui, selon ce que cette Loi précise bien, ne s'appliquent qu'« à la présente loi ».

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government institution" must be ascertained in its proper context.

[72] In effect, the Commissioner's position on this issue follows the same rationale underlying her arguments on the other grounds of appeal. She argues in favour of a function-based approach in order to interpret the term "officer", according to which a Minister would be considered an officer of a government institution when exercising powers in relation to the institution, and not an officer of a government institution when exercising powers unrelated to the institution. The problem with this approach, however, is that there is nothing in either statute suggesting that a person might be an officer for some purposes and not for others.

[73] Nor is there any support in either statute for finding that a Minister is intended to be an "officer" of the government institution simply because he is the "head" of that institution. In fact, s. 73 of the *Access to Information Act* suggests the opposite, given that it provides that the "head" of the government institution may delegate powers and duties under the Act to one or more "officers or employees" of the government institution. A distinction is therefore drawn between "head" and "officer" in that provision. Further, as noted earlier in discussing the definition of "government institution", s. 21 of the *Access to Information Act* also makes a distinction between "officer", "employee", and "minister".

[74] Finally, as this Court explained in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (*per* La Forest J. in dissent but not on this point), and reiterated in *RCMP*, the *Access to Information*

Cette définition n'est pas reprise dans les définitions que l'on trouve à l'art. 35, lequel, à l'inverse, s'applique « à tous les textes ». Enfin, la *Loi d'interprétation* fait elle-même une distinction entre un « fonctionnaire public » et un « ministre » (voir, p. ex., l'art. 24). À mon avis, c'est à bon droit que la Cour d'appel fédérale a conclu que le sens de l'expression « cadre d'une institution fédérale » doit être déterminé en le situant dans le contexte qui lui est propre.

[72] En fait, la thèse de la Commissaire sur ce point suit le même raisonnement que celui qui est à la base des arguments qu'elle fait valoir au sujet des autres moyens d'appel. Elle plaide en faveur d'une approche fonctionnelle qui ferait en sorte que l'on interprète le terme « cadre » en considérant un ministre comme un cadre d'une institution fédérale lorsqu'il exerce ses pouvoirs en rapport avec l'institution, et différemment d'un cadre d'une institution fédérale lorsqu'il exerce des pouvoirs qui ne sont pas reliés à l'institution. Le problème que comporte cette approche réside toutefois dans le fait que rien, dans l'une ou l'autre loi, ne permet de penser qu'une personne pourrait être un cadre pour certaines fins et non pour d'autres.

[73] Aucune des deux lois ne permet non plus de conclure qu'un ministre est censé être un « cadre » de l'institution fédérale du simple fait qu'il est le « responsable » de cette institution. En fait, l'art. 73 de la *Loi sur l'accès à l'information* laisse entrevoir le contraire, compte tenu du fait qu'il prévoit que le « responsable » d'une institution fédérale peut déléguer certaines de ses attributions à « des cadres ou employés » de l'institution. Cette disposition établit donc une distinction entre un « responsable » et un « cadre ». De plus, ainsi que je l'ai déjà signalé en discutant de la définition de l'expression « institution fédérale », l'art. 21 de la *Loi sur l'accès à l'information* établit également une distinction entre les termes « dirigeant », « employé » et « ministre ».

[74] Enfin, comme notre Cour l'a expliqué dans l'arrêt *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403 (le juge La Forest, dissident, mais pas sur ce point), et l'a répété dans l'arrêt

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Act and the *Privacy Act* are to be read together as a seamless code. The interpretation of Kelen J. and the Commissioner would create discordance between the two statutes. Under the *Access to Information Act*, a Minister or Prime Minister would not be part of a government institution, while under the *Privacy Act*, he would be considered an "officer" of the government institution. I agree with the Federal Court of Appeal. Had Parliament intended the Prime Minister to be treated as an "officer" of the PCO pursuant to the *Privacy Act*, it would have said so expressly. Applying s. 3(*j*) of the *Privacy Act* to the relevant portions of the Prime Minister's agenda under the control of the RCMP and the PCO, I conclude that they fall outside the scope of the access to information regime.

[75] I would therefore dismiss the Commissioner's appeal on the fourth application with costs.

The following are the reasons delivered by

LeBel J. —

1. Overview

[76] I agree with Charron J.'s conclusions and with much of what she says in her reasons, including her findings on the applicable standard of review and on the use of expert evidence, and the control test she proposes. I also agree with my colleague's view that a Minister's office is not a "government institution" for the purposes of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("the Act"). Nonetheless, in my opinion, this conclusion cannot be the basis for an implied exception for political records. The legal relationship between a Minister's office and the government institution for which the Minister is responsible may have some bearing on whether or not the institution in question controls a

GRC, la *Loi sur l'accès à l'information* et la *Loi sur la protection des renseignements personnels* doivent être considérées ensemble comme s'il s'agissait d'un code homogène. L'interprétation proposée par le juge Kelen et par la Commissaire créerait une dissonance entre ces deux lois. Suivant la *Loi sur l'accès à l'information*, un ministre ou le premier ministre ne feraient pas partie d'institutions fédérales, tandis que, sous le régime de la *Loi sur la protection des renseignements personnels*, ils seraient considérés comme des « cadres » d'institutions fédérales. J'abonde dans le sens de la Cour d'appel fédérale. Si le législateur fédéral avait voulu que le premier ministre soit assimilé à un « cadre » du BCP pour l'application de la *Loi sur la protection des renseignements personnels*, il l'aurait dit explicitement. Appliquant aux passages pertinents de l'agenda du premier ministre relevant de la GRC et du BCP, l'al. *j*) de la définition de « renseignements personnels » figurant à l'art. 3 de la *Loi sur la protection des renseignements personnels*, je conclus que ces passages échappent à l'application du régime d'accès à l'information.

[75] Je suis par conséquent d'avis de rejeter avec dépens le pourvoi de la Commissaire en ce qui concerne la quatrième demande.

Version française des motifs rendus par

Le juge LeBel —

1. Aperçu général

[76] Je souscris aux conclusions de la juge Charron et, dans une large mesure, aux propos qu'elle tient dans ses motifs, notamment ses constatations sur la norme de contrôle applicable et sur l'utilisation de la preuve d'expert, ainsi qu'au critère qu'elle propose à l'égard de l'expression « relevant de ». Je partage également l'avis de ma collègue que le cabinet d'un ministre n'est pas une « institution fédérale » pour l'application de la *Loi sur l'accès à l'information*, L.R.C. 1985, ch. A-1 (« la Loi »). J'estime néanmoins que cette conclusion ne saurait justifier la création d'une exception implicite au sujet des documents politiques. Les rapports juridiques entre le cabinet d'un ministre et

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requested record. However, that relationship does not give rise to an implied presumption that the public does not have a right of access to records in a Minister's office.

[77] As my colleague points out, at para. 41, s. 2 of the *Access to Information Act* indicates that exceptions to the public's right of access must be "necessary". Moreover, such exceptions must be "limited and specific" according to the Act. If the Act does not specifically exempt political records, the right of access is presumed to apply to them. For the reasons that follow, I disagree with my colleague and with the Government that this presumption, which follows from a plain reading of the Act, "would dramatically expand the access to information regime in Canada" (see para. 13).

2. Purpose of the *Access to Information Act*: To Strike a Balance Between Democracy and Efficient Governance

[78] As my colleague points out in para. 15, this Court recently stated that access to government information "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" (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, *per* McLachlin C.J. and Abella J., at para. 1).

[79] Access to information legislation embodies values that are fundamental to our democracy. In *Criminal Lawyers' Association*, this Court recognized that where access to government information is essential, it is protected by the right to freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* as a derivative right. Statutes that protect *Charter* rights

l'institution fédérale dont celui-ci est responsable peuvent avoir une certaine incidence sur la question de savoir si le document demandé relève de l'institution en cause. Cependant, ces rapports juridiques ne créent pas implicitement une présomption qui priverait le public de tout droit d'accès aux documents se trouvant au cabinet d'un ministre.

[77] Comme ma collègue le souligne au par. 41, l'art. 2 de la Loi indique que les exceptions au droit d'accès du public doivent être « indispensables ». De plus, selon la Loi, ces exceptions doivent être « précises et limitées ». Si la Loi ne prévoit pas explicitement qu'ils sont exemptés, il faut présumer que le droit d'accès s'applique aux documents politiques. Pour les motifs qui suivent, je ne puis convenir avec ma collègue et le gouvernement que cette présomption, clairement exprimée dans la Loi, « aurait pour effet d'élargir considérablement la portée du régime d'accès à l'information au Canada » (voir le par. 13).

2. L'objet de la *Loi sur l'accès à l'information* : établir un équilibre entre la démocratie et une gouvernance efficace

[78] Comme ma collègue le souligne au par. 15 de ses motifs, notre Cour a récemment affirmé que l'accès aux renseignements gouvernementaux « peut accroître la transparence du gouvernement, aider le public à se former une opinion éclairée et favoriser une société ouverte et démocratique. Certains renseignements détenus par ces institutions doivent toutefois être protégés pour empêcher une atteinte à ces mêmes principes et promouvoir une bonne gouvernance » (*Ontario (Sûreté et Sécurité publique) c. Criminal Lawyers' Association*, 2010 CSC 23, [2010] 1 R.C.S. 815, la juge en chef McLachlin et la juge Abella, par. 1).

[79] La législation en matière d'accès à l'information incarne des valeurs fondamentales pour notre démocratie. La Cour a reconnu dans l'arrêt *Criminal Lawyers' Association* que l'accès aux renseignements gouvernementaux a un caractère essentiel et jouit, en tant que droit dérivé, de la garantie de la liberté d'expression accordée par l'al. 2*b*) de la *Charte canadienne des droits et libertés*.

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have often been found to have quasi-constitutional status (see, e.g., *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at paras. 21-23, but also *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, and *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345). One such statute is the *Privacy Act*, R.S.C. 1985, c. P-21, which, as has often been stated, must be read together with the *Access to Information Act* as a "seamless code" (see *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 22, and *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441, at para. 2).

[80] Moreover, this Court's position is consistent with the view that access to information legislation creates and safeguards certain values — transparency, accountability and governance — that are essential to making democracy workable (see M. W. Drapeau and M.-A. Racicot, *Federal Access to Information and Privacy Legislation Annotated 2011* (2010), at p. v). Before the advent of modern government, the mechanisms that embodied these values were subsumed in the doctrine of ministerial responsibility, according to which Ministers were accountable to Parliament for their actions. The sovereign Parliament, and only Parliament, was responsible for holding governments to account (J. F. McEldowney, "Accountability and Governance: Managing Change and Transparency in Democratic Government" (2008), 1 *J.P.P.L.* 203, at pp. 203-4).

[81] As McEldowney observes, the growing complexity of modern government has entailed unprecedented delegation of parliamentary powers to the executive branch of government. In this context, "[t]he complexity and variety of bodies involved in decision-making has contributed to a gap in our system of accountability" (p. 209). In Canada, access to information legislation was enacted to respond to and deal with the rising

De plus, les lois protégeant des droits garantis par la *Charte* ont souvent été qualifiées de quasi constitutionnelles (voir, p. ex., *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773, par. 21-23, mais aussi *Robichaud c. Canada (Conseil du Trésor)*, [1987] 2 R.C.S. 84, et *Béliveau St-Jacques c. Fédération des employées et employés de services publics inc.*, [1996] 2 R.C.S. 345). Citons à titre d'exemple la *Loi sur la protection des renseignements personnels*, L.R.C. 1985, ch. P-21, qui, comme on l'a affirmé à maintes reprises, doit être interprétée conjointement avec la *Loi sur l'accès à l'information* comme un « code homogène » (voir *Canada (Commissaire à l'information) c. Canada (Commissaire de la Gendarmerie royale du Canada)*, 2003 CSC 8, [2003] 1 R.C.S. 66, par. 22, et *Cie H.J. Heinz du Canada ltée c. Canada (Procureur général)*, 2006 CSC 13, [2006] 1 R.C.S. 441, par. 2).

[80] De plus, la position de notre Cour concorde avec l'opinion que la législation en matière d'accès à l'information établit et protège certaines valeurs — la transparence, la responsabilité et la gouvernance — essentielles au bon fonctionnement de la démocratie (voir M. W. Drapeau et M.-A. Racicot, *Federal Access to Information and Privacy Legislation Annotated 2011* (2010), p. v). Avant l'avènement de l'État moderne, les mécanismes qui incarnaient ces valeurs étaient subordonnés au principe de la responsabilité ministérielle, selon lequel les ministres devaient rendre compte de leurs actes devant le Parlement. Seul le Parlement souverain pouvait demander des comptes aux gouvernements (J. F. McEldowney, « Accountability and Governance : Managing Change and Transparency in Democratic Government » (2008), 1 *J.P.P.L.* 203, p. 203-204).

[81] Comme le fait remarquer McEldowney, la complexité croissante de l'État moderne a donné lieu à une délégation sans précédent des pouvoirs du Parlement aux organes exécutifs du gouvernement. Dans ce contexte, [TRADUCTION] « [l]a complexité et la diversité des organismes participant à la prise des décisions a entraîné un décalage dans le régime de responsabilité canadien » (p. 209). La législation canadienne en matière d'accès

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power of administrative agencies (see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 60-61; see also G. J. Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia* (2007), at pp. 109-10).

[82] This being said, in access to information matters, the Court has consistently sought to ensure a degree of government accountability to Canadian citizens, while at the same time accepting that rights of access and the values they safeguard must be balanced against the interests of efficient governance (see *Criminal Lawyers' Association*, at para. 1, and *Dagg*, at paras. 45-57). This balance has been struck in access to information legislation by means of a presumption of a right of access — as opposed to a presumption that access should be refused — to all records, subject to exceptions that are specified in the legislation.

[83] In *Criminal Lawyers' Association*, this Court reaffirmed that the right of access to government documents is not absolute (para. 35; see also *Rubin v. Canada (Clerk of the Privy Council)*, [1996] 1 S.C.R. 6). There is no constitutional right of access. The right is created by statute and is subject to specific exceptions provided for in the statute. Though the right must be interpreted liberally, exceptions to it must be interpreted narrowly, as is suggested by s. 2 of the Act, which requires that exceptions be not only "specific", but "limited". Accordingly, it is imperative that exemptions be limited to those provided for in ss. 13 to 26; qualifying words should not be read into the Act (see *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (C.A.)).

3. To Protect "Full and Frank Discussion" in a Minister's Office Without Excluding Ministers' Offices From the Scope of the Act

[84] "[P]olitical records" are not explicitly exempt from disclosure under the *Access to Information Act*. They are records that pertain to

à l'information a été adoptée en réaction au pouvoir grandissant de l'administration (voir *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403, par. 60-61; voir aussi G. J. Levine, *The Law of Government Ethics : Federal, Ontario and British Columbia* (2007), p. 109-110).

[82] Cela dit, dans le domaine de l'accès à l'information, la Cour a toujours cherché à assurer un certain degré de responsabilité gouvernementale envers les citoyens canadiens, tout en reconnaissant la nécessité de concilier, d'une part, les droits d'accès et les valeurs que ceux-ci protègent et, d'autre part, les intérêts d'une gouvernance efficace (voir *Criminal Lawyers' Association*, par. 1, et *Dagg*, par. 45-57). La législation en matière d'accès à l'information a réalisé cet équilibre en créant une présomption d'accessibilité de tous les documents, sous réserve des exceptions prévues par la législation — plutôt qu'une présomption selon laquelle l'accès doit être refusé.

[83] Dans *Criminal Lawyers' Association*, la Cour a réitéré que le droit d'accès aux documents gouvernementaux n'est pas absolu (par. 35, voir aussi *Rubin c. Canada (Greffier du Conseil privé)*, [1996] 1 R.C.S. 6). La Constitution ne garantit pas un tel droit d'accès. La Loi crée ce droit et le subordonne aux exceptions précises qu'elle prescrit. Ce droit commande une interprétation libérale, mais les exceptions dont il est assorti doivent recevoir une interprétation étroite, comme l'indique l'art. 2 de la Loi, selon lequel les exceptions seront non seulement « précises », mais aussi « limitées ». Il est donc impératif que les exemptions se limitent à celles énumérées aux art. 13 à 26; il faut éviter d'ajouter à la Loi, par interprétation, des termes restrictifs (voir *Société canadienne des postes c. Canada (Ministre des Travaux publics)*, [1995] 2 C.F. 110 (C.A.)).

3. Protéger la tenue de « débats ouverts et francs » au cabinet d'un ministre sans exclure ce cabinet du champ d'application de la Loi

[84] La Loi ne soustrait pas explicitement les « documents politiques » à la communication. Ces documents concernent les activités du ministre en

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a Minister's activities as a member of a political party, as opposed to his or her duties as a member of Cabinet who is accountable to Parliament for the administration of a government department. In line with the interpretative approach adopted by this Court in *Criminal Lawyers' Association*, we must conclude that the right of access can be presumed to apply to political records but that it is subject to any of the statutory exceptions that apply. These exceptions reflect the complexity of the various functions of Ministers of the Crown in a modern parliamentary democracy.

[85] I agree completely with my colleague that this interpretative approach must be reconciled with "the need for a private space to allow for the full and frank discussion of issues" (para. 41). I also agree with her that in s. 21 of the Act, Parliament has recognized "the need for confidential advice to be sought by and provided to a Minister and [that], consequently, records in a government institution offering such advice are exempt from disclosure at the discretion of the head of the institution" (para. 41). I would contend, however, that the structure of the Act and the inclusion of s. 21 already address this concern explicitly.

[86] As a result, I disagree with the assertion that the need for a full and frank discussion justifies excluding Ministers' offices from the scope of the Act. To read such a broad exemption into the Act is not "necessary" within the meaning of s. 2, because the concern is already addressed explicitly. In my view, to read this exclusion into the Act is to deviate from the approach adopted by the Court in *Criminal Lawyers' Association*, as outlined above.

[87] The conclusion that a Minister's office is not a government institution flows from the modern approach to statutory interpretation, which my colleague describes as a "general roadmap", at para. 27. But I feel it necessary to distance myself from the findings of Kelen J., which my colleague draws

sa qualité de membre d'un parti politique plutôt que les fonctions qu'il exerce à titre de membre du Cabinet, responsable devant le Parlement de l'administration d'un ministère. Pour rester fidèle à la méthode d'interprétation que la Cour a retenue dans *Criminal Lawyers' Association*, nous devons conclure que le droit d'accès est présumé s'appliquer aux documents politiques sous réserve des exceptions légales applicables. Ces exceptions traduisent la complexité des différentes fonctions qu'exercent les ministres dans une démocratie parlementaire moderne.

[85] Je suis tout à fait d'accord avec ma collègue pour affirmer qu'il faut concilier cette méthode d'interprétation avec « la nécessité de prévoir un espace privé où il est possible de débattre ouvertement et franchement de certaines questions » (par. 41). Je conviens aussi avec elle que le législateur reconnaît, à l'art. 21 de la Loi, « le besoin qu'ont les ministres de solliciter et de recevoir des avis confidentiels de sorte que les documents d'une institution fédérale qui contiennent de tels avis sont soustraits à la communication, à la discrétion du responsable de l'institution » (par. 41). Toutefois, à mon avis, l'économie de la Loi et l'insertion de l'art. 21 répondent déjà expressément à cette nécessité.

[86] En conséquence, je ne peux souscrire à l'affirmation de ma collègue que la nécessité d'un débat ouvert et franc justifie de soustraire les cabinets des ministres à l'application de la Loi. Il n'est pas « indispensable », au sens de l'art. 2, d'incorporer par interprétation à la Loi une exemption aussi générale, car la Loi pourvoit déjà expressément à cette préoccupation. À mon avis, intégrer par interprétation pareille exclusion dans la Loi ne respecte pas l'approche retenue par notre Cour dans *Criminal Lawyers' Association*, comme je l'ai expliqué précédemment.

[87] La conclusion que le cabinet d'un ministre n'est pas une institution fédérale découle de la méthode moderne d'interprétation des lois, méthode que ma collègue qualifie d'« indications générales » au par. 27. J'estime toutefois nécessaire d'exprimer ma réserve à l'égard des conclusions du

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on as "useful guideposts" for her interpretation (para. 27).

[88] More specifically, I take issue with Kelen J.'s interpretation of Parliament's silence regarding political records (2008 FC 766, [2009] 2 F.C.R. 86, at paras. 57-60). On the basis of that silence, Kelen J. reasoned that an interpretation of the term "government institution" that included Ministers' offices would dramatically extend the right of access. I cannot agree with this view.

[89] As I mentioned above, this Court's approach has been that access to information legislation creates a general right of access to which there are necessary exceptions that must be limited and specific. If the legislature is silent with respect to a given class of documents, such as political records, courts must assume, *prima facie* at least, that the documents in question are not exempt. Whether access can indeed be obtained as requested is a different matter for which it is necessary to design an appropriate control test. Therefore, it cannot be inferred from the legislature's silence that political records were not intended to be disclosed at all. Politics and administration are sometimes intertwined in our democratic system. As a result, the contents of ministerial records may straddle the two worlds of politics and pure administration, if it is even possible to draw so sharp a distinction between the different roles of Ministers in Canada's political system. On this basis, the much bolder inference that Ministers' offices are presumptively excluded from the purview of the *Access to Information Act* is also incorrect.

[90] Kelen J. also concluded that all ministerial records are presumptively excluded on the basis that the *Library and Archives of Canada Act*, S.C. 2004, c. 11, differentiates "government records" from "ministerial records". Government records and ministerial records are indeed different. In s. 2 of the *Library and Archives of Canada Act*, a "government record" is defined as "a record that is

juge Kelen, que ma collègue utilise comme « points de repère utiles » pour son interprétation (par. 27).

[88] Je m'inscris plus particulièrement en faux contre l'interprétation donnée par le juge Kelen au silence du législateur à propos des documents politiques (2008 CF 766, [2009] 2 R.C.F. 86, par. 57-60). En raison de ce silence, le juge Kelen estime qu'interpréter « institution fédérale » comme englobant les cabinets des ministres aurait pour effet d'élargir considérablement le droit d'accès. Je ne puis accepter son raisonnement sur ce point.

[89] Rappelons que, selon la Cour, la législation en matière d'accès à l'information crée un droit général d'accès assorti d'exceptions indispensables qui doivent demeurer limitées et précises. Si le législateur reste muet à l'égard d'une catégorie donnée de documents, comme les documents politiques, les cours doivent présumer, du moins à première vue, que ces documents ne sont pas soustraits à la communication. La possibilité d'obtenir sur demande l'accès à ces documents est une question distincte qui commande l'élaboration d'un critère adéquat pour dégager le sens de l'expression « relevant de ». On ne saurait donc conclure du silence du législateur que les documents politiques se trouvent exclus de l'application de l'obligation générale de communication. Dans notre régime démocratique, le politique et l'administratif se chevauchent parfois. Par conséquent, le contenu des documents ministériels peut recouper les sphères de la politique et de l'administration pure, à supposer qu'il soit même possible d'établir une distinction aussi nette entre les différents rôles attribués aux ministres dans le régime politique canadien. En conséquence, la conclusion beaucoup plus tranchée que les cabinets des ministres sont présumés soustraits à l'application de la Loi est elle aussi incorrecte.

[90] Le juge Kelen a également conclu à l'existence d'une présomption d'inaccessibilité de tous les documents ministériels en se fondant sur la *Loi sur la Bibliothèque et les Archives du Canada*, L.C. 2004, ch. 11, qui distingue les « documents fédéraux » des « documents ministériels ». Ces deux types de documents sont effectivement différents. Selon l'art. 2 de la *Loi sur la Bibliothèque et les*

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under the control of a government institution". On the other hand, a "ministerial record" is a record

of a member of the Queen's Privy Council for Canada who holds the office of a minister and that pertains to that office, other than a record that is of a personal or political nature or that is a government record.

[91] With respect, the fact that these two kinds of records are treated differently in the *Library and Archives of Canada Act* does not mean that ministerial records are presumptively outside the scope of the *Access to Information Act*. My position on the legal relationship between a Minister's office and the government institution for which the Minister is responsible flows from a plain reading of the Act. As my colleague mentions, Ministers' offices are not listed in Schedule I of the Act, and I accordingly agree with her that they should not be considered "government institutions" for the purposes of the Act. This being said, it does not follow that Ministers' offices are presumptively excluded from the scope of the Act. The fact that Ministers' offices are separate and different from government institutions does not mean that a government institution cannot control a record that is not in its premises. If a government institution controls a record in a Minister's office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head must facilitate access to it on the basis of the procedure and the limits specified in the Act.

[92] The *Access to Information Act* applies to records. Ministers' offices remain within the scope of the Act inasmuch as they possess "record[s] under the control of a government institution" (s. 4). The right of access is presumed to apply to such records unless they fall under a specific exemption.

[93] In my view, the presumption that the Act applies to Ministers' offices does not expand the right of access at all. Any requested record that is

Archives du Canada, « document fédéral » s'entend d'un « [d]ocument qui relève d'une institution fédérale ». Pour sa part, le « document ministériel » est un document afférent à la qualité de ministre

d'un membre du Conseil privé de la Reine pour le Canada, à l'exclusion des documents personnels ou politiques et des documents fédéraux.

[91] Avec égards pour l'opinion contraire, la différence de traitement faite entre ces deux types de documents dans la *Loi sur la Bibliothèque et les Archives du Canada* ne signifie pas qu'il existe une présomption soustrayant les documents ministériels à l'application de la Loi. Ma position concernant les rapports juridiques qu'entretiennent le cabinet d'un ministre et l'institution fédérale dont celui-ci est responsable se fonde sur le sens clair de la Loi. Comme l'affirme ma collègue, les cabinets des ministres ne figurent pas à l'annexe I de la Loi, et je conviens donc avec elle qu'ils ne doivent pas être considérés comme des « institutions fédérales » pour l'application de la Loi. Cela dit, il ne s'ensuit pas que les cabinets des ministres sont présumés échapper à l'application de la Loi. Bien que les cabinets des ministres soient autonomes et différents des institutions fédérales, cette considération n'empêche pas un document qui ne se trouve pas dans les locaux d'une institution fédérale de relever de cette dernière. Si un document conservé au cabinet d'un ministre relève d'une institution fédérale, la Loi s'applique à ce document. En pareil cas, le responsable doit faciliter l'accès au document conformément à la procédure et aux limites prescrites par la Loi.

[92] La Loi s'applique aux documents et les cabinets des ministres continuent de relever du champ d'application de celle-ci dans la mesure où ils sont en possession de « documents des institutions fédérales » (art. 4). Le droit d'accès est présumé viser ces documents si aucune exemption précise ne s'applique à leur égard.

[93] À mon avis, la présomption que la Loi s'applique aux cabinets des ministres n'a aucunement pour effet d'élargir le droit d'accès. Tout document

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located in a Minister's office is subject to the two-part control test proposed by my colleague.

[94] For this purpose, the "head" of the government institution must determine, first, whether the requested record relates to a departmental matter. In other words, does the record contain government information? This first stage of the test, "a useful screening device" (para. 55), will exclude all documents, such as political records (e.g. plans for a party fundraiser), that do not relate to a departmental matter.

[95] Second, the head of the government institution must determine whether the institution could reasonably expect to obtain a copy of the record upon request. As my colleague proposes, this stage of the test requires an objective analysis to determine whether that expectation is reasonable in which all relevant factors, including the content of the record, the circumstances in which it was created and the legal relationship between the government institution and the record holder, are taken into account (para. 56). If the record holder is the Minister, the fact that his or her office is not part of the government institution he or she oversees may weigh in the balance; it does not, however, create a presumption of an exception to the right of access.

4. Question of "Hybrid" Records

[96] The *Access to Information Act* is of course not applied in a vacuum. The reality that Ministers wear many hats must be taken into account in doing so. Thus, a Minister is a member of Cabinet who is accountable to Parliament for the administration of a government department, but is usually also a Member of Parliament in addition to being a member of a political party for which he or she performs various functions and, finally, a private person. Records connected with these different functions may blend into each other in the course of regular business.

demandé qui se trouve au cabinet d'un ministre demeure assujetti au critère d'application en deux étapes de l'expression « relevant de » que propose ma collègue.

[94] À cette fin, le « responsable » de l'institution fédérale doit d'abord décider si le document demandé se rapporte à une affaire ministérielle. Autrement dit, le document contient-il des renseignements gouvernementaux? Cette première étape du critère, à savoir « un mécanisme de tamisage utile » (par. 55), permet d'exclure tous les documents — tels les documents politiques (p. ex., des projets de collecte de fonds pour un parti) — qui ne se rapportent pas à une affaire ministérielle.

[95] Deuxièmement, le responsable de l'institution fédérale doit se demander s'il est raisonnable de s'attendre à ce que l'institution obtienne une copie du document sur demande. Comme l'indique ma collègue, cette étape du critère implique une analyse objective du caractère raisonnable des attentes qui tienne compte de tous les critères pertinents, notamment la teneur du document, les circonstances dans lesquelles il a été créé et les rapports juridiques qu'entretiennent l'institution fédérale et le détenteur du document (par. 56). Si le ministre détient le document, le fait que son cabinet ne fasse pas partie de l'institution fédérale qu'il dirige peut être pris en considération, mais ce facteur ne fait toutefois pas présumer l'existence d'une exception au droit d'accès au document.

4. La question des documents « mixtes »

[96] Bien entendu, la Loi ne s'applique pas dans l'abstrait. Son application doit tenir compte du fait que les ministres agissent en plusieurs qualités. Ainsi, le ministre est non seulement membre du Cabinet et responsable devant le Parlement de l'administration d'un ministère, mais il est aussi, dans la plupart des cas, un député, en plus d'appartenir à un parti politique pour le compte duquel il exerce différentes fonctions et, enfin, il demeure un particulier. Il est donc normal que des documents portent sur des sujets se rattachant à ces diverses qualités du ministre.

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[97] As I mentioned above, the right of access is presumed to apply to "political records", but such records are unlikely to be under the control of a government institution if they do not relate to a departmental matter. At the other end of the spectrum are records that relate to departmental matters and are under the control of a government institution. I will refer to the latter as "government records" for the purposes of this discussion. If requested, government records should be disclosed under the *Access to Information Act*.

[98] It is conceivable, however, that many records will not fall neatly into one category or another. For example, departmental matters are sometimes decided on the basis of political priorities. Documents in which departmental targets are assessed in light of political aims would fall into a grey area. I will refer to such documents as "hybrid records".

[99] The *Access to Information Act* provides for the existence of this grey area, at least to some extent. Thus, s. 25 provides for the severance of part of a record. Where a Minister is authorized to refuse to disclose a record, the Minister can redact the exempted portions of the document, but must disclose the portions that are not exempted.

[100] In addition, s. 21(1) provides that, subject to specific exceptions in s. 21(2), a Minister has a very broad authorization to refuse to disclose a requested record that contains any of the following:

> **21.** (1) . . .
>
> (*a*) advice or recommendations developed by or for a government institution or a minister of the Crown,
>
> (*b*) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,
>
> (*c*) positions or plans developed for the purpose of negotiations carried on or to be carried on by

[97] Comme je l'ai mentionné précédemment, le droit d'accès est présumé viser les « documents politiques », mais il est peu probable que ces documents relèvent d'une institution fédérale s'ils ne se rapportent pas à une affaire ministérielle. On trouve, à l'autre extrémité du spectre, les documents relatifs à une affaire ministérielle qui relèvent d'une institution fédérale. J'appellerai ceux-ci les « documents fédéraux » pour les besoins de la présente analyse. Les documents fédéraux doivent être communiqués sur demande en application de la Loi.

[98] Il se peut toutefois que bon nombre de documents ne relèvent pas clairement de l'une ou l'autre de ces catégories. Par exemple, certaines affaires ministérielles sont parfois décidées en fonction de priorités d'ordre politique. Les documents dans lesquels des objectifs ministériels sont appréciés à la lumière de buts politiques se situeraient dans une zone grise. Je qualifierai de « mixtes » les documents de ce genre.

[99] La Loi tient compte, du moins dans une certaine mesure, de l'existence de cette zone grise. Ainsi, l'art. 25 prévoit la possibilité d'expurger des parties de documents. Lorsqu'il est autorisé à refuser la communication d'un document, le ministre peut expurger les parties du document qui sont soustraites à la communication, mais il doit communiquer celles qui ne le sont pas.

[100] Qui plus est, le par. 21(1) dispose que, sous réserve des exceptions précises établies au par. (2), le ministre est investi d'un très large pouvoir l'autorisant à refuser de communiquer tout document demandé, daté de moins de vingt ans, lorsqu'il contient un des éléments suivants :

> **21.** (1) . . .
>
> *a*) des avis ou recommandations élaborés par ou pour une institution fédérale ou un ministre;
>
> *b*) des comptes rendus de consultations ou délibérations auxquelles ont participé des administrateurs, dirigeants ou employés d'une institution fédérale, un ministre ou son personnel;
>
> *c*) des projets préparés ou des renseignements portant sur des positions envisagées dans le cadre de

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or on behalf of the Government of Canada and considerations relating thereto, or

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

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

Section 21(2) reads as follows:

21. . . .

(2) Subsection (1) does not apply in respect of a record that contains

(*a*) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or

(*b*) a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared.

[101] Section 21 covers many of the circumstances in which certain kinds of hybrid records that contain information relating to departmental matters are produced (see s. 21(1)(*a*)). Section 21(1) is specifically designed to cover material produced in the course of *full and frank discussions*, such as deliberations in which directors, officers or employees of a government institution participate together with a Minister or a Minister's staff (see s. 21(1)(*b*)).

5. Investigatory Powers of the Commissioner

[102] Though the head of a government institution has a broad discretion to either disclose or retain hybrid records, the Information Commissioner is given equally broad investigatory powers in s. 36 of the *Access to Information Act*. These powers can act as a check on the Minister's discretion. As I mentioned above, Parliament has sought to strike a balance between access rights and efficient governance. On the one hand, through s. 21 and the

négociations menées ou à mener par le gouvernement du Canada ou en son nom, ainsi que des renseignements portant sur les considérations qui y sont liées;

d) des projets relatifs à la gestion du personnel ou à l'administration d'une institution fédérale et qui n'ont pas encore été mis en œuvre.

Le paragraphe (2) est rédigé en ces termes :

21. . . .

(2) Le paragraphe (1) ne s'applique pas aux documents contenant :

a) le compte rendu ou l'exposé des motifs d'une décision qui est prise dans l'exercice d'un pouvoir discrétionnaire ou rendue dans l'exercice d'une fonction judiciaire ou quasi judiciaire et qui touche les droits d'une personne;

b) le rapport établi par un consultant ou un conseiller qui, à l'époque où le rapport a été établi, n'était pas un administrateur, un dirigeant ou un employé d'une institution fédérale ou n'appartenait pas au personnel d'un ministre, selon le cas.

[101] L'article 21 vise bon nombre des circonstances dans lesquelles sont produits certains types de documents mixtes contenant des renseignements sur des affaires ministérielles (voir l'al. 21(1)*a*)). Le paragraphe 21(1) s'applique spécifiquement aux documents produits dans le cours de *débats ouverts et francs*, par exemple des délibérations auxquelles des administrateurs, dirigeants ou employés d'une institution fédérale ont participé conjointement avec un ministre ou son personnel (voir l'al. 21(1)*b*)).

5. Les pouvoirs d'enquête du Commissaire

[102] Bien que le responsable d'une institution fédérale dispose d'un large pouvoir discrétionnaire l'habilitant à communiquer ou à conserver des documents mixtes, l'art. 36 de la Loi investit le Commissaire à l'information de pouvoirs d'enquête tout aussi larges, qui peuvent être utilisés comme contrepoids au pouvoir discrétionnaire du ministre. Comme je l'ai déjà mentionné, le législateur a cherché à établir un équilibre entre le droit d'accès

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general structure of the Act, Parliament has created a space in which Ministers may review and debate issues in private. On the other hand, through s. 36 and the general structure of the Act, Parliament has ensured that this private space is not abused.

et une gouvernance efficace. D'une part, le législateur a créé, par l'art. 21 et l'économie générale de la Loi, un espace où les ministres peuvent examiner certaines questions et en débattre en privé. D'autre part, le législateur a veillé, au moyen de l'art. 36 et de l'économie générale de la Loi, à ce que l'on n'abuse pas du recours à cet espace privé.

[103] The Commissioner has the same power to summon witnesses and compel them to give evidence as a superior court of record (s. 36(1)(*a*)), and also has the power to administer oaths (s. 36(1)(*b*)), and to receive and accept such evidence as the Commissioner sees fit (s. 36(1)(*c*)). The Commissioner may also enter any premises of a government institution for the purposes of an investigation, as well as converse with persons and examine documents in those premises (s. 36(1)(*d*)). However, since a Minister's office is not a government institution for the purposes of the Act, the Commissioner does not have the power to enter one.

[103] Le Commissaire possède, pour assigner et contraindre des témoins à déposer, le même pouvoir que celui d'une cour supérieure d'archives (al. 36(1)*a*)). Il dispose aussi du pouvoir de faire prêter serment (al. 36(1)*b*)) et de recevoir tous les éléments de preuve qu'il estime indiqués (al. 36(1)*c*)). De plus, le Commissaire peut pénétrer dans les locaux d'une institution fédérale pour les besoins d'une enquête, et il peut s'entretenir avec des personnes et examiner des documents qui se trouvent dans ces locaux (al. 36(1)*d*)). Mais comme le cabinet d'un ministre n'est pas une institution fédérale pour l'application de la Loi, le Commissaire ne dispose pas du pouvoir d'y entrer.

[104] Importantly, pursuant to s. 36(2), the Commissioner has the power to examine "any record to which this Act applies that is under the control of a government institution". In light of the above reasoning, records located in a Minister's office can fall within the ambit of this provision. Section 36(2) is crucial to the balance Parliament intended to strike. Indeed, it is the first mechanism, prior to judicial review, for applying the principle that "decisions on the disclosure of government information should be reviewed independently of government" (s. 2).

[104] Fait important, le par. 36(2) investit le Commissaire du pouvoir d'examiner « tous les documents qui relèvent d'une institution fédérale et auxquels la présente loi s'applique ». Pour les raisons exposées ci-dessus, cette disposition peut s'appliquer aux documents qui se trouvent au cabinet d'un ministre. Le paragraphe 36(2) constitue un élément essentiel au maintien de cet équilibre recherché par le législateur. Il s'agit en fait du premier mécanisme, avant le contrôle judiciaire, permettant d'appliquer le principe selon lequel « les décisions quant à la communication [sont] susceptibles de recours indépendants du pouvoir exécutif » (art. 2).

[105] Under s. 21, the head of a government institution is responsible for determining whether requested hybrid documents located in a Minister's office should be disclosed. The first step in the assessment is to consider whether the records fall within the scope of the Act: for this purpose, the head must perform the control test we propose. If the requested documents are found to fall within the scope of the Act, the head must then perform the second step of the assessment process: to determine

[105] Aux termes de l'art. 21, il appartient au responsable d'une institution fédérale de déterminer si les documents mixtes demandés qui se trouvent au cabinet d'un ministre doivent être communiqués. La première étape de cet examen consiste à établir si les documents tombent dans le champ d'application de la Loi; à cette fin, le responsable doit utiliser le critère d'application de l'expression « relevant de » que nous préconisons. S'il juge que les documents demandés tombent sous

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whether the requested records fall under any of the exemptions provided for in the Act, including in s. 21. Depending on which exemption applies, the head may or may not have the discretion to disclose the document.

[106] The purpose of the Commissioner's investigatory powers is to determine whether the head of a government institution has complied with the Act in performing his or her duties. This includes an inquiry into whether the head has conducted the correct analysis at both stages.

[107] If a head claims to have refused access on the basis that the requested document was not under the control of a government institution, then the Commissioner may exercise only his or her powers under s. 36(1)(*a*) to (*c*). If the evidence garnered under those subsections leads the Commissioner to believe that the documents are likely under the control of a government institution, he or she may examine them to ascertain whether the control test was applied properly.

[108] If the Commissioner is entitled to inquire into whether the head applied the control test properly, the Commissioner may require access to some documents that are ultimately outside the scope of the Act. This does not broaden the public's right of access. Section 35(1) of the Act provides that "[e]very investigation of a complaint . . . by the Information Commissioner shall be conducted in private." Further, in the course of an investigation, parties affected by the investigation have a right to make representations (s. 35(2)). Following an investigation, the Commissioner cannot compel the head of a government institution to disclose the documents in question; rather, the Commissioner may only make recommendations to the head (s. 37). Finally, anyone who has been refused access to such records after an investigation is entitled to apply for judicial review of the decision (s. 41).

le coup de la Loi, le responsable doit alors, à la deuxième étape de l'examen, se demander s'ils sont assujettis à l'une des exemptions prévues à la Loi, notamment à l'art. 21. Selon l'exemption applicable, le responsable peut disposer ou non du pouvoir discrétionnaire de communiquer le document.

[106] Les pouvoirs d'enquête du Commissaire doivent lui permettre d'établir si le responsable d'une institution fédérale s'est conformé à la Loi dans l'exercice de ses fonctions. Pour ces fins, le Commissaire peut notamment enquêter pour déterminer si le responsable a bien respecté les deux étapes de l'analyse.

[107] Si un responsable prétend avoir refusé l'accès au document demandé parce que celui-ci ne relevait pas d'une institution fédérale, le Commissaire ne peut alors exercer que les pouvoirs que lui confèrent les al. 36(1)*a*) à *c*). Si la preuve recueillie en vertu des alinéas susmentionnés amène le Commissaire à croire que les documents relèvent vraisemblablement d'une institution fédérale, il peut les examiner pour vérifier si le critère d'application de l'expression « relevant de » a été utilisé correctement.

[108] Si le Commissaire a le droit d'enquêter pour établir si le responsable a bien utilisé le critère relatif à l'expression « relevant de », il peut avoir besoin d'accéder à certains documents qui, en dernière analyse, échappent à la portée de la Loi. Ce pouvoir n'élargit pas le droit d'accès du public car, aux termes du par. 35(1) de la Loi, « [l]es enquêtes menées sur les plaintes par le Commissaire [. . .] sont secrètes. » Par surcroît, les parties touchées par l'enquête ont le droit de faire des observations au cours de celle-ci (par. 35(2)). Le Commissaire ne peut pas contraindre le responsable d'une institution fédérale à communiquer les documents en question à la suite d'une enquête; il peut seulement lui transmettre des recommandations (art. 37). Enfin, les personnes auxquelles on a refusé de communiquer ces documents possèdent le droit d'exercer un recours en révision de la décision (art. 41).

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[109] With respect, I am of the view that a presumption that a Minister's records are beyond the scope of the Act would upset the balance between the head's discretionary powers and the Commissioner's powers of investigation. My colleague's analysis involves a presumption that the Commissioner would have no power whatsoever to examine records located in a Minister's office. The Commissioner's power would be limited to summoning witnesses and compelling them to give evidence concerning such records. Even if that evidence led the Commissioner to suspect that the control test had not been applied properly, the Commissioner would not be able to examine the documents to confirm his or her suspicions. Such an interpretation of the Act would effectively leave the head of a government institution with the final say as to whether a given document was under the institution's control and would run counter to the purpose of the Act as outlined in s. 2, according to which decisions on the disclosure of government information must be reviewed independently. In my opinion, the presumption of an exception to the right of access that my colleague proposes would significantly weaken the Commissioner's powers of investigation, which are crucial to the intended balance between access to information and good governance.

6. Application to the Records at Issue

[110] I agree with my colleague that, in the circumstances in which the records at issue in the first three applications were created and managed, a government institution would not have a reasonable expectation of obtaining them and that these documents were therefore not under the control of a government institution.

[111] As for the records in the possession of the Privy Council Office and the Royal Canadian Mounted Police, I agree with my colleague that, even though they were under the control of a government institution, they were subject to s. 19 of the *Access to Information Act* and the heads of

[109] En toute déférence, j'estime qu'une présomption écartant les documents d'un ministre du champ d'application de la Loi romprait l'équilibre qui existe entre le pouvoir discrétionnaire du responsable et le pouvoir d'enquête du Commissaire. Dans son analyse, ma collègue présume que le Commissaire ne disposerait d'aucun pouvoir d'examiner des documents se trouvant au cabinet d'un ministre. Le Commissaire détiendrait seulement le pouvoir d'assigner et de contraindre des témoins à déposer au sujet de ces documents. Même si de tels éléments de preuve amenaient le Commissaire à soupçonner que le critère relatif à l'expression « relevant de » n'a pas été appliqué correctement, il ne serait pas autorisé à examiner les documents pour confirmer ses soupçons. Si elle est retenue, cette interprétation de la Loi laisserait effectivement au responsable d'une institution fédérale le soin de décider en dernier ressort si un document donné relève de l'institution fédérale en cause et irait à l'encontre de l'objet de la Loi, exposé à l'art. 2, soit que les décisions quant à la communication sont susceptibles de recours indépendants. À mon avis, la présomption proposée par ma collègue, selon laquelle le droit d'accès est soumis à une telle exception, affaiblirait considérablement les pouvoirs d'enquête du Commissaire, malgré leur caractère fondamental pour le maintien de l'équilibre recherché entre l'accès à l'information et la bonne gouvernance.

6. Application aux documents en cause

[110] À l'instar de ma collègue, j'estime que, vu les circonstances dans lesquelles les documents en question dans les trois premières demandes ont été rédigés et gérés, une institution fédérale ne pourrait raisonnablement pas s'attendre à les obtenir. Les documents ne relevaient donc pas d'une institution fédérale.

[111] Quant aux documents que possèdent le Bureau du Conseil privé et la Gendarmerie royale du Canada, je suis d'accord avec ma collègue pour conclure que l'art. 19 de la *Loi sur l'accès à l'information* s'applique à eux même s'ils relevaient d'une institution fédérale. Par conséquent, les

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those institutions accordingly had an obligation to refuse to disclose them.

[112] For these reasons, I would dismiss the appeals.

Appeals dismissed with costs.

Solicitor for the appellant: Information Commissioner of Canada, Ottawa.

Solicitor for the respondents: Attorney General of Canada, Ottawa.

Solicitors for the interveners: Blake, Cassels & Graydon, Toronto.

responsables de ces institutions étaient tenus d'en refuser la communication.

[112] Pour ces motifs, je rejetterais les pourvois.

Pourvois rejetés avec dépens.

Procureur de l'appelant : Commissaire à l'information du Canada, Ottawa.

Procureur des intimés : Procureur général du Canada, Ottawa.

Procureurs des intervenantes : Blake, Cassels & Graydon, Toronto.

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Tab 3

CITATION: City of Ottawa v. Ontario, 2010 ONSC 6835
DIVISIONAL COURT FILE NO.: 201/10
DATE: 20101213

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JENNINGS, MOLLOY and DALEY JJ.

2010 ONSC 6835 (CanLII)

BETWEEN:	)	
	)	
CITY OF OTTAWA	)	Priscilla Platt and Brad Elberg, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
ONTARIO (INFORMATION AND PRIVACY COMMISSIONER) and JOHN DUNN	)	David Goodis and Allison Knight, for the Respondent Ontario (Information and Privacy Commisioner)
	)	
Respondents	)	John Dunn, in person
	)	
	)	
	)	**HEARD:** December 7, 2010 in Toronto

MOLLOY J.:

REASONS FOR DECISION

A. INTRODUCTION

[1] When a government employee uses his workplace email address to send and receive personal emails completely unrelated to his work, are those emails subject to disclosure to members of the public who request them under freedom of information legisation? That is the central issue raised by this judicial review application.

[2] The City of Ottawa was of the view that the personal emails of one of its employees were not within its "custody or control" within the meaning of the applicable legislation and refused a request to disclose them. On appeal, the Information and Privacy Commissioner took the opposite view, ruled that the emails were subject to the legislation, and ordered the City to

process the application for disclosure. The City of Ottawa seeks judicial review of that decision (Order MO-2408, which is dated April 9, 2009).

[3] This case turns on the interpretation of s. 4(1) of the *Municipal Freedom & Protection of Privacy Act*[1] ("MFIPPA" or "the Act"), which states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

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[4] For the reasons that follow, I find that emails of this nature do not fall within the scope of the Act. The adjudicator erred in law in finding to the contrary and her decision is therefore set aside. The fundamental error underlying the Adjudicator's decision is her failure to consider the purpose and intent of freedom of information legislation in determining the scope of the Act and whether it applied to the private communications of individuals who happen to be employed by government.

B. FACTUAL BACKGROUND

[5] The factual background is not in dispute.

[6] The City of Ottawa permits incidental personal use of its email system by its employees, subject to certain conditions. One of the conditions imposed is that the City retains the right to monitor its IT systems, including email, at any time and without notice "for security breaches and non-compliance with City policies and procedures, as well as for network management reasons." The City's Responsible Computing Policy also specifies that electronic information and IT assets remain the property of the City. However, employees are not required to retain personal emails sent and received by them and can delete them whenever and as they see fit.

[7] Rick O'Connor worked for the City of Ottawa as a City Solicitor. In his spare time, he volunteered on the Board of Directors of the Children's Aid Society ("CAS"). There is no connection between Mr. O'Connor's volunteer work for CAS and his work for the City. Mr. O'Connor used his work email address to send and receive emails relating to his CAS volunteer work. He segregated such emails in a separate file folder, but they were stored within that folder

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[1] R.S.O. 1990, c. M.56

on the City's email server. There is no other connection between the City and those emails and nothing improper in Mr. O'Connor's use of his work email for this purpose.

[8] On October 23, 2007, the respondent John Dunn made a request under the *Municipal Freedom & Protection of Privacy Act*[2] ("MFIPPA" or "the Act") seeking disclosure by the City of Ottawa of all "emails, letters and faxes" sent or received by Mr. O'Connor to and from anyone at CAS[3] since February, 2007.

[9] The City Clerk responded on December 6, 2007, stating that: the communications did not relate to Mr. O'Connor's duties as City Solicitor, but rather to his role with CAS; the documents were not within the City's custody or control and fall outside the scope of MFIPPA; and therefore the City would not be processing his request.

[10] Mr. Dunn appealed to the Information and Privacy Commissioner ("IPC") and a hearing was conducted before Adjudicator Catherine Corbin. By this point, the original request (which had led to the identification of 417 pages of records as falling within the category of documents sought), had through the process of mediation and without prejudice consensual disclosure, been reduced to six pages. All are emails sent by the Executive Directeor of CAS to various CAS personnel including Mr. O'Connor. None have anything to do with the business of the City of Ottawa.

C. THE DECISION OF THE ARBITRATOR

[11] The Arbitrator's analysis of the issue before her covers approximately four pages of her decision, of which two pages are extensive quotations from two other IPC decisions.

[12] The Arbitrator began her analysis by referring to established authority that a "purposive approach must be taken to 'custody or control' questions" under s. 4(1) of the Act. That is a correct statement of the law, but this statement is the extent of her analysis of it.

[13] The Arbitrator then correctly noted that possession of documents is not necessarily determinative, stating that bare possession of documents is not sufficient in the absence of responsibility for the care and protection of them. She cited with approval, the decision of former Commissioner Sidney Linden in Order 120 and set out a list of factors he identified as relevant to the consideration of whether an institution has "care or control" of a document.

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[2] R.S.O. 1990, c. M.56

[3] Various individuals and addresses are specified in the request, but all appear to be CAS related and to involve Mr. O'Connor.

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[14] Next, the Arbitrator cited as being particularly relevant the decision in Order PO-1725, which involved a request for access to an electronic agenda of an employee at the Permier's office, which contained both governmental and personal appointments.

[15] Finally, the Arbitrator considered the relevant factors identified by Commissioner Linden and concluded that the weight of those factors supported a finding that the emails in this case were within the custody and/or control of the City. In particular, the Arbitrator found it persuasive that: (1) the City had physical possession of the emails on its server; (2) the City had the authority to regulate the email system and could not divest itself of its responsibility by choosing not to exercise control over a particular type of record; and (3) since the City has the right to monitor the emails on its system for unauthorized use, any emails on the system at any given time are within the City's control, even if the City has not actually accessed or used them.

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D. STANDARD OF REVIEW

[16] In *Walmsley v. Ontario (Attorney General)*[4] the Ontario Court of Appeal held that a standard of correctness applied to a determination by the IPC that certain documents were within the control of the Ministry of the Attorney-General and therefore subject to FFIPA. The documents were actually in the possession of individual members of the Judicial Appointments Advisory Committee, a body which provides advice to the Attorney-General on the suitability of candidates for appointment as provincial court judges. The IPC found the members of the committee were agents of the Ministry and that the Ministry therefore had control of the documents. In imposing a correctness standard of review, the Court of Appeal reasoned that this was a question going to jurisdiction and not one requiring specialized expertise to interpret.

[17] *Walmsley* was decided prior to the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*[5], a case which fundamentally changed the law with respect to the standard of review of administrative tribunals by collapsing the previous three standards into two – correctness and reasonableness. In doing so, however, the Court held that it did not intend to alter the level of deference afforded to tribunals previously and stated that where the standard of review has already been settled with respect to a particular question, it is not necessary to revisit the issue in subsequent cases. Further, in *Dunsmuir* the Supreme Court held that the standard of correctness will continue to apply to questions of jurisdiction and general questions of law outside the specialized expertise of the tribunal.[6]

[18] Post-*Dunsmuir*, the Divisional Court considered the appropriate standard of review from a decision of the IPC in *Ministry of the Attorney-General v. Toronto Star,*[7] a case involving the

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[4] *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 at 618 (C.A.)
[5] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190
[6] *Dunsmuir,* at paras. 57 and 59-60.
[7] *Ministry of the Attorney-General v. Toronto Star*, 2010 ONSC 991 (Div.Ct.)

interpretation of a provision stating that FFIPA does not apply to a record in relation to an ongoing criminal prosecution. In that case, this Court ruled that a correctness standard should be applied because it involved a matter of general law of significant importance to the administration of criminal justice and did not fall within the specialized expertise of the IPC. Similarly, in *Simon Fraser Univerity v. British Columbia (Information and Privacy Commissioner)*[8], the British Columbia Supreme Court applied the principles in *Dunsmuir* and imposed a standard of correctness on judicial review of a tribunal decision as to whether certain documents were within the custody or control of Simon Fraser University.

[19] The respondents concede that a standard of correctness applies to the legal interpretation of the term "custody or control". However, the respondents characterize the decision in this case as one involving mixed facts and law and the weighing of various factors in coming to a conclusion, and therefore submit that the applicable standard of review is reasonableness.

[20] In my view, the heart of this issue is a jurisdictional question – whether the Act has any application at all to the documents in question. Moreover, this is a legal question of broad significance for thousands of individuals across the province, going well beyond the interests of the particular parties before the court. This is a question of law that attracts the correctness standard, as has been determined in *Walmsley* and, more recently, *Ministry of the Attorney-General v. Toronto Star.*

F. ANALYSIS

What is the purpose and intent of the legislation?

[21] Although the Arbitrator recognized that the correct legal approach in determining the meaning of "custody or control" must be a purposive one, she did not actually take a purposive approach to the issue before her. Indeed, apart from merely stating the principle, she gave no consideration to the intent and purpose of the legislation as part of her analysis in determining what "custody or control" means in relation to the subject documents. This, in my view, is a fundamental legal error.

[22] The act itself contains no definition of the words "custody" or "control," which makes context and legislative intention even more important. As a starting point, it is worth noting that the modern approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[9] (Emphasis added)

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[8] *Simon Fraser Univerity v. British Columbia (Information and Privacy Commissioner),* 2009 BCSC 1481.

[9] *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26, citing with approval Driedger's *Construction of Statutes* (2nd ed., 1983 at p. 87)

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[23] The first indication of legislative purpose (as it relates to this case) is within the Act itself, and in particular in s. 1 (a) which states:

> The purposes of this Act are,
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information;

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[24] Although this provision emphasizes the broad importance of access to information and requires that exemptions to that access be circumscribed, it does not provide much information about the underlying purpose of providing for access to government information. Fortunately, there is considerable information about that in government reports upon which the legislation was based, and there is considerable analysis of the issue in the case law. From these sources, it is clear that the legislative intent is inextricably linked to enhancing the democratic process.

[25] Prior to the enactment of freedom of information legislation in Ontario, the government appointed a commission ("the Williams Commission") to study the issue and it was upon the rcommendations of that Commission that the first Ontario legislation was based.[10] In its 1980 report, the Williams Commission identified four major rationales for public sector access to information legislation, as follows:[11]

(i) Accountability: Increased access to information "about the operations of government" would increase the ability of members of the public to hold their elected representatives accountable. Also, the accountability of the executive branch would be enhanced if members of the legislature were granted access to "information about government."

(ii) Public Participation: An informed citizenry is better able to participate in the formulation of public policy. When government policy-making has included the

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[10] The first legislation came into force in 1988 and applied to the provincial government. The current provincial scheme is under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31 ("FIPPA"). MFIPPA was modelled on FIPPA and has virtually identical language, including with respect to "custody or control." The municipal scheme first came into force in 1991.

[11] Ontario, *Report of the Commission on Freedom of Information and Individual Privacy/* 1980, vol. 2 (Toronto: Ontario Government Book Store, 1980) at pp. 77-79

participation of a wide spectrum of citizens and pertinent and accurate information, public perception that the decisions have been fairly made will be enhanced.

(iii) Fairness in Decision Making: Access to information about administrative decisions that may affect individuals gives those affected a fair opportunity to present their side on an informed basis and ensures fairness in decision making.

(iv) Personal Privacy: A person's right to access the information government is compiling on him may reduce the intrusiveness of some government record-keeping practices.

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[26] The fourth of these considerations is not relevant in this case. However, it is clear from the first three purposes listed that enhanced participation in the democratic process is a primary focus of freedom of information legislation.

[27] This theme has been noted in the case law. In *Dagg v. Canada (Minister of Finance)*[12] the Supreme Court of Canada held that the "overarching purpose" of access to information is to "facilitate democracy" and stated (at para. 63) that "rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable." LaForest J. held at paras 61-62:

> [61] The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.
>
> See also: Canadian Bar Association, *Freedom of Information in Canada: A Model Bill* (1979), at p. 6.

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[12] *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 per LaForest J. at paras. 61-62, adopted by the majority on this point at para 1.

[62] Access laws operate on the premise that politically relevant information should be distributed as widely as reasonably possible. Political philosopher John Plamenatz explains in *Democracy and Illusion* (1973), at pp. 178-79:

> There are not two stores of politically relevant information, a larger one *shared* by the professionals, the whole-time leaders and persuaders, and a much smaller one *shared* by ordinary citizens. No leader or persuader possesses more than a small part of the information that must be available in the community if government is to be effective and responsible; and the same is true of the ordinary citizen. What matters, if there is to be responsible government, is that this mass of information should be so distributed among professionals and ordinary citizens that competitors for power, influence and popular support are exposed to relevant and searching criticism. [Emphasis in original.]

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How does a purposive approach inform the interpretation?

[28] Having determined that the intent of the legislature in enacting the Act was to enhance democratic values by providing its citizens with access to government information, the next stage of the analysis is to consider how a purposive interpretation of the statutory language used might inform the interpretation of the Act. Would interpreting the term "custody or control" as including private communications of employees unrelated to government business do anything to advance the purpose of the legislation? Conversely, would interpreting the language of the Act as not applying to the private communications of employees interfere with a citizen's right to fully participate in democracy? The answer to both questions must, in my view, be "No."

[29] The fatal flaw in the reasoning of the Arbitrator is that she did not even ask herself these questions. Further, in considering the various relevant factors that inform the interpretation of what constitutes "custody or control" she did not consider those factors in the context of whether such an interpretation would enhance participation in the democratic process.

[30] The Arbitrator in this case adopted the criteria established in Order 120 by former Commissioner Sidney Linden as being relevant considerations for determining whether the requirements of custody or control are met. Commissioner Linden emphasized that this was not meant to be an exhaustive list, but that these are merely the kinds of questions that could be considered in making such determinations. His 10-item list is a useful one and it is relevant to consider each item on the list in the context of the legislative purpose and intent.

(1) Was the record created by an officer or employee of the institution?
(Mr. O'Connor was a recipient of the emails, but most were created by someone at CAS. To the extent anything was created by Mr. O'Connor it was outside the

context of his role as an employee of the institution, such that access to the document would not appear to relate to the democratic municipal process)

(2) What use did the creator intent to make of the record?
(The documents were never intended to be used by the City or for any municipally related purpose.)

(3) Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
(The City had possession of the emails. However, there was no requirement for the employee to use the City's email server. He voluntarily chose to do that for convenience. He also could have deleted the emails at any time without any involvement of the City. Therefore, the City's possession occurred by happenstance.)

(4) If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
(No. The possession is entirely unrelated to City business)

(5) Does the institution have a right to possession of the record?
(Only to the extent that the employee chooses to use the City's email. The employee is not required to provide the document itself to the City and can delete it from the electronic server at any time.)

(6) Does the content of the record relate to the institution's mandate and functions?
(No. The emails have no bearing whatsoever on the processes of City government and cannot provide any information to citizens about the functioning of municipal government)

(7) Does the institution have the authority to regulate the record's use?
(The City has authority to regulate the use of its email server and the nature of the emails sent by employees using that server. However, the City has no authority to regulate the use of the document itself.)

(8) To what extent has the record been relied upon by the institution?
(Not at all. There is nothing about the documents that can provide any glimpse into how the City operates.)

(9) How closely has the record been integrated with the other records held by the institution?

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(The emails are stored in a separate file folder on the City's email server and would not be accessible to other City personnel, except as required by the City to monitor for maintenance and security purposes or to determine whether employees are complying with guidelines for proper email and internet use.)

(10) Does the institution have the authority to dispose of the record?
(Only in the sense that it has ultimate control over the server upon which the record is stored)

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[31] Thus, in my opinion, an examination of these factors from the perspective of scrutinizing government action and making government documents available to citizens so that they can participate more fully in democracy, points overwhelmingly to the conclusion that the documents cannot be said to be within the control of the City. The Arbitrator did not err in considering these factors to be relevant to her determination of what constitutes custody or control. She did err, however, in failing to consider those factors contextually in light of the purpose of the legislation.

[32] The respondents argue that the broadest possible interpretation must be given to the qualifying language for the application of the Act and that any concerns about the personal nature of the material or privacy concerns should be left to be considered under the exemption sections of the legislation. I disagree. The Act itself[13] and case authority interpreting it emphasize the necessity of construing exemptions narrowly in order to promote the intention of the legislation. Such an approach is based on the presumption that disclosure of the documents would support the democratic purpose and should only be applied when the documents in question properly fall within the legislation. Further, the exemption provisions dealing with personal information and privacy issues are concerned more with the content of documents being personal in nature, whereas the objection to production in this case goes to the nature of the document itself, and not necessarily any sensitivity relating to its content. In my view, the analysis as to the applicability of the Act is properly conducted at this preliminary stage, while recognizing that a conclusion that the City had custody or control of these emails is not determinative of disclosure as exemptions might apply depending on their content.

[33] The respondents further submit that the interpretation urged by the applicant requires an impermissible "reading in" of words not included in the legislation. Again, I disagree. The respondents point to examples of American legislation considered by the Williams Commission which had specific provisions restricting the application of the legislation to "information relating to the conduct of the people's business,"[14] or "retained by a public body in the

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[13] Section 1 *(b) of MFIPPA*
[14] *California Public Records Act*, Cal.Gov.Code 6250-6270 [enacted 1968]

performance of an official function."[15] The respondents submit that the failure of the Legislature to adopt this type of language indicates an intention to cast the net of inclusion more broadly. There is no support for that proposition in the language of the Williams Commission report itself, which refers repeatedly to the purpose of the legislation as relating to documents about the functioning of government.

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[34] Applying a purposive interpretation to the words "custody" and "control" and concluding that they do not extend to the circumstances in this case does not involve reading anything into the statute. It is merely an interpretation of the legislation based on already established criteria, but bearing in mind the purpose of the legislation.

[35] The Children's Aid Society is not an agency subject to freedom of information legislation. Mr. O'Connor, in his personal capacity, is also not subject to having his personal documents seized and passed over to any member of the public who requests them. The communications between CAS and Mr. O'Connor have no connection whatsoever to the functioning of government nor to the business affairs of the City of Ottawa. It follows that providing public access to such documents does nothing to enhance participation in municipal affairs and prohibiting access does nothing to impair democratic values. Quite simply, these documents have nothing to do with municipal government and are not remotely connected to anything the legislation was intended to encompass. Further, the seizure of such documents by the City and the delivery of them to a third party would be antithetical to the privacy rights of individuals, which is another goal the legislation seeks to protect.

Is there a difference between emails and paper documents?

[36] Counsel advise that there has been no judicial determination to date as to the applicability of freedom of information legislation to personal employee emails that happen to be in the bare possession of a government institution. However, in most respects I can see little difference between the personal communications and documents of employees that are stored in paper form in their government-owned filing cabinets and desks and those that are stored in electronic form in their government-owned computer systems.

[37] It can be confidently predicted that any government employee who works in an office setting will have stored, somewhere in that office, documents that have nothing whatsoever to do with his or her job, but which are purely personal in nature. Such documents can range from the most intimately personal documents (such as medical records) to the most mundane (such as a list of household chores). It cannot be suggested that employees of an institution governed by freedom of information legislation are themselves subject to that legislation in respect of any piece of personal material they happen to have in their offices at any given time. That is clearly not contemplated as being within the intent and purpose of the legislation.

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[15] *Michigan Freedom of Information Act*, MCL 15.231 [enacted 1977]

[38] The question then is whether information stored electronically should be treated any differently. I do not see any rational basis for making such a distinction.

[39] There is, however, one difference in how the employer might treat electronic records somewhat differently and that relates to the security concerns posed by employees' use of email and the internet while at work. Understandably, employers who allow employees to use their electronic servers for personal matters will typically have policies to ensure that these electronic media are not being used in a manner that is inappropriate or illegal or that compromises the security of the entire system.

[40] In this case, the City of Ottawa had a Responsible Computing Policy which addressed, among other things, the personal use of IT services and assets by its employees. There were understable restrictions on such use, none of which arise in this case. In order to ensure compliance with the policy, and for network management reasons, the City stipulated that it had the right to access its IT assets and information at any time and that monitoring may be done at any time without notice and without the knowledge of the individual users. Employees were therefore warned that if they had privacy concerns they should refrain from using the City's IT services to store or transmit personal-use information.

[41] It was the City's policy with respect to management of its IT services that led the Arbitrator to find that the personal emails of Mr. O'Connor were actually in the custody of the City. The Arbitrator held that the policy meant the City: (1) had physical possession and the right to possession of the emails; and (2) the City had the authority to regulate the use and disposal of the records on its system. In my view, those factors are not determinative of control given the purpose for which the City retained the right to monitor its system, as contrasted to the underlying purpose of freedom of information legislation.

[42] Employers from time to time may also need to access a filing cabinet containing an employee's personal files. That does not make the personal files of the employee subject to disclosure to the general public on the basis that the employer has some measure of control over them. The nature of electronically stored files makes the need for monitoring more pressing and the actual monitoring more frequent, but it does not change the nature of the documents, nor the nature of the City's conduct in relation to them. It does not, in my view, constitute custody by the City, within the meaning of the Act.

This approach is consistent with existing case authority

[43] In my opinion, this approach is fully consistent with the existing case law and with policy statements of the IPC itself.

[44] In a Guildeline issued in March 1997 entitled "Electronic Records: Maximizing Best Practices" the IPC noted that freedom of information legislation had been conceived when the full impact of information technology had yet to be felt. The purpose of these Guidelines was to suggest best practices for dealing with electronic records. In particular, the IPC considered what

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types of electronic records should be preserved by institutions and stated (at page 6) that emails "relating to the mandate or functions of the organization" should be considered a record for the purposes of the Act." At the same time, the guideline noted, "There is not doubt that in some cases e-mail bears no relation to the mandate or functions of the organization (for example, personal messages) or is so inconsequential that may not need to be retained for operational purposes." It is clear that, at least at this point, the IPC did not contemplate that personal emails of City employees would be covered by the Act.

[45] I believe the same principles emerge from the limited case authority available. In *David v. Ontario (Information and Privacy Commissioner)*[16] the Divisional Court considered whether documents in the possession of an independent investigator appointed by the City of Toronto could be said to be in the control of the City. The Court held that the investigator was not an employee or officer of the City and could not be characterized as an agent of the City because he was required to conduct his inquiry arms-length from the City. The Court therefore concluded that the documents held by the investigator were not in the control of the City, even though some of them were actually stored on a computer owned by the City. (It should be noted, however, that in that case the computer had been allocated to the inquiry and was not accessible to persons outside the inquiry staff.)

[46] A similar conclusion was reached by the Court of Appeal in *Walmsley* in dealing with documents in the possession of individual members of the Judicial Appointments Committee. The Court held that although the content of the documents related to work for the Ministry (as the Committee acted in an advisory capacity to the Ministry), they could not be said to be within the control of the Ministry for the purposes of the Act. One of the factors influencing the court in reaching that conclusion was the fact that the Legislature could not have intended that simply by giving advice to the Attorney-General individuals would be subjected to the access provisions and also the recordkeeping aspects of the Act. The Court also held, at p. 619:

> The Ministry had no statutory or contractual right to dictate to the committee or its individual members what documents they could create, use or maintain or what use to make of the documents they do possess. The Ministry had no statutory or contractual basis upon which to assert the right to possess or dispose of these documents, nor was there any basis for finding that the Ministry had a property right in them.

[47] The factual background in *Walmsley* is quite different from the situation in this case. The City in this case has some limited control over the documents in the sense that it can dictate what can be created or stored on its server. However, this is merely a prohibition power, not a creation power. The City can prohibit employees from certain uses, but does not control what

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[16] *David v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4351, 217 O.A.C. 112 (Div.Ct.)

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employees create, how or if they store it on the server, and what they choose to do with their own material after that, including the right to destroy it if they wish. Just as in *Walmsley*, when considered against the intent and purpose of the legislation, it cannot have been intended that the mere use of the email server for personal purposes results in employees being bound by the recordkeeping obligation of the Act in respect of their personal correspondence and documents.

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[48] A useful test for determining "control" was suggested by the court in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*[17]. The issue was whether documents in the posession of the Prime Minister and certain Ministers could be said to be within the control of the government institutions to which they were connected and which were subject to federal freedom of information legislation. The Federal Court of Appeal imposed a two part test for determining whether such a document could be said to be within the control of the government institution: (i) whether the contents of the document relate to a departmental matter; and (2) whether the relevant government institution could reasonably expect to obtain a copy of the document upon request. The Court held that the document would only be in the control of the government institution if the answer to both questions is yes. Applying those same questions in this case would result in a finding that Mr. O'Connor's correspondence with CAS would not be in the control of the City of Ottawa because: (1) the contents do not relate to a City matter; and (2) the City could not expect to be given such documents merely by requesting them because they did not fall within the scope of Mr. O'Connor's employment.

[49] In Order P-1069 dated November 30, 1995, the IPC held that CAS records are not subject to FIPPA merely because the Ministry of Community and Social Services has a general supervisory and monitoring role over the CAS. In coming to that conclusion, the Adjudicator relied on the fact that the Ministry's right of access to CAS records was limited to requiring financial accountability and periodic administrative reviews to ensure compliance with the *Child and Family Services Act.* There is a direct parallel between that case and this one. In the case before us the City has a right to monitor and supervise the use of its email server to ensure compliance with policies. However, that is also a limited right of access. Applying the same reasoning as in Order P-1069, CAS records should not be subject to the Act merely because they have been sent to an individual who has stored them on an electronic data base subject to monitoring by the City to ensure compliance with its own policies.

[50] The case closest on its facts to the case before this Court is also an IPC decision, Order PO-1947-F dated September 13, 2001, a decision of Arbitrator Liang. At issue were records that had been prepared by employees in relation to a Minister's consitituency affairs. The records were in the bare possession of the Minstry of Tourism because they were phsyically stored in the Ministry's office. However, Arbitrator Liang held they were not in the "control" of the Ministry

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[17] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2008FC 766 (T.D.), aff'd. 2009 FCA 175 at para. 8.

because they were not created by employees "in respect of matters within the mandate of the Ministry or to be used in the Ministry," had been "kept in separate files" and "had not been integrated with other Ministry records." Applying that same reasoning, Mr. O'Connor's CAS files were kept on the City's email server and in that respect could be said to be in the bare possession of the City, but they were not created in respect of matters within the mandate of the City, they were kept in a separate file, and they were not inegrated with other City records. The same policy reasons would apply to exclude these records from the operation of MFIPPA. Indeed, if anything, there are stronger policy reasons for excluding the documents in this case than there were in the Ministry of Tourism case.

[51] Finally, it is relevant to address the IPC decision in Order PO-1725, which was so heavily relied upon by the Arbitrator in this case. In that case, the requester sought access to the electronic agenda of an employee at the Premier's office. The same agenda contained both governmental appointments and personal appointments. The entire agenda was found to be within the control of the government institution. In my view, the critical distinction between that case and this one is the extent to which personal and governmental information were combined within the electronic agenda. That is not the situation in this case. That said, it does not follow that personal emails not filed in a separate folder (as was the case here) are necessarily subject to the operation of the Act. Much will depend on the individual circumstances of each case, but generally speaking, I would expect very few employee emails that are personal in nature and unrelated to government affairs to be subject to the legislation merely because they were sent or received on the email server of an institution subject to the Act.

G. CONCLUSION AND ORDER

[52] In my opinion, the Arbitrator erred in law in concluding that the records in this case can be said to be within the custody or control of the City of Ottawa. Applying a correctness standard, this is a sufficient basis to set aside her decision.

[53] However, I have also considered whether the decision could stand if a reasonableness standard is applied, as advocated by the respondents. Applying that analysis, however, I come to the same conclusion. *Dunsmuir* establishes that a decision can be said to be reasonable if it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[18] In my view, it is not reasonable for emails belonging to a private individual to be subject to access by members of the public merely because they are sent or received on a government owned email server. That is not a sensible or logical result whether as a question of fact or a question of law. The implications for the many thousands of employees who work in government offices across this country are staggering. I do not consider this decision to fall within the range of reasonable possible outcomes described by the Supreme Court in *Dunsmuir*

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[18] *Dunsmuir*, at para. 47

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as necessary to meet the reasonableness standard. By either analysis – correctness or reasonableness—the decision cannot stand.

[54] Accordingly, I would grant the application, set aside the decision of the Arbitrator, and confirm the decision made by the City of Ottawa denying the request for access to these documents. The parties are agreed that there should be no order with respect to costs.

MOLLOY J.

I agree:

JENNINGS J.

I agree:

DALEY J.

Released: December 13, 2010

2010 ONSC 6835 (CanLII)

CITATION: City of Ottawa v. Ontario, 2010 ONSC 6835
DIVISIONAL COURT FILE NO.: 201/10
DATE: 20101213

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ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JENNINGS, MOLLOY and DALEY JJ.

BETWEEN:

CITY OF OTTAWA

Applicant

– and –

ONTARIO (INFORMATION AND PRIVACY COMMISSIONER) and JOHN DUNN

Respondents

REASONS FOR DECISION

JENNINGS J.
MOLLOY J.
DALEY J.

Released: December 13, 2010

Tab 4

OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

2021 CanLII 10799 (NL IPC)

A-2021-008

February 15, 2021

Town of Conception Bay South

Summary: The Complainant made an access to information request to the Town of Conception Bay South (the "Town") for Board minutes of the Long Pond Harbour Authority pursuant to the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015*"). The Town initially withheld the records based on section 39 (disclosure harmful to business interests of a third party). The Complainant asserted that the Town had not met all three parts of the test under section 39 of *ATIPPA, 2015* and asked the Commissioner to review the Town's refusal. During the investigation, submissions were received from the Long Pond Harbour Authority arguing that the Town did not have custody or control of the records, therefore the records could not be disclosed under *ATIPPA, 2015*. The Town agreed with this position. The Commissioner determined that the records were not in the custody or under the control of the Town and that *ATIPPA, 2015* did not apply to the records.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, section 5.

Authorities Relied On: NL OIPC Reports A-2014-012, A-2017-021, A-2020-013; Ontario IPC Order MO-2750; Canada (Information Commissioner) v. Canada (Minister of Defence) [2011] 2 S.C.R. 306.

File #: 0025-102-20-005

I BACKGROUND

[1] The Complainant made an access request under the *Access to Information and Protection of Privacy Act, 2015* (*"ATIPPA, 2015"* or the *"Act"*) to the Town of Conception Bay South (the "Town") for:

> *Copies of Board minutes of the Long Pond Harbour Authority for the period December 2015 to September 2020 received by CBS officials who are by virtue of their positions with the Town of Conception Bay South, members fo* [sic] *the Long Pond Harbour Authority as per the Articles of Association filed with the Registry of Companies.*

[2] The Town initially withheld all responsive records pursuant to section 39 (disclosure harmful to business interests of a third party) of *ATIPPA, 2015*. The Complainant was not satisfied with the Town's response and filed a complaint with this Office.

[3] During the investigation, this Office received a submission from the Long Pond Harbour Authority (the "LPHA") which was accepted under section 96(1) of *ATIPPA, 2015*. The LPHA is a private corporation without share capital, incorporated pursuant to the Newfoundland and Labrador *Corporations Act*. In 2013, the LPHA was provided ownership of the Port of Long Pond infrastructure and seabed as part of the Canadian Port Divestiture Program.

[4] The LPHA argued that the records were not in the Town's custody or control for the purposes of the *Act* and that if the records were found to be in the Town's custody or control then section 39 of *ATIPPA, 2015* applied to withhold the records.

[5] Following receipt of the LPHA's submissions, the Town agreed with the LPHA's position regarding custody and control and submitted to this Office that the Town did not have custody or control.

[6] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

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II PUBLIC BODY'S POSITION

[7] In its final response to the Complainant, and in its submissions to this Office, the Town initially withheld the records pursuant to section 39 of *ATIPPA, 2015.* However, upon receipt of a letter from the LPHA, the Town agreed with the position that the records were not within its custody or under its control for the purposes of *ATIPPA, 2015* and that the access to information procedure under the *Act* could not require their disclosure. As the Town has agreed with the position initially put forward by the LPHA, the LPHA's arguments constitute the Town's position on custody or control.

[8] The LPHA stated that it is not a public body as defined by section 2(x) of *ATIPPA, 2015* and therefore not subject to the *Act*. Furthermore, the LPHA does not consider itself subject to the federal *Access to Information Act* as it believes that LPHA does not meet the definition of a government institution under that *Act*.

[9] LPHA stated that it has two member groups: the Town of Conception Bay South, a municipal corporation, and the Port Users Group, which is comprised of the industrial and commercial users of the Port of Long Pond who have applied to be members of the Port Users Group and who have met the specified financial contributions in the by-laws of the LPHA.

[10] While the LPHA acknowledges that the Town is a public body and subject to the *Act*, its position is that the records are not in the Town's custody or control for the purposes of *ATIPPA, 2015.* It is LPHA's position that the Town only has bare possession of the records.

[11] The LPHA provided our Office with a detailed submission describing its rationale for claiming that the records are not in the custody or under the control of the Town as well as the application of section 39 of *ATIPPA, 2015* if the records are found to be in the custody or under the control of the Town. We will refer to the LPHA's position and arguments where necessary later in this Report.

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III COMPLAINANT'S POSITION

[12] The Complainant's position was that all three parts of the test under section 39 were not met and therefore the Town could not rely on that exception to withhold the records.

[13] The Complainant did not provide a position on the issue of custody or control as that was not the Town's initial position.

IV ISSUES

[14] The issues to be dealt with in this Report are:

1. whether the records are in the custody of or under the control of the Town for the purposes of *ATIPPA, 2015*? and
2. if the records are in the custody or under the control of the Town, does section 39 apply to the records?

V DECISION

[15] While section 39 of *ATIPPA, 2015* was originally claimed by the Town we must address the LPHA's claim that the Town does not have custody or control of the records as this must be determined before this Office can determine whether or not it has the authority to embark on any further steps.

[16] Section 5 of *ATIPPA, 2015* addresses the issue of custody and control as follows:

> *5(1) This Act applies to all records in the custody of or under the control of a public body...*

[17] The issue of custody and control has been reviewed in previous reports such as Report A-2014-012, Report A-2017-021 and recently in Report A-2020-013.

[18] As stated in the above-noted reports, section 5(1) establishes an important threshold. In order for *ATIPPA, 2015* to apply to records, the records must either be in the custody of *or* under the control of a public body, it need not be both.

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[19] The terms "custody" and "control" are not defined in *ATIPPA, 2015*. However, these terms have been given a broad and liberal interpretation in keeping with the purposes of access to information legislation. One of the purposes of *ATIPPA, 2015* is to facilitate democracy through ensuring that citizens have the information required to participate meaningfully in the democratic process, increased transparency in government and public bodies and protecting the privacy of individuals.

[20] It has generally been established that while physical possession of a record is the best evidence of custody, simple possession is not determinative.

[21] There is a two-part test set out in *Canada (Information Commissioner) v. Canada (Minister of Defence)* to determine the question of control:

(i) whether the contents of the document relate to a departmental matter; and
(ii) whether the relevant government institution could reasonably expect to obtain a copy of the document upon request.

[22] In addition to the two-part test, a non-exhaustive list of factors in Ontario IPC Order MO-2750 for custody or control has been accepted in other jurisdictions. The unique circumstances of each case determines the relevance, if any, of these factors:

- Was the record created by an officer or employee of the institution?
- What use did the creator intend to make of the record?
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?
- Is the activity in question a "core", "central" or "basic" function of the institution?
- Does the content of the record relate to the institution's mandate and functions?
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the institution does have possession of the record, is it more than "bare possession"?
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?

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- Does the institution have a right to possession of the record?
- Does the institution have the authority to regulate the record's content, use and disposal?
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the record?
- How closely is the record integrated with other records held by the institution?
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?

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[23] In considering the factors listed above, as well as others, the LPHA answered many of the questions in the negative. The LPHA argued that the records do not relate to a Town matter. While the Port of Long Pond lands are located within the boundaries of the Town and the Town receives benefits from the Port, the Port is not owned or operated by the Town as it is a privately-owned asset of LPHA.

[24] In accordance with the LPHA By-laws, the Town has appointed two of its employees to the LPHA board of directors. The Town has possession of the records as the records were sent to these directors at their Town email addresses. However, it is the LPHA's position that the Town does not have a right or an obligation to possess or hold the minutes sufficient to establish custody. According to LPHA, the employees of the Town who are also directors of LPHA are not permitted to provide the minutes to the Town council, to other Town employees, or to anyone else, and they are prohibited from permitting the Town council and Town employees to inspect or have access to the minutes, without first obtaining authorization to do so from LPHA.

[25] The directors of the LPHA must make and sign an oath of office before they are permitted to act as directors. This requirement is found in the LPHA's By-laws, section 7(i) and the oath says in part:

> *I...solemnly swear or affirm that I will faithfully, truly and to the best of my judgment, skill, knowledge and ability execute and perform the duties required as a Director..... I further solemnly swear that I will not communicate or allow to be communicated to any person not legally entitled thereto any and all information related to the business of the Corporation, nor will I, without due authority, allow any such person to inspect*

> *or have access to any books or documents belonging to or in possession of the Corporation and relating to the business of the Corporation.*

[26] The LPHA further explained that all LPHA directors are required to enter into, and each director has entered into, a confidentiality agreement with the LPHA by which each director agrees to keep all information pertaining to the corporation in the strictest confidence, and further agrees not to disclose any such information to third parties without the consent of the corporation. Also, each director is required to comply with a Code of Conduct, and to sign an acknowledgement that he or she has read and understands the Code of Conduct and that observation of the Code of Conduct is a condition of the individual's appointment as a director. The Code of Conduct states in s. 6.2 as follows:

> *Subject to section 6.3, no director or officer shall disclose any information concerning the business or affairs or proposed business or affairs of the Corporation acquired in connection with his or her position with the Corporation ("Confidential Information") which has not been disclosed to the public or has been made available to the public without the prior written consent of the Board.*

[27] The LPHA's position is that the directors of LPHA owe a fiduciary duty to LPHA to act honestly and in good faith in the best interests of the organization. This fiduciary duty requires that the directors not disclose or use the organization's confidential information, such as, but not limited to, information discussed at board meetings, the minutes, the organization's financial information, or information about employees of the organization. Although the directors are accountable to the members of LPHA, such as the Town, they do not owe the members a fiduciary duty. The directors' fiduciary duty is only owed to the corporation.

[28] The LPHA further argued that although the Town is a member of the LPHA, in its capacity as a member, the Town does not have the right to inspect, examine or possess the minutes. While the Town employees who are directors of LPHA have been appointed to those roles by the Town, these directors owe a fiduciary duty to LPHA to maintain the confidentiality of the minutes, These directors have, in accordance with the By-laws of LPHA and the oath of office each director must take, agreed not to disclose the minutes, or the contents thereof, to anyone, including the Town.

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[29] After reviewing the arguments by the parties and the factors listed above, I have determined that the records the Complainant has requested are not in the custody or under the control of the Town. This determination relies on a numbers of facts and circumstances specific to this file and the relationship between the Town and LPHA.

[30] When a public body does not have custody or control of a responsive record, it may, under section 14 of *ATIPPA, 2015*, transfer an access to information request to a public body which does have custody or control of the records in question. As noted above, LPHA submitted to this Office that it is not a public body under either *ATIPPA, 2015* or the federal access to information legislation. Having reviewed LPHA's submissions; its articles of incorporation and by-laws; and the definition of "public body" at section 2 of *ATIPPA, 2015*, it is our view that the LPHA is not a public body under *ATIPPA, 2015* and it would not have been possible for the Town to transfer the request to the LPHA.

[31] Even though the Town is a public body under *ATIPPA, 2015*, it has been determined that the Town does not have custody or control of the records for the purposes of *ATIPPA, 2015.*, Based on this there is no need to examine the arguments put forward under section 39 of *ATIPPA, 2015* as the *Act* does not apply to the records.

VI RECOMMENDATIONS

[32] Under the authority of section 47 of *ATIPPA, 2015* I recommend that the Town may continue to refuse access to the responsive record.

[33] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Town must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

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[34] Dated at St. John's, in the Province of Newfoundland and Labrador, this 15th day of February 2021.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador

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Tab 5

COURT FILE NO.: 24/05
DATE: 20061030

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE:	Lawrence David	Applicant
	-and-	
	Donald Hale, Adjudicator, Information and Privacy Commissioner Ontario	Respondent
	-and	
	City of Toronto,	Respondent
	-and-	
	Coulter A. Osborne	Respondent

06 305 043

HEARD: October 27, 28; December 19: 2005; January 12, March 27: 2006

BEFORE: Lane, Greer and Epstein JJ.

COUNSEL: Applicant in person.

William S. Challis, for the Information and Privacy Commissioner.
Susan L. Ungar and Mark Siboni for the City of Toronto

REASONS FOR JUDGMENT

LANE J.:

[1] This is one of three related applications[1] that were heard together. They all arose out of the political storm that developed about the selection process for bidders for the contract for the

[1] The others are: Div. Ct. file 494/04, Lawrence David v. Robert Binstock (Registrar Information and Privacy Commissioner, Ontario) and Div. Ct. file 485/04, Rita Reynolds v. Robert Binstock (Registrar I. P. C.)

renovation and future operation of the Union Station, the main railway station in Toronto and a landmark historic site. This application involves a request by Mr. David for access under the *Municipal Freedom of Information and Protection of Privacy Act*[2] to the notes made by the City's appointed investigator, the Hon. C. A. Osborne, of his interviews with Mr. David or of interviews with others referring to Mr. David, together with much information not relating to Mr. David, all obtained by Mr. Osborne in the course of preparing his report. The other two applications before us seek to require the Commissioner to investigate complaints as to alleged breaches of the applicants' privacy interests relating to the release, in Mr. Osborne's report, of certain information about Mr. David and about Ms. Rita Reynolds, the other applicant.

Overview

[2] The City rejected Mr. David's request for access to Mr. Osborne's notes on the basis that these records were not under the City's custody or control. His appeal to the Commissioner failed on the same basis. Mr. David applies to this court for an order quashing the Commissioner's Order MO-1892 and seeking an inquiry into the Commissioner's conduct of the appeal. It is the respondents' position that the Commissioner correctly concluded that the records the applicant requested were not in the City's custody or control but rather in the sole possession of Mr. Osborne. They were therefore not subject to public disclosure under MFIPPA.

Factual Context of the Decisions

[3] The background to all of this is that, at its meeting of February 6, 2003, the Council of the respondent City of Toronto engaged the Hon. Coulter A. Osborne, a retired judge of the Court of Appeal to inquire into the process adopted by the City to develop the Request for Proposals, evaluate the submissions and select the preferred proponent to carry forward the redevelopment of the Union Station. The purpose of the Review was to determine whether the RFP was fair, that is, not slanted toward the interests of one or the other of the two proponents. Mr. Osborne was to report directly to Council. He conducted 58 interviews with 43 persons, including the applicant who was interviewed twice. On May 23, 2003 his report was presented

[2] R.S.O. 1990, c. M.56 (hereinafter "MFIPPA")

to Council and published on the City website. The applicant complained of personal references in the report as an invasion of his privacy and a breach of MFIPPA .

[4] On October 22 and 23, 2003, the applicant submitted access to document requests under MFIPPA to the City. He stated that Mr. Osborne had interviewed him and a number of other individuals in the course of conducting this review. The applicant asked that he be provided with

> (i) copies of all notes that Mr. Osborne had taken in the course of interviewing him, as well as copies of all notes which referred to him which Mr. Osborne made either prior to or subsequent to the applicant's interview;
> (ii) copies of all references to him in notes that were created by, or submitted to, Mr. Osborne in the course of interviews with some twenty named persons during his interviews with such persons;
> (iii) notes as to the views or opinions of the general public or other persons not employed by Toronto in notes taken by Mr. Osborne in the interviews in item (ii) above;
> (iv) all notes, records, submissions, letters or emails received by Mr. Osborne in interviewing 8 City Councillors
> (v) all notes or records generated by Mr. Osborne in the course of the interviews or in the course of preparing the report.

[5] The City responded to the applicant's requests by letter of November 12, 2003, advising him that the records he wished to access were not in the City's custody or control. Any notes or records relating to Mr. Osborne's review and the preparation of his report were under his care and control. Further, many of the requests would constitute an unjustified invasion of the privacy of individuals other than the applicant. The applicant's requests were denied for these reasons.

[6] By letter of November 17, 2003, the applicant appealed the City's decision to deny his requests to the Information and Privacy Commissioner of Ontario (the "Commissioner"). During the course of the mediation held in connection with the applicant's appeal, the applicant agreed to narrow the scope of his access request. In order to resolve the applicant's appeal, the Commissioner had to determine whether the City erred in not providing the applicant with copies of those records he asked for that were in Mr. Osborne's possession.

[7] The applicant's requests are made under section 4(1) of MFIPPA (which grants to every person a right of access to records) and section 36 of MFIPPA (which guarantees individuals the right to access their own personal information). These sections provide requesters, such as the

applicant, access to records and information that are "in the custody or under the control of an institution".

[8] On March 10, 2004 the Commissioner sent a Notice to the City asking 22 questions to obtain the information necessary to determine the custody or control issue. The answers indicated that Mr. Osborne was not a City employee, but an independent party retained to conduct an investigation on a fee for service basis; that his notes were prepared to assist his recollection in preparing his report; that the City did not have the records, nor was Mr. Osborne required by contract or statute to provide them to the City; that the notes, and indeed Mr. Osborne's whole operation, were never integrated with the City operations, but were kept separate and all data in the computer drive was destroyed when the report was completed. The City and Mr. Osborne agreed that the notes were his and all that the City expected to receive was the report. In summary, Mr. Osborne was an independent contractor, not an employee, officer or an agent of the City. Mr. Osborne made submissions that he was to do his work independently of the City; that his records were never in the City's custody or control during or after the review; and that much information was received on a "without attribution" basis and compliance with the applicant's request would breach this confidence.

[9] Subsequently, the Commissioner sent the City's submissions to the applicant for his submissions, noting that Mr. Osborne had also made submissions which supported the City's position, but not forwarding them as Mr. Osborne had marked them 'Confidential'. The applicant made extensive submissions in response. He contended that the review was an internal inquiry and not an independent inquiry by a judge under the *Municipal Act*, s. 274; that Mr. Osborne was a contract employee or an agent; that Mr. Osborne's activities were subject to MFIPPA; that the City had no authority to conduct a process outside of MFIPPA; and to fulfill its statutory duties, the City was obliged to control and maintain the records of Mr. Osborne's review.

[10] The City responded stating that section 8 of the *Municipal Act* provided authority for conducting the review; that the record retention provisions of MFIPPA did not apply as the City never had the records; and that the computer used by Mr. Osborne was independent of the City network. Mr. Osborne submitted that the whole thrust of the review was that it was to be independent of the City.

[11] On December 23, 2004, the Commissioner issued Order MO-1892 in which the respondent Donald Hale, acting as adjudicator on behalf of the Commissioner, held that the records the applicant wished to access were not in the City's custody or control. He found that the records had never been in the City's control; that the City had the authority under s. 8 of the *Municipal Act* to retain an independent contractor to perform functions independently of the City; that Mr. Osborne was not an officer or employee of the City; that the computer, while in a City building, was not available to City staff; the records had not been seen or used by City staff; that Mr. Osborne was not an agent of the City such that it could control his notes; and the City did not have the right to possess and control those notes. This decision disposed of the applicant's appeal because the rights of access that the applicant wished to assert under sections 4(1) and 36(1) of MFIPPA only relate to records that are in the care or under the control of "institutions" like the City. As a result of the Commissioner's finding, it was determined that the applicant did not have the right to access the records he asked the City to produce under MFIPPA. This, then, is the matter before us.

Relevant statutory provisions

[12] Section 4(1) of MFIPPA:

> 4(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless [exemption details omitted]
>
> Section 36 (1) of MFIPPA:
>
> 36(1) Every individual has a right of access to,
>
> (a) [omitted as inapplicable]
>
> (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

[13] It is clear from these sections that the question of the custody or control of these notes is the central issue. The City does not have them, so that the issue to be resolved is the degree to which the City controls them. As the answer will depend upon the nature of the relationship between the City and Mr. Osborne, it was necessary for the adjudicator to explore that relationship. He did so, with the results set out above. Our task is not to find the facts, but to

review the decision to determine if there is a sound basis for the factual findings and whether the appropriate legal principles have been applied.

The Standard of Review

[14] The parties are in agreement that the standard of review for the issue of whether the records are in the custody or control of the City is correctness. In my view the parties are correct in this agreement. A leading case on the standard of review applicable to the Commissioner is *Walmsley*[3] in which the Court of Appeal reviewed a decision of the Commissioner as to whether certain records were in the custody or control of an institution. The court held that the decision as to the meaning of 'custody or control' should be reviewed on the standard of correctness.[4] Applying the pragmatic and functional approach as outlined by Iacobucci J. in *Pezim*[5], the court found that the application of the custody or control test was:

> "a jurisdiction-limiting one in the sense that records under the control of an institution are subject to the workings of the Act, both as to access and as to protection of privacy. Records not under the control of an institution are not so subject and are beyond the jurisdiction of the commissioner or his designee. Moreover, the test found in section 10(1), namely "custody or control", is not one requiring a specialized expertise to interpret. By contrast, once records are found to be in the control of the institution, the applicability of the many legislated exemptions would clearly call on the particular expertise of the commissioner. Finally, the legislation has not seen fit to clothe the commissioner with the protection of any privative clause. Hence, using the pragmatic and functional approach, I conclude that the legislature did not intend the decision in issue here to be considered one within jurisdiction. Rather, it is one to be reviewed on the standard of correctness.

[15] Our attention was drawn to *Minister of Health*[6] where the Court of Appeal held that the appropriate standard was reasonableness, even on a pure question of law, if the question was in the Commissioner's core expertise. In my view, the main question of law before us is not at the core of the Commissioner's expertise, but is more correctly characterized in *Walmsley* as one in

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[3] Walmsley v. Ontario (Attorney General), (1997) 34 O.R. (3d) 611 (C.A.) [hereinafter "Walmsley"].
[4] See also *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* (1999), 47 O.R. (3rd) 210, 207 (C.A.)
[5] *Pezim v. British Columbia (Superintendent of Brokers)* [1994] 2 S.C.R. 557, 590.
[6] *Ontario (Minister of Health) v Ontario (Assistant Information and Privacy Comm'r)* (2004) 73 O.R. (3rd) 321 (C.A.)

which the expertise of the Commissioner is not engaged. I therefore conclude that the standard of review which we must apply on the meaning of "custody or control" is that of correctness. The standard of review of other aspects of the Commissioner's decision, such as fact-finding or interpreting sections of MFIPPA at the core of the expertise, is reasonableness.

Custody or Control: The Walmsley Case

[16] The *Walmsley* court addressed the indicia of custody or control under section 10(1) of FIPPA, which uses the same language as section 4(1) of MFIPPA, the section before us. In *Walmsley* the entity having the requested documents was a nominating committee called the 'Advisory Committee on Judicial Appointments', which had been appointed by the Attorney General. It described itself as "a completely independent body with a mandate to select, interview and recommend to the Attorney General suitable candidates for judicial appointment." It was composed of two judges, four lawyers and four lay persons, none of whom had ever been employees of the Ministry, who received a per diem honorarium and expenses but no salary, were not appointed by Order-in-Council and had no contractual or codified relationship with the Ministry. They received applications for provincial judicial appointments, made their own inquiries, and made their decisions and recommendations without any involvement of the Attorney General. The assistant commissioner, who heard the matter, determined that the committee was "part of the Ministry" because its work was very closely connected to the activities of the Ministry. He then continued by finding the documents in the possession of the members fell under the control of the Ministry for the purposes of FIPPA. The Court of Appeal held that the assistant commissioner was in error on both points.

[17] As to whether the Committee was part of the Ministry, the members were not employees of the Ministry and even if they could be regarded as agents of the Ministry, that was not enough to make them part of it. If that relationship sufficed, any agency would automatically qualify, and section 2(1)(b) of FIPPA, which designates specified agencies as coming within the Act, would have been superfluous. The documents could not come within section 10(1) because the Committee members were not part of the ministry. In the case before us, the applicant submits that Mr. Osborne was indeed "part of the City" and attempts to distinguish *Walmsley*. I will deal with these submissions later.

[18] As to the second question, were the documents under the control of the Ministry, the court said that the answer depended upon the examination of all aspects of the relationship between the members and the Ministry that were relevant to control over the documents. At page 619, Goudge J.A., for the court, wrote:

> It is true, as the assistant commissioner said, that the documents in question were held by these individuals because of their role on the committee and that the contents of the documents related to the work of the Ministry. While these factors are of some limited relevance to the question of Ministry control, much more important are the following considerations. Individual committee members were neither employees nor officers of the Ministry. They constituted a committee that was set up to provide recommendations that were arrived at independently and at arm's length from the Ministry. The Ministry had no statutory or contractual right to dictate to the committee or its individual members what documents they should create, use or maintain or what use to make of the documents they do possess. The Ministry had no statutory or contractual basis upon which to assert the right to possess or dispose of these documents, nor was there any basis for finding that the Ministry had a property right in them. While there may have been elements of agency in the relationship between individual committee members and the Ministry, nothing suggests that that agency carried with it the right of the Ministry to control these documents. Finally, there is nothing in the record that allows the conclusion that these documents were in fact controlled by the Ministry. Hence, it cannot be said that the documents in the possession of individual committee members were under the control of the Ministry. In my opinion, the assistant commissioner was wrong in so deciding.

Analysis 1: Custody

[19] This passage from *Walmsley* establishes a number of factors that enter into the consideration of the 'custody or control' issue. As in that case, so here, there is no doubt that the documents are not in the custody of the City. To the extent that they still exist, the hard drive having been cleaned, they are in the personal possession of Mr. Osborne.

Analysis 2: Control: Is Mr. Osborne Part of the City?

[20] The applicant submits that section 2(3) of MFIPPA makes Mr. Osborne "a part of the municipality for the purposes of this Act". The section provides:

> (3) Every agency, board, commission, corporation or other body not mentioned in clause (b) of the definition of "institution" in subsection (1) or designated [as an

> institution in the regulations] is deemed to be a part of the municipality for the purposes of this Act if all of its members or officers are appointed or chosen by or under the authority of the council of the municipality.

[21] In construing the subsection, it is useful to consider the list of entities contained in subsection (1), being those already brought into the definition of an "institution". They are all nouns referring to groups of people. The subsection appears to be designed to include as part of the municipality any group whose members are all appointed by the municipality. A "body" in the sense used in the subsection is defined in the Oxford[7] as "an aggregate of people". The use of the phrase "all of its members or officers" bears a plural connotation that supports the view that one individual engaged as an independent contractor is not caught by the subsection. In my view, this section does not make Mr. Osborne, as an independent consultant, "part of" the City of Toronto.

Analysis 3: Control: Are the Records Under the Control of the City?

[22] The applicant submits that the Commissioner erred in treating his application as one for a 'record' under section 4(1) of Part I the Act, whereas he actually sought the production of his 'personal information' under sections 36 and 37 of Part II. But the right to access personal information is given under Part II only in respect of such information as is in the 'custody or control' of an institution, so that there appears to be no practical difference. The applicant submits that the question of control of personal information has to begin with considering how the information was collected. He refers to the obligation of an institution to give notice to an individual when collecting his personal information, something which Mr. Osborne did not do. But that begs the question. Mr. Osborne did not have that obligation unless he was an "institution", or part of one, which, as I have said above, he was not. In any event, I cannot see that whether information is under the 'control' of the municipality can be read as having a different meaning in two parts of the same Act without some very express language.

[23] In determining 'control', there is some limited relevance in the fact that the records are in Mr. Osborne's control because of his role as investigator and their contents relate to the task that he was engaged to do for the City. More important factors include that Mr. Osborne was neither

[7] The New Shorter Oxford English Dictionary, 1993, Oxford University Press.

an employee nor an officer of the City. He was an independent person appointed to conduct an inquiry into, and to report on the selection process. He was to conduct the inquiry and make his report independently of, and at arms-length from the City. In my view, he was not an agent of the City in the traditional sense of one who has the authority to bind his principal; Mr. Osborne had no such power or authority. His recommendations were not to be binding on anyone. Nothing in the record before us leads to the conclusion that the documents were ever actually controlled by the City. Although they were in some cases stored in a computer owned by the City, it is clear that the computer was allocated to the inquiry and not accessible to persons not associated with the actual inquiry.

[24] On these criteria, I am of the view that the case is very similar to *Walmsley* and the result should be the same: the records are not under the control of the City, for the same reasons the Appointments Committee's records were not under the control of the Ministry.

[25] However, the applicant submits that what is at issue is whether the City has the right to control, and a duty to structure its relationship with a consultant such as Mr. Osborne so as to obtain the right to control, any records which he may produce in the course of his inquiry. This is the heart of the argument made by the applicant: the City has no power to establish a relationship with Mr. Osborne that precludes the availability of his records to those who would be entitled to them under MFIPPA.

[26] The applicant has not referred us to any specific provision in MFIPPA that enacts in terms that a municipality shall require those with whom it does business to comply with the record-keeping and data collection practices mandated by MFIPPA for the City itself. Instead, he bases his submissions on the purposes of the Act, chiefly the purpose set out by the Williams Report[8], which served as a guide to the actual legislation. It stressed the need for individuals to be able to control for themselves how their information is communicated to others. This principle is reflected in the purposes of MFIPPA as set out in section 1 (b): "to protect the

[8] *Report of Commission on Freedom of Information and Individual Privacy*, Queen's Printer, 1980.

privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information." [emphasis added] This statement of purpose is accurately and fully reflected in the provisions of MFIPPA at issue: the information which is available is that held by institutions, not that which is held by others. The purpose of the Act is not so broadly phrased as to support an interpretation that information cannot be collected by those who are not institutions, for their own purposes, even though they are engaged in completing a contract with the City to supply their services to it.

[27] The applicant contends that by the device of engaging an independent contractor, Toronto has arbitrarily removed quasi-constitutional rights from him. If there were some evidence that the engagement of Mr. Osborne was a colourable device to enable the City to obtain personal information from persons so that it could be used without the restrictions of MFIPPA, this might be a different case. But there is no such evidence. The gathering of information for the inquiry was a legitimate activity, which the City wished to be conducted at arms' length from it and its staff for the very good reason that the conduct of the City and its staff was itself the subject of the inquiry. Nothing in MFIPPA leads me to conclude that everyone who does business with the City is thereby bound to submit to the MFIPPA regime. Had this been intended, it would have been easy to have said so.

[28] The applicant further submitted that through Mr. Osborne, the City was engaged in collecting personal information without the safeguards of the Act; that this was ultra vires and without authority. There are two aspects to this. Was Mr. Osborne simply a surrogate for the City such that his acts were the City's acts? Or was Mr. Osborne appointed without authority?

[29] If Mr. Osborne was an independent contractor, as in effect, the Commission found he was, and as I also think, it seems to me that the information was collected by him, not by the City. The separation of Mr. Osborne's inquiry from the City provides a guarantee that the City will not have access to the information gathered by him save to the extent that it may be referred to in the report, which is all that the City contracted to receive from Mr. Osborne. The evidence is that Mr. Osborne gathered information from many people who knew that he was doing so for the purposes of his report, in at least some cases on a "without attribution" basis, and that he used the information for that purpose alone and destroyed much of it when he had finished with it.

This is consistent with his submission (and the City's) that the information was never expected, by either the City or himself, to be available to the City.

[30] The applicant submitted that, as the Commissioner had found that the records in question related directly to the City's mandate and function, therefore the City could not escape its responsibilities as to records by delegating the activity to an outside person. In my opinion, if the City had purported to assign to Mr. Osborne the responsibility of actually performing one of the City's core functions, there might well be some force in this submission. But that is not this case. Mr. Osborne was not performing contract procurement on behalf of the City. He was conducting an external arm's-length review of how the City had proceeded in a particular case. In these facts, I am satisfied that the Commissioner reached the correct decision when he found that Mr. Osborne was not an agent of the City in conducting his inquiry.

[31] As to the City's power to engage a person as an independent contractor, the applicant submitted that there was no basis for the Commissioner's finding that the City could do so without attaching all the provisions of MFIPPA to the agreement. The applicant contended that the City's powers of a natural person do not extend that far, and in any event ought to be exercised by by-law and no enabling by-law exists.

[32] The City submitted that by-law 3-2003, enacted at the Council meeting of February 4, 5 and 6, 2003, adopted, ratified and confirmed the recommendation in clause 1a of the Report No. 14 of the Administration Committee, that Mr. Osborne be requested to conduct a review of the Union Station RFP process, and authorized the officers to do what was necessary to give effect to this recommendation. Hence, if there was a requirement to act by by-law, it has been fulfilled. It is not necessary for us to decide whether the City can only exercise its natural person powers by by-law, as the by-law exists.

[33] As to the City's fundamental powers, counsel for the City referred to the view of Mr. I. M. Rogers, in his text[9] that a municipality possesses not only powers expressly given by statute, but also those powers fairly or necessarily implied or incidental to the express powers and those powers indispensable to effecting the purposes of the municipality. Counsel referred to section

[9] Ian M. Rogers *The Law of Canadian Municipal Corporations*, 2nd ed., Carswell, Toronto, page 309.

27 of the *Interpretation Act*[10] which provides that legislation creating a corporation vests in the corporation power to sue and be sued, to contract and be contracted with, to acquire, hold and alienate property etc. Counsel also referred to the coming into force on January 1, 2003 of sections 8 and 9 of the *Municipal Act, 2001*:

> 8. A municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act.
> 9. Sections 8 and 11 shall be interpreted broadly so as to confer broad authority on municipalities,
> a) to enable them to govern their affairs as they consider appropriate; and
> b) to enhance their ability to respond to municipal issues.

[34] The powers given to the City are certainly broad enough to authorize it to engage Mr. Osborne to perform an arms-length inquiry into the conduct of the procurement process with respect to the Union Station. There is nothing in MFIPPA to require that such persons follow the document–handling policies to which the City itself must adhere. I do not accept the applicant's submission that the City has no power to engage in business with a person without insisting on control over the information that is generated by the performance of the task contracted for. Such a requirement would extend MFIPPA well beyond "institutions" and deeply into the private sector, whose information is not intended to be accessible to the public.

[35] The applicant relies on the absence of authority to establish the Integrity Commissioner as an independent contractor exempt from MFIPPA as a precedent applicable to this case. He submits that the City has shown by its own resolutions about the Integrity Commissioner that Council knows it has no authority to exempt the Integrity Commissioner from MFIPPA and therefore also knows it has no authority to exempt Mr. Osborne. In my view, the two situations are entirely different. The Integrity Commissioner is hired as an officer of Council on an on-going basis. As an officer of Council, the Commissioner is clearly a part of the operations of the City and his records are subject to MFIPPA, unless exempted. By contrast, Mr. Osborne is not part of the operations of the City. He is a person engaged to study one particular facet of those operations as an independent investigator. His records are not within the control of the City, are therefore not subject to MFIPPA and no question of exemption arises.

[10] R.S.O. 1990 c. I-11, s. 27

[36] Even if there had been conduct by Mr. Osborne in the gathering of information, which would have been a breach of the provisions of MFIPPA, had it applied, the reality is that the City did not stipulate for the right to control the information and Mr. Osborne, as an individual and not a part of the City, has no obligation to surrender the information. Indeed, as he points out, to do so could involve a breach of undertakings given by him to some informants.

[37] For these reasons, I would dismiss the application for judicial review. Costs, if demanded, may be the subject of written submissions, those of the Commissioner within 30 days and those of the applicant within a further thirty.

Lane J.

Greer J.

Epstein J.

DATE: October 26, 2006

14P.

Tab 6

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1242

Appeal MA-980226-1

City of Kitchener

80 Bloor Street West,
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M5S 2V1

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Toronto (Ontario)
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NATURE OF THE APPEAL:

The City of Kitchener (the City) decided to build a new fire department headquarters. For this purpose, the City retained the services of an architect (the architect). One of the architect's duties was to conduct a pre-qualification process, a process by which potential bidders/construction firms are screened to prevent those who clearly are unqualified from bidding.

After the pre-qualification process was completed, the City received a request for access to information under the Municipal Freedom of Information and Protection of Privacy Act (the Act) from a firm that had not been permitted to bid. The request was for records concerning the pre-qualification of bidders for the construction of the new headquarters, and was broken down into three parts:

1. Any notes, letters, memos, messages or other records referring in any way to [the requester] received by the City from anyone other than [the requester].

2. Any notes, letters, memos, messages, reports or other records in any way referring to [the requester] prepared by the City for [its] own use, or for the use of others, other than [the requester].

3. All record[s] and documents used to include or exclude each applicant from bidding for the project through the pre-qualification process, including all submissions and evaluations performed by or on behalf of the City.

The requester subsequently expanded the request to include copies of any purchasing by-laws or policies relating to the pre-qualification or bidding process. Still later the requester indicated that it was not interested in bidder pre-qualification forms submitted by other construction firms.

The City identified three records responsive to the request and granted access to them in their entirety. The first is a letter from the architect to the City listing the construction firms the architect recommends as qualified to bid. The second is a list of potential bidders. Thirdly, in response to the expanded request, the City provided the appellant with a copy of its purchasing by-law referred to as "Chapter 170 (Purchasing and Materials Management) of the City of Kitchener Municipal Code." The City advised the requester that it had no other records relating to the project, other than the pre-qualification forms submitted by the other bidders.

The requester responded that it believed further records existed, including:

> ...Evaluations performed on each respondent by your agent (the professional Architect in this case). Kindly provide copies of all evaluations performed on each respondent applying for pre-qualification, complete with explanatory notes and comparative evaluations to justify selections of one contractor over another. Copies of explanations or reports on each proponent outlining the rational and reasons for disqualification of each proponent who was not allowed to bid for the work.

The City answered that it was again enclosing a copy of the by-law referred to in its initial decision and stated:

> You have also requested copies of evaluation documents compiled and used by the Architect in arriving at his pre-qualification recommendation. [The City's initial

decision] stated that the City neither receives nor requires the assessment records as part of its agreement with the Architect. Staff involvement in the process is limited to discussing with the Architect how the review will be conducted, after which the research and assessment is entirely in his/her hands. The Architect is paid to provide a professional opinion, and under normal circumstances it is not the City's practice to review the basis for that opinion, hence we have no need for the information used in arriving at this opinion.

Section 4(1) of the [Act] indicates that every person has a right of access to a record that is in the City's custody or under its control. The assessment records are not in the City's custody and it is our position that they are the property of the Architect and consequently not under our control. You may wish to approach the Architect directly and request this documentation.

The requester replied that records in the custody of the architect are under the control of the City because the architect is "... an agent of the institution in this instance". The requester asked the City to reconsider its position.

The City said it would not reconsider its position because "these records are kept separately by [the architect] for [its] own use and there is no agreement requiring that these be provided to the City upon request."

The requester (now the appellant) appealed the City's decision to this office. An initial Notice of Inquiry setting out the issues in the appeal was provided to the City and the appellant. Representations were received from the City only. I decided to seek further representations from the parties on the issues in the appeal, and sent a supplementary Notice of Inquiry to the City, the appellant and the architect. I received no representations in response to this supplementary document.

DISCUSSION:

CUSTODY OR CONTROL

Section 4(1) of the Act provides a right of access to records "in the custody or under the control of an institution" (emphasis added). The issue for me to decide is whether or not records responsive to the request in the custody of the architect are under the control of the City within the meaning of section 4(1). If so, the right of access under section 4(1) applies.

In the supplementary Notice of Inquiry, I asked the parties to provide representations in response to the following questions regarding the "control" issue under section 4(1). I also referred to pertinent authorities under each question, where appropriate:

1. Does the City have a statutory power or duty to carry out the activity which resulted in the creation of the records? [Order P-912, upheld in Ontario (Criminal Code Review City) v. Ontario (Information and Privacy Commissioner) (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.), leave to appeal granted [1997] O.J. No. 4899 (C.A.)]

2. Is the activity in question a "core", "central" or "basic" function of the City? [Order P-912, above]

3. Are there any provisions in any contracts between the City and the architect in relation to the activity which resulted in the creation of the records, which expressly or by implication give the City the right to possess or otherwise control the records? [Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner), [1999] B.C.J. No. 198 (S.C.)]

4. Was there an understanding or agreement between the City and the architect, or any other party, that the record was not to be disclosed to the City? [Order M-165]

5. Who paid for the creation of the record? [Order M-506]

6. Was the architect an agent of the City for the purposes of the activity in question? If so, what was the scope of that agency, and does it carry with it a right of the City to possess or otherwise control the records? [Walmsley v. Ontario (Attorney General) (1997), 34 O.R. (3d) 611 (C.A.)]

7. What is the customary practice of the City and institutions similar to the City in relation to possession or control of records of this nature, in similar circumstances?

8. What is the customary practice of the architect and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?

9. To what extent did the City rely or intend to rely on the record? [Order P-120]

10. Who owns the record? [Order M-315]

These questions reflect a purposive approach to the "control" question under section 4(1). A similar approach has been adopted in other access to information regimes. For example, in a recent decision under the federal Access to Information Act, the Federal Court of Appeal said:

> The notion of control referred to in subsection 4(1) of the Access to Information Act ... is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those
>
> documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.

> It is, in my view, as much the duty of courts to give subsection 4(1) of the Access to Information Act a liberal and purposive construction, without reading in limiting words not found in the Act or otherwise circumventing the intention of the legislature as "[i]t is the duty of boards and courts", as Chief Justice Lamer of the Supreme Court of Canada reminded us in relation to the Canadian Human Rights Act ... "to give s. 3 a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature" ... It is not in the power of this court to cut down the broad meaning of the word "control" as there is nothing in the Act which indicates that the word should not be given its broad meaning ... On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the Act to government information ... [Canada Post Corp. v. Canada (Minister of Public Works) (1995), 30 Admin. L.R. (2d) 242 at 244-245]

I will address each of the above-listed questions below.

Analysis of "control" factors

1. Statutory powers

Based on Order P-912, upheld in Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner) (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.), leave to appeal granted [1997] O.J. No. 4899 (C.A.), the statutory framework is the starting point for any "control" analysis.

Section 210(31) of the Municipal Act grants a power to the City Council to pass by-laws for providing fire-fighting and fire protection services. The City's fire department is established by by-law enacted pursuant to this power [Consolidated By-Law Number 359]. This statutory framework gives the City the power to build a headquarters for its fire department. Encompassed within the scope of this authority is the power to do all things necessary to discharge this function, which would include setting up and administering a bidding process. In this case, the bidding process involved pre-qualification of bidders. As a result, pre-qualification is an integral component of the City's statutory power [Order MO-1237].

2. Core function

The City submits:

> ...the contents of the records do not relate to the City's mandate and functions, as the City's role in the project is to evaluate the bids received and oversee the construction of the project. The role of the architect in regard to pre-qualification is to provide a list of the contractors who should receive bid documents. The City views the creation of a pre-qualification list and the evaluation of bidders [as] two separate processes.

For the reasons given above, the overall function of building a fire department headquarters is a core function of the City. The pre-qualification of bidders was directly related to this statutory function.

This process was an important initial step towards the broader goal of building the headquarters. The pre-qualification and evaluation of bidders are not discrete processes but are closely integrated and directly connected to the statutory function. In carrying out the pre-qualification process, the architect clearly was acting on the City's behalf.

3. Contract

The provisions of any contract setting out the relationship between the parties in question may be a relevant factor on the issue of control [Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner), [1999] B.C.J. No. 198 (S.C.)], although not determinative when in conflict with the statutory framework [Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner) (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.)].

The City submits that it does not have a "right of access" to the records because the architect was "hired by resolution of City Council" and there is no contract or agreement with the architect providing the City with this right. This resolution contains no detailed provisions which shed light on the nature of the agreement and its impact on the issue of control of the records.

4. Agreement not to disclose

The City submits that its "...only expectation was that it would receive the names of the contractors after stipulating how many it wished to have pre-qualified."

This evidence does not establish that an agreement existed between the City and the architect that the records should not be disclosed to the City.

5. Payment for the record

The City submits:

> A representative of the architectural firm has advised that he views the pre-qualification process as an undertaking outside of the scope of project duties, and it is performed as a value added service to the City.
>
> . . . . .
>
> [The architect believes that] the pre-qualification work is not considered to be within the scope of duties relative to this project, but is an extra service provided at the architect's discretion and at no cost.

I have difficulty accepting that pre-qualification work is not performed at the expense of the client. A service of this nature accrues to the benefit of the client and is normally paid for by the client and not simply absorbed by the architect as part of its overhead [Order MO-1237]. In my view, there is nothing before me to persuade me to depart from this conclusion.

6. Agency

In approaching the "control" analysis, it is useful to ascertain whether or not elements of agency are present and, if so, whether the agency relationship carries with it the right to possess or control the records in question. Although this may assist in the control issue, a finding one way or another is not necessarily determinative [Walmsley v. Ontario (Attorney General) (1997), 34 O.R. (3d) 611 (C.A.)].

"Agency" is the relationship between one party (the principal) and another (the agent) whereby the latter is empowered to act on behalf of and represent the former. Agency can emerge from the express or implied consent of principal and agent [Royal Securities Corp. v. Montreal Trust Co., [1967] 1 O.R. 137 (H.C.), affirmed [1967] 2 O.R. 200 (C.A.)]. Anyone doing something for another person can be an agent for that limited purpose [Penderville Apartments Development Partnership v. Cressey Developments Corp. (1990), 43 B.C.L.R. (2d) 57 (C.A.)]. An agent, though bound to exercise authority in accordance with all lawful instructions that may be given from time to time by the principal, is not subject in its exercise to the direct control or supervision of the principal. However, there must be some degree of control or direction of the agent by the principal [Royal Securities Corp., above]. Among other things, an agent has a general duty to produce to the principal all documents in the agent's hands relating to the principal's affairs [F.M.B. Reynolds, Bowstead on Agency, 15th ed., (London: Sweet and Maxwell, 1985), Article 51 at p. 191; Tim v. Lai, [1986] B.C.J. No. 3171 at pp. 10-11 (S.C.)].

The City submits:

> City staff have no direct involvement in the evaluation process per se. They do advise the architect, in accordance with Council direction, as to the number of contractors to be pre-qualified. They also develop, with the architect, the process to be followed in regard to pre-qualification. The evaluation process itself is entirely the responsibility of the architect with no staff involvement.

As I have stated, the pre-qualification process forms part of the general bidding process which is directly connected to the statutory function of building the headquarters. I find that in carrying out the pre-qualification process, the architect was acting on behalf of the City.

This conclusion is supported by The Canadian Law of Architecture and Engineering, 2nd ed. (Toronto: Butterworths, 1994) by B.M. McLachlin et al. (at pp. 126, 195):

> Architects and engineers are employed primarily as the agent of the owner, to design, supervise and administer the project ...
>
> The architect or engineer acts as the agent of the owner in preparing and issuing tender documents and supervising the tender process.

[See also Pielak v. Granville Custom Homes and Renovations Ltd., [1994] B.C.J. No. 565 (S.C.), at p. 15; D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General), [1999] N.S.J. No. 163 (S.C.), at p. 32), in which these passages are quoted with approval].

The next question is whether or not this agency relationship carries with it the right of the City, as principal, to possess or control the records. The general principle is that an agent has the duty to produce to the principal all documents in the agent's hands relating to the principal's affairs. This point is elaborated upon in Bowstead (at pp.192-193):

> The principal is entitled to have delivered up to him at the termination of the agency all documents concerning his affairs which have been prepared by the agent for him. In each case it is necessary to decide whether the document in question came into existence for the purpose of the agency relationship or for some other purpose, e.g., in pursuance of a duty to give professional advice.

The Canadian Law of Architecture and Engineering also states (at p. 266):

> ... a client who decides to proceed with a project for which an architect or engineer has prepared designs, expressly or by implication appoints the architect or engineer as his or her agent for various purposes ... The documents the architect or engineer receives or creates in his or her role as agent for the client are owned by the client.

In contrast to the facts in Walmsley, there is a strong basis for a finding that the agency relationship between the City and the architect carries with it, at a minimum, the City's ownership of records relating to the pre-qualification process, as ancillary to the tender process. This ownership carries with it the right to possess and control the records.

7. Customary practice of the City

I have insufficient evidence on which to base a finding on this point.

8. Customary practice of the architect

I also have insufficient evidence on which to base a finding on this point.

9. Reliance on the records

The City states that "the record has not been relied upon by the City, as the City only relies upon the list of contractors which results from the architect's analysis."

In my view, since the City relies on the architect's interpretation of the information gathered in the records for its benefit, it relies on the records.

10. Ownership

The City submits that the architect advised the City that it did not view the records as "the City's property."

As found at point 6, documents which the architect receives or creates in his or her role as agent for the client are "owned" by the client. Since the architect acts as the City's agent in the pre-qualification process, the City owns the records and has the requisite control over them on this basis alone.

Conclusion

The legal framework and factual circumstances lead me to conclude that the City has control of documents relating to the pre-qualification process in the possession of the architect. This finding is dictated by the relevant statutory framework (points 1 and 2), as well as the nature of the agency relationship between the City and the architect (point 6), and is supported by the City's reliance on the record (point 9). This agency relationship carries with it a right of ownership (point 10) and possession (point 6) of the records. As a result, I find that the relevant records are in the "control" of the City for the purpose of section 4(1) of the Act.

ORDER:

1. I order the City to send a written direction to the architect to provide the City with records responsive to the appellant's request. The City's written direction should be issued no later than **November 23, 1999**, but no earlier than **November 18, 1999**, and should require delivery of the records no later than **December 7, 1999**.

2. Upon receipt of the records from the architect, I order the City to issue an access decision to the appellant in accordance with Part I of the Act, treating the date of receipt of the records as the date of the request.

3. I order the City to provide me with a copy of the written direction referred to in provision 1 above, and a copy of the City's access decision referred to in provision 2 above.

4. I remain seized of this appeal with respect to any compliance issues arising from this order.

Original signed by: October 19, 1999
David Goodis
Senior Adjudicator

Tab 7

Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4066

Appeals PA18-203, PA18-311, and PA18-312

Laurentian University

September 16, 2020

Summary: Laurentian University ("Laurentian") received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the salary and benefits of the presidents of three federated universities. The university denied access on the basis that the records are not in its custody or control and that, as a result, there is no right of access to them under the *Act*. The requester appealed. In this order, the adjudicator finds that the federated universities are not part of Laurentian for the purposes of the *Act*, and that the employment contracts of the presidents of the federated universities are not in Laurentian's custody or control. However, she finds that some salary and benefit information of the federated universities' presidents is found in other records that are in Laurentian's custody or control, and orders Laurentian to issue an access decision with respect to those records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* ss. 2(1) (definition of "institution"), 10(1).

Orders and Investigation Reports Considered: Orders PO-2775-R, MO-3141, MO-3142, MO-3143, MO-3144, MO-3145, MO-3146, P-239, PO-1725.

Cases Considered: *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario (TEDCO),* 2008 ONCA 366.

BACKGROUND

[1] The appellant, an association that was represented for the purposes of these

appeals by an individual, submitted three requests under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) to Laurentian University of Sudbury (Laurentian) for information relating to each of the presidents of three federated universities affiliated with Laurentian: the University of Sudbury, Huntington University and Thorneloe University. Specifically, in each request, the appellant sought access to:

> ... the current contract and terms of employment for [named president of the federated university] as president of [the federated university], including salary, benefits, pension and a list of all other entitlements (for example a list of allowable expenses such as housing, terms of travel whether first class, business class, memberships in clubs and associations and other perquisites and benefits).

[2] Laurentian issued three decisions denying the appellant access to the requested records on the basis that the records are not in its custody or under its control and that, as a result, there is no right of access to them under section 10(1) of the *Act*.

[3] The appellant appealed the university's decisions and the IPC opened three appeal files. During mediation, Laurentian maintained its position that the records are not within its custody or under its control. The appellant referred to Reconsideration Order PO-2775-R (discussed in more detail later in this order) and maintained her position that the federated universities are part of Laurentian for the purpose of the *Act* and Laurentian has custody and control over the responsive records. Mediation did not resolve the appeals and they were transferred to the adjudication stage of the appeal process. The assigned adjudicator began her inquiry by inviting Laurentian, the three federated universities identified in the request, and each federated university's president to make representations.

[4] Laurentian University, the three federated universities and one president submitted representations. The appellant then provided her representations, and the appeals were transferred to me. I asked Laurentian for clarification of its representations respecting the benefit plans and received that clarification.

[5] In this order, I find that the University of Sudbury, Huntington University and Thorneloe University are not part of Laurentian for the purposes of the *Act* and that the employment contracts of the federated universities' presidents are not in Laurentian's custody or control, so there is no right of access to them under the *Act*. I find, however, that Laurentian has custody or control of certain salary and benefit information that is responsive to the request, as a result of its role as administrator of benefits plans for the employees of the federated universities. I order Laurentian to make an access decision relating to the latter records.

ISSUES

A. Are the federated universities part of Laurentian for the purposes of the *Act*?

B. Are the records at issue in the custody or under the control of Laurentian under section 10(1) of the *Act*?

RECORDS

[6] The records at issue are the employment contracts of the presidents of the three federated universities, and other records in Laurentian's possession containing salary and benefit information relating to the presidents of the three federated universities.

DISCUSSION

[7] The issues in these appeals are whether the federated universities are part of Laurentian for the purposes of the *Act*, and if not, whether Laurentian nonetheless has custody or control of the records under section 10(1).

[8] Section 10(1) of the *Act* reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[9] Under section 10(1), a right of access applies only to records that are in the custody or under the control of an institution. A record will be subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.[1]

[10] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.[2] A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 through 22 and section 49).

[11] The courts and this office have applied a broad and liberal approach to the custody or control question.[3] Based on this approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of

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[1] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[2] Order PO-2836.
[3] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.); and Order MO-1251.

an institution.[4] I will set out this list in more detail later in this order but for the moment I note that it includes matters such as who created the record; whether the institution has a statutory power or duty to carry out the activity that resulted in the creation of the record; whether the content of the record relates to the institution's mandate and functions; and whether the institution's possession of the record is more than "bare possession".

[12] The factors are to be considered contextually in light of the purpose of the legislation.[5] Where an institution does not have possession of the record, a relevant factor is whether it could reasonably be expected to obtain a copy on request.

A. Are Huntington, U Sudbury and Thorneloe part of Laurentian for the purposes of the *Act*?

Order PO-2775-R

[13] The appellant relies on a previous order of this office, Reconsideration Order PO-2775-R,[6] and all parties[7] referred to it in their representations. I will briefly summarize the order before moving to the parties' representations.

[14] Order PO-2775-R addressed the issue of whether the University of Toronto (U of T) had custody or control of a record in the possession of the University of Victoria (Victoria). The record at issue in that case was a report written by a consultant for a United Church of Canada/Victoria University Archives Task Force that had been formed as part of a program renewal exercise.

[15] "Institution" is defined in section 2(1) of the *Act*.[8] The relevant part of that definition reads:

> "institution" means,
>
> > (b) any agency, board, commission, corporation or other body designated as an institution in the regulations;

[16] Regulation 460 under the *Act* contains a schedule listing the institutions covered

---

[4] Orders 120, MO-1251, PO-2306 and PO-2683.
[5] *Ottawa (City) v. Ontario (Information and Privacy Commissioner)*, 2010 ONSC 6835
[6] For the sake of brevity, I will refer to this order as Order PO-2775-R.
[7] Except Thorneloe, which provided only brief representations.
[8] Under section 2(1) of the *Act*, an "institution" means:
(0.a) the Assembly,
(a) a ministry of the Government of Ontario.
(a.1) a service provider organization within the meaning of section 17.1 of the Ministry of Government Services Act,
(a.2) a hospital, and
(b) any agency, board, commission, corporation or other body designated as an institution in the regulations.

by the *Act*. Victoria is not listed in the relevant schedule. The parties and the adjudicator framed the issue to be decided as whether Victoria was nevertheless part of U of T for the purposes of the *Act*, and was subject to the *Act* for that reason.

[17] The adjudicator found that Victoria was part of U of T, and therefore subject to the *Act*, for three main reasons:

- The legislative history of the amendments that brought Ontario's universities under the ambit of the Act suggests that all universities receiving public funding were intended to be included. In the adjudicator's view, there is no principled reason why this would not include those universities whose largest source of public funding is derived from a flow-through of monies, like Victoria, from a scheduled university, like U of T.

- The degree of integration of the administrative, financial and academic operations of Victoria and U of T supports a finding that Victoria is part of U of T for the purposes of the Act. Here, the adjudicator pointed to U of T's flow-through funding of Victoria, and the fact that Victoria suspended its degree-granting authority for all except divinity students, which results in its students receiving a degree not from Victoria but from U of T.

- Victoria and U of T took various steps to prepare for their inclusion in the freedom of information and privacy protection regimes under the *Act* at the time of the amendments. This showed that they considered Victoria to be subject to the requirements of the *Act*.

[18] The adjudicator added a post-script to the order, stating in part as follows:

> While this order deals only with Victoria, it is clear from the legislative history surrounding the amendment of the *Act*, which saw the inclusion of the university sector, that it was the intention of the Legislature that all publicly-funded universities would be subject to the *Act*.
>
> Specifically listing all publicly funded universities in the Schedule to Regulation 460 including those universities and colleges that are federated or affiliated with universities already listed in the Schedule, would remove any uncertainty over whether those entities are subject to the *Act*. Accordingly, I am providing the Ministry of Government Services, which has responsibility for administering the *Act*, with a copy of this reconsideration order and recommend that it move expeditiously to address these issues.

[19] The Schedule to Regulation 460 has not in fact been modified since Order PO-2775-R to add all publicly funded universities. Thorneloe, Huntington and U Sudbury are not listed in the Schedule.

[20] The appellant argues that the reasoning in Order PO-2775-R is equally applicable here, while the other parties take the position that the facts in that order are distinguishable from those present here, and/or that the order was wrongly decided. As seen later in these reasons, I find Order PO-2775-R to be distinguishable from the circumstances before me.

Representations of Laurentian, Huntington, Sudbury and Thorneloe

Background

[21] Laurentian, Huntington and U Sudbury provided some background information on their respective histories and the relationships of the federated universities with one another and with Laurentian.

[22] The three federated universities are "federated" with Laurentian pursuant to agreements that allow them to meet their own unique mandates by collaborating with a larger post-secondary educational institution.

[23] The University of Sudbury was founded and incorporated pursuant to statute in 1913 (as Collège du Sacré-Cour). It was the first, and for many years the only, institution of higher learning in Northern Ontario. In 1957, it changed its name to "University of Sudbury" and began to exercise its full teaching and degree-granting powers. It entered into the Laurentian Federation as a founding member in 1960. It offers programs and courses in philosophy, Indigenous studies, religious studies, folklore, and "études journalistiques," all of which are accredited towards a Laurentian University degree.

[24] Huntington University is a corporation[9] founded as an affiliate of the United Church of Canada in 1960, existing today as a liberal arts university that offers courses in religious studies, theology, ethics, gerontology and communication studies.

[25] Thorneloe University was founded and incorporated in 1961 by the Synod of the Anglican Diocese of Algoma. Today, Thorneloe is an interdisciplinary centre of teaching, learning and research in the humanities, the arts and theology.

[26] Laurentian was incorporated under *The Laurentian University of Sudbury Act,* 1960 (*Laurentian Act*) as a bilingual institution with representation from the Roman Catholic, United and Anglican Churches. Today, it aims to be Northeastern Ontario's comprehensive university.

[27] The three federated universities have their own independent governance bodies, with each university having its own chief executive officer (president) reporting to its own Board of Regents or Board of Governors, as the case may be. It is submitted that no one of these officers or boards has any authority over the other.

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[9] *An Act to Incorporate Huntington University*, S.O. 1960, c. 143.

Federation agreements

[28] The *Laurentian Act* contemplates academic federations between Laurentian and the federated universities by which the federated universities suspend their own granting of degrees to enable their students to obtain Laurentian degrees.[10] Each agreement "admits" the smaller university into federation with Laurentian and stipulates that the federated university's degree-granting powers are suspended. The federation agreements were entered into in 1960, in the case of U Sudbury and Huntington, and 1961, in the case of Thorneloe.

Relationships between the universities

[29] Laurentian, Sudbury, Huntington and Thorneloe all stress the independence of the federated universities relative to Laurentian and to one another. Laurentian explains that while the *Laurentian Act* leaves the parameters of federation mostly to be defined by agreement, that act does expressly state that the Laurentian Board of Governors has no power to hire or fire employees of the federated universities. The federated universities all have their own collective agreements and employment policies.

[30] In accordance with the terms of their respective federation agreements, Laurentian provides a number of services to the federated universities in exchange for payment of service fees. However, the affairs of the federated universities are managed by their own independent Board of Regents or Board of Governors, and their own presidents. As an example, U Sudbury provided a copy of its own General By-law.

[31] The relationships of the federated universities with Laurentian are governed by contract, and in particular, the federation agreements. Upon federation with Laurentian, the federated universities agreed to sell certain assets and suspend certain of their degree-granting rights in order to coordinate with the other federated universities, achieving economies of scale and avoiding unnecessary duplication of services. However, the federation agreements do not give Laurentian a right to direct or control the operations of the federated universities, including their management of human resources. The federated universities maintain exclusive control over their operations and their assets remain entirely their own.

[32] Huntington explains that Laurentian does not teach any classes in Huntington's buildings, that its faculty do not have offices in Huntington's buildings, and that there are no cross-appointments between Laurentian and Huntington. While students of Huntington may also be students of Laurentian, the universities themselves remain distinct. Similarly, U Sudbury says it has its own Registrar, full-time faculty members and its support staff, which it does not share with Laurentian or any other federated university. U Sudbury courses are taught by U Sudbury faculty in the U Sudbury building, though U Sudbury students may also register in classes offered by Laurentian

[10] The parties provided copies of the federation agreements with Huntington, U Sudbury, and Thorneloe.

or other members of the Laurentian federation. Laurentian does not teach any classes in the U Sudbury building nor do its faculty members have offices there.

[33] U Sudbury further explains the extent of the academic collaboration between it and Laurentian. It says that it promotes itself as distinct and separate from Laurentian, despite the latter's authority to issue degrees to those students graduating from courses at U Sudbury. The parties collaborate on academic matters, as required to give effect to Laurentian's power to confer degrees in respect of U Sudbury students. Laurentian also provides some administrative services to U Sudbury students, for which U Sudbury pays, in accordance with their contractual arrangements. For example, U Sudbury students register through Laurentian and pay their tuition fees to Laurentian, which it then transfers to U Sudbury. U Sudbury students obtain Laurentian academic credentials in accordance with Laurentian's academic requirements. Nevertheless, U Sudbury has sole control over the programs and courses it offers, the development and delivery of its programs, the size of its classes, its tuition fees, student recruitment, and evaluation. There are no cross or joint appointments between U Sudbury and Laurentian.

[34] With respect to finances, U Sudbury explains that its sources of funding include funds provided by Laurentian based on the federation agreement, religious institutions, its own endowment funds, and tuition and residence fees. Laurentian does not retain any decision-making authority over how U Sudbury chooses to allocate the funds that it receives from Laurentian, including the salaries and benefits entitlements of U Sudbury employees or its president. U Sudbury has its own building, infrastructure, and assets, which it owns exclusively. In accordance with the federation agreement, it merely rents the land on which U Sudbury and its student residence is located from Laurentian.

[35] Huntington, too, explains that it has its own building, infrastructure, assets, and employees. It also has a unique collective agreement with its academic staff, who form their own distinct bargaining unit. Non-unionized staff members are subject to Huntington's administrative and support staff policies alone, and not those of Laurentian. Like the other federated universities, Huntington also adopts and enforces its own governing policies separately from Laurentian. For example, Huntington has its own unique Accessibility Policy; Health and Safety Policy; and Harassment, Sexual Harassment and a Violence-Free Workplace Policy.[11]

[36] U Sudbury points out that its president is not an employee of Laurentian but of U Sudbury, appointed by the Board of Regents, in which Laurentian and its officers take no part. None of the members of Laurentian's Board or executive sit or are entitled to sit on the Board of Regents of U Sudbury. Thorneloe, too, says that its Board of Governors is solely responsible for the appointment of all of its employees and that it alone is responsible for paying its president's salary.

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[11] Huntington provided copies of these policies.

[37] Finally, Laurentian submits that the only responsive information it possesses is a result of one of its arrangements with the federated universities in exchange for payment of service fees. The arrangement in question allows federated university employees to participate with Laurentian employees in certain benefit plans. The federated universities pay the all benefit costs and make all benefit contributions in respect of their own employees. Laurentian handles the personal information of the federated universities' employees, subject to a duty of confidence that prohibits Laurentian from dealing with the information for its own purposes. Laurentian takes no position on whether this particular information is in its custody or control for the purposes of the *Act*, while U Sudbury and Huntington argue that it is not. This argument is addressed under Issue B below (custody and control).

Argument

[38] Laurentian and the federated universities argue that the latter are not part of Laurentian under the *Act*.

[39] The universities argue that the words "Laurentian University of Sudbury" in Regulation 460 do not include the three federated universities. Laurentian points out that its designated head is the "executive head" – i.e., its president. The president has the powers and duties of the president's office as established by the *Laurentian Act*. Pursuant to the *Laurentian Act*, he is the chief executive officer of Laurentian and has supervision over and direction of the academic work and general administration of Laurentian and its teaching staff, students, and officers. Laurentian submits that the *Laurentian Act* does not assign to its president any powers in respect of federated universities (though the *Laurentian Act* does include other provisions about federated universities). Laurentian submits that from this reading of the *Act* and the *Laurentian Act*, it is clear that the intent of the regulation was to designate Laurentian alone as an institution.

[40] Laurentian also argues that since the right of access to records applies to records in the "custody or control" of an institution, the *Act* already features a mechanism for addressing whether records belonging to a related or affiliated entity are subject to the right of access. Laurentian submits that this record-specific mechanism is the only mechanism contemplated by the Legislature to apply to matters such as the one raised by these appeals.

[41] Huntington, U Sudbury and Thorneloe, too, say that they are separate bodies from Laurentian, and that since they are not listed in the schedule to Regulation 460, their records are not accessible under the *Act*. U Sudbury argues that it has opted to contract at arm's length with Laurentian for cost efficiency reasons, but it is under no legal obligation to do so - it could terminate the contracts and choose to perform the work itself or it could contract with other service providers. U Sudbury also notes that unlike Laurentian, it does not receive a direct operating grant from the Ministry of Training, Colleges and Universities.

Order PO-2775-R

[42] Laurentian, Huntington and U Sudbury argue that Order PO-2775-R is distinguishable because it was decided based on manifestly different facts from those present here. Laurentian and Huntington also argue that Order PO-2775-R was wrongly decided.

Order PO-2775-R is distinguishable

[43] Laurentian notes that in Order PO-2775-R, Victoria University had described itself as being "in the University of Toronto", and the adjudicator found that the operational and financial affairs of Victoria and U of T were integrated to a very high degree. In contrast, section 18 of the *Laurentian Act* gives Laurentian's Board of Governors power to control the "operational and financial management" of Laurentian alone. Laurentian can enter into federation agreements as contemplated by the *Laurentian Act*, but these agreements create much less integration than that between Victoria and the University of Toronto. They merely create an academic collaboration that entails the granting of Laurentian academic credentials to students of the federated universities. They do not invite operational and financial integration.

[44] Huntington notes that the Order PO-2775-R adjudicator, in finding that there was a "high degree of integration" between the University of Toronto and Victoria University academically, placed significant weight on the fact that it was difficult to tell where Victoria University undergraduate programs ended and University of Toronto programs began. Huntington notes that, in contrast, its courses are taught by separate faculty, under a separate collective agreement, in a separate physical location. While all Huntington students are entitled to graduate with degrees conferred by Laurentian (with the exception of the graduate degree in counselling, which is conferred exclusively by Huntington) there is virtually no overlap between full-time academic staff for Laurentian and Huntington.

[45] U Sudbury argues that there is no integration between it and Laurentian beyond the academic integration described above. It says that in Order PO-2775-R, there was a high degree of integration between the University of Victoria and the University of Toronto. Under that federated framework, the humanities departments at University of Victoria and the other U of T federated universities had long been amalgamated into university-wide departments, while faculty members kept their appointments in their respective federated universities or university college. Furthermore, Victoria is not exclusive to Victoria faculty, staff and students; rather, it hosts faculty, graduate students and staff of a number of several University of Toronto departments and centres. U Sudbury says that this is significantly different from the relationship between U Sudbury and Laurentian, where there is only limited collaboration in the parties' academic operations, and U Sudbury maintains separate and independent operations from Laurentian in all other areas.

[46] With respect to financial integration, Huntington observes that in Order P-2775-

R, the adjudicator found that "the financial affairs of Victoria and the University are integrated to a very high degree", and specifically noted the University of Toronto's obligation to provide funding to Victoria University "at levels comparable to the costs of similar activities within the University's own operations". By contrast, Huntington submits, the financial affairs of Huntington and University are not integrated in this manner. The federated universities' finances are separate and they do not share risk, revenue or profits. Further, while the University of Toronto provided financial support to the University of Victoria for its day-to-day operations, including such things as administration and registrar services, the reverse is true here: Huntington pays Laurentian to provide the same in this case and it is entirely within Huntington's rights to allow its contracts with Laurentian to expire or be terminated, and to contract with other service providers for IT services, security, student counselling, and so on. However, it has opted to contract with Laurentian in this regard in order to provide these services cost-effectively.

[47] Huntington explains that the federated universities are financially autonomous and fundraise separately. Each university generates its own budget and revenue, and manages its own finances. The universities bill and pay one another for use of space and services. There is no commingling of funds or assets, except for some incidental expenses, such as the sharing of licensing fees for online journals.

[48] Huntington's academic staff have their own union local (LUFA-H) and Huntington is the sole employer in their collective agreement, a copy of which Huntington provided.

[49] Huntington and U Sudbury also observe that the adjudicator in Order PO-2775-R relied on the fact that Victoria University had its own privacy policy in relation to the *Act*, as well as its own *FIPPA* officer, and that it had a process for responding to access requests that was integrated with, and delegated from, the University of Toronto. That process involved a formal agreement whereby the parties undertook to respond to *FIPPA* requests collaboratively. All these factors the adjudicator took as evidence that Victoria University "understood that they would fall within the ambit of the *Act*". By contrast, Huntington notes that it has no privacy policy because it is not subject to the *Act*. It has no *FIPPA* officer and does not process *FIPPA* requests for Laurentian. U Sudbury says essentially the same thing.

Order PO-2775-R is also wrongly decided

[50] Laurentian and Huntington submit that Order PO-2775-R is wrongly decided. They say that the adjudicator, in reading the schedule in Regulation 460 to include Victoria, relied on the purposive construction principle instead of construing the relevant text of the *Act*. Laurentian states that, for unknown reasons, the Government did not designate the federated universities as institutions, but that this should be presumed to be a deliberate choice. Huntington notes that the government never added Victoria University or the federated universities at issue here to the schedule, despite the adjudicator's postscript noting the oversight in the Regulation and urging the government to do so.

[51] Laurentian also submits that the adjudicator in Order PO-2775-R failed to consider the significant harmful consequences of finding that a designated institution includes a legally distinct and autonomous institution. It says it will have no context to understand or interpret a request for records of the federated universities because it has no dealings with the subject matter of the request. Further, it says it has no power to conduct a search for records.

[52] Laurentian also notes that the *Act* contains not just access rights but also privacy obligations, and that to accept Order PO-2775-R's finding as applicable here would be to suggest that the Laurentian (and its Head) are responsible for privacy protection at the federated universities.

Appellant's representations

[53] The appellant argues that the facts here do not substantially differ from those in Order PO-2775-R. She argues that Order PO-2775-R determined that the federated universities in fact fall under the scope of the *Act* through their agreements and links with their "parent" university.

[54] The appellant notes that in fact, she contacted the Ministry of Government and Consumer Services prior to submitting the access requests at issue in these appeals, and received the following response from a ministry staff member in the Freedom of Information Unit:

> "I consulted with [staff of the Information, Privacy and Archives division] on the status of federated universities and they provided the advice that the request should be directed to Laurentian, citing Information and Privacy Commissioner IPC Order PO-2775-R, in which it was determined that the University of Toronto was required to provide records from one of their federated universities (Victoria). The IPA also provided the background information that they decided not to add the federated universities as separate institutions in the directory because they are considered to be under the umbrella of their main institution that's already listed." [emphasis the appellant's].

[55] The appellant argues that it was the legislature's intention to include federated universities under the amendments made to the *Act* to add universities as institutions subject to the *Act*. The appellant acknowledges that the federated universities are in many ways separate entities with unique characteristics with respect to faculty and programs, but stresses that they are all part of a post-secondary educational scheme.

[56] The appellant refers to the following passage from the Webster dictionary:[12]

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[12] The appellant did not stipulate under which definition this passage appears.

> A university, in contrast, is usually composed of a number of different colleges or schools and in most cases, postgraduate opportunities for advanced degrees in more than one field. That's why you might hear about a person attending "Forbes College at Princeton University," for example.

[57] The appellant argues that for administrative purposes with respect to their relationship to government, the federated universities are considered to form part of one university. For example, for the purpose of receiving basic income units (BIU) that each university receives from the Ministry of Education, the federated universities' entitlements flow through Laurentian. Other "flow-throughs" include tri-council funding, research ethics, and occupational health and safety rules. The appellant says that the *Act* is simply another form of government interaction by which the federated universities would "flow through" their parent university. For this reason, the appellant argues, Laurentian University, as the listed institution under Regulation 460, has the authority to request the production of the records and it controls the records at issue for the purposes of the *Act*.

[58] The appellant also relies on Laurentian's website, which, according to the appellant, describes the strong administrative relationship between the federated universities and Laurentian:

> The Laurentian Federation
>
> In 1960 and 1961 respectively, Huntington University and Thorneloe University were founded and joined with the University of Sudbury in the Laurentian Federation.
>
> While each individual university contributes unique academic programs, distinct learning and residential accommodations, and other diverse attributes to Laurentian's offerings, students at University of Sudbury, Thorneloe and Huntington <u>are all Laurentian students who share classrooms, services, activities and are an integral part of the Laurentian community.</u>
>
> The Laurentian student card provides access to the university's full spectrum of student amenities – from the library and the Laurentian Voyageur Athletics and Campus Recreation Centre, to the various support services. Laurentian's federated universities add character and flexible options for students looking for specific programming or courses, a unique learning environment, or distinct residential style.[13] (Emphasis added by appellant).

[59] The appellant argues that the federated universities are not listed on the

[13] https://laurentian.ca/stub-176.

provincial website[14] of the Ministry of Colleges and Universities because all provincial funding is provided to the "parent university" to then be disbursed and allocated to the federated universities. She argues that it would therefore be reasonable for the legislature to list the same universities under Regulation 460 of the *Act*, with the intent that the federated universities would fall under their degree-granting institution.

[60] Likewise, the appellant argues, students applying for the Ontario Student Assistance Program (OSAP) funding must list Laurentian University as their attending institution; funding is then allocated by Laurentian as the "lead" to either Thorneloe, Huntington or U Sudbury depending on the student's course selection. Even though the federated universities are not listed on the approved list of private or public colleges or universities for OSAP assistance, they are nonetheless provided with funding as a recognized post-secondary educational institution.[15]

[61] The appellant refers to the sharing of certain administrative/operating costs between the federated universities and Laurentian as seen in their respective federation agreements. By way of example, the U Sudbury federation agreement with Laurentian states in part:

> "All students enrolled in federated universities or colleges who intend to proceed towards degrees or to obtain diplomas, certificates or other academic qualifications at Laurentian University and to become entitled to degrees, diplomas, certificates or other academic qualifications at Laurentian University must comply with all requirements of Laurentian University. In the case of students enrolled in federated university or colleges, fees paid shall be apportioned between Laurentian University and such federated universities or colleges as may from time to time be agreed upon between the parties hereto provided however that the academic standing of all students now registered at Sudbury University who by virtue of the Act of Incorporation of Laurentian University and of this agreement, become registered as student of Laurentian University shall be accepted as students of Laurentian University upon the basis of their academic standing at Sudbury University, provided they comply with the requirements of Laurentian University in regard to registration and payment of fees." (emphasis appellant's)

[62] The appellant asserts that Laurentian has been established as the administrative "lead" of all the federated universities under its umbrella: there is one website, one contact phone number, one email address, one student registration scheme/student card, one campus, one application for OSAP and public funding, and one degree granted.[16] In addition, the appellant notes that faculty of the federated institutions are

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[14] https://www.ontario.ca/page/ontario-universities.
[15] https://osap.gov.on.ca/SchoolSearchWeb/search/school_search.xhtml?lang=en.
[16] Each federated university in fact has its own website, as U Sudbury noted.

represented by the same association that represents Laurentian faculty. In addition, the federated universities supply student counts and financial statements to Laurentian University in order to comply with government reporting requirements.

[63] The appellant notes that financial reporting for 2016/17 of Ontario universities published by Common University Data Ontario (CUDO) indicates that 90% of operating funds are obtained through ministry grants, with the second largest source of income obtained through tuition fees. The appellant also notes that 60% of the operational aspects of the universities go to pay for salary and wages.[17] The appellant notes that all funds reported by CUDO include those reported by the federated universities, and that the government provides federated universities funding through the grants provided to Laurentian University, with the knowledge that they will provide the federated institutions with appropriate portions of these government grants in order to provide their educational services. The appellant argues that federated universities that receive this funding should not be permitted to "hide" behind their parent university for accountability purposes.

[64] The appellant argues that the key factor in determining whether the federated universities are part of Laurentian for the purposes of the *Act* is not whether Laurentian is involved in the operational and financial management of the federated universities. Rather, the appellant says, the key factor is the fact that the federated institutions receive public funding by way of a flow-through of grant disbursements issued by Laurentian in accordance with the agreements. She argues the *Act*'s core purpose is to provide the general public with a right of access to information held by publicly funded institutions. The appellant also argues that the federated universities' lack of preparedness to respond to access to information requests under the *Act* should not be used as an argument as to why they should be considered to be outside the scope of the *Act*.

[65] Finally, the appellant notes that in an article in the "University Affairs" on January 13, 2016, the description of a federated institution is provided as follow:

> "A federation, generally speaking, is a specific type of affiliation where two or more institutions come together to create a new university that is recognized by civic authorities and is eligible for government funding. That was the case when the existing University of Sudbury (previously the Jesuit Collège du Sacré-Coeur) came together with the new Huntington University (United Church) and Thorneloe University (Anglican) to form the Laurentian Federation in 1960-61."[18]

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[17] https://cou.ca/wp-content/uploads/2018/04/Financial-Report-Highlights-2016-17-Final.pdf.

[18] https://www.universityaffairs.ca/features/feature-article/federated-affiliated-colleges-different-mainly-equal/

Analysis and findings

[66] As I mentioned above, the issue of whether U Sudbury, Huntington and Thorneloe are part of Laurentian for the purposes of the *Act* was raised by the appellant in mediation, and she relies on Order PO-2775-R, which she says is indistinguishable on its facts from the circumstances before me.

[67] I see some merit in Laurentian's argument that since the right of access to records applies to records in the "custody or control" of an institution, the *Act* already features a mechanism for addressing whether records belonging to a related or affiliated entity are subject to the right of access. Laurentian submits that the federated universities are not institutions under the *Act* and that the record-specific mechanism afforded by the custody/control analysis is the only mechanism contemplated by the Legislature to apply to matters such as the one raised by these appeals.

[68] I agree that in many, if not most cases where a record is held by an entity other than an institution listed in the regulation, the real issue is whether the institution (here, Laurentian), has custody or control of the record at issue. A record-specific approach avoids unnecessarily broad findings about whether an entity is "part of" the listed institution for the purpose of the *Act*. In my view, such a finding, made in the context of an access request for specific records, could have unforeseen and/or unintended consequences for future requests relating to different records.

[69] That said, in my view there are some cases where it is obvious that all records of an entity should be subject to the *Act* because of the entity's relationship with a listed institution. One example is found in a series of orders of this office, Orders MO-3141 through MO-3146. The issue in those cases was whether certain school bus consortiums were subject to the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*), the municipal counterpart to *FIPPA*. The role of the consortiums is to provide management and administrative support for the school boards to acquire transportation services for its students through third party providers. *MFIPPA* defines "institution" as including a school board, and also lists some specific entities. School bus consortiums are not listed.

[70] In finding that, for the purposes of the *MFIPPA*, the consortiums are each a part of the school boards that created them, the adjudicator noted that:

- The consortium is comprised of the school boards that created it. The very definition of a consortium, therefore, is that it is no more and no less than the school boards it serves.

- All approved costs and expenses relating to the consortium are financed by the participating school boards and each participating school board is liable for all financial obligations for which the consortium is legally liable.

- Ownership of the consortium is vested with the constituent boards. Each school board appoints three members to the Governance Committee of the consortium, consisting of a Trustee from each school board, the Director or designate from each school board, and the Senior Business Official from each school board.

- The consortium manages the provision of transportation on behalf of the school boards; however it is these school boards that have the legal responsibility under the *Education Act* for the provision of these services. It would be a perverse result if the establishment of a consortium, which is controlled and even staffed by school boards, resulted in the removal of records from access under *MFIPPA*.

[71] The adjudicator also referred to *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario* (*TEDCO*),[19] where the Ontario Court of Appeal found that the City of Toronto Economic Development Corporation (TEDCO) was subject to the provisions of *MFIPPA* because TEDCO was deemed to be part of the City of Toronto. That case concerned the interpretation of section 2(3) of *MFIPPA*. The Court stated at paragraph 39 that:

> ...a formal and technical interpretation of s. 2(3) runs contrary to the purpose of [*MFIPPA*]. We are dealing with a corporation whose sole shareholder is the City of Toronto, whose sole purpose is to advance the economic development of the City, and whose board of directors - at the time of the proceedings before the adjudicator - was populated by persons directly appointed by City Council, including the Mayor of Toronto (or his/her designate), the Chair of the City's Economic Development and Parks Committee, two City Councillors, and the Commissioner of Economic Development, Culture and Tourism (or his/her designate). In light of what La Forest J. observed in the above-cited passage from *Dagg*, it seems to me that TEDCO is just another example of a complex bureaucratic structure of public administration. In my view, it is contrary to the purpose of [*MFIPPA*] and access to information legislation in general to permit the City to evade its statutory duty to provide its residents with access to its information simply by delegating its powers to a board of directors over which it holds ultimate authority.

[72] If Laurentian is suggesting that there is no place for a finding, in any circumstance, that an entity is part of a listed institution for the purposes of the *Act*, then I disagree. The reasoning in the above examples, with which I agree, shows that there are some cases where treating an entity as part of a listed institution is the correct approach.

[73] However, for the following reasons, I find that the federated universities at issue here are not part of Laurentian for the purposes of the *Act*. As a result, whether the

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[19] 2008 ONCA 366.

records of any one of the federated universities are subject to the *Act* must be determined on a case-by-case basis, applying the principles of custody and control.

Legislation, by-laws and federation agreements

The Laurentian Act

[74] The *Laurentian Act* grants Laurentian the power to offer degrees, except in Theology, and to offer instruction, except in religious knowledge. It expressly provides that its management and control are to be non-denominational and that no religious test is to be required of any student or employee (though the management and control are to be based on "Christian principles").

[75] Among Laurentian's powers is the power to admit church-related universities into federation as colleges of the Faculty of Arts and Science, which church-related universities have the right to give instruction in philosophy and religious knowledge and in such other subjects as may from time to time be approved by Laurentian. Laurentian is to accept such courses in partial fulfillment of the requirements for a Laurentian degree.

[76] The *Laurentian Act* further provides that its own Board of Governors has the power to appoint and dismiss its president and vice-presidents. It does not contain any provision allowing its Board to appoint or dismiss the presidents of the federated universities. That act further gives Laurentian the power, upon the recommendation of its president, to appoint and dismiss the heads and associate heads of its faculties, departments and colleges, but not those of federated universities. The same is true for Laurentian's appointment and dismissal of teaching staff and all other officers, servants, agents and employees.

[77] Members of the federated universities do sit on Laurentian's Senate, which is responsible for setting academic policy. Further, the degree-granting powers of a university that is federated with Laurentian (with the exception of those relating to the granting of theology degrees) are dormant so long as the federation continues. Finally, the governing body of each federated university has responsibility for, including discipline in respect of, the conduct of its students for matters arising or occurring in its building or on its grounds, while disciplinary action is vested in the Laurentian Court of Discipline[20] for all other matters.

The Huntington University Act

[78] Huntington explains that it was incorporated by private statute, *An Act to Incorporate Huntington University*.[21] On my review of this piece of legislation, I note that it provides that Huntington's president is appointed by Huntington's Board of

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[20] Which consists of Laurentian personnel as well as the president of each federated university.
[21] S.O. 1960, c. 143.1. The Act was amended in 1966 and 1971. I have the 1971 version before me.

Regents.

U Sudbury's General By-law of the Board of Regents

[79] U Sudbury provided a copy of its General By-law of the Board of Regents. According to that by-law, the president of U Sudbury is appointed by U Sudbury's Board of Regents.

Federation Agreements

[80] The federation agreements between each of the federated universities and Laurentian are nearly identical, though the agreement with Sudbury, as the only pre-existing member of the federation, contains additional provisions, as described below in my findings. The provisions are described below in my findings.

The parties' representations

[81] I have also taken into account the parties' extensive representations, which are set out above.

Findings

[82] As all the parties have noted, the federated universities are not listed in the schedule to Regulation 460. The question is whether they should nonetheless be subject to *FIPPA* on the basis they are a part of Laurentian for the purposes of *FIPPA*. I find that they are not part of Laurentian for the purposes of *FIPPA*.

[83] First, I easily distinguish the circumstances before me from those in the *TEDCO* decision and the school bus consortium orders. Unlike the circumstances in those decisions, where the purpose of the entity in question was to further the interests or carry out the mandate of an institution under *MFIPPA*, the evidence before me does not suggest that the federated universities were established by Laurentian for the purpose of fulfilling a Laurentian function. In fact, U Sudbury's existence predated that of Laurentian. Further, there is no evidence before me to suggest that Laurentian is liable for the financial obligations of the federated universities; the evidence is to the contrary, that each entity is responsible for its own finances. Finally, unlike the school bus consortium boards, I have no evidence before me to suggest that Laurentian controls the boards of the federated universities. Again, there is evidence to the contrary: U Sudbury explains that none of the members of Laurentian's Board or executive sit or are entitled to sit on U Sudbury's board of regents.

[84] The appellant's arguments fall into three main categories, which mirror the bases for the adjudicator's conclusion in Order PO-2775-R: the degree of integration between the federated universities and Laurentian, statutory interpretation, and funding, with her arguments on the latter two points overlapping. She urges me to find that the circumstances here are indistinguishable from those in Order PO-2775-R.

[85] I have considered the reasons of the adjudicator in Order PO-2775-R in support of his finding that Victoria is part of U of T for the purposes of the *Act*. In that case, the adjudicator relied heavily on what he saw as a high degree integration between the operations of Victoria and those of U of T. In my view, the level of integration here is less than that described in Order PO-2775-R.Therefore, assuming that Order PO-2775-R was rightly decided, I find the present situation distinguishable from that in Order PO-2775-R.

[86] As noted above, to make a finding that the federated universities are "part of" Laurentian for the purposes of the *Act* would be to find that all records of the federated university are subject to the *Act*. In my view, the level of integration in all the operations of Laurentian and each federated university must be very high in order to support such a result, and the evidence does not support the requisite level of integration here.

[87] I have carefully reviewed the parties' representations, the federation agreements and the other material before me. In my view, the universities, in an effort to distinguish this case from Order PO-2775-R, may have overstated their independence from one another. They have certainly downplayed the similarities between the instant case and some of the facts in Order PO-2775-R. For example, the universities before me stress that they own their own buildings and other assets, and have their own employees. However, this was also the case in the circumstances before the adjudicator in Order PO-2775-R. The universities also argue that the federated universities generate their own budget and revenue, and manage their own finances. Again, the facts in Order PO-2775-R were similar in that respect.

[88] It is clear to me that the federated universities have a close relationship with Laurentian on many levels, including academically and administratively. However, overall, I am not satisfied that the level of integration between the universities is sufficient to support a finding that the federated universities are part of Laurentian for the purposes of the *Act*. In my view, the contractual arrangements between Laurentian and the federated universities establishing the structure, administration and implementation of the federation are evidence of consistent and comprehensive measures designed to maintain a substantial level of separation and independence from Laurentian. Aside from the student registration and degree-conferring arrangements described above, the federation agreement between Laurentian and Sudbury provides as follows:

i. Laurentian assumed and continued all faculties, departments, chairs, and other academic structures within Sudbury, except those relating to its philosophy and theology functions.

ii. Laurentian assumed or entered into new contacts of employment with all Sudbury teaching staff, except in the departments of philosophy and theology.

iii. Sudbury sold to Laurentian all its library holdings, except in the areas of philosophy and theology, as well as all of Sudbury's laboratory equipment and supplies.

iv. Laurentian assumed Sudbury's leasehold interests in certain buildings.

v. Laurentian reserved land on its campus which Sudbury could acquire for the construction of buildings for its own purposes in accordance with arrangements to be agreed.

vi. Sudbury retained disciplinary jurisdiction over its students in relation to conduct on its own facilities, but not otherwise.

vii. Sudbury retained its own gifts, scholarships, endowments, bequests, and grants.

viii. Student enrolment fees for federated university students would be apportioned between Laurentian and the federated universities on an agreed upon basis.

[89] Except for the first two items above, which appear in the agreement with Sudbury as the only pre-existing member of the federation, the agreements with Huntington and Thorneloe follow the same pattern. In my view, these agreements reflect an intention to create a clear line of demarcation between the administration of the theology and philosophy programs and associated facilities of the federated universities on the one hand, and the purely secular programs and associated facilities of Laurentian on the other hand.

[90] This contrasts with Order PO-2775-R where the general undergraduate programs, together with academic staff, infrastructure and associated facilities, were retained by Victoria University but were then fully integrated within the University of Toronto under a single faculty of arts and science.[22] That arrangement resulted in a corresponding flow-through of public funding commensurate with the secular undergraduate components of Victoria's academic programs, but not its theology programs.[23] While it is acknowledged that there is some level of flow through of public funds from Laurentian to the federated universities, there is no evidence before me of the level of funding or whether such funding would be at a level comparable with Victoria University given the evidence before me of the limited theology and other programs offered by the federated universities.

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[22] Order PO-2775-R, paras. 18, 58-59, 62, 66.

[23] Order PO-2775-R. See the Ministry's submissions at para. 17: "... unlike universities that are currently listed in Ontario Regulation 460 made under [the Act], Victoria and other universities federated with the University of Toronto do not receive direct operating funding from the Ontario government. These organizations do receive grants from U of T, which may represent a flow-through of operating funds provided to the main university by the government of Ontario, to support undergraduate, but not divinity or theology programs.
And see paras. 25, 39, 47, 55-56, 60-62, 64.

[91] In short, one of the principal reasons for the finding in Order PO-2775-R that Victoria University is part of the University of Toronto – namely, the integration of Victoria's undergraduate programs and operations within the faculty of arts and science and the corresponding flow-through of funding for those programs - does not appear to be present, at least to the same extent, in the arrangements between Laurentian and its federated universities. In my view, this is a qualitative distinction which, together with the other indicia of independence described above, supports my finding that the federated universities are not part of Laurentian for the purposes of the *Act*.

[92] As an aside, I have given no weight to the universities' submission to the effect that, unlike the situation in Order PO-2775-R the federated universities have not undertaken to respond to *FIPPA* requests collaboratively. In my view, this fact is of limited or no relevance since a non-institution cannot attorn (i,e agree to be subject to) to the *Act*'s jurisdiction simply by behaving as though the *Act* applies to it. In my view, therefore, this distinction between the facts before me and those is Order PO-2775-R is not helpful to my analysis.

[93] The appellant refers to an email she received from the Ministry of Government Services. In the email, she was told that staff in the Information, Privacy and Archives division were of the view that federated universities are not listed as separate institutions in the directory because they are considered to be under the umbrella of "their main institution" that is already listed (here, Laurentian).

[94] The appellant relies on this statement to support her argument that the federated universities are implicitly covered by the *Act*, even though they are not listed in the relevant schedule. In *Sullivan on the Construction of Statutes*, 6th Ed., the author discusses external aids to the interpretation of statutes. On the subject of administrative interpretation, she states:

> It is well-established that administrative interpretation may be relied on by courts to assist in determining the meaning or effect of legislation. However, the opinion of administrative interpreters is not binding on the courts. Except in so far as they are empowered to do so by statute, administrators can neither make law (that is the job of the legislature) nor determine its true meaning (that is the job of the courts). All they can do is offer an opinion that is more or less persuasive.[24]

[95] The appellant has submitted the opinion of an unnamed individual in the Information, Privacy and Archives division of the Ministry in support of her interpretation of Regulation 460 to include the federated universities at issue here. I have not been made aware of any written interpretation bulletin or other document setting out a formal opinion on the correct interpretation of the regulation. In my view, the second hand evidence of an unnamed person in the Information, Privacy and

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[24] *Sullivan on the Construction of Statutes* at §23.118.

Archives division is unreliable evidence of the legislature's intent, and I do not give it any weight.

[96] The appellant also refers to the fact that the federated universities receive public funding via flow-through funding from Laurentian. This is acknowledged by the federated universities in these appeals, but the legislature has not set up the *Act* in such a way that all entities receiving public funding are covered by the *Act*. The fact that the federated universities receive public funding does not, in my view, provide a standalone reason, absent the requisite level of integration between Laurentian and the federated universities, why the latter should be covered by the *Act* where they have not been listed.

[97] I find, therefore, that the federated universities are not part of Laurentian for the purposes of the *Act*.

[98] Since I have found that the federated universities are not "part of" Laurentian for the purposes of the application of the *Act*, I must now decide whether the responsive records are in Laurentian's custody or control.

B. Are the records at issue in Laurentian's custody or control?

[99] At the outset, I note that there are various records that would be responsive to the appellant's request. The federated universities' presidents' employment contracts themselves are the most obvious responsive records. However, institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, any ambiguity in the request should be resolved in the requester's favour.[25] To be considered responsive to the request, records must "reasonably relate" to the request.[26]

[100] In my view, and as the universities appear to acknowledge in this case, the salary and benefit information that Laurentian holds as a result of its role as administrator of certain benefit plans is also information that reasonably relates to the access requests.

[101] I will consider, therefore, whether Laurentian has custody or control of 1) the employment contracts themselves and b) the responsive information in the possession of Laurentian as a result of its administration of the benefit plans.

Factors relevant to determining "custody or control"

[102] As I mentioned above, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as

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[25] Orders P-134 and P-880.
[26] Orders P-880 and PO-2661.

follows.[27] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution?[28]
- What use did the creator intend to make of the record?[29]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[30]
- Is the activity in question a "core", "central" or "basic" function of the institution?[31]
- Does the content of the record relate to the institution's mandate and functions?[32]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?[33]
- If the institution does have possession of the record, is it more than "bare possession"?[34]
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?[35]
- Does the institution have a right to possession of the record?[36]
- Does the institution have the authority to regulate the record's content, use and disposal?[37]

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[27] Orders 120, MO-1251, PO-2306 and PO-2683.
[28] Order 120.
[29] Orders 120 and P-239.
[30] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.
[31] Order P-912.
[32] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.) and Orders 120 and P-239.
[33] Orders 120 and P-239.
[34] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[35] Orders 120 and P-239.
[36] Orders 120 and P-239.
[37] Orders 120 and P-239.

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?[38]

- To what extent has the institution relied upon the record?[39]

- How closely is the record integrated with other records held by the institution?[40]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?[41]

[103] The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?[42]

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record?[43]

- Who paid for the creation of the record?[44]

- What are the circumstances surrounding the creation, use and retention of the record? [45]

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record?[46]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution?[47] If so, what were the precise undertakings of

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[38] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[39] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.
[40] Orders 120 and P-239.
[41] Order MO-1251.
[42] PO-2683.
[43] Order M-315.
[44] Order M-506.
[45] PO-2386.
[46] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).
[47] Orders M-165 and MO-2586.

confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution?[48]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?[49]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?[50]

[104] In determining whether records are in the "custody or control" of an institution, the above factors must be considered contextually in light of the purpose of the legislation.[51]

[105] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*,[52] the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?

2. Could the government institution reasonably expect to obtain a copy of the document upon request?

Representations of Laurentian, Huntington, U Sudbury and Thorneloe

Laurentian

[106] Laurentian submits that it does not have custody or control of the responsive employment contracts. It takes no position on whether it has custody or control of the salary and benefits-related information.

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[48] *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and *David v Ontario (Information and Privacy Commissioner) et al* (2006), 217 O.A.C. 112 (Div. Ct.).
[49] Order MO-1251.
[50] Order MO-1251.
[51] *City of Ottawa v. Ontario*, cited above.
[52] 2011 SCC 25, [2011] 2 SCR 306.

[107] Laurentian submits that the custody or control analysis must be informed by the context in which separate entities relate. It states:

> This is the principle from the Court of Appeal for Ontario's recent *Children's Lawyer* decision, in which the Court held that the IPC erred in finding that the Ministry of the Attorney General was in custody or control of certain Children's Lawyer records. The Court said:
>
> > By starting from the assumption that the Children's Lawyer is a branch of MAG, the Adjudicator did not take into account the context in which the Children's Lawyer must operate, separate and distinct from MAG. Instead, she used the concept of a "branch" to cloak MAG with control over the Children's Lawyer.

[108] Laurentian submits that the principle from *Children's Lawyer* is important because it highlights that a custody or control finding can threaten independence that exists for legitimate and important purposes. In these appeals, Laurentian submits, independence is essential to Laurentian because it seeks to avoid the risk of any employment-related liability to the employees of the federated universities. A finding that Laurentian controls the federated universities' employment contracts would disrupt the desired *status quo* between parties.

[109] Laurentian addresses the factors listed above and notes that: the contracts were not created by an officer or employee of Laurentian and in fact, Laurentian has never seen them; it has no right to regulate their use; it not does not possess them, and it has no express or implied right to demand the records; and the records do not relate to Laurentian's mandate and functions. To summarize, Laurentian states that it has dealings with the federated universities that are contemplated by the federation agreements, but none that relate to or invite custody or control of the records at issue in these appeals.

[110] As noted above, Laurentian takes no position on whether the information it possesses as a result of the benefits plans it administers is in its custody. In response to my inquiries, it provided the following additional information:

- Laurentian is the administrator of the Retirement Plan of Laurentian University of Sudbury and its Federated and Affiliated Universities (the Pension Plan). The federated universities have elected to participate in the Pension Plan with Laurentian' s consent, and each federated university has a seat on the Pension Committee that oversees the operation of the Pension. The federated universities submit contributions (employer and employee) directly to the Pension Plan trustee. Laurentian receives a list of monthly contributions from the federated universities, knows the salary and years of service of all participating employees and provides contribution data to the Pension Plan trustee.

- Laurentian holds two policies in which certain employees of the federated universities may participate: (a) an extended health and dental benefits policy; and (b) an insurance and accidental death and dismemberment policy with a different insurer. The federated universities make contributions directly to the insurers and Laurentian does not receive back information about any federated university employees or their dependents.

- Laurentian also maintains a retiree health benefit program in which retirees of the federated universities may participate. The federated universities make contributions directly to Laurentian University and Laurentian knows the salary and contributions of every participating employee.

[111] Laurentian provided me with a copy of the Pension Plan.

Huntington

[112] Huntington, like Laurentian, submits that Laurentian does not have custody or control of the employment contract of Huntington's president. Its executive employee contracts and related employment documents were created by Huntington and are not shared with Laurentian. Laurentian does not have, and has no power to obtain, the requested documents.

[113] Huntington reiterates that each university hires its own faculties and staff and each university pays its own salaries. Huntington's president receives no remuneration from Laurentian. Laurentian has no right to enter on Huntington's premises to seize the employment contracts and would not be able to comply with an order that it do so.

[114] Huntington notes that the only exception to the segregation of information between Laurentian and Huntington is in respect of employee information that Laurentian may be privy to as a result of the federated universities' employees participating in the same benefits plans. For example, certain Laurentian staff are privy to the pensionable earnings of Huntington staff in order to verify contribution levels and to determine entitlements, but they do not have any of the relevant supporting documentation sought by the applicant.

[115] Huntington submits that the pension information is not stored in Laurentian systems and is kept separate from Laurentian data. Further, it submits that to whatever extent Laurentian is in possession of any of requested documents as a result of participation in shared benefit plans, such possession is bare possession only, as those documents were not created by Laurentian employees in respect of matters within its mandate, they are kept in separate files and were never integrated with Laurentian files, and they are accordingly are not within Laurentian's custody or control.

U Sudbury

[116] U Sudbury says that for the purposes of its submissions, it considers the records

to include both the president's employment agreement, and other records containing the terms and conditions of employment. U Sudbury acknowledges that Laurentian has possession of some information contained in the records related to Laurentian's role as the pension plan and group benefits administrator for U Sudbury. However, it argues that this does not in itself provide Laurentian with custody or control of those records under the *Act*.

[117] With respect to the factors for determining custody or control, U Sudbury argues that the records were created by an agent of U Sudbury, not Laurentian, and were created for U Sudbury's purposes – to govern the employment of its president. Laurentian has no statutory power or duty to carry out this function as the human resources functions of U Sudbury are not a mandate or function of Laurentian. Under the Federation Agreement, U Sudbury maintains control over its human resources and other administrative operations.

[118] U Sudbury says that Laurentian does not have physical possession of U Sudbury's president's employment contract. Furthermore, Laurentian does not have, nor has it ever had, any access to the president's employment contract and therefore cannot have relied upon it. Also, Laurentian has only bare possession of the salary and benefits information of U Sudbury's president as a result of the benefits administration services Laurentian provides to U Sudbury. Further, Laurentian has no right to possession of the records as a whole. Its right to possession of part of the records is limited to its role as administrator of the Laurentian Pension Plan and Group Benefits Plan, pursuant to the contractual arrangement between U Sudbury and Laurentian. In this regard, Laurentian is only entitled to obtain, possess or use any information in the records for purposes relating to the administration of the Laurentian Pension Plan and Group Benefits Plan.

[119] U Sudbury also points out that the benefits offered under the U Sudbury policy are determined solely by U Sudbury. U Sudbury argues that Laurentian's reliance upon the records is limited to the administration of the Laurentian Pension Plan and Group Benefits Plan for U Sudbury's president. It says that the information is in a Benefits Chart summarizing the benefits of the various group insurance policies under the Laurentian Group Benefits Plan, which is created and provided by the insurance carrier to each participating entity, and that the chart applicable to U Sudbury can easily be separated from the charts applicable to Laurentian or other participating entities.

[120] U Sudbury also refers to the two-part test in *National Defence* for determining whether or not a record that is not in the physical possession of an institution is within its custody or control. First, U Sudbury says that the records do not in any way relate to Laurentian's operations or to any matters relating to its mandate. They relate to the independent operations of U Sudbury and to the administration of its own human resources, separate and apart from the human resources of Laurentian.

[121] Second, Laurentian could not expect to obtain a copy of the employment

contract of the chief executive of an independent and separate entity upon request. Sudbury's president is not an employee of Laurentian. In the exercise of his duties and responsibilities, the president reports solely to U Sudbury's Board of Regents. Laurentian did not participate in the hiring of U Sudbury's president nor does it have a right to do so. Laurentian did not participate in determining the terms and conditions of employment of the president and had no right to do so. Although U Sudbury does receive some funding from Laurentian, Laurentian has no right to dictate how that funding is allocated, including what portion of the funding should go to the president's salary.

[122] U Sudbury says that the only right Laurentian has to part of the records is a contractual right limited to the terms of the arrangement between U Sudbury and Laurentian as the administrator of the Laurentian Pension Plan and the Laurentian Group Benefits Plan in which U Sudbury has chosen to participate. Laurentian has no right, statutory or otherwise, to require that U Sudbury provide more than confirmation of the president's salary pursuant to the terms of the Laurentian Pension Plan.

[123] Furthermore, U Sudbury relies on *City of Ottawa v. Ontario* and argues that in determining questions of custody and control, the purposes of *FIPPA* have to be considered.[53] These purposes are:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.[54]

[124] U Sudbury says it is clear from not only the language of *FIPPA* itself, but from interpretation of the legislative intent that the *Act* is meant to entitle individuals to access to information in order to facilitate the democratic process and allow for scrutiny of government actions in respect of designated institutions. It also relies on Order P-239 for the proposition that custody requires some right to deal with the records and some responsibility for their care and protection.

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[53] *City of Ottawa v. Ontario*, cited above.
[54] *FIPPA*, s. 1.

[125] U Sudbury, like Laurentian, also relies on *Children's Lawyer* and submits that, in deciding the custody and control question, it is necessary to consider the context in which U Sudbury operates, as separate and distinct from Laurentian.

Thorneloe

[126] Thorneloe says that although it is a federated partner located on the Laurentian campus, both universities are substantially separate such that the employment contract sought by the appellant is not within Laurentian's custody or control, for reasons similar to those already set out above.

Appellant's representations

[127] While the appellant focused her representations on the question of whether Huntington, U Sudbury and Thorneloe are part of Laurentian, and not on the custody or control issue, I have taken her representations into account in coming to my conclusions below.

Analysis and findings

[128] I will begin with the employment contracts themselves, which are not in Laurentian's possession, and then turn to the salary and benefit information that is in Laurentian's possession.

The employment contracts of the federated universities' presidents

[129] As a starting point, I have found above that the federated universities are separate from Laurentian for the purposes of the *Act*. Further, it appears to be common ground that Laurentian does not have physical possession of the employment contracts of the federated universities' presidents. Because the federated universities are not part of Laurentian, and Laurentian does not have possession of these records, the issue is whether it has control of them. If it does, these records are subject to the *Act*.

[130] I conclude, however, for the following reasons, that Laurentian does not have control of the employment contracts.

[131] It is undisputed that each of the federated universities hires its own faculty and staff, and pays their salaries. The evidence before me is that each president is appointed by the federated university's board of governors/regents, and the employment contracts were entered into between the presidents and their respective boards of governors/regents. The records were created by an agent of each federated university, not Laurentian, and were created to govern the employment of their respective presidents.

[132] I agree that Laurentian has no statutory power or duty to carry out the human resource function of the federated universities and in particular with respect to their

presidents. The evidence is that the contracts are stored and used by the federated universities.

[133] It is also undisputed that Laurentian has not seen the contracts. Further, neither the *Laurentian Act* nor the federation agreements includes any provisions that expressly or by implication give Laurentian the right to possess or otherwise control the contracts. In fact, and as noted above, the *Laurentian Act* expressly states that Laurentian's Board of Governors has no power to hire or fire employees of the federated universities. I have not been pointed to any other agreements between Laurentian and the federated universities that would allow Laurentian to require the federated universities to provide it with these contracts.

[134] I have specifically reviewed the Pension Plan agreement Laurentian provided to me, by virtue of which Laurentian administers the pension plan for its employees as well as employees of the federated universities. The Plan contains the following provision:

> As a condition of participating in the Plan, it shall be the responsibility of each Employer other than the Principal Employer[55] to supply to the Principal Employer all such reports, records and information as are required to permit the Principal Employer to perform its duties and obligations under the terms of the Plan.

[135] While the federated universities must provide Laurentian with salary information of their staff in order for Laurentian to administer the plan, my review of the Pension Plan does not lead me to conclude that Laurentian could require the federated universities to provide it with the employment contracts themselves, or that the federated universities would voluntarily do so. Specifically, while the Pension Plan requires that Laurentian be provided with information to permit it to perform its duties under the Plan, I am not satisfied that this extends to the employment contracts themselves, which would likely include information over and above pensionable earnings, such as information relating to bonuses. I note that the Pension Plan itself states that pensionable earnings do not include bonuses.

[136] In determining whether records are in the "custody or control" of an institution, I am to consider these factors contextually in light of the purpose of the legislation.[56] I acknowledge that one of the purposes of the *Act* is to promote accountability for government expenditures, and that the federated universities are funded in part through public funds. I have also considered that generally, a broad and liberal

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[55] The Pension Plan defines the Principal Employer as Laurentian and the Employers as including the federated universities.

[56] *City of Ottawa v. Ontario*, cited above.

approach to the custody or control question is appropriate.[57] In my view, however, this is not enough to bring the employment contracts in question under the control of Laurentian, in the face of the statutory context[58] and evidence in the federation agreements that the parties in question intended to keep their employment obligations separate.

[137] I conclude, therefore, that the employment contracts at issue are not in Laurentian's custody or control. I also reach the same conclusion applying the two-part test in *National Defence*.[59] As mentioned above, the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?

2. Could the government institution reasonably expect to obtain a copy of the document upon request?

[138] I find that the employment of the federated universities' presidents is not a Laurentian matter. The reasons are set out above but in short, the employment of the presidents of the federated university is not a Laurentian matter, as is clear from the legislation, the federation agreements and the parties' representations. Moreover, and again for the reasons stated above, I find that Laurentian could not reasonably expect to obtain a copy of the contracts upon request.

The salary and benefit information held by Laurentian

[139] I reach a different conclusion in respect of the salary and benefit information that relates to the presidents of the federated universities and which is in Laurentian's possession. For the following reasons, I find that this information is in Laurentian's custody under section 10(1) of the *Act*.

[140] I begin by agreeing that simple possession is not enough to establish custody. There must be some right on the part of the institution to deal with the records, and some responsibility for their care and protection.[60] I also agree that in deciding the issue of custody it is important to consider the *Act*'s aim of promoting accountability in respect of government actions and expenditures of public funds.

[141] U Sudbury and Huntington argue that Laurentian has only bare possession of the benefit-related information they provide to Laurentian, while Laurentian takes no

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[57] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.); and Order MO-1251.

[58] i.e, *The Laurentian Act, The Huntington University Act, 1971*. See also U Sudbury's General By-Law of the Board of Regents.

[59] 2011 SCC 25, [2011] 2 SCR 306.

[60] Order P-239.

position on the issue.

[142] The evidence before me is that Laurentian is in possession of salary and benefit information of the presidents in order to administer the Pension Plan and other benefit plans.

[143] The Pension Plan document states:

> The Principal Employer[61] shall keep records for each Member of the Plan showing the amount and date of all contributions made by the Member to the Member's Defined Benefit Account and all other records required to be maintained to perform its duties and obligations under the terms of the Plan...

[144] I am satisfied that Laurentian has some right to deal with this salary and benefit information, and some responsibility for its care and protection. Indeed, it was argued before me that Laurentian is subject to a duty of confidentiality in respect of this information. In my view, Laurentian's responsibilities in respect of this information do not support a finding that its possession of the information amounts to bare possession only.

[145] The circumstances here are distinguishable from those in *City of Ottawa*, relied on by the federated universities. In *City of Ottawa*, the record at issue was a personal email sent by a city employee from his work email account.

[146] I acknowledge that in *City of Ottawa*, the Divisional Court found that the mere possibility that the city had the authority, pursuant to its IT policy, to monitor the employee's email account for misuse, was not sufficient to bring the employee's personal emails at issue within the city's custody under the *Act*. The federated universities appear to argue that in a similar vein, Laurentian's limited role in holding the salary information for benefit administration purposes is not sufficient to bring that information into Laurentian's custody for the purposes of the *Act*.

[147] However, in this case, and unlike the *City of Ottawa* situation, Laurentian has the responsibility to protect the very information at issue – that is, the substance of the information, not just the server or filing cabinet where the information happens to be held.

[148] I have also considered other factors related to custody or control. Laurentian has a duty pursuant to the Pension Plan to handle the information in its possession resulting from its role as administrator. While administering benefit plans for employees other than its own may not be a "core", "central" or "basic" function of Laurentian, it is a function that Laurentian has undertaken pursuant to agreement with the federated universities.

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[61] i.e., Laurentian.

[149] The federated universities argue that there are limits on the use to which Laurentian may put the records, due to the confidentiality of the salary information. While this may be, in my view this fact does not detract from the finding of custody, though it may support one or more exemption claims.

[150] According to the evidence of U Sudbury, the salary and benefit information of the federated universities' presidents is found in a chart that contains both the information relating to the federated universities' employees and employees of Laurentian itself. I note that in Order PO-1725, the IPC found that the electronic agenda of an employee in the Premier's office was in the control of the Premier's office, notwithstanding that it contained both personal and professional entries.

[151] However, this is not a critical fact since in my view, and for the reasons above, Laurentian has custody of the federated universities' presidents' salary information even where it may be found in a document separate from the information relating to Laurentian's own employees. Laurentian has assumed the responsibility for administering the benefits plan and the information, therefore, relates to a Laurentian matter.

[152] I do not agree that the fact that Laurentian is acting as a benefits administrator somehow means that these records are in its bare possession only. Institutions under the *Act* perform many functions and routinely hold the information of other parties.

[153] On balance, I am satisfied that Laurentian has custody of the salary and benefit information in its possession as a result of its administration of the benefit plans. In coming to this conclusion, I have considered the above factors and have also considered whether a finding of custody on Laurentian's part is consistent with the *Act*'s purpose of enabling citizens to scrutinize government activity so as to participate more fully in democracy. As I have noted, the records, unlike those at issue in *City of Ottawa*, are related to the activities of Laurentian, as opposed to the personal activities of an employee unrelated to the institution's mandate. Moreover, the records reveal the salaries of senior officials at the federated universities – the presidents – who are paid, in part, from public funds.

Exemption claims

[154] In the alternative to its position on custody and control, Huntington argues that the records contain information that is exempt from disclosure under the mandatory exemptions in sections 14 (personal privacy) and 17 (third party information) of the *Act*. The parties were not asked to make representations on the application of any exemptions to the records and I make no finding about the application of any exemptions to the salary and benefit information in Laurentian's possession. Instead, I will order Laurentian to make an access decision with respect to the records in its possession containing the salary and benefit information of the federated universities' presidents. I note that Laurentian is obligated under section 21(8) to notify any affected

parties if its decision is to disclose the information.

ORDER:

1. I uphold Laurentian's decision that the employment contracts of the presidents of the federated universities are not in its custody or control.

2. I order Laurentian to issue an access decision for the salary and benefit information in its possession relating to the presidents of the federated universities for the time period stated in the appellant's request. For the purposes of the procedural requirements of the access decision, the date of this order should be treated as the date of the request.

Original signed by: September 16, 2020

Gillian Shaw
Senior Adjudicator

Tab 8

OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

2024 CanLII 16508 (NL IPC)

A-2024-006

February 8, 2024

Memorial University of Newfoundland

Summary: The Complainant submitted four access to information requests to Memorial University of Newfoundland related to expenditures incurred by three of the University's separately incorporated entities. Memorial did not perform a search for the records requested by the Complainant and instead responded claiming it does not have custody or control of the records as they relate to expenditures by the separately incorporated entities. The Commissioner noted that Memorial should have performed a search for responsive records, as without such a search a claim of lack of custody or control cannot be substantiated. Therefore, Memorial did not meet its duty to assist the Complainant pursuant to section 13(1) of *ATIPPA, 2015.* An analysis of Memorial's custody or control showed that on a balance of probabilities Memorial has custody or control of records containing information relating to the Complainant's access request.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, sections 2, 3(1) 5(1) 8(1), and 13(1).

Auditor General Act, 2021 SNL c. A-22.01, section 19.

Memorial University Act RSNL 1990 c. M-7 sections 3(1), 22(2), 34(1), and 38.

Authorities Relied On: NL OIPC Reports A-2023-020, A-2023-029 and A-2023-052; Ontario IPC Order MO-2750; Canada (Information Commissioner) v. Canada (Minister of Defence) [2011] 2 S.C.R 306; PEI Order No. FI-15-002; *Memorial University Independent Auditor's Report*.

File #'s 0020-062-23-125; 0020-062-23-126; 0020-062-23-127 and 0020-062-23-128

BACKGROUND

[1] The Complainant submitted the following four access to information requests to Memorial University of Newfoundland (Memorial):

- *bonuses/special payments paid to C-Core executives and bonuses paid to C-Core management employees from January 1, 2019 to October 23, 2023 (OIPC File 0020-062-23-125);*
- *all bonuses and special payments paid to Genesis executives and all incentives paid to Genesis management employees from January 1, 2019 to October 23, 2023 (OIPC File 0020-062-23-126);*
- *all vehicle allowances paid to Genesis executive and management staff from January 1, 2019 to present (OIPC File 0020-062-23-126);*
- *all vehicle allowances paid to Centre for Fisheries Innovation executive and management staff from January 1, 2019 to November 2, 2023.*

[2] Memorial's response was that C-Core, the Canadian Centre for Fisheries Innovation (CCFI), and Genesis Group Inc. are not public bodies pursuant to *ATIPPA, 2015,* and therefore Memorial did not have custody or control over records belonging to these entities.

[3] The Complainant disagreed with this assessment, noting that C-Core, CCFI, and Genesis are located within Memorial and have substantial financial connections with the university

[4] As informal resolution was unsuccessful, the Complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015.*

PUBLIC BODY'S POSITION

[5] It is the position of Memorial that C-Core, Genesis, and CCFI are separately incorporated entities (SIEs) of Memorial and function completely separate and apart from the university. Any relationship between the SIEs and Memorial are negotiated between the parties. As SIEs are separate from Memorial, they are not public bodies as defined in section 2 of *ATIPPA, 2015* and are not subject to the Act. Memorial asserts that determining that the SIEs are either part of Memorial or their own separate public body would be an improper piercing of the corporate veils of the SIEs.

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[6] With respect to a lack of custody or control over the records sought by the Complainant, Memorial provided no evidence to support this claim. Memorial did acknowledge that it did not perform a search for the records requested by the Complainant. The lack of search also means that the three SIEs were not contacted as third parties with an interest in the records, pursuant to section 19 of *ATIPPA, 2019*. Such notice is only provided when records of interest to a third party exist and the public body intends to release them to the applicant.

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COMPLAINANT'S POSITION

[7] The Complainant asserts that Memorial exerts a significant amount of control over the SIEs. The Complainant expressed no position as to whether this control means that the SIEs are an indivisible part of Memorial or their own public bodies, but the control is sufficient enough that it is likely that the university has custody or control over the requested records.

DECISION

[8] The sections of *ATIPPA, 2015* relevant to this matter are as follows:

> *2. In this Act*
>
> *(h) "educational body" means*
>
> *(i) Memorial University of Newfoundland*
>
> *. . .*
>
> *(p) "local public body" means*
>
> *(i) An education body,*
>
> *. . .*
>
> *(x) "public body" means*
>
> *(iii) a corporation, commission, or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an At, the Lieutenant-Governor in council or a minister,*
>
> *(iv) a local public body*
>
> *. . .*

3.(1) The purpose of this Act is to facilitate democracy through

(a) ensuring that citizens have the information required to participate meaningfully in the democratic process,

(b) increasing transparency in government and public bodies so that elected officials, officers, and employees of public bodies remain accountable;

. . .

5.(1) This Act applies to all records in the custody or under the control of a public body...

. . .

8.(1) A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.

. . .

13.(1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

The sections of the *Auditor General Act, 2021* relevant to this matter are as follows:

19.(1) Notwithstanding any other Act or regulation, the auditor general is the auditor of the financial statements and accounts of all agencies of the Crown and Crown controlled corporations and shall make those examinations and inquiries that the auditor general considers necessary to enable the auditor general to report as required by this Act.

. . .

19.(3) Where an agent has been appointed to conduct an audit of the financial statements of an agency of the Crown or of a Crown controlled corporation, the agent shall immediately

. . .

(b) make available to the auditor general, when requested by the auditor general, all working papers, reports, schedules and other documents in respect of the audit,

The section of the *Memorial University Act* relevant to this matter is as follows:

3.(1) The Memorial University of Newfoundland, consisting of a Chancellor, Convocation, Board of Regents, Senate, faculty councils and the faculties is continued as a corporation.

. . .

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22.(2) The Board shall consist of

(c) 17 members appointed by the Lieutenant-Governor in Council of whom 3 shall be the same person who are appointed under subsection 10(2.1) of the College Act, 1996;

. . .

34.(1) The board shall have the following power

. . .

(s) to do and perform all other matters and things which may seem appropriate and useful for the well ordering and advancement of the university, the doing of things not repugnant to this Act or to a law in force in the province.

. . .

38.(1) The accounts of the board shall be audited at least once a year by the auditor general, or by some person appointed by the Lieutenant-Governor in Council.

38.(2) Where an auditor other than the auditor general audits the accounts of the board, the auditor shall comply with subsection 19(3) of the Auditor General Act, 2021.

Duty to Assist

[9] The duty to assist an applicant with an access to information request is one of the foundations of *ATIPPA, 2015.* The *Act* cannot work as it is intended if the public body was not required to actively help an applicant receive the information being requested. The duty-to-assist has several different components that encompass communication with an applicant to the manner in which a search for records is conducted.

[10] In this case, Memorial acknowledged that it did not perform a search for the records that the Complainant was seeking. Not conducting a search does not mean that the public body has not met its duty to assist. In Report A-2023-052, this Office determined that the House of Assembly had still met its duty to assist even though the House had not conducted a search for the responsive records sought by the Complainant. In that instance, the Complainant fundamentally misunderstood the purpose of the House, which had no connection with the documents the Complainant requested.

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[11] The same circumstances are not present in this case. There are significant connections between Memorial and the SIEs that are the subject of this Complaint that will be addressed later in this Report. Memorial's response to this access request ignores all of these connections. Further, Memorial's position is based on an argument that because the SIEs are not public bodies, that Memorial by default will not have custody or control over any of the records requested by the Complainant. This is not how *ATIPPA, 2015* functions. Memorial has a duty to conduct a search for records unless it can provide strong evidence that it is highly unlikely that such records would be in Memorial's custody or control and therefore conducting a search would be a waste of resources. That evidence was not provided by Memorial. This Office routinely addresses complaints that involve documents created by third parties that are not public bodies. Under certain circumstances such documents fall clearly within the jurisdiction of *ATIPPA, 2015.* Memorial's argument that documents that may belong to a third party are by default not under the university's custody or control is without basis.

[12] Memorial did not meet its duty to assist the Complainant. Memorial should have conducted a reasonable search for the records that were requested to determine what it had custody or control over. Once the search was conducted, there could have been a determination on whether third parties needed to be notified.

Are the SIEs Independent Public Bodies or Part of Memorial

[13] This Complaint raises the important question of how *ATIPPA, 2015* applies to Memorial's SIEs. Given the complex relationship between Memorial and its SIEs, this Report does provide an analysis of this question. With that said, the recommendations made in this Report are not dependent upon whether the SIEs are public bodies, part of Memorial, or third parties. The recommendations are based on an assessment of Memorial's relationship to the records requested by the Complainant.

[14] Memorial is a public body under *ATIPPA, 2015* in two ways. First, Memorial is defined in section 2 of the Act as an "educational body," which in turn is defined as a "local public body," which is then listed as a public body pursuant to section 2(x)(iv) of the *Act*. Memorial is also a public body pursuant to section 2(x)(iii), as it is a corporation with a majority of its board appointed by the Lieutenant-Governor in Council according to the *Memorial University Act.*

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[15] Memorial has 5 SIEs:

- C-Core
- Genesis Group Inc.
- The Canadian Centre of Fisheries Innovation
- Memorial University Recreation Complex
- Campus Childcare Inc.

There is nothing in the *Memorial University Act* that specifically grants Memorial the ability to establish an SIE, though it appears that the ability to do so is now incorporated into board discretionary authority granted in section 34(1)(s) of that *Act*. All five SIEs operate on Memorial's campuses and the university owns the buildings in which they operate.

[16] Memorial's Board of Regents appoints the boards of directors for C-Core, Genesis, and CCFI. In the bylaws of the Board of Regents, the term "University" is defined as "Memorial University of Newfoundland and its affiliated colleges, institutes and separately incorporated entities." In the "responsibilities" section of the bylaws, it states that the Board of Regents "Participates in setting the long term vision, mission and strategic direction of the University" and "provides oversight for and monitors progress towards the achievement of the University's goals." The bylaws clearly incorporate the SIEs into Memorial's overall plans and makes no distinction between them and its responsibility for the rest of the university. Financially, Memorial incorporates the assets and liabilities of the SIEs into its statutorily required financial statements. Annually, Memorial releases a consolidated financial statement, which states under in the notes under "Significant Financial Policies" that Memorial controls its SIEs.

[17] From our assessment, it does not appear that Memorial's SIEs are stand-alone public bodies. What remains unclear is whether the SIEs are in reality simply part of Memorial and therefore subject to *ATIPPA, 2015.*

[18] Memorial rejects this position. It argues that SIEs are separate from Memorial because they are incorporated as individual organizations. Furthermore, Memorial states that because

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C-Core, Genesis, and CCFI are separately incorporated and are one-step removed from the University, the SIEs are neither local public bodies nor corporations that have boards that are majority appointed by the Minister, the Lieutenant-Governor, or an *Act*. Moreover, any finding that the SIEs are indeed part of Memorial would be an improper piercing of the corporate veil under which the SIEs currently operate.[1]

[19] Two of the stated purposes of *ATIPPA, 2015* are to allow for meaningful citizen participation in the democratic process and to increase transparency in government and public bodies. To facilitate this purpose, the definition of a public body is broad so as to encompass essentially all organizations that are primarily funded by the public purse. If a public body is not covered by the *Act* that is made clear in legislation.

[20] Public bodies, as defined by section 2(x) of the *Act* fall into two general categories. The first are those that are funded exclusively or largely from provincial revenue. This includes all government departments; corporations owned by the Crown; corporations with boards that are majority appointed by the Lieutenant-Governor, a minister, or an Act, health care authorities; government-funded education systems, such as Memorial and grade schools; and the House of Assembly and statutory offices. The second category are local governments, which the provincial government do not control but which are funded by public money. According to section 2(x), not only is the municipal body covered by *ATIPPA, 2015,* but so is any other corporation or entity created by the municipality for the management of local government assets or responsibilities; in other words, any entity created by the municipality that could be engaged in spending public money is covered by the *Act*.

[21] The position of Memorial is that it has the right to establish an SIE; that it can provide resources to the SIE, such as space on Memorial's campuses to operate or use of Memorial's resources; that it can incorporate the revenues of the SIE into its statements or revenue and expenditures; and that an SIE is sheltered from public oversight because it is incorporated.

[1] In law, the primary benefit of incorporation is limited liability, which confines liability to the corporation and not beyond. Under certain circumstances, courts in Canada have pierced the corporate veil for a variety of reasons including general unfairness, the interest of justice, and equitable remedies, and in doing so have held employees, directors, or shareholders responsible for the actions of a corporation.

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Thus, a public body creates a non-public body that shares the same resources as the public body. Such an interpretation offends the purpose of *ATIPPA, 2015.* It could be argued that this is a legislative oversight that only the legislature can address. But that is not clear. If a board appointed by the Lieutenant-Governor creates a new entity over which it retains significant financial, structural, and policy control, then it is impossible to say that this new entity is wholly distinct from that board controlled by the provincial government. More practically speaking, if the Board of Regents wanted this new entity to change focus, it would have the ability to appoint a board to this new entity that would enact the desired changes of the Board of Regents.

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[22] Memorial's assertion that a decision finding that the SIEs are part of Memorial would involve piercing the corporate veil is misplaced. The purpose of this analysis is to determine whether an entity created by a public body is bound to follow legislated rules of transparency and disclosure. For that purpose, consideration of control of the entity and how it is funded is relevant. This analysis is not done for the purpose of attaching a legal liability between the SIEs in question and Memorial. A similar finding was made in 2015 by the Privacy Commissioner of Prince Edward Island in *Re. Department of Economic Development and Tourism (Island Investment Development Inc.)*. In that case, the Department sought to withhold information relating to seven financial intermediaries and argued that requiring such information to be released would involve piercing the corporate veil. The Commissioner disagreed, noting at paragraph 92:

> *In my view, the concept of "piercing the corporate veil" is a common law principle which may initiate directors', officers' or shareholders' liability where there would ordinarily be none. It has no application to this review.*

I agree.

[23] From our investigation and based upon the balance of probabilities, C-Core, Genesis, and CCFI are part of Memorial and subject to *ATIPPA, 2015.* There is significant evidence to support this claim. However, my recommendation in this Report is not based upon this position; instead it is clear that Memorial has custody or control over the records in question regardless of whether the SIEs are part of Memorial, third parties, or their own public bodies. This will be addressed in the next section of this Report.

Custody or Control of the Records

[24] Both sections 5 and 8 of *ATIPPA, 2015* state that the *Act* applies to all records under the custody of or control of a public body. Neither custody nor control are defined in the *Act*, however, the concept of control was given extensive consideration by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011, SCC 25. In its decision, the Court defined control as follows:

> *[48] As "control" is not a defined term in the Act, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are "under the control of a government institution," courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting control" and* "de jure" *as well as* "de facto" *control... In this case, "control" means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document even if it is only on a "partial" basis, a "transient basis" or a* "de facto" *basis.*

[25] The *National Defence* decision sets out a test for determining whether a public body has control over a record. The test is as follows:

> *[50] in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request?*
>
> *[55] Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the Access to Information Act is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.*

[26] The information sought by the Complainant is as follows:

- Records disclosing bonuses or special payments made to C-Core executives and management;

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- Records disclosing bonuses and special payments made to Genesis executives and incentives paid to management;
- Records disclosing vehicle allowances paid to Genesis executives and management; and
- Records disclosing vehicle allowances paid to executives and management of CCFI.

All of this information is financial in nature.

[27] Section 38 of the *Memorial University Act* requires that Memorial conduct an audit of the university's accounts once a year. As Memorial makes clear in its audited statements, its audit includes the expenditures and revenues of its separately incorporated entities. These expenditures and revenues are not listed separately, but are instead subsumed within the figures set forth within the financial statements.

[28] With respect to question one of the custody or control test, the information being sought by the Complainant certainly relates to a matter of importance to Memorial; in fact, it relates to a statutory obligation. The information requested by the Complainant directly impacts the result of the audit that Memorial is obligated to perform. What is being sought are expenditures made by three of Memorial's SIEs and these expenditures would have to be disclosed to Memorial in order for its audit to be accurate.

[29] As for the second part of the test, it is certainly reasonable for Memorial to be expected to obtain a copy of the record upon request. In fact, Memorial is statutorily required to be able to obtain a copy of a financial record, as section 38(2) of the *Memorial University Act* requires that the university comply with section 19(3) of the *Auditor General's Act.* This section states that the Auditor General is the auditor for all Crown and Crown-controlled corporations and that the Auditor General has access to all the information that went into an audit of these corporations. If the Auditor General can access this information upon request, then Memorial, by statutory necessity, has to either have custody, or can request copies of, the financial information sought by the Complainant.

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[30] In addition to the two-part test, a non-exhaustive list of factors in Ontario IPC Order MO-275 for custody and control has been accepted in other jurisdictions. While not all circumstances considered by the Ontario decision are pertinent to this Report, numerous are and provide further evidence of Memorial's custody or control of the records sought by the complainant.

1. *Was the record created by an officer or employee of the institution?*

    - This is not clear and depends on how the employees of the SIEs are classified and what resources of Memorial that the SIEs utilize. For example, some SIEs do utilize Memorial's Human Resources Department. This office does not know if the SIEs utilize Memorial's financial or accounting resources.

2. *What use did the creator intend to make of the record?*

    - The creators of the record were recording the expenditures incurred by C-Core, Genesis, and CCFI, as is legally required. The creators should also know that such a document would inform the overall financial statements of Memorial because those financial statements incorporate the revenue and expenditures of the SIEs.

3. *Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?*

    - The activity in question is not the payment of bonuses or vehicle expenses. The activity is the proper accounting of expenditures. As noted above, Memorial has a statutory duty to account for its expenditures, which includes those incurred by its separately incorporated entities.

4. *Is the activity in question a "core", "central" or "basic" function of the institution?*

    - Yes. Managing Memorial's finances are a central component of the University – how it functions, its capacity, how it is viewed by the people of the province, etc. The provincial government and the public, whose taxes fund Memorial's

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operations, expect the university to be accurate in its accounting of revenues and expenditures.

5. *Does the content of the record relate to the institution's mandate and functions?*

   - Yes, Memorial has a mandate to manage and account for all its expenditures.

6. *Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?*

   - Due to notes included in the Auditor General's Report of the university, it is likely that Memorial is in possession of the records sought by the Complainant. On page 31 of the report, table 6 covers "Entities Bonuses and Incentives Paid to Management Employees for the Period April 2019 to December 2022." This table only includes C-Core and Genesis. The number of management employees is redacted in the version of the report released to the public, as is the average bonus payment to management employees and the total payments. This information specifically relates to two of the four access requests addressed in this Report. At the bottom of the table, the source for the information that is redacted is Memorial. Similarly, tables listed on pages 27 and 28 of the report detail the management positions, bonuses, and incentive payments made by C-Core and Genesis. Again, the source of this information is listed as Memorial. There is no similar table setting out car allowances, which is the subject of the two other access requests covered in this Report, though the matter is addressed on page 32 of the report where specific car allowance amounts are listed though redacted. A review of the source for all information contained in the report shows that Genesis, C-Core, and CCFI provided no information directly to the Auditor General. Instead all financial information used in the report appears to have been sourced directly from Memorial. Therefore, it is likely that Memorial is also in possession of the records that disclose car allowances.

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7. *If the institution does have possession of the record, is it more than "bare possession"? "Bare possession" means: does Memorial have ownership of the record without the right to use it for its benefit?*

    - "Bare possession" means: does Memorial have ownership of the record without the right to use it for its benefit? Memorial does have more than "bare possession" of the records. It has sufficient possession to provide them to its auditor and the Auditor General to meet its legislative requirements.

8. *If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?*

    - On a balance of probabilities, it is likely that Memorial has possession of the records.

9. *Does the institution have a right to possession of the record?*

    - Yes, it has a statutory right.

10. *Does the institution have the authority to regulate the record's content, use and disposal?*

    - Yes. Since the financials of the three SIEs are consolidated into Memorial's financial statements, the university would presumably regulate how the record is created, used, and maintained.

11. *Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?*

    - Only those that may be imposed by legislation or the internal bylaws and policies of Memorial.

12. *To what extent has the institution relied upon the record?*

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- The institution heavily relies upon the records in question as they are needed to establish accurate annual financial statements, which is legislatively required.

13. *How closely is the record integrated with other records held by the institution?*

- The records are integrated with all other financial records that are used to create Memorial's annual financial statement.

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[31] There is no doubt that Memorial has custody or control over the financial records sought by the Complainant. Memorial's possession or right to access such records must exist if it is to be properly audited. While an audit does not examine every financial record, it does require access to every financial record so that the general figures and assumptions of the auditor can be confirmed.

[32] In 2023, this Office released two reports on Memorial's SIEs that contained recommendations not consistent with those set out in this Report. In Report A-2023-020, which involved Memorial's Child Care Centre, and Report A-2023-029, which involved the Memorial University Recreation Complex Inc., this Office found that the records requested – about childcare services and swimming pool chemicals, respectively - were not "departmental matters" of Memorial and were therefore not within the custody or control of Memorial. These Reports were issued before the recent performance audit of Memorial conducted by the Auditor General shone light on the fact that Memorial's financial records are consolidated with those of the SIEs. This revealed that: even if the SIEs are separate entities rather than part of the university, Memorial has financial control of them; at a minimum, it must have the authority to obtain these records for the purposes of audit; and it is likely that Memorial presently has custody of these records, having previously obtained them for audit and other purposes.

[33] In summary, by failing to perform a search for the records requested by the Complainant, Memorial did not meet its duty to assist pursuant to section 13(1) of *ATIPPA, 2015*. Such a search must be conducted regardless of the position of Memorial on custody or control over the documents. Further, as the above analysis of the legal standard of custody or control in

access to information cases makes clear, on a balance of probabilities Memorial does have custody or control over the records in question. Whether further exceptions to access apply to these records will have to be assessed once the search is concluded and the records in question are examined further.

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RECOMMENDATIONS

[34] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that: Memorial University of Newfoundland conduct a reasonable search for the records described in the four access to information requests that are addressed in this Report; if necessary, request any responsive records from C-Core, Genesis Group Inc., and the Canadian Centre for Fisheries Innovation; and that Memorial provide its final response to these requests to the Complainant within 30 business days of receipt of this Report.

[35] As set out in section 49(1)(b) of ATIPPA, 2015, the head of Memorial University must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[36] Dated at St. John's, in the Province of Newfoundland and Labrador, this 8th day of February 2024.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador

Tab 9

OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

2017 CanLII 53403 (NL IPC)

Report A-2017-021

August 15, 2017

Memorial University

Summary: Memorial University received an access request seeking disclosure of all communication transmitted or received by a named professor which concerned the Applicant as well as all communication the professor had regarding the meetings and operations of the IEEE Communications Society Awards Committee since November 1, 2016 that concerned the Applicant. Memorial University denied access to the information claiming that the records were not in the custody or control of Memorial University therefore they were not available under the *ATIPPA, 2015*. The Applicant was not satisfied with Memorial University's response and filed a complaint with this Office. The Commissioner determined that the records were not in the custody or control of Memorial University and therefore the *ATIPPA, 2015* did not apply to the records.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, s.5(1).

Authorities Relied On: *Canada (Information Commissioner)* v. *Canada (Minister of Defence)* [2011] 2 S.C.R. 306; Ontario IPC Order MO-2750; *University of Alberta v. Alberta (Information and Privacy Commissioner)* 2012 ABQB 247; *City of Ottawa v. Ontario* 2010 ONSC 6835; Wilfrid Laurier University (Re), 2009 CanLII 60394 (ON IPC); University of Ottawa (Re), 2009 CanLII 63942 (ON IPC); University of Alberta v. Alberta (Information and Privacy Commissioner), 2009 ABQB 112 (CanLII).

File # 0020-062-17-049

I BACKGROUND

[1] The Applicant made a request to Memorial University (the "University") under the *Access to Information and Protection of Privacy Act, 2015* (the "*ATIPPA, 2015*" or "*Act*") for:

> *"All emails and all written correspondence received or transmitted by* [a named professor] *in the time period November 1, 2016 to the present that names or concerns* [the Applicant], *identified by name, by title, by implication, and by any other context. All such information that resides on the computers and electronic and paper files of* [named professor], *her students and her laboratory staff. All such material received or transmitted from and to Fax number* [a fax number]. *Under the same conditions, all emails and written correspondence, in electronic and paper form concerning the meetings and operations of the IEEE Communications Society Awards Committee since November 1, 2016 to present."*

[2] The University indicated in response to this request that the only records in the possession of the professor that meet the search criteria were not University records as they were "received/generated solely in her capacity as a member of the IEEE Communications Awards Committee." As such, the University indicated that these records "are not in the custody or control of Memorial University and, therefore, are not available under the Access to Information and Protection of Privacy Act."

[3] As the complaint could not be resolved informally it was referred to formal investigation under subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[4] The University did not request records from the professor's students as they are not employees or agents of the University. Also, the professor confirmed that her laboratory staff had no records responsive to the request. As for the records in the professor's possession, the University indicated that, while these records "reside in files and computing equipment located at and owned by Memorial University", they are not in the University's custody or under their control as "physical possession does not determine control."

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[5] The University relied on the two-part test set out in *Canada (Information Commissioner)* v. *Canada (Minister of Defence)* to determine the question of control:

> *(i) whether the contents of the document relate to a departmental matter; and*
> *(ii) whether the relevant government institution could reasonably expect to obtain a copy of the document upon request.*

[6] The University determined the records did not meet either element of this test as they did not relate to University matters, but instead related entirely to the volunteer work done by the professor; and secondly, the University could not expect to be given such documents merely by requesting them, as they do not fall within the professor's scope of employment.

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III APPLICANT'S POSITION

[7] The Applicant notes that the files reside on the server at the University and therefore should be in the University's custody.

[8] The Applicant also points out that the IEEE provides email accounts to members of the IEEE Communications Society Awards Committee to use for its business, and he alleges that the professor circumvented the access provisions that apply to the IEEE email account by using the University's email system to transact IEEE business.

[9] It is the Applicant's position that the professor's use of the University's email system was not for volunteer or personal use, rather for conducting business related to the IEEE, and that the records should be in the custody or under the control of the University.

IV DECISION

[10] The issue of custody and control was reviewed in Report A-2014-012. Section 5(1) of the *ATIPPA, 2015* outlines the application of the *ATIPPA, 2015* and reads, in part, as follows:

> *5(1) This Act applies to all records in the custody of or under the control of a public body ...*

[11] Section 5(1) sets out an important threshold question. In order for the *ATIPPA, 2015* to apply to records, the records must either be in the custody of **or** under the control of a public body, it need not be both.

[12] The terms "custody" and "control" are not defined in the *ATIPPA, 2015*, however, these terms have been given a broad and liberal interpretation in keeping with the purposes of access to information legislation. One of the purposes of the *ATIPPA, 2015* is to facilitate democracy through ensuring that citizens have the information required to participate meaningfully in the democratic process, increased transparency in government and public bodies and protecting the privacy of individuals.

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[13] It has generally been established that while physical possession of a record is the best evidence of custody, simple possession is not determinative.

[14] In addition to the two-part test set out in *Canada (Information Commissioner)* v. *Canada (Minister of Defence)* to determine the question of control, a non-exhaustive list of factors in Ontario IPC Order MO-2750 for custody or control has been accepted in other jurisdictions. The unique circumstances of each case determine the relevance, if any, of these factors:

- *Was the record created by an officer or employee of the institution?*
- *What use did the creator intend to make of the record?*
- *Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?*
- *Is the activity in question a "core", "central" or "basic" function of the institution?*
- *Does the content of the record relate to the institution's mandate and functions?*
- *Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?*
- *If the institution does have possession of the record, is it more than "bare possession"?*
- *If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?*
- *Does the institution have a right to possession of the record?*

- *Does the institution have the authority to regulate the record's content, use and disposal?*
- *Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?*
- *To what extent has the institution relied upon the record?*
- *How closely is the record integrated with other records held by the institution?*
- *What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?*

[15] After reviewing the cases and evidence provided by the University, the cases relied on by the Applicant, and the factors listed above, I have determined that the records the Applicant has requested are not in the custody or under the control of Memorial University. This determination relies on a constellation of facts and circumstances specific to this file. Determining custody or control involves an in depth analysis of the unique facts of each case.

VI RECOMMENDATIONS

[16] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the University maintain its position that the records are not in the University's custody or control.

[17] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the University must give written notice of his or her decision with respect to this recommendation to the Commissioner and to any person who was sent a copy of this Report within 10 business days of receiving this Report.

[18] Please note that within 10 business days of receiving the decision of the University under section 49, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*.

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[19] Dated at St. John's, in the Province of Newfoundland and Labrador, this 15th day of August 2017.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador

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Tab 10

OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

2020 CanLII 35643 (NL IPC)

Report A-2020-002

January 20, 2020

Memorial University

Summary: Memorial University ("Memorial") received an access request for records relating to logs of domain activities involving a specific desktop computer for a specific period of time. Memorial provided records to the Applicant. The Complainant alleged that Memorial failed in its duty to assist under section 13 of the *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA, 2015*) by failing to conduct a reasonable search for records and by not responding in an open, accurate and complete manner. The Commissioner determined that Memorial had conducted a reasonable search for records and had responded appropriately to the Complainant.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, section 13.

Authorities Relied On: NL OIPC Report A-2019-032; A-2018-020; A-2018-011.

Other Resources: OIPC NL Practice Bulletin on Reasonable Search.

File #: 0020-062-19-070

I BACKGROUND

[1] The Complainant made an access to information request to Memorial University ("Memorial") as follows:

> *the logs of domain activities involving the desktop computer located in* [named room number] *(device name:* [specific number]*) from September 13, 2019 between 5AM and 5PM*
> *Possible location: the Information Technology Services (ITS)*

[2] Memorial responded to the access request by providing the Complainant with records. The Complainant was not satisfied with Memorial's response and filed a complaint with this Office alleging that Memorial had failed in its duty to assist under section 13 of *ATIPPA, 2015* by not conducting a reasonable search for responsive records. The Complainant also alleged that Memorial had failed in its duty to assist by refusing to provide clarifications and explanations.

[3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[4] Memorial's position is that it conducted a reasonable search for records and fulfilled its duty to assist under *ATIPPA, 2015*.

[5] Memorial advised that the scope of the access request was narrow as it was for "logs of domain activities" of a specific computer. Memorial explained that the search was based on the domain activity tied to that device for the timeframe specified and the security logs of Memorial's Domain Controllers were searched.

[6] Memorial further advised that Memorial's Information Access and Privacy (IAP) office consulted with Memorial's System Administrator who manages Memorial's domain environment in responding to this access request and that it was Memorial's expert on

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Microsoft Active Directory which encompasses domain setup and activity who conducted the search.

[7] Memorial stated that the records responsive to this request would have only resided in Memorial's Domain Controller security logs. Memorial stated that the search was straightforward and reasonable, and that records were located and provided to the Complainant.

[8] Through specific follow up questions from this Office raised by the Complainant, Memorial provided further details. Memorial advised that the security logs were filtered by client address (IP) and date range. This information had been previously provided to the Complainant.

[9] Memorial confirmed that the search conducted would have captured access to the computer by other IP addresses in the domain, including individuals with administrative privileges.

[10] In one of the follow up questions by the Complainant to Memorial, he raised the "audit journal" as a possible location for responsive records. When asked if other responsive records could be located in the "audit journal" and if that area was searched, Memorial responded that it was unfamiliar with the generic term "audit journal" in the domain environment but stated that the Audit Object Access is a Microsoft Windows configuration that does not produce an "audit journal". Memorial confirmed that all domain related logs applicable to this access request were provided.

[11] Memorial also argued in its submission that a public body's compliance with the duty to assist cannot properly be the subject of a complaint or recommendations in a Commissioner's report under *ATIPPA, 2015*.

III COMPLAINANT'S POSITION

[12] The Complainant stated that Memorial failed in its duty to assist pursuant to section 13 of *ATIPPA, 2015* by failing to conduct a reasonable search for records.

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[13] It is the Complainant's position that Memorial improperly limited the scope of the search for responsive records and that the records provided were incomplete.

[14] The Complainant stated that the scope of the search for responsive logs was deliberately restricted to domain activities associated with his IP address and that his IP address was used by Memorial as a filter when retrieving responsive logs. The Complainant further stated that any domain related activities involving his files that were migrated to the P: drive that were associated with another IP address in the domain were excluded from the search. The Complainant argued that the file access logs were not retrieved and that the Public Body improperly narrowed the scope of the search.

[15] The Complainant argued that since the logs were filtered by his IP address then the list is incomplete and he believes that the IP addresses of all individuals with administrator privileges would necessarily be included within the scope of his original request. The Complainant further requested any logs from the audit journal be released and as the Complainant stated that the file audit policy is inaccessible through the Microsoft domain controller, the Complainant requested that relevant data be retrieved directly from the Linux file server.

[16] The Complainant also alleged that Memorial did not respond in an open, accurate and complete manner since it did not continue to answer his follow up questions after the records were provided.

[17] After the records were provided, the Complainant contacted Memorial to ask some questions as he believed the logs were not complete. Memorial responded and asked the Complainant to send a list of questions and it would try to assist. The Complainant provided two questions which Memorial answered. The Complainant then sent a number of more technical questions to Memorial. Memorial advised that since the Complainant had an ongoing privacy complaint investigation with this Office that was dealing with the domain logs, the Complainant could share his concerns with our Office. Memorial advised that the processing of the access request was completed and its file was closed. The Complainant

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noted that an access request and a privacy investigation are different processes that are regulated by different parts of the *ATIPPA, 2015*.

[18] The Complainant relies on Report A-2018-011 from this Office as support for the position that the duty to communicate with a requestor does not stop with the release of records. Paragraph 22 of that Report is as follows:

> *However, the duty to communicate with an applicant goes beyond simply notifying them of their statutory rights to appeal. Where an applicant has follow-up questions about the final response they received public bodies will likely find it to their advantage to engage with the applicant to work to resolve these issues if there is the potential of avoiding an appeal to either this Office or to the Supreme Court of Newfoundland and Labrador. I would note however, for the benefit of potential complainants, that the deadlines set by the ATIPPA, 2015 for filing an appeal would continue to apply notwithstanding any efforts to resolve a matter informally with the public body.*

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IV DECISION

Duty to Assist

[19] This Office has considered a public body's duty to assist previously in numerous reports. Section 13 of *ATIPPA, 2015* states:

> *13. (1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*
>
> *(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.*

[20] Report A-2018-020 states the position of this Office with regard to the duty to assist:

> *[8] It is a long held position of this Office that the duty to assist has three components, as outlined in Report A-2009-011:*
>
> > *[80] ...First, the public body must assist an applicant in the early stages of making a request. Second, it must conduct a reasonable search for the requested records. Third, it must respond to the applicant in an open, accurate and complete manner.*

The standard for assessing a public body's efforts is reasonableness, not perfection.

[21] The Complainant's position is that Memorial failed in its duty to assist by not conducting a reasonable search as the Complainant claims that the scope of the search was limited and the records were incomplete.

[22] This Office asked Memorial to explain how the search had been conducted in order to assess whether or not it was reasonable. Memorial explained the search parameters – who conducted the search, where the search was done and areas searched etc. Memorial explained that the search was narrow, involving a limited time frame and the search was also very specific as it only dealt with the Complainant's desktop computer domain logs.

[23] Memorial confirmed that the search would have captured access to the computer by other IP addresses in the domain, including individuals with administrative privileges. Memorial also confirmed that the responsive records to this access request reside in Memorial's Domain Controller security logs and would not be located elsewhere, and furthermore the search was conducted by Memorial's expert on Microsoft Active Directory, which encompasses Domain setup.

[24] The Complainant raised issues with the scope of the search, suggesting that other areas should be searched to determine if individuals with administrator privileges accessed his computer or if there were responsive records in the audit journal. Memorial has addressed these specific questions to our satisfaction.

[25] Furthermore the wording of the access request was for the logs of domain activities involving the Complainant's desktop computer, therefore filtering for his IP address is logical and necessary. Memorial has confirmed that the logs show all activity tied to that asset.

[26] While the Complainant has raised numerous arguments and technical questions, it must be remembered that we are reviewing the reasonableness of the search, meaning: did a

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person knowledgeable in the area search in the locations where responsive records might reasonably be located. Based on these criteria, Memorial conducted a reasonable search.

[27] The Complainant also alleged that Memorial did not respond in an open, accurate and complete manner since it did not continue to answer his follow up questions after the records were provided. Memorial answered the Complainant's initial questions which led the Complainant to ask further questions. The Complainant had a related privacy complaint file ongoing with this Office and Memorial had suggested some questions may be answered through that file.

[28] The Complainant quoted from Report A-2018-011 as support for the position that the duty to communicate with a requestor does not stop with the release of records. While we encourage public bodies to try and assist applicants even after records have been provided, not all questions can be answered to the satisfaction of some applicants. If there is potential of avoiding either an appeal to this Office or to the Supreme Court of Newfoundland and Labrador then further communication may be beneficial.

[29] In this case, Memorial attempted to answer the Complainant's first round of questions, however, once the Complainant continued to ask more technical questions, Memorial determined that the best course of action was for the Complainant to deal directly with our Office as we were already investigating a privacy complaint that was related.

[30] While perhaps Memorial could have tried to answer further questions, there was already an ongoing file with this Office. Memorial's decision does not mean it failed in its duty to assist.

[31] As outlined in Report A-2019-032, Memorial argued that this Office does not have the ability to review complaints relating to the duty to assist. This issue was addressed in Report A-2019-032 and this Office maintains its position as set out in paragraph 42 of that Report:

> *In the course of our investigation, Memorial has also argued that this Office does not have the ability to review complaints on the duty to assist. As stated by Memorial, section 42 makes provisions for filing a complaint respecting "a*

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decision, act or failure to act....that relates to the request". The duty to assist is a failure to act that relates to a request. It is our view that we do indeed have the jurisdiction to review this issue and to make recommendations. These recommendations can be made under section 47(d) which permits this Office to make recommendations for "other improvements for access to information be made within the public body". While section 95(2)(h) allows us to "bring to the attention of the head of a public body a failure to fulfil the duty to assist applicants", this provision is "in addition to" the Commissioner's powers and duties with respect to complaint investigations. It allows us to bring such matters to the attention of the head of a public body outside of the context of a complaint investigation, but does not limit the Commissioner's ability to do so, or to make related recommendations, in a Report resulting from a complaint. As noted above, the full scope of a complaint to the Commissioner is outlined in section 42(1). A failure of the duty to assist is a failure to act that relates to the request. On that basis we reject the assertion that our jurisdiction to address and make recommendations in a Report regarding the duty to assist is in any way limited.

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V CONCLUSIONS

[32] This Office finds that Memorial fulfilled its duty to assist by conducting a reasonable search for records and responding without delay to the Complainant in an open, accurate and complete manner.

VI RECOMMENDATIONS

[33] Under the authority of section 47 of *ATIPPA, 2015*, I find that Memorial has conducted a reasonable search for records and responded to the Complainant appropriately under section 13 of the *ATIPPA, 2015*. Therefore, I recommend that Memorial maintain its position regarding these matters.

[34] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Memorial University must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[35] Dated at St. John's, in the Province of Newfoundland and Labrador, this 20th day of January 2020.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador

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Tab 11

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

2023 CanLII 39561 (NL IPC)

Report A-2023-020

May 4, 2023

Memorial University

Summary: The Complainant made an access to information request to Memorial University for records related to discounts, reduced fees, credits, and registration at Memorial's Childcare Centre. Memorial did not provide any records to the Complainant, stating the Childcare Centre was not a public body as defined by *ATIPPA, 2015* and that the records were not in Memorial's custody or control. The Complainant disagreed and filed a complaint with this Office. After review of submissions from both parties, the Commissioner concluded *ATIPPA, 2015* does not apply to the Childcare Centre and that the requested records were not within Memorial's custody or control.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, Sections 2, 5, and 8

Authorities Relied On: NL OIPC Reports A-2017-021, A-2021-008, A-2014-012, Ontario Access to Information Order Order MO-2750, *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25, [2011] 2 SCR 306

BACKGROUND

[1] On February 7, 2023, the Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015*") to Memorial University ("Memorial") for the following:

> *I am requesting all information regarding discounts, reduced fees, credits, refunds, and registration for every other week (week on/week off) for after-school childcare at MUN's Childcare Centre's Activity Centre. I am requesting email (internal and external), internal documents (handwritten and digital), receipts, and any other means someone may use for recording information. I am requesting this information from the Childcare Centre's Front Office, Activity Centre, and Executive Director's Office. I am also requesting correspondence to and from the ATIPP Office and the respective departments in regards to this request.*

[2] Memorial responded that Memorial's Childcare Centre (the "Daycare") is not a public body and that the requested records were not in the custody or control of Memorial. As access had been refused by Memorial, the Complainant filed a complaint with this Office.

[3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY'S POSITION

[4] It is Memorial's position that the Daycare is a separately incorporated entity and thus is not captured by *ATIPPA, 2015*'s definition of public body.

[5] Memorial states further the requested records are not within the custody or control of the public body as the documents relate to core, day-to-day functions of the Daycare and do not pertain to the University. Memorial maintains that it does not have physical possession of the requested records and would not have access to them.

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COMPLAINANT'S POSITION

[6] The Complainant states the Daycare is a public body and that they are entitled to the requested records. Even if not a public body, the Complainant states Memorial has 'custody and control' of the emails as they are on a shared ("@mun.ca") email server. The Complainant also suggests the shared email server is evidence that the employees of the Daycare are employees of Memorial.

[7] In the Complainant's view, the Daycare is Memorial and the two cannot be logically separated. Thus, since Memorial is specifically referenced as a public body in section 2(h) of *ATIPPA, 2015*, Daycare must also be a public body as it is a part of Memorial.

[8] The Complainant further submits that because Daycare employees are represented by the Canadian Union of Public Employees Union ("CUPE") then they must be employees of a public body and of Memorial and thus the Daycare's records are subject to *ATIPPA, 2015*. He also raises the fact that the Daycare serves as a research facility for various departments within Memorial.

ISSUES

[9] There are two issues to be addressed:

a. Whether the Daycare meets the definition of a public body under *ATIPPA, 2015*, and
b. Whether the requested records are in the custody or control of Memorial.

DECISION

[10] Section 5 of *ATIPPA, 2015* states the *Act* applies to all records in the custody of or under the control of a public body.

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Application of ATIPPA, 2015 to the Daycare

[11] Relevant definitions at section 2 of *ATIPPA, 2015* are as follows:

> *2. In this Act*
>
> *...*
>
> *(h) "educational body" means*
>
> *(i) Memorial University of Newfoundland ,*
>
> *...*
>
> *(o) "local government body" means*
>
> *(i) the City of Corner Brook ,*
>
> *(ii) the City of Mount Pearl ,*
>
> *(iii) the City of St. John's ,*
>
> *(iv) a municipality as defined in the Municipalities Act, 1999 , and*
>
> *(v) a body designated as a local government body in the regulations made under section 116 ;*
>
> *(p) "local public body" means*
>
> *(i) an educational body,*
>
> *...*
>
> *(x) "public body" means*
>
> *...*
>
> *(ii) a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown,*
>
> *(iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister,*
>
> *(iv) a local public body,*
>
> *...*
>
> *(vi) a corporation or other entity owned by or created by or for a local government body or group of local government bodies, which has as its primary purpose the management of a local government asset or the discharge of a local government responsibility*

[12] After reviewing the definition of a public body under *ATIPPA, 2015*, our conclusion is that the Daycare is not a 'public body'. Further, while Memorial is a public body, the Daycare is not an integral party of Memorial and is a separate entity. The Daycare operates and is managed

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independently of Memorial, is regulated by its own articles of incorporation, and is financially self-governing. Based on a plain reading, an entity incorporated separately from an educational body such as Memorial would not be captured by *ATIPPA, 2015*'s definition of public body.

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[13] *ATIPPA, 2015* specifically recognizes certain corporations as public bodies in section 2(x). Section 2(x)(ii) recognizes corporations majority-owned by the Crown as public bodies. Section 2(x)(iii) recognizes corporations as public bodies where the majority of its board members are appointed by an *Act* or Cabinet. Neither of these apply to the Daycare.

[14] With regards to section 2(x)(vi), which discusses corporations set up by local government bodies, a local government body means a city or municipality as defined in section 2(o) and does not include Memorial. Had the legislature intended *ATIPPA, 2015* to apply to corporations, such as the Daycare, established by an educational body, it would have been specifically enumerated in the *Act*.

Custody or Control of Daycare Records

[15] While the Daycare is not a public body subject to *ATIPPA, 2015*, this is not determinative of whether Memorial must provide responsive records in response to the Complainant's access request. Section 8 of the *ATIPPA, 2015* establishes the right of access:

> *8.(1) A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

[16] Therefore, even if the Daycare is not a public body, any records about the Daycare which are in Memorial's "custody or control" are subject to *ATIPPA, 2015*. Memorial states it is not in physical possession of the requested records. However, that does not end the analysis.

[17] The Supreme Court of Canada considered the meaning of custody or control in the context of the federal *Access to Information Act*, RSC 1985 in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306. At paragraph 50, the Court stated a two-part test for whether a document is under the control of an institution:

> *... in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request?*

[18] The court elaborated further on the test at paragraph 55:

> *Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the Access to Information Act is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.*

[19] As to the first question, the request for "all information regarding discounts, reduced fees, credits, refunds, and registration for every other week (week on/week off) for after-school childcare at MUN's Childcare Centre's Activity Centre" is specific to the day-to-day operations of the Daycare and appear to not relate to a departmental matter. Despite this, it is still necessary to address the second part of the test and the relationship between the Daycare and Memorial.

[20] With respect to the second part of the test, all relevant factors must be considered, as stated by the Supreme Court of Canada in *Minister of National Defence*. A non-exhaustive list of factors has been developed and used in other jurisdictions in assessing custody and control, which was considered by this office in A-2021-008 and A-2014-012. Order MO-2750 from the Information and Privacy Commissioner of Ontario sets out these factors as follows:

- *Was the record created by an officer or employee of the institution?*
- *What use did the creator intend to make of the record?*
- *Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?*
- *Is the activity in question a "core", "central" or "basic" function of the institution?*
- *Does the content of the record relate to the institution's mandate and functions?*
- *Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?*

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- *If the institution does have possession of the record, is it more than "bare possession"?*
- *If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?*
- *Does the institution have a right to possession of the record?*
- *Does the institution have the authority to regulate the record's content, use and disposal?*
- *Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?*
- *To what extent has the institution relied upon the record?*
- *How closely is the record integrated with other records held by the institution?*
- *What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?*

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[21] Not all of the above factors relate to the requested records, but it is clear they do not relate to Memorial's mandate, for example. They also do not relate to a "core" or "basic" function of Memorial and are not closely integrated with Memorial records, as it is a separate entity providing childcare. Rather, the information requested, which is for receipts and documentation relating to discounts and payments, among other related items, relate to the Daycare's day-to-day operations. It is also apparent that Memorial would not have the right to regulate the content or use of the requested records, and that Memorial would not be relying upon such records.

[22] The existence of a shared email server in itself does not establish custody or control. Memorial provides email service to students, staff, retirees, and alumni. While Daycare employees do use the email server provided by Memorial, not all emails sent and received through @mun.ca are in the control of Memorial (see, for example, A-2017-021).

[23] The Complainant points out that employees of the Daycare are members of CUPE and argues this is evidence they are employees of Memorial. However, Daycare employees and Memorial employees are members of two separate, distinct bargaining units (CUPE 4554-01 and CUPE 1615, respectively). Moreover, CUPE represents other bargaining units, such as non-profit organizations, for example, which would fall outside *ATIPPA, 2015* and the mere fact of an organization's employees being represented by a union that generally – but not

exclusively – represents public employees does not determine that the employer is itself a public body for *ATIPPA, 2015* purposes.

[24] The Complainant submitted that as the Daycare also serves as a research facility for various departments within Memorial (such as Psychology, Early Childhood Education, Education, Nursing, and Human Kinetics), this means the Daycare is a 'core' part of Memorial's functions. However, as it relates to custody or control, the question is whether the requested records relate to a 'core' function of the institution, which in our view they do not.

[25] To further assess the issue of custody or control, it is important to explore the structure of the Daycare's operations and links it has to Memorial. In a history document on Memorial's website, Dr. Carole Peterson writes about the Daycare's organization within Memorial, and how it became a separate entity in 2006:

> *As a consequence of the negotiations, the Board of the Childcare Centre was reorganized and the Centre became a Separately Incorporated Entity (SIE) within the University community in 2006. That meant that, financially and in other ways, we were on our own. We were* ***independent of both the Students' Union and MUN,*** *and it was our responsibility to balance our books and run ourselves – of course still under the direction of the Board of Directors. Both the Students' Union and members of the MUN administration sit on the Board, along with parent representatives and faculty members who have expertise in relevant areas (child development and education). But ultimately,* ***it is the Board who is responsible for the financial and policy well-being of the Centre.*** *We are now captains of our own fate.*

[26] With regards to the composition of the Daycare's Board of Directors, Memorial's website states the following:

> *Campus Childcare is operated by an appointed Board of Directors consisting of:*
>
> *University faculty members*
> *human resources personnel*
> *financial services personnel*
> *legal counsel*
> *student representatives*
> *parent representatives*
> *the centre's executive director (ex-offico)*

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[27] Elections for parent representatives are usually conducted in an open parent meeting in the Fall semester. As per the Daycare's Articles of Incorporation, the board shall be made up of nine individuals, four of which shall be elected by the Memorial University Students' Union and parents and five being Memorial appointees. The Daycare's board, while appointed by the Memorial's Board of Regents, operates separately and independent from Memorial. Employees of the Daycare are not employees of Memorial, nor does Memorial provide any pension or benefits.

[28] Memorial employees who sit on the board are not involved in the schedules or operational issues which related to the requested documentation. Memorial employees would have access to records such as board meeting minutes or agendas; however, the requested records do not relate to such documentation but relate to specific operational records of the Daycare itself. Furthermore, even if Memorial employees who sit on the board did have such operational records in their physical possession, an analysis would still be required to determine if those records were in Memorial's control or custody or not for the purposes of *ATIPPA, 2015* (see, for example, Report A-2021-008).

[29] The Daycare's financial statements, which are not at issue in the present case, are consolidated with the Memorial's financial statements each year, which does demonstrate a level of integration between the Daycare and Memorial. However, the documents requested are far more specific and thus fall outside Memorial's control.

[30] On balance, while there is a degree of connection between the Daycare and Memorial, for the purposes of *ATIPPA, 2015*, the Daycare is not a public body, nor are the requested documents within Memorial's custody or control.

RECOMMENDATIONS

[31] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Memorial maintain its position.

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[32] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Memorial must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4th day of May 2023.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador

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Tab 12

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

2023 CanLII 64130 (NL IPC)

Report A-2023-029

June 29, 2023

Memorial University

Summary: The Complainant made an access to information request to Memorial for records related to swimming pool chemicals purchased for the Aquarena, which is part of the Memorial University Recreation Complex Inc. (MURC). Memorial did not provide any records to the Complainant, stating MURC was not a public body as defined by *ATIPPA, 2015* and that, in any case, the records were not in Memorial's custody or control. The Complainant responded by filing a complaint with this Office. After review of submissions, the Commissioner concluded *ATIPPA, 2015* does not apply to the MURC and that the requested records were not in Memorial's custody or control.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, Sections 2, 5, 8.

Authorities Relied On: NL OIPC Report A-2023-020, Ontario Access to Information Order MO-2750, *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25, [2011] 2 SCR 306

Other Resources: Submission of the Information and Privacy Commissioner to the Access to Information and Protection of Privacy Review Committee, June 16, 2014, Report of the 2014 Statutory Review of the *Access to Information and Protection of Privacy Act*

File #: 0015-060-23-131

BACKGROUND

[1] On March 20, 2023, the Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015*") to Memorial University of Newfoundland ("Memorial") for the following:

> *... a copy of the current March 2023 supply contract pricing for all the swimming pool chemicals purchased for the Aquarena, including the full cost of the Sodium Hypochlorite 205L drums, including the cost of drum deposit and shipping.*

[2] The Aquarena is one facility that is part of a larger entity known as The Works and which is incorporated as "Memorial University Recreation Complex Inc." (MURC).

[3] Memorial did not provide the requested records, stating the records are not in its custody or control and that MURC is not a public body subject to *ATIPPA, 2015*.

[4] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

COMPLAINANT'S POSITION

[5] The Complainant states they are entitled to the requested documents as Memorial is subject to *ATIPPA, 2015* and MURC is owned by Memorial. The Complainant did not provide submissions on the issues of custody or control or the definition of public body.

PUBLIC BODY'S POSITION

[6] Memorial states MURC is a separately incorporated entity ("SIE") and thus is not captured by *ATIPPA, 2015*'s definition of public body.

[7] Memorial further states the requested records are not within its custody or control as Memorial was not involved in the issuance of the contract relating to the swimming pool

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chemicals purchased for MURC. Moreover, Memorial states it does not have physical possession of the requested records and would not have access to them.

ISSUES

[8] The issues to be addressed in this Report are:

a) whether MURC meets the definition of public body under section 2 of *ATIPPA, 2015*; and

b) whether the requested records are in the custody or control of Memorial as per section 8 of *ATIPPA, 2015*.

DECISION

[9] This Office recently considered the issues of custody and control and the definition of public body in Report A-2023-020. In that case, the Complainant made an access to information request to Memorial for records related to discounts, reduced fees, credits and registration at Memorial's Childcare Centre. Memorial did not provide any records to the Complainant, stating the Childcare Centre was not a public body as defined by *ATIPPA, 2015* and that the records were not in Memorial's custody or control. After review of the submissions, this Office agreed with Memorial's position.

[10] Both the Childcare Centre in A-2023-020 and MURC are corporations established by Memorial to carry out specific functions. The records in question in both cases relate to day-to-day operations of the corporation and thus, at first glance, the analysis in A-2023-020 appears to be applicable to the present case. However, the entities are SIEs with different functions and more analysis is needed to specifically assess MURC's status with respect to *ATIPPA, 2015* and the custody or control of the requested records.

Application of *ATIPPA, 2015* to MURC

[11] Section 5 of *ATIPPA, 2015* states the *Act* applies to all records in the custody of or under the control of a public body. As noted above, this is the second time in recent months this Office has considered the application of *ATIPPA, 2015* to a corporation owned by Memorial.

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While Memorial itself is a public body subject to *ATIPPA, 2015*, only certain government-owned corporations are recognized as public bodies in their own right under the legislation.

[12] On June 16, 2014, this Office provided submissions in conjunction with a statutory review of *ATIPPA*. One of our key recommendations in the submission was to "broaden the definition of "public body" to include a corporation or entity owned by or created by or for a public body or for a group of public bodies." In response, the Report of the 2014 Statutory Review of *ATIPPA* recommended that "additional language be added to the definition of public body under section 2(p) of *ATIPPA* to include municipally owned and directed corporations." This recommendation was accepted by government. Now, section 2(x)(vi) of *ATIPPA, 2015* specifically includes corporations created by municipalities to manage a government asset or discharge a government responsibility. It must be noted, however, that there is still no express language in *ATIPPA, 2015* with respect to corporations owned by educational bodies such as Memorial.

[13] Relevant definitions at section 2 of *ATIPPA, 2015* are as follows:

> *2. In this Act*
>
> ...
>
> *(h) "educational body" means*
> *(i) Memorial University of Newfoundland ,*
>
> ...
>
> *(o) "local government body" means*
> *(i) the City of Corner Brook ,*
> *(ii) the City of Mount Pearl ,*
> *(iii) the City of St. John's ,*
> *(iv) a municipality as defined in the Municipalities Act, 1999 , and*
> *(v) a body designated as a local government body in the regulations made under section 116 ;*
>
> ...
>
> *(p) "local public body" means*
> *(i) an educational body,*
>
> ...
>
> *(x) "public body" means*
>
> ...

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> *(ii) a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown,*
> *(iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister,*
> *(iv) a local public body,*
> *...*
> *(vi) a corporation or other entity owned by or created by or for a local government body or group of local government bodies, which has as its primary purpose the management of a local government asset or the discharge of a local government responsibility*

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[14] After reviewing the definition of a public body under *ATIPPA, 2015*, our conclusion is that MURC is not a public body. MURC operates and is managed independently of Memorial, is regulated by its own articles of incorporation, and is financially self-governing. Moreover, it maintains its own separate registered head office and is responsible for its own record keeping. Therefore, I conclude it is separate from Memorial and does not fall within the definition of "educational body" in section 2(h)(i) of *ATIPPA, 2015* or any other definition of public body provided by section 2 of the *Act*. Had the legislature intended *ATIPPA, 2015* to apply to corporations set up by Memorial, such as MURC, it would have been specifically enumerated in the *Act*.

Custody or Control of MURC Records

[15] While MURC is not a public body subject to *ATIPPA, 2015*, this is not determinative of whether Memorial must provide records in response to the Complainant's access request. Section 8 of *ATIPPA, 2015* establishes the right of access:

> *8.(1) A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

[16] Memorial states that it is not in possession of the requested documents. However, the analysis does not end there. As discussed in A-2023-020, the Supreme Court in *Canada (Information Commissioner) v. Canada (Minister of National Defence),* 2011 SCC 25, [2011] 2 SCR 306 established a two-part test for whether a document is under the control of an institution at paragraph 50:

> *... in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request?*

[17] The court elaborated further on the test at paragraph 55:

> *Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the Access to Information Act is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.*

[18] With regard to the first part of the test, records relating to swimming pool chemicals for the Aquarena appear specific to the day-to-day operations of MURC and do not appear to relate to a departmental matter (in this case, "departmental" would mean a matter relating to Memorial University). Memorial was not involved with the contract for swimming pool chemicals, nor does it purchase any materials or supplies for the Aquarena pool. On the other hand, if the MURC fitness and pool facilities are considered departmental, then records relating to their upkeep relate to a departmental matter. More analysis is therefore necessary to consider the functions and uses of MURC within Memorial.

[19] With respect to the second part of the test, all relevant factors must be considered, as stated by the Supreme Court of Canada in *Minister of National Defence*. Order MO-2750 from the Information and Privacy Commissioner of Ontario sets out factors to be considered when assessing custody or control:

- *Was the record created by an officer or employee of the institution?*
- *What use did the creator intend to make of the record?*
- *Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?*
- *Is the activity in question a "core", "central" or "basic" function of the institution?*
- *Does the content of the record relate to the institution's mandate and functions?*

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- *Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?*
- *If the institution does have possession of the record, is it more than "bare possession"?*
- *If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?*
- *Does the institution have a right to possession of the record?*
- *Does the institution have the authority to regulate the record's content, use and disposal?*
- *Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?*
- *To what extent has the institution relied upon the record?*
- *How closely is the record integrated with other records held by the institution?*
- *What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?*

[20] Not all of the above factors relate to the requested records. However, it is clear that Memorial would not have the right to regulate the records' content and use, for example. The requested records are also not closely integrated with Memorial, as Memorial is not involved in the tendering process or purchase of swimming pool chemicals for the Aquarena. It also cannot be said that Memorial is relying upon these records in any way, nor were they created by an employee of Memorial.

[21] Memorial states swimming pool chemicals would not relate to a "core" or "central function" of the University. Instead, it states the records relate to the purchase of a product necessary for the function of MURC's facilities. However, there is a significant level of integration between Memorial and MURC. For example, MURC provides numerous fitness, aquatic and recreational programs to the university community. The Sea-Hawks varsity basketball and volleyball teams play their home games at the Field House, a facility within MURC. The Field House is also attached to Memorial's School of Human Kinetics and Recreation and most students have access to the MURC facilities. Arguably then, maintaining

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a fitness facility is a core function of Memorial, as it would be at any University, and thus documents in relation to products purchased for same relate to its core functions.

[22] Despite this, however, the fact that a SIE provides services to the University is not necessarily determinative of custody or control. The Childcare Centre in A-2023-020 also provided services to the University, and the requested documents in that case were still found to be outside Memorial's custody or control. In the present case, while MURC clearly provides facilities to the University, it also provides fitness, aquatic and recreational facilities to the general public through both drop-in classes and term-based memberships.

[23] MURC is a separately incorporated entity, established by Memorial to manage and maintain a fitness facility on Memorial's St. John's campus. As stated on its website:

> *Separately incorporated entities associated with Memorial University operate under the university's policies or policies approved by their individual boards. Each entity is wholly owned by the university and operates autonomously under the governance of a university-appointed board of directors that reflects the interests of its stakeholders.*

[24] MURC is governed by its own Articles of Incorporation and a volunteer Board of Directors, which acts autonomously from Memorial, which was similarly the case in Report A-2023-020. While Memorial owns MURC, it is not involved in operational issues such as the supply of swimming pool chemicals. Memorial states they have no correspondence or records with regards to this contract, and all documents are in the control or custody of MURC.

[25] The Complainant states previous tenders issued for Aquarena pool supplies were handled directly by Memorial as were cheques in relation to those contracts. However this is not determinative of custody or control of the requested records in this particular case. In the present case MURC entered into an agreement for the supply of swimming pool chemicals without an open tender process involving Memorial.

[26] On this point, MURC has the ability to enter into contracts as an agent of the University as may be necessary. Section 2.24 of the agreement between the two entities states MURC has the authority "...generally to do and perform and where desirable contract in its own name for

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all things desirable or necessary for the proper and efficient management of the Facilities". It is true that Memorial issues cheques on behalf of all SIEs such as MURC. However such cheques are issued from the revenue of and on behalf of all Memorial's SIEs.

[27] There is some degree of connection between MURC and Memorial. However, on balance, and for the purposes of *ATIPPA, 2015*, I find the requested documents are not in the custody or control of Memorial.

RECOMMENDATIONS

[28] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Memorial maintain its position.

[29] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of Memorial must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[30] Dated at St. John's, in the Province of Newfoundland and Labrador, this 29th day of June 2023.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador

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Tab 13

OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

2023 CanLII 121464 (NL IPC)

Report A-2023-051

December 1, 2023

The House of Assembly

Summary: The Complainant made an access to information request to the House of Assembly for records relating to the planning for the release of the Office of the Auditor General report on Memorial University. The House of Assembly advised the Complainant the day after the request was submitted, that it had no access to the records of the Office of the Auditor General as it was its own independent statutory office. The Complainant asserted that the House of Assembly likely has access to the material requested and was obligated to perform a thorough search related to their request and the quick response from the House of Assembly suggested it had not met its duty to assist pursuant to section 13(1) of *ATIPPA, 2015.* This Office confirmed that the House of Assembly did meet its duty to assist and that the length of time for a response is not determinative as to whether the statutory duty is met. The quick response was appropriate and a benefit to the Complainant.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2, section 13(1), 14(1).

House of Assembly Accountability, Integrity and Administration Act, RSNL 1990, c. H-10, section 2(r)(6).

Auditor General Act, 2021, SNL c. A-22.01, section 30(1).

0030-060-23-015

BACKGROUND

[1] The Complainant made the following request to the House of Assembly (House):

> *All records pertaining to the scheduling of the preparation and release of the OAG [Office of the Auditor General] Report on Special Assignment into the Executive & Management Compensation. Operating Expenses and Oversight at Memorial University, which includes, but not limited to, records containing the planned release period. Period covered: 1 April 2022 to date.*

[2] The House replied to the Complainant's request the next day, stating that it had no responsive records as it is not involved in the work conducted by the Office of the Auditor General on the matter of interest to the Complainant.

[3] Due to the House's prompt response to their access request, the Complainant filed a complaint with this Office alleging that the House had not conducted a reasonable search for responsive records and had not met its duty to assist the Complainant pursuant to section 13(1) of *ATIPPA, 2015.*

[4] As informal resolution was unsuccessful, the Complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015.*

PUBLIC BODY'S POSITION

[5] It is the position of the House that it did meet its duty to assist the Complainant. Prior to the submission of the access request the Complainant contacted the House seeking the contact information for the ATIPP coordinator for the Office of the Auditor General. The House informed the Complainant that the Office of the Auditor General was not subject to *ATIPPA, 2015* as it was not considered a public body. The House provided the Complainant with the relevant legislative provisions that established this fact. When the Complainant challenged this position, the House provided the Complainant with the name of an individual at the Office of the Auditor General to contact for more information.

[6] A few days later, the Complainant submitted their access request intended for the Office of the Auditor General to the House. The House knew immediately that it possessed no

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information related to the access request as that would offend the independence of the Office of the Auditor General and be contrary to the Office of the Auditor General's enabling legislation. For those reasons, it promptly informed the Complainant that it had no responsive records. According to the House, it communicated quickly and comprehensively to the Complainant, as it is expected to do pursuant to *ATIPPA, 2015.*

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COMPLAINANT'S POSITION

[7] The Complainant states the House did not meet its duty to assist as it did not perform a thorough search related to their request. The Complainant insists that since the Office of the Auditor General report regarding Memorial University was initiated by two provincial government ministers, who are also members of the House, that the House would be privy to the information about the Office of the Auditor General's work on the report. The Complainant also asserts that the House did not meet its duty to assist as it did not transfer their access request to the appropriate public body in accordance with section 14(1) of *ATIPPA, 2015*

DECISION

[8] The sections of *ATIPPA, 2015* relevant to this matter is as follows:

> *13. (1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*
>
> . . .
>
> *14. (1) The head of a public body may, upon notifying the applicant in writing, transfer to another public body not later than 5 business days after receiving it, where it appears that*
>
> *(a) the record was produced by or for the other public body;*
>
> *(b) the record or personal information is in the custody of or under the control of the other public body.*

The section of the *House of Assembly Accountability, Integrity and Administration Act* relevant to this matter is as follows:

> *2. In this Act*
>
> . . .
>
> *(r) "statutory office" means the office and administrative staff serving the*
>
> . . .
>
> *(vi) other offices of the House of Assembly, with the exception of the office of the Auditor General, that may be established under an Act;*

The section of the *Auditor General Act, 2021* relevant to this matter is as follows:

> *30. (1) Audit working papers of the auditor general's office shall not be laid before the House of Assembly or a committee of the House of Assembly.*

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[9] In most cases, when this Office examines the duty to assist, it is in relation to the reasonableness of a search. However, the duty to assist goes beyond the search for responsive records and includes the interactions between a public body and applicant and the degree to which the public body tries to help the applicant resolve their issue.

[10] The duty to assist requires that a public body make a reasonable effort and respond without delay to an access request. A reasonable effort does not require a thorough search for records if the public body officials responding to the request know that what is being requested does not involve the public body. In this instance, the Complainant's original intention was to file their access request with the Office of the Auditor General. That is clear from the Complainant's communication with the House regarding who was the ATIPP Coordinator for the Office of the Auditor General. That the House quickly realized the error that the Complainant had made in submitting their request to the House is commendable. Legislatively, the House could have waited 20 business days before informing the Complainant that it did not have any responsive records. The House did not do this, saving the Complainant several weeks of waiting for a response.

[11] The House also does not function in the manner that the Complainant believes. The House does not serve as a repository for all communications between Members of the House of Assembly, nor does it provide members of the House access to the internal business of the various statutory offices. The *Auditor General Act, 2021* specifically prohibits records of the

Office of the Auditor General, other than a final report, from being disclosed to the House. As the House noted in its submission, if the House were monitoring and privy to all material generated by a statutory office, it would call into question the independence of those offices.

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[12] Section 30(1) of the *Auditor General Act, 2021* also explicitly removes the House from any involvement in the preparation of Auditor General reports, with the House only becoming involved once the report is tabled. The Complainant is seeking information on the internal workings of when the Office of the Auditor General planned to release its report on Memorial University and why that timeline was selected. It would be contrary to legislation for the House to be privy to the progress, or any other aspect, of an Office of the Auditor General report given the statutory barrier that exists between both bodies.

[13] The House understands its mandate. It should not have to expend resources searching for records on a matter in which it knows it has no role. If the Complainant is alleging that the House has possession of the records they are seeking, in contravention of the above-quoted legislation, the Complainant has not provided any evidence to support such allegations. As noted previously by this Office, a complainant alleging that a public body has not conducted a reasonable search must establish the existence of a reasonable suspicion that a public body is withholding a record. Similarly, the Complainant would have to show there are circumstances that reasonably suggest the House has contravened the *Auditor General Act, 2021*. No evidence of this has been provided by the Complainant. As well, the speed with which a public body responds to a request is not determinative of whether the duty to assist has or has not been met. This is an instance where the request was made to the wrong public body. To be fair to the Complainant, however, given that the Office of the Auditor General is not a public body subject to *ATIPPA, 2015*, there is no alternative public body to which to make a request for the records the Complainant is seeking.

[14] The Complainant also asserts that the House did not abide by section 14 of *ATIPPA, 2015* since it did not transfer their access request to the relevant public body upon realizing that it was not involved in the issue for which the access request was made. In this circumstance, the access request was seeking records from the Office of the Auditor General, which is not a public body for the purposes of *ATIPPA, 2015*. Since section 14 only applies to public bodies,

the House could not transfer a request to the Office of the Auditor General and therefore the House's actions were not contrary to *ATIPPA, 2015.* Instead, the House did the only thing it could do – promptly notify the Complainant that it had no records.

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RECOMMENDATIONS

[15] Under the authority of section 47 of *ATIPPA,* 2015, I find that the House of Assembly met its duty to accommodate pursuant to section 13(1) of *ATIPPA, 2015* and should maintain its position with respect to this access request.

[16] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the House of Assembly must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[17] Dated at St. John's, in the Province of Newfoundland and Labrador, this 1st day of December 2023.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador

Tab 14

Her Majesty the Queen in Right of Newfoundland and Labrador (appellant) v. The Newfoundland and Labrador Teachers' Association, as Representative of its members who are Third Parties to a Request as defined under the *Access to Information and Protection of Privacy Act, 2015* (first respondent) and School Board for Newfoundland and Labrador, English School District (second respondent) and The Information and Privacy Commissioner of Newfoundland and Labrador (third respondent) and Registered Nurses' Union of Newfoundland and Labrador (fourth respondent) and Canadian Union of Public Employees Local 1560 (fifth respondent) and Newfoundland and Labrador Association of Public and Private Employees (sixth respondent) and Eastern Regional Integrated Health Authority (seventh respondent) and Central Regional Integrated Health Authority (eighth respondent) and Western Regional Integrated Health Authority (ninth respondent) and Labrador-Grenfell Regional Integrated Health Authority (tenth respondent)
(17/10)

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Indexed As: Newfoundland and Labrador v. Newfoundland and Labrador Teachers' Association

2018 NLCA 54
3 C.A.N.L.R. 360
Court of Appeal of Newfoundland and Labrador
Welsh, White and Hoegg JJ.A.
September 17, 2018

Summary:
A local journalist requested the "name, job title and corresponding taxable income for the 2015 tax year for all English School District employees earning more than $100,000" pursuant to the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2. The English School District notified the affected employees that, subject to any appeal, it would disclose the information under the *Act*. The Newfoundland and Labrador Teachers' Association (NLTA) appealed the decision. The appellate judge in Supreme Court allowed the appeal, finding that disclosure was unreasonable and harmful to personal privacy under section 40(2) of the *Act* because an employee's name was not "information about a third party's position" which is not unreasonable to disclose. The Province appealed to this Court.

Held: Appeal allowed, decision of the English School Board restored (Welsh J.A. dissenting).

White J.A. (Hoegg J.A concurring): When a decision to disclose information under the *Act* is appealed to the Supreme Court, it is heard as a new matter and not using an administrative law standard of review. A further appeal to the Court of Appeal is governed by the ordinary appellate standards of review. Although it was argued that the appeal is moot, it is not for the reasons given by Welsh J.A.

Leave to appeal to SCC refused, 38400 (April 11, 2019)

In general, people have the right to access records held by public bodies. When a record is requested, it will be disclosed unless it falls into some particular exception. The exception the NLTA relies on is found in section 40(1) which provides that the head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy. The teachers' names are personal information. Under section 40(2)(f) a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff. Under section 40(4) disclosure of personal information is presumptively unreasonable if the personal information consists of the third party's name where it appears with other personal information about the third party. Under section 40(5) in considering whether this presumption is rebutted the head of a public body shall consider all the relevant circumstances, including whether the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny; the third party will be exposed unfairly to financial or other harm; or the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant.

Statutory interpretation requires a consideration, as an integral part of the interpretive exercise, of the problem or mischief to which the legislature directed its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court's general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been.

The name of the third party who occupies a position is "information about the third party's position" under section 40(2)(f). In the phrase "the third party's position", the words "the third party's" could on their face operate simply to identify which position may be disclosed. But that would be redundant: every position can be disclosed. Instead, they should be seen in the context of section 40(2)(f), whose only function is to allow the disclosure of personal information. The words "the third party's" emphasize that the information to be disclosed is not just impersonal facts about the position itself, but personal information about the particular individual who occupies it.

Under the other subsections which form the context of section 40(2)(f) it is reasonable to expect that the legislature intended that public bodies would have to disclose the names of persons who receive large government contracts (section 40(2)(g)) or persons who receive discretionary financial benefits (section 40(2)(h)). This is consistent with longstanding practice.

Moreover, the public has a legitimate and significant interest in the identities of the people who receive public money. Disclosing names promotes meaningful participation in the democratic process accountability. The privacy interests at stake are real, but are not comparable to the significant public

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interest in disclosure. If section 40(2)(f) applies, the information must be disclosed, and that is final. No other factors under section 40(5) must be considered.

Welsh J.A., dissenting: At issue is whether the appeal is moot, and, if not, whether the appellate judge erred in concluding that disclosure of the names of all employees of the Board who earn more than $100,000 annually is an unreasonable invasion of their personal privacy.

The *Public Sector Compensation Transparency Act* (the "*Transparency Act*"), assented to December 14, 2016, specifies disclosure requirements for public bodies such as the Board. It is specific regarding the release of an employee's name, which, it is argued, renders this appeal moot. The *Transparency Act* requires disclosure once a year and there is a threshold for employment compensation required for the release of the information. There are therefore several differences between the two statutes such that there remains a live controversy that may affect the rights of the participants. The appeal is not moot.

The stated purposes in section 3 of the *Access to Information Act* are ensuring that citizens have the information required to participate meaningfully in the democratic process; increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies. It is difficult to understand how these purposes are advanced by the release of the names of all employees earning more than $100,000 annually.

Section 40(2)(f) specifies that disclosure of personal information "is not an unreasonable invasion" of personal privacy where the information "is about a third party's position, functions or remuneration as an officer, employee or member of a public body". "Name" is not mentioned. The provision refers to information "about" an individual's position or remuneration, which would not, without more, necessarily include the individual's name. Insofar as this results in ambiguity, the remaining provisions provide interpretive assistance.

Under section 40(4)(g), disclosure of the name is presumed to be an unreasonable invasion of privacy where it appears with other personal information. Disclosure of a teacher's or other employee's name together with that person's employment status, including remuneration, would fall within the language of section 40(4) and, on that basis, be presumed to be an unreasonable invasion of privacy. The name of an identified employee is not information "about" that person's position, function or remuneration. Disclosure of an employee's name therefore does not fall within section 40(2)(f).

The presumption in section 40(4) may be rebutted by considering "all the relevant circumstances", including the enumerated list in section 40(5). No

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participant made persuasive submissions to counter this interpretation of the *Act* which balances the rights of individual employees with the democratic purposes sought to be achieved by the *Act*. The appellate judge did not err in concluding that disclosure of the names of all teachers and other employees of the Board, as requested, is, pursuant to section 40(4) of the *Act*, presumed to be an unreasonable invasion of their personal privacy, and that, upon consideration of all the relevant circumstances, the factors enumerated in section 40(5), and the purpose of the *Act* set out in section 3, that presumption was not rebutted. The appeal should be dismissed.

Cases cited:
White J.A.:
Corporate Express Canada Inc. v. Memorial University of Newfoundland, 2015 NLCA 52, 371 Nfld. & P.E.I.R. 137
Archean Resources Ltd. v. Newfoundland (Minister of Finance), 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124
Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), 2003 SCC 8, [2003] 1 S.C.R. 66
O.P.S.E.U. v. Ontario (Attorney General), [1987] 2 S.C.R. 2, 41 D.L.R. (4th) 1
Newfoundland (Treasury Board) v. N.A.P.E., 2004 SCC 66, [2004] 3 S.C.R. 381

Welsh J.A. (dissenting):
Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342
Ministry of Finance (BC Public Service Agency), 2014 BCIPC 44
Dickie v. Nova Scotia (Minister of Health) (1999), 176 N.S.R. (2d) 333 (NS CA)
MacNeill v. Information and Privacy Commissioner (P.E.I.), 2004 PESCTD 69, 242 Nfld. & P.E.I.R. 231

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Twila Reid, for the seventh, eighth, ninth and tenth respondents.

This appeal was heard on February 12 and 13, 2018 before Welsh, White and Hoegg JJ.A.

The following judgment was delivered on September 17, 2018 by White J.A. and concurred in by Hoegg J.A. with separate dissenting reasons by Welsh J.A.

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White J.A.:

[1] The *Access to Information and Protection of Privacy Act* requires public bodies to disclose employees' position, functions and salary, if requested. This case is about whether the *Act* also requires public bodies to disclose employees' names.

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BACKGROUND

[2] The case began on March 4, 2016, when a local journalist requested the "name, job title and corresponding taxable income for the 2015 tax year for all English School District employees earning more than $100,000". After evaluating the request, the English School District notified the affected employees that, subject to any appeal, it would disclose the information under the *Act*.

[3] The Newfoundland and Labrador Teachers' Association (NLTA) appealed the decision. It argued that the English School District had not given sufficient reasons for its decision and that the *Act*, properly interpreted, did not authorize disclosure. It also filed affidavits from teachers and principals indicating that disclosure could lead to acrimony between teachers and parents, causing undue harm and undermining the education system.

[4] The appellate judge in Supreme Court allowed the appeal. The Province appealed to this Court.

ISSUES

[5] The Province states two issues:

1. What is the standard of review?

2. Should the decision of the appellate judge be upheld?

STANDARD OF REVIEW

[6] When a decision to disclose information under the *Act* is appealed to the Supreme Court, it is heard as a new matter and not using an administrative law standard of review: see section 59(1). A further appeal to the Court of Appeal is governed by the ordinary appellate standards of review, as explained in *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52, 371 Nfld. & P.E.I.R. 137, where Hoegg J.A. said,

> [16] This appeal raises issues of statutory interpretation and application of statutory law to found facts. Matters of statutory interpretation are questions of law reviewable on a standard of correctness, as was recently confirmed by the Supreme Court in *Canadian National Railway Co. v. Canada (Attorney General)*, 2014

SCC 40, [2014] 2 S.C.R. 135 (see also *Trimart Investments Limited v. Gander (Town)*, 2015 NLCA 32). Judicial determinations resulting from the application of a legal standard to a set of facts raise questions of mixed fact and law. Questions of mixed fact and law are reviewable on the deferential standard of palpable and overriding error unless "it is clear that the ... judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law" (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 37).

ANALYSIS

Statutory Scheme: Access to Personal Information

[7] In general, people have the right to access records held by public bodies: see section 7(1). When a record is requested, it will be disclosed unless it falls into some particular exception. The exception the NLTA relies on is found in section 40(1):

> The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

[8] The scope of this exception is outlined in a few other sections. First, "personal information" is defined in section 2(u):

> "personal information" means recorded information about an identifiable individual, including
>
> ...
>
> (i) the individual's name, address or telephone number, [and]
>
> ...
>
> (vii) information about the individual's educational, financial, criminal or employment status or history ... .

[9] The teachers' names are personal information as set out in s. 2(u)(i). So are the position title and salary under section 2(u)(vii), if they are released together with the name or if the position title on its own is sufficient to identify the individual.

[10] Second, section 40(4) sets out some situations where disclosure is presumptively unreasonable, one of which applies:

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> A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where
>
> ...
>
> (g) the personal information consists of the third party's name where
>
> (i) it appears with other personal information about the third party ... .

[11] Third, the factors that determine whether this presumption is rebutted are outlined in section 40(5). Here are the most relevant portions:

> In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;
>
> ...
>
> (e) the third party will be exposed unfairly to financial or other harm;
>
> ...
>
> (h) the disclosure may unfairly damage the reputation of a person referred to in the record requested by the applicant ... .

[12] The NLTA argues that the names are personal information under s. 2(u)(i), that their disclosure together with position and salary engages the presumption in section 40(4), and that the presumption cannot be rebutted under section 40(5).

[13] The Province responds that the information must be disclosed under section 40(2)(f):

> A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where
>
> ...

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> (f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff ... .

[14] The appellate judge concluded that the information did not fall under section 40(2)(f) because an employee's name is not "information about a third party's position". The correctness of that conclusion is the central issue on this appeal. But before coming to it I will review the principles of statutory interpretation.

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General Principles of Statutory Interpretation

[15] The appellate judge rightly pointed to *Archean Resources Ltd. v. Newfoundland (Minister of Finance)*, 2002 NFCA 43, 215 Nfld. & P.E.I.R. 124 as the leading case in this province on interpreting provincial legislation. At paragraph 22 Green J.A. sets out the approach to be followed:

> [22] Instead of mandating some fictionalized search for a collective "legislative intention", s. 16 [of the *Interpretation Act*] directs the court to consider every provision "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. This requires a consideration, as an integral part of the interpretive exercise, of the problem or "mischief" to which the legislature directed its legislative act as a remedy and then the drawing of an inference, based on the language of the whole enactment and the court's general knowledge of the state of the pre-existing law and any information as to the broad social context in which the legislative act occurred, as to what, broadly speaking, the object or objects of the legislative act must have been. The end result is to arrive at a "true" meaning. ...

Does section 40(2)(f) apply?

[16] ***Statutory Language.*** The name of the third party who occupies a position is "information about the third party's position".

[17] This conclusion can be reached by considering the ordinary use of language. If an ordinary person is asked for information about the position of Premier of Newfoundland and Labrador, the identity of the current Premier is likely to come to mind.

[18] The same conclusion can be supported by a more detailed analysis of the words. The words "information about" indicate that section 40(2)(f) is not confined to the third party's position: it embraces a range of information related to or about the position.

[19] In the phrase "the third party's position", the words "the third party's" could on their face operate simply to identify which position may be disclosed.

But that would be redundant: every position can be disclosed. Instead, they should be seen in the context of section 40(2)(f), whose only function is to allow the disclosure of personal information. The words "the third party's" emphasize that the information to be disclosed is not just impersonal facts about the position itself, but personal information about the particular individual who occupies it.

[20] There are interesting line-drawing questions about how much personal information a provision like section 40(2)(f) is meant to include: see e.g. *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66. But the person's name is the starting place for personal information, the most public and least intimate identifying fact.

[21] The legislature does not need to use the word "name" for the third party's name to be "information about the third party's position". It is always possible to call for clearer language. The legislature could have specifically included the third party's name—but they could also have specifically excluded it. They did neither, and the Court must now interpret the language that exists.

[22] ***The Remainder of section 40(2)***. Section 40(2)(f) does not exist in a vacuum. Many other paragraphs of section 40(2) protect public access to information about public spending:

> A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where
>
> ...
>
> (g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;
>
> (h) the disclosure reveals the opinions or views of a third party given in the course of performing services for a public body, except where they are given in respect of another individual;
>
> . . .
>
> (j) the information is about expenses incurred by a third party while travelling at the expense of a public body;
>
> (k) the disclosure reveals details of a licence, permit or a similar discretionary benefit granted to a third party by a public body, not including personal information supplied in support of the application for the benefit;

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(l) the disclosure reveals details of a discretionary benefit of a financial nature granted to a third party by a public body, not including

(i) personal information that is supplied in support of the application for the benefit, or

(ii) personal information that relates to eligibility for income and employment support under the *Income and Employment Support Act* or to the determination of income or employment support levels.

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[23] These provisions are located in the same subsection as section 40(2)(f). They are concerned with the same topic: transparency about the personal information of people receiving discretionary public funds and benefits. They are similarly worded, and none of them specifically allow disclosure of the name of the third party who is receiving public funds. If section 40(2)(f) does not allow disclosure of third parties' names, then neither do these other provisions.

[24] But it is reasonable to expect that the legislature intended that public bodies would have to disclose the names of persons who receive large government contracts (section 40(2)(g)) or persons who receive discretionary financial benefits (section 40(2)(h)). Similarly, when a public body engages an external report, it must be presumed that it can disclose the name of the third party who produced it (section 40(2)(h).

[25] ***Existing Practice.*** The names of government employees have historically been publicly disclosed. In fact, as of the date of this decision, the government offers a phone book with the name and contact information of many of its employees: see Newfoundland and Labrador, "Telephone Directory" available at <http://telephonedirectory.gov.nl.ca/>.

[26] Perhaps the *Act* is inconsistent with this longstanding practice. But nothing in the statutory language suggests so. (Neither does anything in the analysis below.)

[27] ***Why Disclose Names?*** The appellate judge concluded at paragraphs 134 and 135 that the public interest in disclosing the names of public employees was outweighed by the employees' privacy interests. She saw little public interest in disclosing the names of individual employees.

[28] I disagree. The public has a legitimate and significant interest in the identities of the people who receive public money.

[29] The legislative purpose is stated in section 3(1):

The purpose of this *Act* is to facilitate democracy through

(a) ensuring that citizens have the information required to participate meaningfully in the democratic process;

(b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and

(c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

[Underlining added.]

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[30] Disclosing names promotes both meaningful participation in the democratic process (section 3(1)(a)) and accountability (section 3(1)(b)).

[31] People have a right to inquire whether politicians or senior civil servants are hiring or promoting family members or friends. People have a right to inquire whether campaign donors or volunteers are proliferating on the payroll. Names are necessary to satisfy these inquiries.

[32] Whether a salary is fair depends on who is being paid. A government solicitor is paid $100,000—is this a high salary for a junior lawyer or a low salary for a senior one?

[33] The values at stake go beyond value for money. The political neutrality of the civil service is a constitutional principle, an essential part of the modern Westminster system of responsible government. It is sufficiently important to justify depriving many public servants of the right to run for political office or speak on political issues: see *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, 41 D.L.R. (4th) 1. And yet for the public to meaningfully assess whether the civil service remains neutral, they need access to the names of civil servants and, their specific compensation.

[34] Another important value at stake is employment equity. The public has a legitimate interest in knowing whether historically disadvantaged groups are fairly represented in the civil service. Individuals who lose job competitions have a legitimate interest in knowing who won. Here, again, the identities of public employees are relevant.

[35] Yet another relevant constitutional value in play is pay equity: see *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381. Individual public employees should be able to determine whether they are fairly paid relative to their counterparts. To do this it is not enough to know what positions have what salaries. An individual employee may not know whether a higher-paying position in another department with a

comparable title is occupied by someone more or less senior, more or less qualified. How can employees assess whether they are fairly treated compared to their counterparts, without knowing who their counterparts are?

[36] The same applies on a public-accountability level. Researchers, advocates, and voters should be able to collect the information they need to assess pay equity. They need identities and not just position titles.

[37] The applications judge significantly underestimated the legitimate public interests in knowing public employees' names.

[38] ***Names and Privacy:*** Releasing the names and salaries of public employees will lead to a loss of privacy. Giving effect to section 40(2)(f) will enable some harmful gossip, and it may lead to some of the harms outlined in the affidavits before the court.

[39] But even on the narrowest theory of section 40(2)(f) it allows people to snoop into their friends' or neighbours' or coworkers' information. Anyone can anonymously request the position and salary of any named individual. There is no dispute about that.

[40] So a restrictive interpretation of section 40(2)(f) can only serve to discourage gossip from people who are motivated to peruse sunshine lists looking for their acquaintances, but not motivated enough to file cheap anonymous requests to find the information they want. The privacy interests at stake are real, but they are easy to overstate—and not comparable to the significant public interest in disclosure.

[41] ***Hansard and the Wells Report:*** The balancing of interests above is not merely speculative. There is fairly strong evidence that the appropriate balance between public interest and privacy was considered in the drafting of section 40(2)(f), with the conclusion that the balance favoured disclosure.

[42] Unlike most modern legislation, the *Act* was not prepared by the executive branch. It was drafted by an external committee consisting of Clyde K. Wells, Doug Letto, and Jennifer Stoddart, who left detailed reasons for why various choices were made: *Report of the 2014 Statutory Review of the Access to Information Act*, vol. 2 (St. John's, NL: Queen's Printer, 2015), available online: <http://www.ope.gov.nl.ca/publications/pdf/ATIPPA_Report_Vol2.pdf> (the "Wells Report").

[43] The *Act* is the bill suggested in the Wells Report with minor amendments. It passed unanimously. Every member who spoke about the Wells Report did so favourably. See Newfoundland and Labrador, House of Assembly, *House of Assembly Proceedings*, vol. XLVII no. 3, (April 23, 2015) at 97–245; vol. XLVII no. 15 (May 14, 2015), at 683–695. The Wells Report is as close to an authoritative source on legislative intention as can be imagined.

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[44] The Wells Report analyzes, at pp. 190–191, the *Ontario Public Sector Salary Disclosure Act, 1996*, SO 1996, c. 1, Sch. A, which provides for an annual disclosure of the name, salary, and benefits of any Ontario employee making a salary of $100,000 or more: section 3. It then analyzes the stakes:

> In an age where the values of equality and democracy are seen increasingly as being central in our society, there is diminishing justification for holding confidential the payment schemes for employees and officials who are paid from the public purse. Unfortunately, this does result in less privacy for those public officials and employees. However, the deleterious effect of disclosing salaries or pay scales has yet to be shown. Some, such as judges and elected officials, have been subject to such a regime for years.

[45] In addition to Ontario's Sunshine List, the Wells Report compares the regime it endorses to the disclosure regime for judges and elected officials. Like Ontario's Sunshine List, both regimes reveal employees' names.

[46] Before suggesting the current wording of section 40(2)(f), the Wells Report concludes:

> The privacy of public employees needs to be balanced against the public's right to know how their tax dollars are spent. Contemporary values of transparency and accountability for public funds tip the balance in favour of disclosure.

[47] The Wells Report considered several models, all of which required disclosure of names. It reviewed the public interest and the privacy consequences, concluded that the public's right to know was more important, and suggested the current wording. It expressed no reservations about disclosing names. I cannot read the Wells Report as supporting any conclusion apart from that the *Act* was meant to allow the disclosure of employees' names.

[48] ***Conclusion on section 40(2)(f)***: I have concluded that section 40(2)(f) is meant to ensure that members of the public can know who is on the public payroll, what their duties are, and how much they are being paid.

<u>If section 40(2)(f) applies, it is final</u>

[49] Some parties suggested, both below and before this Court, that even if the teachers' names are included in section 40(2)(f) the Court should consider the factors in section 40(5) and decide whether releasing the names would be an unreasonable invasion of privacy.

[50] The appellate judge rejected this conclusion, holding at para. 31 that if section 40(2)(f) applies, "the case is governed by its operation without regard

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to section 40(5)." I agree. If section 40(2)(f) applies, the information must be disclosed, and that is final.

Is the Appeal Moot?

[51] I agree with my colleague that the appeal is not moot. My analysis would have general application regardless of the amount of income.

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CONCLUSION

[52] I would set aside the decision under appeal and restore the decision of the English School Board. The publication ban below must also be set aside. No costs were awarded by the appellate judge and the appellant does not seek costs on appeal. Accordingly, I would make no order as to costs.

Dissenting Reasons by Welsh J.A.:

[53] At issue in this appeal is whether a school board is authorized or required to release for publication by a newspaper the names, positions and annual salaries of employees earning more than $100,000, pursuant to a request by the newspaper under the *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A-1.2.

[54] The School Board for Newfoundland and Labrador, English School District (the "Board"), took the position that the information, including the names of employees, should be released. Some individual employees and the Teachers' Association of Newfoundland and Labrador, representing third parties, objected to release of the names. On appeal to the Supreme Court of Newfoundland and Labrador, the judge concluded that the legislation did not authorize release of the names of the employees. Her Majesty the Queen in Right of Newfoundland and Labrador appeals that decision.

[55] There is also a question of whether the appeal is moot given the enactment of the *Public Sector Compensation Transparency Act*, SNL 2016, c. P-41.02.

BACKGROUND

[56] It is useful to begin with a summary of the parties. In the Supreme Court, the applicant was the Teachers' Association and the Board was the respondent. The Supreme Court judge (the "appellate judge") granted intervenor status to and heard submissions from Her Majesty the Queen in Right of Newfoundland and Labrador (the "Province"), the Information and Privacy Commissioner (the "Commissioner"), three unions, and four health authorities. The unions and health authorities have an interest since the

result in this case may have general application which would affect the rights of their members and employees. Indeed, proceedings brought by those parties were adjourned pending resolution of this case. In granting the applications by the intervenors, the appellate judge permitted them to file affidavits, briefs or other materials as if they were parties to the proceeding. This is consistent with section 56(3) of the *Access to Information and Protection of Privacy Act, 2015* (the "*Access to Information Act*" or the "*Act*") and rule 7.05 of the *Rules of the Supreme Court, 1986*.

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[57] By contrast, the Board did not participate in the proceeding in the court appealed from. The appellate judge was critical of the Board for this failure given that the Board was the named respondent and that, under the legislation, being the public body responsible for making the decision, it bore the onus of establishing that the information was properly disclosed. Although the Board participated in the appeal in this Court, the appeal was, in fact, brought by the Province.

[58] As to the substance of the appeal, a local newspaper, the Telegram, made the following written request to the Board for disclosure of information pursuant to the *Access to Information Act*:

> The name, job title and corresponding total taxable income for the 2015 tax year for all English School District employees earning more than $100,000.

The intention of the Telegram was to publish the information in the newspaper.

[59] The Board gave notice of the Telegram's request to the affected employees to give them the opportunity to object to the release of their information. The notice stated:

> The District has provided the following information to the [Telegram] in response to the Request:
>
> > Position with the District and taxable income for 2015 for all district employees earning more than $100,000.
>
> The Director of Education for the District has determined further disclosure of information is required by the Act and accordingly is assessing disclosure of the following information in response to the request:
>
> > Name, position with the district and taxable income for 2015 for all district employees earning more than $100,000.
>
> As per section 19(5) of the Act (see attached), the District is providing you with written Notice that this further information is intended to be disclosed to the [Telegram] on the basis that it is not an unreasonable invasion of privacy. ...

The Newfoundland and Labrador Teachers' Association objected only to the release of the names of the affected employees.

[60] Ultimately, without giving reasons for its decision, the Board advised the Telegram that the information would be released. The appellate judge

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identified errors in the manner in which the Board provided its decision (2016 NLTD(G) 211):

> [12] In an oral decision on November 15th, 2016, I concluded that while the [Board] had failed in its obligation to provide reasons and cite the provisions of the *Act* upon which its conclusion had been based (as required under section 19(5)(a) of the [*Access to Information Act*]), since the appeal to the trial division was to be treated "as a new matter", the lack of reasons could not delay or bar the appeal. In fact, I concluded that the lack of reasons from the [Board] may constitute a failure to act under section 59 of the [*Act*] which is reviewable in and of itself.

This is a clear reminder to public bodies regarding the responsibility to provide reasons when responding to an application under the *Access to Information Act*.

[61] The appellate judge summarized her conclusions:

> [136] The teachers in question are "identifiable individuals" [under the *Access to Information Act*] because the [Board] had recorded information respecting their positions and income.
>
> [137] For these identifiable individuals, their names would be personal information, the release of which is presumptively an invasion of their personal privacy under subsections 40(4)(d) and (g).
>
> [138] It has not been established that section 40(2)(f) deems the release of names for such identifiable individuals as "not an unreasonable invasion of privacy".
>
> [139] Since subsections of section 40(4) apply and section 40(2)(f) does not apply, consideration of the section 40(5) factors is required. Consideration of these factors does not rebut the presumption in favour of protection of privacy of the third parties.
>
> [140] The [Board] has not met the onus of proving that its decision to release the names (together with positions and incomes) of the identifiable individuals is required under the [*Access to Information Act*].

[62] By way of explanation the appellate judge wrote:

> [134] The [*Access to Information Act*] must therefore be interpreted consistent with its stated purposes (section 3(1)) and the enumerated means of achieving them (section 3(2)). Giving the [Telegram] a list of the public sector positions and salaries over $100,000 increases

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transparency in government and public bodies consistent with section 3(1)(b). Withholding the individual names of those employees protects their individual privacy with respect to personal information about themselves (characteristics) held by the [Board] consistent with section 3(1)(c). The [Telegram] has successfully used its right to access the records under section 3(2)(a) while the [Teachers' Association's members'] right to be protected from unreasonable invasion of privacy, is honoured (section 3(2)(c)(ii)).

[135] In this respect I believe that in the absence of proof that the public interest in disclosure (of the names) outweighs the third parties' rights of privacy (section 3(2)(d)), the interpretation I have given to the impugned sections achieves a result that is fair to both the [Telegram] (and the public at large) and the [Teachers' Association's] members, and is in harmony with the social and legislative context including constitutional values (particularly the *Charter* section 7).

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ISSUES

[63] At issue is whether the appeal is moot, and, if not, whether the appellate judge erred in concluding that disclosure of the names of all employees of the Board who earn more than $100,000 annually is an unreasonable invasion of their personal privacy.

ANALYSIS

The Legislation

[64] The purpose of the *Access to Information and Protection of Privacy Act* is set out in section 3(1):

> The purpose of this Act is to facilitate democracy through
>
> > (a) ensuring that citizens have the information required to participate meaningfully in the democratic process;
> >
> > (b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and
> >
> > (c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

[65] "Personal information" is defined in section 2(u) to mean:

> recorded information about an identifiable individual, including

> (i) the individual's name, address or telephone number,
>
> (ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
>
> (iii) the individual's age, sex, sexual orientation, marital status or family status,
>
> ...
>
> (vii) information about the individual's educational, financial, criminal or employment status or history,
>
> ...
>
> (Emphasis added.)

[66] Section 40(1) of the *Act* precludes release of personal information that would be an unreasonable invasion of privacy:

> The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

[67] Section 40(2)(f) specifies a circumstance where disclosure of information is not an unreasonable invasion of personal privacy:

> A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where
>
> ...
>
> (f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body ...;

[68] Section 40(4)(c) and (g) specify instances where disclosure of information is presumed to be an unreasonable invasion of personal privacy:

> A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where
>
> ...
>
> (c) the personal information relates to employment or educational history;

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> ...
>
> (g) the personal information consists of the third party's name where
>
> (i) it appears with other personal information about the third party, or
>
> (ii) the disclosure of the name itself would reveal personal information about the third party; ...

As with any presumption at law, the presumption set out in this section may be rebutted.

[69] Section 40(5) sets out factors to be considered in determining whether disclosure of information constitutes an invasion of personal privacy:

> In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny;
>
> ...
>
> (e) the third party will be exposed unfairly to financial or other harm;
>
> (f) the personal information has been supplied in confidence;
>
> ...

[70] Pursuant to section 43, the Board, as the public body, has the burden of proving that disclosure of the employees' personal information would not be contrary to the *Act* or *Regulations*.

[71] Section 59(1) of the *Act* provides for an appeal of the Board's decision to the Supreme Court "as a new matter" for which affidavit evidence may be received. The burden of proof set out in section 43 applies to that appeal.

[72] Section 56(3) is directed to the role of the Province and others in an appeal:

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> The minister responsible for this Act, the commissioner, the applicant or a third party may intervene as a party to an appeal under this Division by filing a notice to that effect with the Trial Division.

Is the Appeal Moot?

[73] The *Public Sector Compensation Transparency Act* (the "*Transparency Act*"), assented to December 14, 2016, specifies disclosure requirements for public bodies such as the Board. Section 4 provides:

> Before July 1 of each year the chief executive officer shall disclose to the minister and the public, in the form and manner determined by the minister, the following information with respect to each employee of the public body whose total compensation during the previous year was greater than the threshold:
>
> (a) the name of the employee;
>
> (b) the title of the position the employee held on December 31 of the previous year ...; and
>
> (c) the amount of total compensation paid to the employee.

At the time of this appeal, the threshold was $100,000 (*Public Sector Compensation Transparency Regulations*, NLR 81/16).

[74] Section 4 of the *Transparency Act* is specific regarding the release of an employee's name. An exemption from release may be permitted only where "disclosure of the information could reasonably be expected to threaten the safety or mental or physical health of the employee" (sections 7 and 8 of the *Act*). By contrast, as discussed in the appellate judge's decision, and below, the language in the *Access to Information Act* is not specific and, as a result, is less clear regarding disclosure of an employee's name pursuant to an application under the *Act*. This necessitates statutory interpretation of relevant provisions, especially sections 3 and 40 of the *Act*.

[75] It may be argued that the subsequent, specific legislation adopted in the *Transparency Act* renders consideration of this appeal moot on the basis that the issues under the *Access to Information Act* have become academic (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at page 353).

[76] On the other hand, it was submitted in response that there is a difference between the two statutes such that there remains a live controversy that may affect the rights of the participants. Under the *Transparency Act*, the Board is required, before July 1 each year, to disclose to the minister and to the public the information in section 4. However, that information is required to be disclosed only once per year. By contrast, the

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Access to Information Act permits an application seeking disclosure under that legislation at any time.

[77] Further, the *Transparency Act* specifies a threshold employment compensation of $100,000 to engage release of the information. No similar limitation is found in the *Access to Information Act*. While the request by the Telegram is restricted to "employees earning more than $100,000" annually, the analysis would have general application to any similar request for information regarding the release of employees' names along with their job titles and annual salary regardless of the amount of the salary.

[78] Accordingly, I accept that the *Transparency Act* does not have the effect of rendering this appeal moot.

Interpretation of Section 40 of the *Access to Information Act*

Purpose of the Access to Information Act

[79] I begin with the stated purpose in section 3 of the *Access to Information Act*, which is three-fold, and which I repeat for ease of reference:

> (a) ensuring that citizens have the information required to participate meaningfully in the democratic process;
>
> (b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and
>
> (c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

[80] The question is how these purposes are advanced by the release of the names of all employees earning more than $100,000 annually. I begin with some general comments regarding the stated purposes before turning to the interpretation of section 40 of the *Act*. To summarize briefly, first, it is difficult to understand how knowing the names of all teachers and other Board employees who earn more than $100,000 annually is necessary to permit citizens to participate meaningfully in the democratic process. Second, it is difficult to understand how disclosure of the information that named teachers or Board employees earn a salary of more than $100,000 annually will address the objective that "elected officials, officers and employees of public bodies remain accountable". Third, it is difficult to understand how disclosing the names of teachers or Board employees earning a salary of more than $100,000 annually is consistent with protecting the privacy of those individual teachers and employees.

[81] If the objective is to provide the public with statistical information regarding the expenditure of public funds for teachers and other Board

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employees, this can be done without naming individual teachers and employees who earn more than a specified salary. That is, disclosing the number of employees in each position earning an annual salary of more than $100,000, without names, would hold the Board accountable for how it is spending its funds. If accountability of the Board regarding, for example, employment equity is an issue, information could be provided stating the number of teachers and other employees earning specified salaries with sub-categories regarding gender, race or other identifying characteristics if that would be pertinent information. Providing the names of teachers or employees earning an annual salary of more than $100,000 would provide little, if any, information useful in assessing the Board's accountability regarding the expenditure of public funds. Rather, statistical information, for which the names of individuals would be irrelevant, would achieve that purpose.

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[82] Further, if there is some reason for disclosing the salary of individual, named teachers and employees, it is unclear why a threshold salary of $100,000 is relevant. Are those earning $90,000 less accountable? Is the Board less accountable for those earning $80,000 annually? Indeed, the March 2015 report submitted by the committee conducting the statutory review of the existing *Access to Information Act* recommended:

> The Committee concludes it is unfair to single out employees at any particular income level, and recommends that salaries and benefits of all employees of public bodies be subject to disclosure.

[83] Keeping the purposes stated in section 3 in mind, I turn to the interpretation of section 40 of the *Act*. I would add here that the analysis is directed to the request made by the Telegram and similar requests. Other types of requests, including where a name may be involved, must be assessed on their merits in light of the purpose, requirements and language of the *Act*.

Subsections (3) and (4) of Section 40 of the Access to Information Act

[84] Under section 40(1) of the *Act*, the Board "shall refuse" to disclose personal information where "disclosure would be an unreasonable invasion" of the individual's personal privacy. An individual's name falls within the definition of "personal information" under section 2(u).

[85] Section 40(2)(f) specifies that disclosure of personal information "is not an unreasonable invasion" of personal privacy where the information "is about a third party's position, functions or remuneration as an officer, employee or member of a public body" (underlining added). Name is not mentioned and no distinction is drawn among officers, employees and members of the Board. The provision refers to information "about" an individual's position or remuneration, which would not, without more,

necessarily include the individual's name. Insofar as this results in ambiguity, the remaining provisions provide interpretive assistance.

[86] Section 40(4) enumerates circumstances where disclosure of personal information is presumed to be an unreasonable invasion of personal privacy. In contrast to section 40(2), section 40(4)(g) refers specifically to the individual's name. Under section 40(4)(g), disclosure of the name is presumed to be an unreasonable invasion of privacy where it appears with other personal information or the disclosure would reveal personal information about the individual. Included in the definition of personal information is "information about the individual's educational, financial, criminal or employment status or history" (section 2(u)(vii)). It follows that disclosure of a teacher's or other employee's name together with that person's employment status, including remuneration, would fall within the language of section 40(4) and, on that basis, be presumed to be an unreasonable invasion of privacy. That interpretation of the language of sections 40(4) and 2(u), is further supported when those provisions are read together with section 40(2), which is ambiguous regarding the disclosure of names. This is the conclusion reached by the appellate judge.

[87] As further support for that conclusion, the judge reviewed judicial decisions from other jurisdictions. I agree with her assessment and conclusion regarding *Ministry of Finance (BC Public Service Agency)*, 2014 BCIPC 44, adjudicator's decision:

> [76] Both the facts and the legislative basis upon which Adjudicator Flanagan made his decision in Order F14-41 are significantly different than the facts before me and the legislative regime in Newfoundland and Labrador. Order F14-41 does not assist me in my interpretation of subsections 40(4)(d) or (g).

[88] Regarding *Dickie v. Nova Scotia (Minister of Health)* (1999), 176 N.S.R. (2d) 333 (NS CA), I agree with the appellate judge:

> [77] While the Nova Scotia legislation is identical, the *Dickie* decision does not assist in my interpretation of subsections 40(4)(d) and (g) because the request therein was for records associated with a professional misconduct complaint. The applicant was seeking witness statements and case assessments (paragraph 4) and not names, functions and remuneration.

[89] Finally, the appellate judge found support for the conclusion that disclosure of the employee's name is presumptively an unreasonable invasion of privacy from the decision in *MacNeill v. Information and Privacy Commissioner (P.E.I.)*, 2004 PESCTD 69, 242 Nfld. & P.E.I.R. 231. The legislation under review in that case is the same as the legislation under review here. The appellate judge summarized the result in *MacNeill*:

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> [80] ... that salary range and job titles were not entitled to the presumption of privacy and were in fact deemed not to be an unreasonable invasion of personal privacy under section 15(2)(e) but that the disclosure of individual salary information was entitled to the presumption of privacy under section 15(4)(e) and (g) which presumption was not rebutted by section 15(5) (the equivalent of our 40(5)).

[90] Further, the appellate judge explained that the name of an identified employee is a characteristic of that person similar to age, sex or marital status (section 2(u) of the *Act*), and is not information "about" that person's position, function or remuneration. She reached that conclusion based on "the surrounding text, other relevant sections [of the *Act*], the social and legislative context and jurisprudence" (appellate judge's decision, at paragraph 115).

[91] In the result, the appellate judge concluded that disclosure of an employee's name does not fall within section 40(2)(f) of the *Access to Information Act* and, therefore, cannot be characterized under the *Act* as "not an unreasonable invasion of privacy". (The Province relies on the conclusion that section 40(2) of the *Act* applies and took no position regarding the application of sections 40(4) and (5).)

[92] In light of the above discussion I am satisfied that the appellate judge did not err in concluding that disclosure of the employee's name is presumptively an unreasonable invasion of privacy under section 40(4) of the *Access to Information Act*. That presumption may be rebutted if the Board, or another participant in the proceeding, can establish that disclosure of employee names as requested by the Telegram is necessary to achieve the purpose of the *Act* despite the operation of the presumption in section 40(4).

Section 40(5) of the Access to Information Act

[93] In considering whether the section 40(4) presumption had been rebutted, since the Board, which bore the onus of proof, did not participate in the proceeding, the appellate judge relied on submissions by the other participants. She also referenced the March 2015 report submitted by the committee conducting the statutory review of the existing *Access to Information Act* and affidavits filed by several teachers. Section 40(5) of the *Act* requires a consideration of "all the relevant circumstances", including the enumerated list.

[94] The appellate judge found the affidavits to be of little or no assistance. She particularly considered section 40(5)(a) of the *Act*, that is, "whether the disclosure is desirable for the purpose of subjecting the activities of the province or a public body to public scrutiny". This factor requires an assessment of the purpose of the *Access to Information Act*. As discussed above at paragraphs 81 and 82, it is difficult to see how the purpose of subjecting the Board's activities to public scrutiny is advanced by the

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disclosure of the names of teachers and employees earning more than $100,000 annually. The names of employees is irrelevant to the compilation of statistical information.

[95] The same applies to financial accountability of the Board which would address information as to the number of employees and types of positions and their remuneration, without reference to individual names. As explained by the appellate judge at paragraphs 134 and 135 (paragraph 62, above), disclosure of the positions and their remuneration, while refusing disclosure of the name of the individual employee holding a particular position, achieves the purposes enumerated in section 3(1)(a) and (b) of the *Act* while protecting the personal privacy of particular employees pursuant to section 3(1)(c).

[96] Neither the Province, which did not address the operation of section 40(5), nor the Board, nor any other participant made persuasive submissions to counter this interpretation of the *Act* which balances the rights of individual employees with the democratic purposes sought to be achieved by the *Act*.

[97] In the result, I am satisfied that the appellate judge did not err in concluding that disclosure of the names of all teachers and other employees of the Board, as requested, is, pursuant to section 40(4) of the *Act*, presumed to be an unreasonable invasion of their personal privacy, and that, upon consideration of all the relevant circumstances, the factors enumerated in section 40(5), and the purpose of the *Act* set out in section 3, that presumption was not rebutted.

SUMMARY

[98] In summary, I am satisfied that the appeal is not moot since, unlike the *Transparency Act*, the *Access to Information Act* is engaged on the basis of applications for information which may be made at any time and is not restricted to a threshold salary of $100,000.

[99] I am satisfied that the appellate judge did not err in concluding that the disclosure of names, as requested in the Telegram's application under the *Access to Information Act*, would result in an unreasonable invasion of the employees' personal privacy. In the result, the *Act* precluded disclosure of the names.

[100] This appeal involves a significant public issue regarding personal privacy and is of fundamental interest to public sector employees and employers, as evidenced by the number of participants. In the circumstances I would make no order as to costs.

[101] Accordingly, I would dismiss the appeal, with no order as to costs.

Appeal allowed, Welsh J.A. dissenting.

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Tab 15

COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner), 2018 ONCA 559
DATE: 20180618
DOCKET: C63765

Rouleau, Benotto and Roberts JJ.A.

BETWEEN

Children's Lawyer for Ontario

Applicant (Appellant)

and

Information and Privacy Commissioner/Ontario and the Ministry of the Attorney General for Ontario, and John Doe, Requester

Respondents (Respondents)

Ian Ross and Sheena Scott, for the appellant, Children's Lawyer for Ontario

Sara Blake and Sarah Kromkamp, for the respondent, Attorney General for Ontario

Linda Rothstein and Jodi Martin, for the respondent, Information and Privacy Commissioner of Ontario

Jesse Mark and Mary Birdsell, for the intervener, Justice for Children and Youth

Heard: December 1, 2017

On appeal from the order of the Divisional Court (Justices Katherine E. Swinton, Carolyn J. Horkins and Michael G. Emery), dated February 2, 2017, with reasons reported at 2017 ONSC 642, dismissing an application for judicial review from an order of the Information and Privacy Commissioner of Ontario, dated August 7, 2015.

Benotto J.A.:

OVERVIEW

[1] Are a child-client's litigation records with the Children's Lawyer for Ontario subject to a father's freedom of information access request? The answer turns on whether the records are "in the custody or under the control" of the Ministry of the Attorney General for Ontario ("MAG") for purposes of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*").

[2] The Assistant Information and Privacy Commissioner of Ontario (the "Adjudicator" and the "IPC") determined they were and ordered that MAG respond to the father's request. The Divisional Court upheld the Adjudicator's order on judicial review.[1] The Children's Lawyer appeals. MAG and Justice for Children and Youth,[2] an intervener, support the Children's Lawyer's position.

[3] I have concluded that the Adjudicator's decision should be reviewed for correctness and that it cannot stand. The issue on appeal involves matters of central importance to the administration of justice and is outside the Adjudicator's specialized expertise. As I will explain, the Adjudicator's decision is based on a fundamental misunderstanding of the role and function of the Children's Lawyer,

---

[1] The Divisional Court applied a reasonableness standard of review and indicated that – in any event – the decision was correct.

[2] Justice for Children and Youth is a legal clinic funded by Legal Aid Ontario with a mission of advancing the rights, interests and dignity of children and youth. It was granted intervener status based on its expertise regarding child representation and the privacy rights of children.

her relationship to MAG, and her duty to provide children with the heightened protection the law mandates. This decision is not in the best interests of children.

[4] For the reasons that follow, I would allow the appeal.

STATUTORY PROVISIONS

[5] Before addressing the facts and decisions below, it is helpful to summarize the various statutes that inform the appeal. The following are relevant: (i) *FIPPA* – which governs access to information; (ii) the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*") – which provides for the appointment of the Children's Lawyer; and (iii) several other statutory provisions – which establish the functions of the Children's Lawyer.

(1) *FIPPA*

[6] *FIPPA* has two purposes: to provide access to information and to protect individuals' privacy as it relates to that information. These are set out in s. 1:

> 1 The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and

> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information. [Emphasis added.]

[7] Under s. 10(1), every person has a right to access records or part of records in the custody or under the control of an institution, subject to certain exemptions:

> 10(1) ... [E]very person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> (a) The record or the part of the record falls within one of the exemptions under sections 12 to 22; or
>
> (b) The head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. [Emphasis added.]

[8] Pursuant to s. 2(1) "institution" includes "a ministry of the Government of Ontario". MAG is captured by this definition.

[9] The exemptions under ss. 12-22, and their exceptions, relate to various matters. Of note, s. 19 creates an exemption for records that are subject to solicitor-client privilege:

> 19 A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use

> in giving legal advice or in contemplation of or for use in litigation.

(2) The *CJA*

[10] Part VI of the *CJA* – under the heading "Judges and Officers" – provides for the appointment of the Children's Lawyer by the Lieutenant Governor in Council:

> Children's Lawyer
>
> 89(1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint a Children's Lawyer for Ontario.

[11] Subsections 89(3)-(3.1) set out the Children's Lawyer's duties:

> (3) Where required to do so by an Act or the rules of court, the Children's Lawyer shall act as litigation guardian of a minor or other person who is a party to a proceeding.
>
> (3.1) At the request of a court, the Children's Lawyer may act as the legal representative of a minor or other person who is not a party to a proceeding.

[12] Under s. 112, the Children's Lawyer may also cause investigations to be made, report to the court, and make recommendations to the court in custody and access matters.

(3) Other statutes

[13] In addition to providing legal representation to children in custody and access disputes, the Children's Lawyer:

- Provides legal representation to children in child protection proceedings, alternative dispute resolution proceedings, and secure treatment and health emergency matters pursuant to ss. 78(3), 78(5), 17(3), 161(6) and 171(8) of the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 ("*CYFSA*");
- Provides independent legal advice to children as well as minor parents consenting to adoption pursuant to ss. 180(6), 180(7) and 180(11) of the *CYFSA*, and rr. 34(11) and 34(11.1) of the *Family Law Rules*, O. Reg. 114/99;
- Acts as the litigation guardian for minors in all applications for guardianship of a child's property; and
- Is the head of the Office of the Children's Lawyer ("OCL"). The OCL has one function: to support the Children's Lawyer in fulfilling her independent statutory duties and functions.

[14] Against this statutory backdrop, I turn to the facts underlying this appeal.

FACTS

[15] Two children were the subject of a custody and access dispute between their parents. In 2008, when the children were nine and eleven years old, McCartney J. appointed the Children's Lawyer and requested that she conduct an investigation, report and make recommendations pursuant to s. 112(1) of the *CJA*.

The Children's Lawyer determined that she would provide legal representation to the children pursuant to s. 89(3.1) of the *CJA*. She also assigned a clinical investigator to assist counsel.

[16] In May, 2010 Warkentin J. made a final order terminating the father's access to the children as well as all forms of verbal communication. In 2012, the father brought a motion to change. Coats J. referred the matter, again, to the Children's Lawyer. The Children's Lawyer decided to provide legal representation to the children, this time without the assistance of a clinical investigator.

[17] On January 23, 2014 the father requested access to information from MAG pursuant to *FIPPA*. He sought records in the Children's Lawyer's litigation files, including:

- Privileged and non-privileged reports relating to the children;
- All documents filed with the court, including settlement reports, medical reports, psychological and educational reports, filed conversations and notes, and transcripts;
- All notes and information relating to the duties of the lawyers acting for the Children's Lawyer, including notes, court documents, and assessments; and
- Social worker notes.

DECISIONS BELOW

(1) MAG denies the father's request

[18] The Children's Lawyer took the position that *FIPPA* does not apply to private litigation files involving her provision of services to children. She emphasized that her office is an independent office within MAG, appointed by the Lieutenant Governor in Council under s. 89 of the *CJA*; she represents the independent legal interests of children and does not act on behalf of MAG or the Crown. She determined that since the records the father requested were prepared or collected in the course of her independent legal representation of the children, they are not within MAG's custody or under its control.

[19] Given the Children's Lawyer's position, MAG advised the father that it does not have custody or control of the records and *FIPPA* does not apply.

(2) The appeal to the IPC

[20] The father appealed MAG's decision to the IPC. The Adjudicator determined that the sole issue before her was whether MAG has custody or control of the requested records. She noted that resolving this issue did not necessarily mean the father would be provided access to the records – even when records are in the custody or control of an institution, they may be excluded under one of *FIPPA*'s exemptions or may be subject to an overriding confidentiality provision enacted in another statute.

[21] The Adjudicator concluded that the records at issue are in MAG's custody or control. She identified two "overriding considerations" leading to this conclusion: "the undisputed fact that the [Children's Lawyer] is a branch of [MAG]"; and that "the records at issue were generated in the course of the [Children's Lawyer] fulfilling its core mandate."

[22] The Adjudicator rejected the submission that the Children's Lawyer is distinct from MAG. She noted that the Children's Lawyer operates as a branch within the formal structure of MAG, is accountable to MAG for the expenditure of public funds, records related to such expenditures are subject to *FIPPA*, and the Children's Lawyer has no separate administrative structure from MAG.

[23] The Adjudicator similarly rejected the Children's Lawyer's submission that while she is "part of" MAG with respect to some records for the purposes of *FIPPA*, she is not "part of" MAG with respect to others. The Adjudicator stated:

> The result urged by the [Children's Lawyer] would treat some of its records as excluded from [*FIPPA*] when it is engaged in certain functions, while other records would be subject to [*FIPPA*]. While [*FIPPA*] itself provides for such a result, through the exclusion of some categories of records, the [Children's Lawyer's] submissions would, in effect, amount to an indirect recognition of an additional exclusion which has not been explicitly legislated.

[24] The Adjudicator further rejected the submission that the Children's Lawyer's fiduciary duties to her child clients are incompatible with access rights under

FIPPA. She determined that confidentiality concerns could be addressed by the exemptions under *FIPPA*, including s. 19 relating to solicitor-client privilege. She similarly determined that subjecting the Children's Lawyer's litigation files to access requests did not give rise to an "intolerable conflict" as urged by the Children's Lawyer. She noted that the Children's Lawyer is authorized by the Attorney General to respond to access requests and has been doing so since 1998. Yet, no conflicts between the Children's Lawyer, her child clients, or MAG appear to have impeded this task to date.

[25] Finally, the Adjudicator assessed the factors typically applied to determine whether records are in the custody or control of an institution. She held that since the Children's Lawyer is a branch of MAG, "it would be redundant to ask whether the [Children's Lawyer] 'could reasonably be expected' to obtain the records at issue." Instead she determined that the Children's Lawyer has the right to the files; the records were created in carrying out activities central to the Children's Lawyer's mandate; and the Children's Lawyer has the authority to regulate the use of its records, subject to its fiduciary and legal obligations to its child clients. She concluded that the records were therefore in MAG's custody or under its control.

[26] The Adjudicator ordered MAG to issue an access decision to the father, which could be made by the Children's Lawyer.

(3) The Divisional Court's decision

[27] The Children's Lawyer, supported by MAG, applied to the Divisional Court for a judicial review of the Adjudicator's order. The Divisional Court identified reasonableness as the appropriate standard of review and held that the Adjudicator's decision was reasonable. It noted that even if the standard of correctness applied, the decision was also correct.

[28] The Divisional Court rejected the submission that compliance with the Adjudicator's order threatened the Children's Lawyer's ability to safeguard either solicitor-client privilege or her clients' confidentiality. It endorsed the Adjudicator's conclusion that the Children's Lawyer's confidentiality concerns could be addressed through the *FIPPA* exemptions, noting that solicitor-client privilege is a specified ground for refusing disclosure under s. 19 of *FIPPA*.

[29] The Divisional Court similarly rejected the Children's Lawyer's submission that compliance with the Adjudicator's order gives rise to an intolerable conflict of interest. It held it was reasonable for the Adjudicator to rely on the absence of any examples of conflicts over the two decades during which the Children's Lawyer has made access decisions.

[30] Ultimately, the Divisional Court concluded that the Adjudicator's decision was consistent with the text and scheme of *FIPPA*. It held that it was reasonable for her to consider the application of s. 10(1) of *FIPPA* in relation to the children's

records; she reasonably considered the custody and control factors; and her interpretation promotes the purpose of access to information.

ISSUES

[31] This appeal raises two issues:

> 1. Did the Divisional Court identify the appropriate standard of review?
>
> 2. Did the Divisional Court err in upholding the Adjudicator's determination that the Children's Lawyer's records are in MAG's custody or control?

ANALYSIS

1. Standard of review

(i) Overview

[32] The parties did not agree on the applicable standard of review before the Divisional Court and they continue to disagree on appeal. The Children's Lawyer and MAG submit that the Divisional Court should have selected and applied correctness; the IPC maintains that the Divisional Court correctly selected reasonableness.

[33] When considering an appeal from a judicial review, this court must determine whether the Divisional Court identified the appropriate standard of review and applied it correctly. This requires this court to step into the Divisional Court's shoes and focus on the administrative decision: *Agraira v. Canada (Public*

Safety and Emergency Preparedness), 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47.

[34] Identifying the appropriate standard of review is a two-step process. At the first stage, "courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 62; and *Agraira*, at para. 48.

[35] If it has, the inquiry ends there. However, where the first stage "is unfruitful or if the relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review", courts must "perform a full analysis in order to determine what the applicable standard is": *Agraira*, at para. 48; and *Dunsmuir*, at para. 62. That is the case here.

[36] I conclude that the Divisional Court erred in selecting reasonableness as the standard of review. As I will explain, the jurisprudence on jurisdiction-limiting questions may well have evolved. However, the inquiry does not end there. In my view, on a full analysis to determine the applicable standard, the appropriate standard remains correctness. The interpretation of "custody or control of records" under s. 10(1) of *FIPPA* as it applies to the Children's Lawyer is a matter of central importance to the legal system as a whole and is also outside the decision-maker's specialized expertise.

(ii) Correctness is the appropriate standard

[37] The Children's Lawyer and MAG submit that jurisprudence has already determined that correctness applies to the interpretation of custody or control of records under s. 10(1) of *FIPPA*. They rely on this court's decision in *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.).

[38] *Walmsley* involved a request for access to records relating to the appointment of a provincial court judge. The records at issue were in the personal possession of individual members of the Judicial Appointments Advisory Committee. This court held that correctness applied to its review of the IPC's determination that MAG had control over these records, since s. 10(1) of *FIPPA* was jurisdiction limiting and did not require a specialized expertise to interpret. Goudge J.A. explained, at p. 618:

> [Section 10(1)] is a jurisdiction limiting one in the sense that records under the control of an institution are subject to the workings of the Act.... Records not under the control of an institution are not so subject and are beyond the jurisdiction of the Commissioner or his designee. Moreover, the test found in s. 10(1), namely "custody or control", is not one requiring a specialized expertise to interpret. By contrast, once records are found to be in the control of the institution, the applicability of the many legislated exemptions would clearly call on the particular expertise of the Commissioner. Finally, the legislation has not seen fit to clothe the Commissioner with the protection of any privative clause.

[39] The Children's Lawyer and MAG also rely on *City of Ottawa v. Ontario*, 2010 ONSC 6835, 272 O.A.C. 162 (Div. Ct.), at para. 20, leave to appeal to ONCA refused, March 30, 2011 (M39605); and *Ontario (Ministry of the Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 172, 104 O.R. (3d) 588 (Div. Ct.), at paras. 22-24 ("*MAG v. IPC*"). In both decisions, the Divisional Court – relying on *Walmsley* – applied correctness to judicial reviews of the IPC's interpretation of "in the custody or under the control".

[40] The IPC submits that this analysis no longer applies and that true questions of jurisdiction are rare. It relies on *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, in which the Supreme Court recognized a presumption of reasonableness where a court is reviewing a tribunal's interpretation or application of its home statute, and that true questions of jurisdiction are "narrow" and "exceptional": at para. 39. The IPC emphasizes that true questions of jurisdiction are now limited to "whether or not the tribunal had the authority to make the inquiry": *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at para. 32.

[41] The Divisional Court accepted the IPC's position, stating, at para. 39:

> I appreciate that the Court of Appeal in *Walmsley* described s. 10 as "a jurisdiction-limiting" provision and acknowledge that this was followed in two subsequent decisions. However, these decisions are inconsistent with the specific direction in *Dunsmuir* that has been repeated and clarified in more recent appellate

> jurisprudence. This jurisprudence supports my conclusion that s. 10 does not raise a true question of jurisdiction that would require a correctness standard of review.

[42] I agree with the Divisional Court that, to the extent they rely on the jurisdictional nature of s. 10(1), *Walmsley* and the cases that followed are not in line with recent developments in the common law. In my view, however, this analysis does not determine the issue here. I say this for two reasons.

[43] First, the jurisdictional nature of s. 10(1) was not the only basis earlier decisions identified for applying correctness. *Walmsley*, *City of Ottawa* and *MAG v. IPC* all determined that the test for custody or control was outside the specialized expertise of the decision-maker. Moreover, in *City of Ottawa* the Divisional Court determined that whether freedom of information legislation applied to documents in question – in that case government employees' personal workplace emails – was "a legal question of broad significance for thousands of individuals across the province, going well beyond the interests of the particular parties before the court": at para. 20.

[44] These aspects of these decisions have not been changed by subsequent jurisprudence. *Walmsley*, *City of Ottawa* and *MAG v. IPC* have, therefore, satisfactorily determined that correctness applies in this case.

[45] Second, even if these decisions have not satisfactorily determined the standard of review, the nature of the question at issue attracts correctness under the second stage of the standard of review analysis.

[46] The unique role of the Children's Lawyer is fundamental to the proper functioning of the legal system. It is thus reviewable on the standard of correctness as per *Dunsmuir*, at para 60:

> [C]ourts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. [Citation omitted.]

[47] Matters fundamental to the functioning of our legal system remain subject to a correctness standard of review post-*Dunsmuir*. In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555 ("*Alberta v. UC*"), the majority of the Supreme Court applied correctness to the interpretation of freedom of information legislation where it might impact solicitor-client privilege. *Alberta v. UC* involved a judicial review of a decision pursuant to Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("*FOIPP*"). The central issue was whether *FOIPP* allowed the Information and Privacy Commissioner of Alberta (the "Commissioner") and her delegates to review documents over which solicitor-client privilege is claimed.

[48] Coté J., writing for the majority, held that whether *FOIPP* allows solicitor-client privilege to be set aside is a question of central importance to the legal system as a whole. She explained, at para. 20:

> As this Court said in *Blood Tribe*, solicitor-client privilege is "fundamental to the proper functioning of our legal system" (para. 9). It is also a privilege that has acquired constitutional dimensions as both a principle of fundamental justice and a part of a client's fundamental right to privacy. [Citations omitted. Emphasis added.]

[49] She emphasized, at para. 26, that the "importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole" (emphasis added).

[50] Coté J. also held that the issue was outside the Commissioner's specialized area of expertise. She stated, at para. 22: "[T]here is nothing to suggest that the Commissioner has particular expertise with respect to solicitor-client privilege, an issue which has traditionally been adjudicated by courts".

[51] Coté J.'s comments in *Alberta v. UC* aptly apply to this case. The protection of the relationship between the Children's Lawyer and her child clients is of central importance to the legal system as a whole. It is a relationship based on confidentiality that extends beyond solicitor-client privilege and requires a *heightened* degree of protection by the courts. As I will explain, the *United Nations Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the "*Convention*"), to

which Canada is a signatory, requires that children be afforded special safeguards, care and legal protection by the courts on all matters involving their best interests, including privacy.

[52] Like solicitor-client privilege, the confidential relationship between the Children's Lawyer and children is "fundamental to the proper functioning of our legal system" and the protection of that relationship "has a central importance to the legal system as a whole".

[53] In summary, the role of the Children's Lawyer is fundamental to the proper functioning of our system of justice; the issue is outside the Adjudicator's specialized area of expertise; and the standard of correctness with respect to the protection of a relationship that has central importance to the legal system has already been adjudicated. Therefore, correctness is the appropriate standard.

2. Was the Adjudicator correct that the Children's Lawyer's records are in MAG's custody or control correct?

(i) Overview

[54] A court undertaking a correctness review will "undertake its own analysis of the question" and "decide whether it agrees with the determination of the decision maker". If it does not, "the court will substitute its own view and provide the correct answer": *Dunsmuir*, at para. 50.

[55] In applying this standard, I begin by situating the issue on appeal within a context, namely: the best interests of the child; the voice of the child; the confidential role of the Children's Lawyer; the child's privacy interests; the fact that confidentiality is broader than solicitor-client privilege; and the fact that the records belong to the child. I then apply the context to the relationship between the Children's Lawyer and MAG to demonstrate that with respect to her core functions of representing children, the Children's Lawyer cannot be a "branch" of MAG as determined by the Adjudicator.

[56] I determine that the Adjudicator *started* from the assumption that the Children's Lawyer is a "branch" or "part of" MAG, and thus MAG had custody or control of the records. In so doing, she failed to give appropriate weight to the Children's Lawyer's role and responsibilities. She did not address the impact of her decision on the best interests of the child who is entitled to heightened protections within the law. Nor did she consider the importance of the relationship on the administration of justice.

[57] I conclude that, given the relevant context, the Children's Lawyer does and must operate separately and distinctly from MAG. When representing children, her office is therefore not a branch of MAG. The Adjudicator was required to analyze whether records held by the Children's Lawyer – as not part of an institution under *FIPPA* – are in MAG's custody or control. She failed to do so. Upon undertaking

this analysis, I determine that MAG does not have custody or control of the requested records.

(ii) The context

Best interests of the child

[58] Whenever a child is affected by a court or government process, the primary consideration must be the child's best interests. This regularly cited principle has been enshrined in the *Convention*. Article 3.1 provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[59] In *A.C. B. v. R. B.*, 2010 ONCA 714, 104 O.R. (3d) 368, Weiler J.A. speaking for a five-member panel of this court, at paras. 12-14, confirmed that the values reflected in the *Convention* can help to inform the contextual approach to statutory interpretation and judicial review.

[60] In my view, the statutes at issue in this appeal, including *FIPPA* itself, must be viewed through this lens and interpreted in a way that gives primacy to the best interests of the child. The Adjudicator, and the Divisional Court on judicial review, failed to consider the best interests of the child – who is at the center of the issue before this court now. The results of the Adjudicator's order would impact the child's voice in the judicial system and the child's privacy rights. Further, the family

law courts would lose the benefit of important information provided by children, affecting decisions for families throughout the province.

[61] A correct interpretation of the relevant statutory provisions at issue requires close attention to the interests and needs of children.

The voice of the child

[62] A classic family law custody dispute gave rise to the Children's Lawyer's involvement in this case. Over the past several years, courts have taken great initiative to seek out and consider the views and preferences of the child. Professors Birnbaum and Bala explain:

> The movement towards child inclusion in decision-making in education, medical treatment, and various areas of the law, including separation and divorce, has grown over the last decade. Studies have explored children's rights as citizens, children's perspectives on family relationships and what is a family, and children's attitudes about parental separation and participation in the decision-making process about post-separation parenting. Research clearly suggests that children's inclusion in the post-separation decision-making process is important to the promotion of their well-being. [Footnotes omitted.][3]

[63] Indeed, art. 12 of the *Convention* requires that:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of

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[3] Rachel Birnbaum and Nicholas Bala, "Views of the Child Reports: The Ontario Pilot Project – Research Findings and Recommendations" (Paper for presentation, delivered in Toronto, June 21, 2017)

> the child being given due weight in accordance with the age and maturity of the child.
>
> For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

[64] Children are among the most vulnerable members of society. Courts, administrative authorities and legislative bodies have a duty to recognize, advance and protect their interests. When children are the subject of a custody dispute or child protection proceedings, they are at their most vulnerable. Exposure to conflict has been called the "single most damaging factor for children in the face of divorce": per Backhouse J., in *Graham v. Bruto*, [2007] O.J. No. 656 (S.C.), at para. 65, aff'd 2008 ONCA 260.

[65] It has always been a challenge for family law courts to find a way for children to express their views without exposing them to further trauma or causing more damage to the family. Those who work in the family law system are all too aware that children remain part of the family long after a judicial decision is reached. The process of determining the child's true wishes and preferences requires delicacy, for to undertake the process without expertise may further hurt the child and fracture family relationships.

[66] The Children's Lawyer has been recognized as a model for addressing this challenge. The Honourable Donna J. Martinson and Caterina E. Tempesta, wrote that:

> In Canada, the most expansive child representation program is offered by the Office of the Children's Lawyer...[it] may serve as a model for other jurisdictions in promoting access to justice for children by ensuring that their views are heard in court processes.[4]

[67] In this case, the judges involved in the underlying custody dispute sought the Children's Lawyer's involvement in the matter.

The Children's Lawyer's role: a confidential relationship with the child

[68] The Children's Lawyer is an independent statutory office holder appointed by Cabinet through the Lieutenant Governor. She derives her independent powers, duties and responsibilities through statute, common law and orders of the court.

[69] Her fiduciary duties to the child require undivided loyalty, good faith and attention to the child's interests, to the exclusion of other interests, including the interests of the child's parents, the interest of the Crown and the interests of MAG. As stated by Abella J., as she then was, in *Re W.* (1980), 27 O.R. (2d) 314 (Prov.

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[4] The Honourable Donna J. Martinson and Caterina E. Tempesta, "Legal Representation for Children in Family Law Cases: A Rights-Based Approach", CLEBC and CBABC Joint Conference, Access to Justice For Children, Child Rights in Action, May 2017, Vancouver B.C.

Ct.), at p. 317, the Children's Lawyer has an obligation to ensure that the views expressed by the child are freely given without duress.

[70] The Children's Lawyer not only represents the child's interests; she provides a safe, effective way for the child's voice to be heard. For her to do this, she must provide a promise of confidentiality. Children must be able to disclose feelings and facts to the Children's Lawyer that cannot or will not be communicated to parents. Children's interests can be averse to that of their parents. Feelings of guilt and betrayal that may influence a child require a safe person to speak to.

[71] It is difficult enough for children to be the subject of litigation. For their voices to be heard, they must be guaranteed confidentiality when they say, "please, don't tell my mom", or "please, don't tell my dad".

[72] To allow a disgruntled parent to obtain confidential records belonging to the child would undermine the Children's Lawyer's promise of confidentiality, inhibit the information she could obtain and sabotage her in the exercise of her duties. This would, in turn, impact proceedings before the court by depriving it of the child's voice and cause damage to the child who would no longer be meaningfully represented. Finally, disclosure to a parent could cause further trauma and stress to the child, who may have divided loyalties, exposing the child to retribution and making the child the problem in the litigation.

The child's privacy interests

[73] The child has significant privacy interests in the information disclosed to the Children's Lawyer. The child's privacy rights, as with her other rights, are entitled to more, not less protection.

[74] The preamble to the *Convention* directs that special safeguards and care, including legal protection, be afforded to children. The preamble states:

> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"[.] [Emphasis added.]

[75] These special safeguards include "[t]o have his or her privacy fully respected at all stages of the proceedings": *Convention*, art. 40(2)(b)(vii).

[76] As explained above, to allow a parent to have access to a child's records would negatively impact the child's privacy interests.

Confidentiality is broader than solicitor-client privilege

[77] The Adjudicator concluded that the Children's Lawyer's "confidentiality concerns ... can be addressed by exemptions under the applicable access to information legislation." In doing so, she conflated solicitor-client privilege with confidentiality. The former is caught by the exemption at s. 19 of *FIPPA*, the latter

is not. And yet, it is the latter that gives rise to the most sensitive information about the child, and which is deserving of special protection.

[78] Information may be confidential without being privileged. As the British Columbia Court of Appeal explained in *British Columbia (Securities Commission) v. B.D.S.*, 2003 BCCA 244, 13 B.C.L.R. (4th) 107, at para 45:

> There is no doubt that lawyers are under an obligation to keep confidential all documents and other communications made to them by their clients, but not all such communications are subject to solicitor-client privilege and a claim of privilege does not convert non-privileged documents into privileged documents.

[79] The Children's Lawyer gathers information from and about her child clients in numerous ways: with assistance from social workers; through therapists, school teachers; and so on. This information is necessary for the Children's Lawyer to properly represent the child. It is crucial in order for the child's voice to be heard.

[80] As Mesbur J. explained in *Catholic Children's Aid Society of Toronto v. S.S.B.*, 2013 ONSC 4560, 35 R.F.L. (7th) 178, at para. 21:

> When [the Children's Lawyer] takes a position on behalf of a child, child's counsel will ascertain the child's views and preferences. In doing so, it will consider the independence, strength and consistency of the child's views and preferences; the circumstances surrounding those views and preferences, and all other relevant evidence about the child's interests. It is in this context the [Children's Lawyer] relies on a clinical investigator to assist counsel in determining those views and preferences so that it can advocate a position on behalf of the child. Essentially, the clinical investigator assists

> counsel in ascertaining its client's reasonable instructions; that is, the position to be taken on behalf of the child. [Footnote omitted.]

[81] While some records may be subject to the solicitor-client exemption, others may not. These include the child's views expressed to teachers, counsellors, therapists, friends, and parents of friends. Yet, the Children's Lawyer's duty of confidentiality applies to all records.

The records belong to the child

[82] The records in question here belong to the child.

[83] The decisions below were incorrect to rely on *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2003), 66 O.R. (3d) 692 (Div. Ct.) ("*Children's Lawyer*"), aff'd (2005), 75 O.R. (3d) 309 (C.A.). In that case, the Divisional Court considered a judicial review from a request by an adult whom the Children's Lawyer represented as a child for her files held by the Children's Lawyer. Oddly, the request was made pursuant to *FIPPA*, rather than as a request from a client for her own files. The Divisional Court upheld an IPC decision ordering the Children's Lawyer to disclose most of the requested documents. The Children's Lawyer appealed only with respect to whether the IPC had standing before the Divisional Court. This court dismissed the appeal, but Goudge J.A. commented as follows, at para. 5:

> Upon reaching majority and apparently dissatisfied with her representation, Jane Doe requested a copy of her

> "complete files". The Children's Lawyer, whose office operates as a branch of the Ministry of the Attorney General, treated this as a request for information under FIPPA rather than as a request from a client for her file. However reasonable it might be to analyze the interests at stake in this framework, this was not raised as an issue before us, and I will say nothing more about it.

[84] The issue of whether the Children's Lawyer is a branch of MAG was not argued before, or addressed by either court. Nor was the issue of whether the files belonged to the client and thus the application was unnecessary. For these reasons, *Children's Lawyer* does not determine the issue here: whether a third party can have access to a child's records through *FIPPA*.

[85] Interestingly, in *Children's Lawyer*, the Divisional Court refers to the fiduciary duties the Children's Lawyer owed the child. At para. 83, the court endorses the IPC's description of the fiduciary nature of the Children's Lawyer as follows:

> The [Children's Lawyer] meets the criteria for the imposition of fiduciary duties, apart from doing so on the basis of the solicitor and client relationship.... It has the classic indicia of a fiduciary relationship: the scope for the exercise of discretion or power; the opportunity to exercise that power unilaterally so as to affect the minor's legal or practical interests; a peculiar vulnerability due to the minority status of the client; and an expectation that the [Children's Lawyer] will be concerned with the minor's interests and not its own.

[86] Here the Adjudicator dismissed the Children's Lawyer's submission as to the child client's ownership of the files. She found: "[T]his argument overreaches". This conclusion is flawed for two reasons.

[87] First, it ignores the heightened privacy rights of children. As the Supreme Court observed in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para 17:

> Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under [various statutes], not to mention international protections such as the *Convention on the Rights of the Child*... The law attributes the heightened vulnerability based on chronology, not temperament [.] [Emphasis in original.]

[88] The only way that the role of the Children's Lawyer differs from that of a conventional solicitor-client relationship is that the child is entitled to a heightened protection of confidentiality as mandated by the *Convention.* As stated by Mesbur J. in *S.S.B.*, at para. 32:

> A child-client's right to a confidential relationship with counsel must be guarded with more vigilance than that accorded to an adult client, not with less.

[89] Second, it is premised on the erroneous notion that children cannot represent themselves in court. The Adjudicator stated:

> The existence of the [Children's Lawyer] is premised in part on the fact that children cannot represent themselves or retain counsel without a litigation guardian, as they are under the legal disability of childhood.

[90] She continued:

> Even with respect to child protection cases, the role of the Children's Lawyer as legal representative ... differs from a conventional solicitor-client relationship[.]

[91] This premise is wrong. Children can represent themselves without a litigation guardian and do so regularly in family proceedings. They are not always under a legal disability. For example, the *Children's Law Reform Act*, R.S.O. 1990, c. C. 12, specifically provides, at s. 63(1), that "[a] minor who is a parent may make an application under this Part [Custody, Access and Guardianship] without a next friend and may respond without a litigation guardian".

[92] Against this context, I turn to the question of whether MAG has custody or control of the records of the Children's Lawyer.

(iii) Applying the context to custody or control

The Children's Lawyer is separate and distinct from MAG

[93] In my view, the Adjudicator erred when she started from the assumption that the Children's Lawyer was a branch of MAG. She stated:

> There is no dispute that [*FIPPA*] applies to "institutions", which are defined to include provincial ministries. The overriding considerations in this case are:
>
> - the undisputed fact that the [Children's Lawyer] is a branch of the ministry and
>
> - all of the records at issue were generated in the course of the [Children's Lawyer] fulfilling its core mandate.

> Despite these considerations, a consistent theme of the [Children's Lawyer's] submissions is an effort to differentiate the [Children's Lawyer], together with its mandate as a branch within [MAG], from [MAG] itself. For the reasons set out below, I find this approach flawed.

[94] It is not "undisputed" that the Children's Lawyer is a branch of MAG. The Adjudicator based her determination on the *Children's Lawyer* decision. However, as discussed, that issue was not argued or addressed in *Children's Lawyer* for it was irrelevant to the outcome of the case.

[95] By starting from the assumption that the Children's Lawyer is a branch of MAG, the Adjudicator did not take into account the context in which the Children's Lawyer must operate, separate and distinct from MAG. Instead, she used the concept of a "branch" to cloak MAG with control over the Children's Lawyer.

[96] Although MAG is an institution within the meaning of s. 2(1) of *FIPPA*, bodies that may be administratively structured under MAG are not automatically subject to *FIPPA*. An organization's administrative structure is not determinative of custody or control; a contextual analysis is required. In *Walmsley*, this court explained that a determination of care or control "depends on an examination of all aspects of the relationship between [here the Children's Lawyer] and [MAG] that are relevant to control over the documents": at p. 619.

[97] An examination of the relationship between the Children's Lawyer and MAG relevant to custody or control over the documents discloses that – for her core functions regarding children – the Children's Lawyer is not a branch of MAG.

[98] The Children's Lawyer represents the child. She is not a government agent. Her functions and promise of confidentiality are not conferred on MAG.

[99] While the Children's Lawyer is administratively structured under and has a funding relationship with MAG, they are not connected with respect to her core functions: there is no statutory relationship between the two entities; she does not receive direction from MAG; she does not report to MAG; and her fiduciary duties are to her child clients, not to MAG.

[100] The Children's Lawyer's fiduciary duties to her child clients require undivided loyalty, good faith and attention to the child's interests, to the exclusion of other interests, including the interests of the child's parents, the interest of the Crown and the interests of MAG. The independence of the Children's Lawyer is particularly significant when she must act contrary to the interests of MAG or the Crown. Her child clients could have an action against the Crown, could have a constitutional question before the court, or could be a defendant in an action brought by the Crown.

[101] When representing children, the Children's Lawyer operates separate and apart from MAG, does not take direction or obtain input from MAG, does not

provide MAG with access to records relating to children and MAG does not have authority to request them. The Children's Lawyer is solely responsible for record keeping in relation to her clients without any direction from MAG.

[102] Thus, the Children's Lawyer is not a branch of MAG for the purposes of the children's records. Again, an organization's administrative structure is not determinative of custody or control for purposes of *FIPPA*.

[103] In *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241, 130 O.R. (3d) 1, aff'd 2017 SCC 47, 414 D.L.R. (4th) 577, this court affirmed that the existence of an administrative relationship between two government entities does not necessarily make them one for the purposes of access to information legislation. *Fontaine* concerned the fate of records generated by the Indian Residential Schools Agreement and the Independent Assessment Process (the "IAP"), which were operated within Aboriginal Affairs and Northern Development Canada ("AANDC"). Strathy C.J.O. commented on the nature of the records, at para. 179:

> Were the head of AANDC to receive an access to information request … it would have no reasonable legal or practical expectation that it could obtain copies of such IAP Documents from the Secretariat … That may not be the case for documents of a different nature, such as those relating to funding, auditing, and human resources - documents for which AANDC would have a much stronger claim for control.

[104] The court ultimately concluded that the Secretariat of the IAP, an "autonomous branch" of AANDC, "retains possession of the documents provided

to and generated by the IAP": at para. 174. It held that IAP documents in the Secretariat's possession "are simply not under the control of AANDC": at para. 180.

[105] The Divisional Court distinguished *Fontaine* on the basis that the Secretariat had decision-making functions, akin to that of a court. That fact, in my view, does not alter the rule that an administrative relationship does not determine custody or control.

[106] Other cases have similarly held that an administrative relationship with a designated institution does not amount to custody or control for freedom of information legislation. For example, the following have been held not be in an institution's custody or control:

> a) Records of the members of the Judicial Appointments Advisory Committee, which was set up by the Attorney General;[5]
>
> b) Personal emails of a city employee on his government email account;[6] and
>
> c) Records held within Ministers' offices under their respective Ministries, except in defined circumstances.[7]

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[5] *Walmsley*, at pp. 615-16 & 618-19.
[6] *City of Ottawa*, at paras. 29-31.
[7] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, at paras. 27, 28, 41 & 43.

The records are not within MAG's custody or control

[107] Since the Children's Lawyer is not part of MAG, and is thus not an institution, an analysis is required to determine whether the records are under MAG's custody or control.

[108] In *Minister of National Defence* the Supreme Court articulated a two-part test for whether records held by bodies that are not part of an institution are under the institution's control and thus subject to freedom of information requests:

> 1. Do the contents of a document relate to a departmental matter?
>
> 2. Could the government institution reasonably expect to obtain a copy of the document upon request?

[109] Charron J. noted, at paras. 55-56:

> Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry....
>
> Under step two, *all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. [Emphasis in original.]

[110] The Adjudicator referred to the two-part test from *Minister of National Defence*, but determined that: "Accepting that the [Children's Lawyer] is a branch of [MAG], it would be redundant to ask whether the [Children's Lawyer] 'could reasonably be expected' to obtain the records at issue."

[111] The Adjudicator's reasoning is flawed for several reasons. First, it is circular, for it starts from the premise that the Children's Lawyer is part of MAG when the object of the exercise is to determine whether MAG has custody or control of the records of another organization. Second, it analyzes whether the Children's Lawyer has control of the records, when what is required under the test is that MAG has control. There was no issue but that the Children's Lawyer had control.

[112] Once the relevant test is applied to the child's records with the Children's Lawyer, it is clear that MAG does not have control of the records:

> *Step one: Do the contents of the requested records relate to a departmental matter?*
>
> The answer must be no. MAG plays no part in the records of the Children's Lawyer. The records do not relate to a departmental matter; MAG has nothing to do with the Children's Lawyer's work.
>
> *Step two: Could MAG reasonably expect to obtain a copy of the records upon request?*
>
> Again the answer – for the reasons set out above – is no. Neither MAG officials nor the Attorney General could reasonably expect to obtain a copy of the requested records.

[113] The Divisional Court in *City of Ottawa*, at para. 30, cited approvingly ten questions former Commissioner Sidney Linden outlined in IPC Order 120 to be asked when determining whether an institution has custody or control of records. Although the Adjudicator referred to some of these questions, she failed to situate

her analysis within the context of the Children's Lawyer's work. I address these ten questions and provide answers based on the context I have set out:

1) Was the record created by an officer or employee of the institution?

[114] Here, the records at issue were created by legal agents of the Children's Lawyer (who is appointed by the court pursuant to the *CJA* to exercise independent statutory functions) while providing legal representation to children. The records were not created for or on behalf of MAG. The Children's Lawyer's role precludes it from acting in the interest of MAG or the Crown in these matters.

2) What use did the creator intend to make of the record?

[115] The records were intended solely for use in litigation on behalf of child clients in custody and access proceedings as ordered by the court. The records were not created for MAG's use or on behalf of the Crown.

3) Does the institution have possession of the record?

[116] MAG does not have possession of the records. They are exclusively held by the Children's Lawyer in her legal file.

4) If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?

[117] The records are being held by the Children's Lawyer for the purposes of her independent statutory, legal and fiduciary duties to children, and not as an agent of MAG.

5) Does the institution have a right to possession of the record?

[118] MAG has no statutory or other right to possess the records. The Children's Lawyer does not allow MAG officials to access or possess these records. Allowing MAG to have access to, or possession of, the records would violate the Children's Lawyer's duty to maintain the confidentiality of her child clients' records.

6) Does the content of the record relate to the institution's mandate and functions?

[119] The contents do not relate to MAG's mandate or functions. The contents of the records relate to the Children's Lawyer's independent statutory functions in providing legal representation to children in custody and access proceedings. The records relate to litigation where the Children's Lawyer is acting, at the request of the court, independently from MAG in representing child clients who are subjects of custody and access proceedings. These functions are statutorily conferred exclusively on the Children's Lawyer, and not on MAG or the Attorney General.

7) Does the institution have the authority to regulate the record's use?

[120] MAG has no authority to regulate the use of the records. The regulation of the use of these records is within the exclusive authority of the Children's Lawyer in accordance with her professional obligations to her child clients. The Children's Lawyer uses these records for the sole purpose of representing the interests of her child clients.

8) To what extent has the record been relied upon by the institution?

[121] MAG has never relied on, or had possession of, these records. The records have only been relied on by the Children's Lawyer in order to represent the interests of its child clients in litigation.

9) How closely has the record been integrated with the other records held by the institution?

[122] These records have never been integrated with MAG records. The Children's Lawyer's files related to legal services provided to children are kept separately from any MAG records. No official or employee outside of the Children's Lawyer has access to these records.

10) Does the institution have the authority to dispose of the record?

[123] The records are maintained and disposed of in accordance with a records policy established by the Children's Lawyer in 2006. The Children's Lawyer does not obtain MAG approval or direction related to its child client records or on its internal policies related to these files.

[124] The IPC alleges that because in the past MAG has forwarded *FIPPA* requests relating to the Children's Lawyer records to the Children's Lawyer for response, it must continue to do so. First, past practice is not determinative. As stated by Charron J. in *Minister of National Defense*, at para. 56:

> [A]ny expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations"

> that bear no relationship on the nature and contents of the record, [or] on the actual legal relationship between the government institution and the record holder...

[125] Second, the evolving nature of the functions of the Children's Lawyer with respect to advancing children's interests and the voice of the child, particularly in light of the *Convention*, requires new scrutiny.

The Adjudicator's order does not promote the purposes of FIPPA

[126] The IPC submits that the Adjudicator's order is consistent with the purpose and the scheme of *FIPPA*. I do not agree.

[127] The purposes of *FIPPA* include providing access to "government information" and protecting the privacy of individuals with respect to personal information about themselves. Subjecting the Children's Lawyer's records to this regime does not accomplish either goal. Children's records do not contain information that could be described as "government information", nor do they contain any information that would advance the goals of government accountability and transparency.

[128] On the contrary, providing third parties with access to a child's records would seriously undermine the Children's Lawyer in her role as advocate for the child. It would also sabotage the child's heightened privacy rights, eviscerate the work of the Children's Lawyer and seriously limit the court's ability to fully address the child's best interests.

[129] One of the most significant developments in family litigation affecting children is the recognition that the child has a voice. The Adjudicator's decision would muzzle that voice, undermine the court process and go against the best interests of the child.

CONCLUSION

[130] For these reasons, I would allow the appeal and quash the Adjudicator's order. In accordance with the parties' agreement, I would not order costs.

Released: "PR" JUN 18 2018

"M.L. Benotto J.A."
"I agree. Paul Rouleau J.A."
"I agree. L.B. Roberts J.A."

Tab 16

FINAL ORDER PO-3009-F; University of Ottawa

Ontario Information and Privacy Commissioner Orders

Ontario Information and Privacy Commissioner

Panel: Diane Smith, Adjudicator

Decision: November 7, 2011.

Final Order No. PO-3009-F, Appeal No. PA07-119

[2011] O.I.P.C. No. 152

Re: University of Ottawa

(183 paras.)

Case Summary

Tribunal Summary:

The appellant made a request to the University of Ottawa under the *Freedom of Information and Protection of Privacy Act* for records mentioning himself. Some of the responsive records would be in the possession of professors at the university, who are members of the Association of Professors of the University of Ottawa (APUO). The university asked APUO members to turn over potentially responsive records to it so it could make an access decision under the *Act.* In response, APUO filed a grievance. The arbitrator hearing the grievance issued three awards, and in those awards he reached several determinations about whether the responsive records held by APUO members are in the university's custody or control, as required for them to be subject to the *Act.* This order determines that, in the context of a dispute arising from an access request under the Act, this office has exclusive jurisdiction to determine the question of custody or control of responsive records. This order also establishes criteria for determining whether records held by APUO members are in the university's custody or control. The university is ordered to request that APUO members produce responsive records in the university's custody or control to it and to issue an access decision to the appellant.

Statutes, regulations and rules cited:

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, as amended, ss. 1, 10(1), 24, 26, 28, 47(1), 50(1), 52(1),(3),(4),(8),(13), 54(1),(3), 65(6),(8.1).

Labour Relations Act, S.O. 1995, c. 1, Sch. A., s. 48(12)(j).

University of Ottawa Act, 1965, S.O. 1965, c. 137, s. 4(a).

Cases cited:

PO-2776-I, PO-1868, P-120, P-239, PO-2536, MO-1285, MO-1283, MO-1251.

City of Ottawa v. Ontario, 2010 ONSC 6835 (Div. Ct.), leave to appeal denied, Doc. M39606 (C.A.).

Ministry of the Attorney General v. Information and Privacy Commissioner, 2011 ONSC 172.

Weber v. Ontario Hydro, [1995] 2 S.C.R. 929.

Koren Thomson

Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General), 2004 SCC 39, [2004] 2 S.C.R. 185.

Bonner v. Via Rail Canada 2009 FC 857.

Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, [2000] 1 S.C.R. 360.

Bisaillon v. Concordia University, [2006] 1 S.C.R. 666.

McNeil v. Brewers Retail Inc., 2008 ONCA 405.

Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner, 2009 ONCA 20 (reversing [2007] O.J. No. 2441).

Reference re Municipal Freedom of Information and Protection of Privacy Act, 2011 ONSC 1495.

Ontario (Minister of Health) v. Holly Big Canoe, 1995 CanLII 512 (C.A.).

Ministry of Attorney General and Toronto Star and Information and Privacy Commissioner of Ontario, 2010 ONSC 991.

St. Joseph Corp. v. Canada (Public Works and Government Services, [2002] F.C.J. No. 361 (T.D.).

Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services), [2003] F.C.J. No. 348 (T.D.).

Canadian Tobacco Manufacturers' Council v. Canada (Minister of National Revenue - M.N.R., [2003] F.C.J. No. 1308 (F.C.).

Ontario (Ministry of Transportation, [2004] O.J. No. 224 (Ont. Div. Ct.).

affirmed (Ont. C.A.), [2005] O.J. No. 4047.

application to Supreme Court of Canada for leave to appeal dismissed [2005] S.C.C.A. No. 563.

Laurentian University Faculty Association v. Laurentian University, 2010 CanLII 32256 (ON LRB).

Amalgamated Transit Union Local 1587 v. GO Transit, 2010 CanLII 45247 (ON GSB).

John Doe v. Ontario (1993) 13 O.R. (3d) 767.

1993 CanLII 3388.

Reynolds v. Binstock, 2006 CanLII 36624 (ON SCDC).

Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner), 1999 CanLII 3805, [1999] O.J. No. 4072.

Canada Post Corp. v. Canada (Minister of Public Works) (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.).

Dagg v. Canada (Minister of Finance) 1997 CanLII 358 (S.C.C.), [1997] 2 S.C.R. 403.

* Access: Provincial Order *

FINAL ORDER PO-3009-F

BACKGROUND:

1 The University of Ottawa (the university) received a detailed request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for all records, written or electronic, that mention or refer to the requester, specific courses, a named website, or a specific radio show, dated on or after September 1, 2004. In response, the university issued an interim access decision and fee estimate under section 57(3) of the *Act*, in which it estimated a total fee of $28,488.20 to respond to the request. The requester, now the appellant, appealed the university's decision.

2 As mediation was not successful in resolving the issues in this appeal, the file was transferred to the adjudication stage, in which an adjudicator conducts an inquiry under the *Act.* Initially, I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the university and to the Association of Professors of the University of Ottawa (APUO), a party whose interests may be affected by disclosure of the information at issue in this appeal. In response, I was informed that the university was in the midst of a grievance proceeding with the APUO, which arose from a request by the university for APUO members to turn over records that are responsive to the request in this appeal. The grievance was heard by Arbitrator Philip Chodos (referred to in this order as "Arbitrator Chodos" or "the arbitrator"). It concerned a determination of which types of responsive records were within the custody and/or control of the university, and which types of records were exclusively controlled by APUO members. As explained in more detail below, the arbitrator ultimately required the university to withdraw its request for the records.

3 Because of the arbitration proceeding between the university and the APUO, I decided to proceed to adjudicate the issue of access to responsive records that were not subject to the arbitration proceedings. As a result, I decided to put on hold the portion of the appeal that concerns the records that may be in the custody or control of APUO members until after the arbitration proceeding had concluded. I advised the parties that my decision to await the arbitrator's decision was being made without prejudice to my right to adjudicate under *FIPPA* any and all matters in this appeal.

4 In response to the Notice of Inquiry, I received representations from the university concerning the responsive records, except for the records that could be in the custody or control of APUO members. I sent a copy of the university's representations to the appellant, along with a Notice of Inquiry. In response, the appellant provided representations. After review of the appellant's representations, I sought clarification from the appellant as to the scope of his request. The appellant provided me with the following clarified request, which seeks:

(1) All (e.g., letter, fax, and email) communications about [the appellant] (other than messages sent by him), sent by or received by all professors (APUO members) at the University of Ottawa.

(2) All (e.g., letter, fax, and email) communications about [the appellant] (other than messages sent by him), sent by or received by all non-APUO member executive officers of the University of Ottawa. These executive officers include: the non-APUO member vice-deans of faculties, the deans of all faculties, the vice presidents of the University, the Secretary of the University (including Legal Counsel's office), the President of the University, and the non-student and non- APUO member members of the Board of Governors of the University.

5 After receipt of the appellant's clarified request, I placed part 1 of that request on hold pending the outcome of the arbitration proceedings because it clearly relates only to records that were the subject of the ongoing arbitration.

6 I dealt with part 2 of the clarified request in interim Order PO-2776-I, in which I upheld the university's fee estimate of $4,141.56 concerning part 2 of the appellant's clarified request. The appellant then sought a waiver of this fee on the basis that section 57(4)(b) (payment will cause financial hardship) of the *Act* applies. His application

for a fee waiver was denied by the university. The appellant appealed this decision, which is the subject of Order PO-2937.

7 After the issuance of Order PO-2776-I, part 1 of the appellant's clarified request remained outstanding. As set out above, part 1 concerns communications about the appellant sent by or received by all professors at the university. The request for these types of records, as outlined in the appellant's original request, had been the subject of the grievance proceeding referred to above, which was filed by the APUO against the university. In its grievance, the APUO stated the following:

1) records of APUO members are not in the control or under the custody of the University;

2) the University does not have the right to demand, or the right of access to, copies of all documents, whether in printed or electronic form, which are in the possession of an APUO member, including those at a location other than the University;

3) emails sent and received using the University email system are not documents for which the University has custody or control;

4) in response to a request under [the *Act*], the University does not have the unilateral right to change existing working conditions nor to violate the established principles of privacy which prohibit the interference in the professional activities of an APUO member or any action that would inhibit the free exchange of information and ideas between academics;

5) the actions of the University contravene, inter alia, articles 5.1, 5.3, 9 and 10.3 of the collective agreement [the agreement], Policy 90, past practice at the University, generally recognized practice in the university sector and academic freedom.

Remedy

As remedy for the above noted grievance, the [APUO] seeks a withdrawal of the claims made by the employer respecting members' records and communications and a retraction of the demand for access to said documents, and/or declarations from an arbitrator accordingly, cease and desist orders, as well as damages, or such other orders as may be deemed appropriate by an arbitrator.

8 After receiving evidence over the course of several hearing dates, the arbitrator issued an award on September 29, 2008. In that decision, the arbitrator stated:

> As employees of the University it is conceivable that academic staff may be in possession of documents which are neither subsumed by the exemptions under the *Act*, nor can be characterized as being strictly related to University administrative matters. For example, in some circumstances student evaluations may fall into this gray zone. In fact, academic staff can be required in the course of the exercise of their responsibilities to provide information to the administration for certain limited and specific purposes. One example is the requirement to submit information concerning research to the Ethics Committee when human subjects are involved. In a number of contexts (e.g. applications for tenure, sabbaticals, internal funding of research) professors are expected (and have complied with this requirement) to submit [sic] fairly detailed information concerning their activities, mostly regarding research projects. It is at least arguable that these requirements are not entirely subsumed under the rubric of "administrative matters".
>
> However, I do agree with the [APUO] that in particular the provisions of the collective agreement such as section 20 that describe in detail the scope of teaching and research activities should be used to put flesh on the bare bones of the exemption provisions of section [65(8.1)] ...
>
> Counsel for the University has readily acknowledged that there are a number of types of documents, including emails, research papers, etc. in the possession of academic staff that are not in the custody and control of the University. The documents [falling] into this category are summarized in detail above under the heading of Arguments for the Employer. One obvious example [is] communications between the [APUO] and its members. Other examples are exchanges between professors and persons outside the University sphere relating to their private work ...

> The [APUO] acknowledges that documents related to the administrative functions of certain academic staff, such as chairs of departments; vice-deans, etc., can be considered within the custody and control of the University. I would agree with this assertion. As to what may specifically constitute documents of this nature, I would suggest that it includes correspondence with the Administration between these individuals concerning these functions including minutes of meetings and documentation of conclusions reached, subject always to the protection of "personal information" as that term is used in the *Act.*
>
> In conclusion, I find that [the University's request to APUO members for the provision to it of information responsive to the appellant's request] is contrary to the collective agreement and should be withdrawn. I appreciate that some of the observations made above with respect to documents that may be in the custody and control of the University are far from comprehensive or definitive. Accordingly, I shall remain seized of this matter in the event that the parties need to seek further guidance with respect to the application of the access request to specific types of documentation.
>
> To the extent noted above, this grievance is upheld.

9 The APUO then sought further direction from the arbitrator with respect to the question of which specific documents fell outside the custody or control of the university administration, but are within the custody and control of academic staff, and are, therefore, not subject to the *Act.* A hearing was held on February 10, 2009, at which time the parties made further submissions to the arbitrator on this matter. In his award following this hearing, issued on May 11, 2009, the arbitrator stated (at paragraph 21) that the issue he was "seized with as an arbitrator" is "whether, *pursuant to the collective agreement* between the parties, the university administration has custody or control over documents that are normally in the possession of members of the APUO bargaining unit." (Emphasis added.)

10 In that same award, the arbitrator determined that the APUO's proposal to him concerning a "final remedy" provided a "useful starting point" in addressing the issues that remained in dispute, and went on to state as follows:

> In its proposal, the [APUO] acknowledged that certain documents, which are identified therein, are in the custody or control of the University administration. The nature of these documents is fully addressed in the proposal as well as in the submissions of Counsel for the [APUO] in these proceedings and requires no further elaboration on my part. Counsel for the [University] has taken the position that the University administration has responsibility for making at least an initial determination as to the custody and control issue with respect to, for example, the personal notes and notations from academic staff. I agree with the [APUO] that the former Counsel to the University, who represented it throughout the lengthy series of hearings leading up to the September 29, 2008 award, had acknowledged that personal notes and annotations are not within the custody or control of the University.
>
> In my view, the University is bound by that acknowledgement, and in light of that, pursuant to my jurisdiction, I find that the University administration has no custody or control over personal notes or annotations made by academic staff. I therefore conclude that the [APUO's] position, as reflected in paragraph A.2) of its proposal [the Proposal], is correct. The [APUO] has taken the position that a number of other types of documents (for example, those related to "career path and performance evaluation", and in some cases "student exams") are exempt pursuant to section 65 of the Act. In my view, this question is best left to determination by the IPC pursuant to its authority under the *Act.*

11 The APUO proposal for a "final remedy" to the grievance was appended to the arbitrator's final award of May 11, 2009, and is also set out in Appendix A to this order. It sets out categories of records that "are subject to a request by the person designated as head under [the *Act*] to the members of the bargaining unit", as well as categories of records that may be in the university's custody or control "unless related to research or teaching as generally described in article 20 of the collective agreement, as *FIPPA* would not apply according to section 65 of the *Act.*"

12 It is notable that the arbitrator states that his ruling is made "pursuant to the collective agreement" rather than under the *Act.* He also finds that the university is "bound" by an "acknowledgement" by the university's former counsel that "personal notes or annotations" of professors are not in the university's custody and control, and as a

consequence, such notes and annotations may not be accessed by the university in relation to request under the *Act.* As explained later in this order, however, the *Act* is a statutory instrument and its application or lack of application is not a matter to be determined "pursuant to the collective agreement," or on the basis of "binding acknowledgement" made by counsel. Legislation cannot be superseded by contract or acknowledgement.

13 Moreover, in the context of the acknowledgement by the university's former counsel, it is significant that the term "personal" is used without reference to the definition of "personal information" in section 2(1) of the *Act.* This purported exception to custody or control is accepted by the arbitrator without qualification. On this basis, its scope would include records relating to "administrative duties," "committees within the university regarding general policies," and "personnel or peer review committees." In other words, it purports to exclude notes or annotations made by an individual professor on any subject whatsoever, including professional and university-related matters, from the university's custody or control.

14 Thus the arbitration award and the proposal purport to definitively exclude potentially responsive information relating to a wide range of matters from the university's custody or control, simply on the basis that the notes or annotations were made or added by a professor. As a consequence, a significant number of records relating to university administrative matters would fall outside the university's custody or control if this approach is followed.

15 As well, other than examination-related records, the proposal does not contemplate that any teaching or research-related materials held by individual professors could ever be within the university's custody or control.

16 I also note that the APUO proposal that is appended to the arbitrator's final award of May 11, 2009 purports to apply sections 65(6) and 65(8.1) to a significant number of record categories without any detailed review of the requirements articulated under those exclusions, or any examination of the meaning or reach of those sections.

17 Following the issuance of the arbitrator's final award on May 11, 2009, I took the appeal off hold relating to records responsive to part 1 of the appellant's clarified request. I then asked the university to provide me with a copy of the decision letter concerning part 1 of the appellant's request as clarified during the course of this appeal. On August 26, 2009 the university wrote to the appellant, as follows:

> As you are aware, the above-referenced part of your request was the subject of a policy grievance filed by the Association of Professors of the University of Ottawa ("APUO") on January 18, 2007 wherein the APUO objected to the University of Ottawa's request for its members to produce records in response to your request for information. The APUO had earlier indicated to its members, in a memorandum dated November 13, 2006, of this objection and advised its members not to respond to such request for information. In the Arbitrator's award of September 29, 2008 in respect of the policy grievance, the Arbitrator ordered the withdrawal of the University of Ottawa's communication of November 6, 2006 regarding this request.
>
> Due to the lack of clarity in the September 29, 2008 arbitral decision as to what categories of records could be sought from APUO members in respect of requests for information generally, the APUO requested a supplemental hearing before the Arbitrator on February 10, 2009 to consider its proposal in that regard. The Arbitrator's decision of May 11, 200[9], in respect of the supplemental hearing, did not provide sufficient direction to the parties in this matter. As a result, it is not clear what categories of records could be sought from APUO members by the University of Ottawa in response for requests for information under *FIPPA.*
>
> The University of Ottawa is disappointed with the latest decision and, therefore, is considering all of its options in this matter, including, but not limited to, pursuing further discussions with the APUO and/or commencing additional legal proceedings.
>
> The issue that needs to be resolved is whether the issuance of a request for APUO records pursuant to a ... request [under the *Act*] invokes a breach of the APUO Collective Agreement thereby restricting access to records.
>
> Accordingly, access is denied with respect to the first item of your request for information as presently there are no responsive records.

18 The appellant appealed this new decision of the university to this office. Because this new appeal arose from part 1 of the clarified request, this new appeal was rolled into Appeal PA07-119 and all of the remaining issues are addressed in this order.

19 I then sent a Notice of Inquiry seeking the representations of the university and the APUO respecting the following issues: the scope of part 1 of the appellant's request; which records are responsive to part 1 of the appellant's request; which responsive records are in the university's custody or control; and which records the university claims are excluded from the application of the *Act* by reason of sections 65(6) and 65(8.1). Because responsive records have not been identified, and no express claim applying section 65(6) or 65(8.1) is before me, this order does not expressly address the application of those provisions.

20 I received representations from the university and the APUO, copies of which were sent to the appellant, along with a Notice of Inquiry. I received representations from the appellant, a copy of which was sent to the university and the APUO, seeking their reply representations. The appellant also raised the issue of whether the university's Freedom of Information Coordinator (FOIC) was in a conflict of interest position vis-à-vis the university. Therefore, this was added as an issue in this appeal. I received representations from both the university and the APUO in reply.

21 Subsequently, I sought representations from all parties on the applicability of two recent Ontario Divisional Court decisions: *City of Ottawa v. Ontario* (hereinafter referred to as *City of Ottawa*),[1] and *Ministry of the Attorney General v. Information and Privacy Commissioner* (hereinafter referred to as *Ministry of the Attorney General*).[2] I received representations from the university and the APUO. I then provided a copy of the APUO's representations to the university and a copy of the university's representations to the APUO. As well, I provided a copy of the APUO's and the university's representations to the appellant. I received representations in response from the APUO only.

DISCUSSION:

PRELIMINARY ISSUES:

22 There are two preliminary issues raised by the parties in their representations, which I will consider at the outset of this order:

A. Whether the FOIC is in a conflict of interest position vis-à-vis the university; and

B. Jurisdiction to determine the question of custody or control of APUO members' records in the context of a request under the *Act.*

A. Is the FOIC in a conflict of interest position vis-à-vis the university?

23 The appellant's representations raised the issue of an alleged conflict of interest because the university's FOIC has also held the positions of the university's Vice-President Governance (formerly the Secretary) or Legal Counsel working under the Vice-President Governance of the university. He states that:

> Under academic freedom, a university employer cannot collect and use even publicly available information about a professor (or information about a professor volunteered by a third party) in a way that is contrary to academic freedom and/or inconsistent with the strict procedures outlined in the Collective Agreement.

24 Based on certain arbitration and court rulings, the appellant describes academic freedom of individual professors as including:

* freedom of expression both inside and outside the classroom without reprisal or interference
* independence in research and in professional communication
* professional independence in teaching methods

* guaranteed right to participation in collegial governance of the institution
* right to political expression and agency without interference
* right to full community and societal participation without interference

25 In reply, the university submits that it is apparent from the structure of the *Act* that there is no inherent conflict of interest even where authority for compliance with the *Act* and authority as the employer vests in the same individual. It states that the role of the FOIC, while common to many institutions, is not set out in the *Act.* Rather, under the *Act*, the authority for responding to access requests rests with the "head" of the institution. Furthermore, the university argues that, because a head may delegate the power and duty to respond to access requests to an officer of the institution, or of another institution [under section 49(1)], the FOIC therefore exercises her powers and responsibilities pursuant to authority delegated by the head of the institution. It submits that:

> While the "employer" is defined in the Collective Agreement as the Board of Governors of the University and not the [FOIC], it is not clear how this distinction gives rise to the appellant's assertion that the individual carrying out the function of the [FOIC] is in a conflict of interest.
>
> Furthermore, it is clear that even if the individual in an institution is exercising the powers under [the *Act*] on behalf of the head and is also exercising a role as the employer, this in of itself does not establish a conflict of interest under [the *Act*].
>
> As the appellant recognizes, any other use by the University of information collected pursuant to [the *Act*] can be addressed through the grievance process contained in the collective agreement.
>
> The Head of any [institution under the *Act*] may be both the directing mind of the institution in its capacity as an employer and the statutory holder of the responsibility for compliance [with the *Act*].
>
> Any "conflict of interest" in this dual role must have been contemplated by the drafters of [the *Act*].

26 The APUO submits that:

> It is the duty of the Head to make a disclosure decision following a request of access to a record.
>
> Public institutions must fulfill various obligations and duties prescribed by external statutes, for example, laws related to taxes, employment benefits, health and safety.
>
> These laws provide that institutions must fulfill specific obligations. These laws do not provide that institutions shall designate a member of the administration whose sole duty would involve answering access to information requests or applying employment laws or laws against discrimination.
>
> The *Act* does not impose such an exclusivity of duties: the costs for public institutions to have the obligation to nominate as "head" a person exclusively dedicated to the administration of *FIPPA* would be onerous and unreasonable.

Analysis/ Findings

27 Previous orders of this office have considered when a conflict of interest may exist with respect to decision-making under the *Act* by an institution. In general, these orders have found that an individual with a personal or special interest in whether the records are disclosed should not be the person who decides the issue of disclosure. In determining whether there is a conflict of interest, these orders looked at (a) whether the decision-maker had a personal or special interest in the records, and (b) whether a well-informed person, considering all of the circumstances, could reasonably perceive a conflict of interest on the part of the decision-maker.[3]

28 The question of conflict of interest encompasses both real conflicts, based on a personal or special interest, and reasonably perceived conflicts. The concern underlying the concept of conflict of interest is that a person making a decision on access to records should be free of extraneous influences that may prevent an impartial decision.

29 In this case, the appellant suggests that the FOIC was in a conflict of interest position since she also acted as

the Vice-President Governance or as legal counsel working under the Vice-President Governance. On the university's website, the role of the Vice-President Governance is described as follows:

> The Vice-President Governance oversees the secretarial and administrative services required for the operation of the Board, the Senate and their committees.
>
> The Vice-President Governance is the official secretary to the Board and Senate and is an ex-officio member of the Administrative Committee, of the Senate and of all Senate committees. The Legal Services, the University Archives and the Sexual Harassment Office report to the Vice-President, Governance.
>
> Finally, the Vice-President, Governance is one of the University's official signing authorities, including all diplomas conferred by the institution.

30 The collective agreement defines the employer as the university's Board of Governors, rather than the FOIC or another person employed by the university. In the collective agreement, the parties agree to neither infringe nor abridge the academic freedom of the members of the bargaining unit, the APUO. The parties to the agreement are defined as the APUO and the university's Board of Governors.

31 As pointed out by the appellant in his representations, the FOIC has the authority under the *Act* to request records only for the purpose of satisfying the requirements of the *Act.* Any other and incorrect use of the records requested by the FOIC would potentially be subject to several possible avenues of complaint, including a privacy complaint to this office; a grievance based on the terms of the collective agreement; an internal investigation and possible disciplinary action by the university; or, in the case where the FOIC is also a lawyer or another professional, a complaint about professional ethics to the Law Society of Upper Canada or other professional body.

32 In this case, the FOIC may hold another position within the university's administration, such as Vice-President Governance or as legal counsel working under the Vice-President Governance. Even if the FOIC in her other position may find herself in an adversarial relationship to the appellant, I find that the FOIC may still make decisions under the *Act* on the appellant's request for disclosure of records.[4] Any such interest does not inherently affect the ability of the FOIC to make an impartial decision on the appellant's access request. The issues to be decided in each role are entirely separate from each other. In addition, on the evidence, I find that the FOIC has no personal or special interest in the request or its subject matter.

33 In my view, no well-informed person would have a reasonable apprehension that the FOIC would be in a conflict of interest, or would not make an impartial decision. Accordingly, I find that the FOIC is not in a conflict of interest because of her duties as the Vice-President Governance or as legal counsel in providing assistance to the Board of Governors of the university in fulfilling its obligations as an employer under the collective agreement. The work performed in the role of FOIC is entirely distinct, and I am unable to discern how these various roles create any reasonable perception of a conflict of interest.

34 Therefore, I conclude that the FOIC is neither in an actual nor reasonably perceived conflict of interest, in deciding on the appellant's access request.

B. Jurisdiction to determine the question of custody or control of APUO members' records in the context of a request under the *Act.*

35 Section 10(1) of the *Act* provides a right of access "to a record or part of a record *in the custody or under the control of an institution ...*" unless the record is subject to an exemption under the *Act* or the request is frivolous or vexatious. Section 47(1) creates a corresponding right of access to one's personal information in the custody or under the control of an institution.

36 As described above, the arbitrator has issued several awards relating to the question of custody or control, which is also raised in this appeal. Accordingly, it is necessary to decide whether the arbitrator and this office have concurrent or overlapping jurisdiction to determine the question of custody and control of APUO members' records

that are the subject of an access request under the *Act*, or alternatively, whether either the arbitrator or this office has exclusive jurisdiction to do so.

37 The representations provided by the university and the APUO in this appeal take markedly different positions in this regard.

38 The APUO submits that:

> Arbitrators and statutory tribunals could have concurrent jurisdiction in matters involving the interpretation of a statute such as the [*Act*], as acknowledged in *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)*, 2007 ABCA 120, application for leave to appeal dismissed, [2007] S.C.C.A. No. 280 and *Amalgamated Transit Union, Local 583 v. Calgary (City)*, 2007 ABCA 121, application for leave to appeal dismissed, [2007] S.C.C.A. No. 294.
>
> However, in this appeal, to render a decision on custody and control of the documents in the possession of the members of the bargaining unit, it is essential to interpret the collective agreement between the employer and the APUO. Where the essential matter of the dispute arises out of an interpretation, application or potential violation of the collective agreement, according to *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, the arbitrator has exclusive jurisdiction to consider and determine the dispute. The analysis developed in *Weber* has been applied in numerous decisions since 1995, as illustrated in *Cherubim Metal Works Limited v. Nova Scotia (Attorney General)*, 2007 NSCA 38 (Application for leave to appeal to the Supreme Court dismissed, [2007] S.C.C.A. No. 278) ...
>
> ... These decisions have been rendered by an arbitral tribunal acting according to the arbitration process governed by the *Ontario Labour Relations Act* ...
>
> APUO submits that the University is trying to avoid the application of a valid arbitration decision by asking a different tribunal under a different Act to decide the very matter submitted to the arbitrator ...
>
> The decision of Arbitrator Chodos was not done in isolation or ignoring the principles behind *FIPPA.* In fact, at paragraph 232 of his award, he has explicitly included in his analysis the principles of interpretation of [the *Act*] ...
>
> APUO respectfully submits that the IPC has the authority to render a decision on disclosure of records following an appeal filed by the requester. However, the interpretation given by Arbitrator Chodos could not be submitted for review by the University in this Appeal process. Arbitrator Chodos' awards are determinative of matters arising under the collective agreement, and should be considered a significant and persuasive determinant in this appeal.

39 The university submits that:

> The Professors are employees of the University and are represented by their union, the APUO. The APUO and the University are party to a collective agreement which they have negotiated and renewed over many years including before [the *Act*] applied to the University.
>
> The employer-employee relationship between a university and a professor is not like the typical employment relationship. The university-professor employment relationship is unique because the philosophical principle of academic freedom has institutional and individual aspects and it lies at the core of university life and activities. The collective agreement and time honoured customs and practices within the university community support and promote the academic freedom of professors ...
>
> [The May 11, 2010 award] seems to suggest that the University may seek from professors only documents falling within the listed categories and not exempted by s. 65. By implication, it would be a violation of the collective agreement negotiated by the parties for the University to seek any other documents.
>
> In practice, Arbitrator Chodos' award is unworkable. It would have the effect of insulating large categories of records from potential disclosure, excluding the University, the "institution" in this case, from the process of determining whether the statutory exemptions are applicable, and preventing the IPC from fulfilling its obligation to provide independent review of the disclosure decisions of the University ...

The APUO suggested [to the arbitrator] that s. 65 [of the *Act*] would be applied not only to insulate records related to research and teaching from disclosure upon an access request, but also to prevent the Head of the University or his Delegate themselves from requesting the documents in the course of responding to an access request...

The University would agree that the determination of the applicability of the s. 65 exemption is a matter which should be left to the University and the IPC. Arbitrator Chodos did adopt the body of the Association's submissions, however, and did not expressly reject its suggestion that professors are not obliged to disclose exempted documents to the Head of the University.

The APUO may assert that the Chodos Awards bar the University from even requesting that professors who are employees of the institution provide documents which fall under the exemptions in s. 65. If this is determined to be the case, professors would be required to make the determination on a record by record basis as to whether those statutory exemptions apply. This is true not only in respect of the research and teaching exemption, but also in respect of the labour relations exemption. This raises two significant problems.

First, professors are generally not knowledgeable about [the *Act*]. The application of the s. 65 exemptions draws on a large body of case law from the courts and IPC, case law of which professors will generally be unaware. Professors are more likely to make errors in applying the exemptions than the delegate of the Head of the University, who must apply the exemptions in light of the jurisprudence on a regular basis as part of her employment responsibilities. Leaving such decisions in the hands of individual professors would also lead to inconsistent decisions between professors. The problem is exacerbated in this case by the fact that the request is for records held by all professors, in this case approximately 1200 individuals.

Secondly, if professors would not be obliged to provide the records to the Head of the University or his delegate where an exemption allegedly applies, the University would be left unaware of whether or not responsive records exist. The University would therefore be required to inform the requester that it was unable to locate responsive records, and the requester would not be able to appeal the determination that exemptions apply. This is a serious problem.

[The *Act*] does not offer a mechanism for independent review of the decision of an individual that a record in their possession is: a) not in the custody and control of their employer, and b) exempted from [the *Act*] in any event. [The *Act*] contemplates review of those determinations only where they are made by the institution, in this case the University.

Where individual professors are making these determinations, and the University is unaware the records even exist, a requester may receive a response from a professor denying that a certain record exists, and have absolutely no recourse for review of this decision. All the University can say to an Inquiry is that it asked, and none of the professors produced responsive records. The IPC might sanction the university, but without some centralized, institutional ability to review responsive records and determine the applicability of exemptions, the University can do little to remedy the error. The IPC would therefore be unable to fulfill its obligation to review the disclosure decisions of the University, while the University would be placed in an untenable position.

In combination with the high probability that individual professors will make errors and inconsistent decisions in applying the exemptions, the lack of an effective review mechanism for their decisions means that the Chodos Awards and the collective agreement they are based on potentially could act as an impenetrable barrier to ***access to information*** under *FIPPA* in the broader University sector. *The University submits that a collective agreement on its own should not be permitted to restrict the right to, and processes for* ***access to, information*** *set out in FIPPA ...*

The application of *FIPPA* to universities was intended to promote transparency and accountability in these public institutions. *If employees, with the support of their union and relying on a collective agreement, are permitted to exclude the University from* ***custody and control*** *over all but the most mechanical of records relating to the day-to-day operation of the University, this intended purpose will be defeated at this university and others.*

> The collective agreement between the University and the Association is the foundation of the relationship between the University and its professors, as represented by their union, the APUO. However, *the collective agreement as a contract cannot supersede the statutory obligations imposed on the University. The Chodos Awards have the potential to do just that.*
>
> Individual professors, unacquainted with and untrained in the statutory exemptions in *FIPPA*, cannot be permitted to be the final and unreviewable arbiters of access and disclosure at the University. Such an outcome would prevent not only the University, but also the office of the IPC itself from fulfilling their obligations under *FIPPA*, and would be contrary to both the spirit and intent of the legislation. It would be tantamount to the University having contracted out of its obligations under *FIPPA*, something the University is not permitted, and indeed has no wish to do. [Emphases added]

40 In *Weber v. Ontario Hydro,*[5] the Supreme Court of Canada discusses three possible approaches with respect to competing jurisdiction as between a labour arbitrator and another tribunal or a court. The three approaches in *Weber* are summarized by McLachlin C.J in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General),*[6] as follows:

> There is no easy answer to the question of which of two possible tribunals should decide disputes that arise in the labour context where legislation appears to permit both to do so. As explained in *Weber v. Ontario Hydro*, [cited above], three outcomes are possible.
>
> The first possibility is to find jurisdiction over the dispute in both tribunals. This is called the "concurrent" jurisdiction model. On this model, any labour dispute could be brought before either the labour arbitrator or the courts or other tribunals.
>
> The second possibility is the "overlapping" jurisdiction model. On this model, while labour tribunals consider traditional labour law issues, nothing ousts the jurisdiction of courts or other tribunals over matters that arise in the employment context, but fall outside traditional labour law issues.
>
> The third possibility is the "exclusive" jurisdiction model. On this model, jurisdiction lies exclusively in either the labour arbitrator or in the alternate tribunal, but not in both.
>
> *Weber* holds that the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix. In *Weber*, the concurrent and overlapping jurisdiction approaches were ruled out because the provisions of the *Ontario Labour Relations Act*, R.S.O. 1990, c. L.2, when applied to the facts of the dispute, dictated that the labour arbitrator had exclusive jurisdiction over the dispute. However, *Weber* does not stand for the proposition that labour arbitrators always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction; see, for example, *Goudie v. Ottawa (City)*, 2003 SCC 14 (CanLII), [2003] 1 S.C.R. 141, 2003 SCC 14; *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, 1996 CanLII 215 (S.C.C.), [1996] 2 S.C.R. 495. As stated in *Weber*, supra, at para. 53, "[b]ecause the nature of the dispute and the ambit of the collective agreement will vary from case to case, it is impossible to categorize the classes of case that will fall within the exclusive jurisdiction of the arbitrator." ...

41 *Weber* provides a two-step approach to determining which tribunal has authority, requiring consideration of (1) the "essential character" of the dispute and (2) the ambit of the collective agreement.

42 In *Bonner v. Via Rail Canada,*[7] (*Bonner*) Martineau, J discusses the proper application of this two-step approach, which was initially developed by the Supreme Court of Canada in *St. Anne Nackawic Pulp and Paper Co. v. Canadian Paper Workers Union, Local 219,*[8], refined in *Weber v. Ontario Hydro,*[9] and more recently reaffirmed in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners,*[10] (*Regina Police Assn.*) and *Bisaillon v. Concordia University,*[11] (*Bisaillon*). *Bonner* deals with a competing jurisdiction issue in relation to the *Official Languages Act* [*OLA*]. Justice Martineau stated:

> In deciding which of the competing statutory regimes should govern the dispute, the Court should first consider the nature of the dispute to determine its essential character, *the key question being whether in its*

> *factual context the essential character of the dispute arises either expressly or inferentially from a statutory scheme* (*Regina Police Assn.*)...
>
> Secondly, in addition to determining whether the facts of the dispute fall within the ambit of the collective agreement, the Court must also determine if the legislature intended the dispute to be governed by the collective agreement or by the OLA, as revealed by the relevant legislation...
>
> ... [W]hile the labour arbitrator certainly has legal authority to interpret and apply both the Charter and external statutes (including the *OLA*) in the case of staffing actions coming under the collective agreement, *the ultimate question is which forum is a "better fit", taking into account the intent of the legislator and the particular nature of the dispute.* Here, the issue raised by the applicant is whether VIA can impose, with the concurrence of CAW, bilingual requirements in the staffing of front-line service positions on-board trains not "designated" bilingual by TBS. This goes far beyond the simple interpretation or application of the text of the on-board collective agreement or the 1998 Memorandum. In the case at bar, VIA's policies and staffing actions are to be measured against any applicable provisions of the OLA and the Regulations. This certainly exceeds the usual expertise of the grievance arbitrator in labour relations matters ...
>
> As a final note on the jurisdictional issue and as affirmed by the Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd. (Re)*, *[1998] 1 S.C.R. 27*, at paragraph 27, "[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences" ... [Emphasis added].

43 From my review of these authorities, it is clear that two somewhat different but inter-related questions need to be addressed, namely: (1) whether one or both of the arbitrator and this office have the authority to determine the question of custody or control of records that have been requested under the *Act*; and (2) whether the jurisdiction to make this determination is concurrent, overlapping or exclusive. Answering these questions requires consideration of the two-part test in *Weber*, as further explained in *Bonner.* Question 2 also requires consideration of the governing legislation in the factual matrix of the dispute, as stated by McLachlin C.J. in *Quebec (Commission des droits de la personne et des droits de la jeunesse).*[12]

44 I will begin with question 1, which requires consideration of the test in *Weber*, as further explained in *Bonner.* This test asks the following questions:

1. What is the "essential character" of the dispute?
2. Did the legislature intend the dispute to be decided by the collective agreement or by the statute in question?

What is the "essential character" of the dispute?

45 In this case, the dispute clearly arises out of a request for access to information made to the university as an institution under the *Act.* That request is at the core of the dispute. The issues of whether responsive records are within the custody or control of the institution, whether they are included or excluded from the ambit of the *Act*, and ultimately whether the requester will be granted or refused access to the records, all arise from that request. The essential character of the dispute is one of access to information under the *Act.*

46 The university, in responding to the request, directed the faculty to search for and produce potentially responsive records, to enable the university to make a decision regarding access to the information. The nature of the records raised the issue of whether some of them may or may not be excluded from the *Act* under the exclusion in section 65(8.1), which is intended to protect academic freedom.

47 Without the request under the *Act*, there would have been no direction by the university to APUO members to search for potentially responsive records and produce them to the university, and absent that direction, there would have been no grievance and no series of arbitration awards.

48 The arbitration awards purport to apply the collective agreement to a great many types of records as a means of

superseding and avoiding the application of the *Act* on the ground of academic freedom. Article 9 of the collective agreement discusses academic freedom as follows:

> The parties agree neither to infringe nor abridge the academic freedom of the members. *Academic freedom is the right of reasonable exercise of civil liberties and responsibilities in an academic setting.* As such it protects each member's freedom to disseminate her opinions both inside and outside the classroom, to practice her profession as teacher and scholar, librarian, or counsellor, to carry out such scholarly and teaching activities as she believes will contribute to and disseminate knowledge, and to express and disseminate the results of her scholarly activities in a reasonable manner, to select, acquire, disseminate and use documents in the exercise of her professional responsibilities, without interference from the employer, its agents, or any outside bodies. All the abovementioned activities are to be conducted with due and proper regard for the academic freedom of others and without contravening the provisions of this agreement. Academic freedom does not require neutrality on the part of the member, but rather makes commitment possible. However, academic freedom does not confer legal immunity, nor does it diminish the obligations of members to meet their duties and responsibilities [Emphasis added].

49 I note that the collective agreement makes no reference to the issue of who has custody or control of a record that has been created, prepared, maintained or used by a professor in the course of his or her employment with the university. Rather, the agreement focuses on the right of professors to the reasonable exercise of their civil liberties and responsibilities in an academic setting.

50 The agreement protects a professor's freedom to ". . . select, acquire, disseminate and use documents in the exercise of his or her professional responsibilities, *without interference from the employer, its agents, or any outside bodies* [emphasis added]."

51 Therefore, the collective agreement seeks to protect professors from interference from the university or any outside bodies in the exercise of their duties as a professor. It does not discuss access requests under the *Act*, or who has custody or control of records that are the subject of such a request.

52 I also note that the collective agreement does not purport to oust, by contract, the potential application of the *Act.* As explored in more detail below, such an exclusion would be impossible. Even more fundamentally, it would be contrary to public policy if the application of duly enacted statutes could be avoided by simple contract, thereby ousting the statutory rights of third parties, without hearing from them.

53 Concerning part 1 of the test set out above, I find that the essential character of the dispute concerns an access-to-information request made under the *Act.* The questions to be decided arise from the interpretation of the provisions of the *Act.* It should be noted in this regard that the Ontario Court of Appeal has stated that, the "essential character" analysis must be applied to the dispute as a whole and not to its constituent elements.[13]

Did the legislature intend the dispute to be decided by the collective agreement or by the statute in question?

54 The university is an institution under the *Act.* Section 69 provides that the *Act* applies to any record in the custody or under the control of an institution. Where an access to information request is made under the *Act*, the statute requires an institution to disclose any responsive information in its custody or under its control that is not excluded from the *Act* or subject to an exemption from disclosure.

55 In *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*,[14] the Ontario Court of Appeal recently affirmed the strong public accountability purposes served by the *Act* and the need to "ensure that citizens have the information required to participate meaningfully in the democratic process." This is reflected in the purposes of the *Act* and that under section 54(1) of the *Act* the Commissioner may make orders regarding disclosure of information that are binding on institutions (see also Order PO-2917).

56 In particular, concerning the public accountability purposes served by the *Act*, section 1 states that the purposes of the *Act* are:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information

57 Concerning an individual's right of access, section 10(1) of the *Act* provides that:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

58 Section 47(1) of the *Act* contains similar provisions conferring on individuals a right of access to their personal information in the custody or under the control of an institution. It states:

> Every individual has a right of access to,
>
> (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
>
> (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

59 The *Act* contemplates that the head will make determinations concerning the application of exemptions from the right of access and exclusions from the scope of the *Act.* The head is responsible to provide an access decision to a requester and notice to potential affected parties. It is also noteworthy that the *Act* expressly confers on the Commissioner the power to hear an appeal of a denial of access or any other decision of the head in relation to an access request made under the *Act*, with no exceptions. Section 50(1) states:

> A person who has made a request for,
>
> (a) access to a record under subsection 24(1);
>
> (b) access to personal information under subsection 48(1); or
>
> (c) correction of personal information under subsection 47(2),
>
> or a person who is given notice of a request under subsection 28(1) may appeal any decision of a head under this Act to the Commissioner.

60 In addition, section 52(1) of the *Act* empowers the Commissioner to conduct an inquiry to determine the issues in an appeal, and the remainder of section 52 confers a variety of powers on the Commissioner for this purpose including the power to order production of records and to enter premises for the purposes of inspecting records [section 52(4)]; to summon and examine any person on oath [section 52(8)]; and to solicit and receive representations [section 52(13)]. Once the inquiry concludes, section 54(1) states that the Commissioner "... shall make an order disposing of the issues raised by the appeal," and section 54(3) indicates that "[s]ubject to this Act, the Commissioner's order may contain any terms and conditions the Commissioner sees fit."

61 It is clear from these provisions that the Legislature has provided the Commissioner with wide-ranging powers to deal with issues in relation to access to information requests and appeals. Since the inception of the *Act*, the Commissioner has issued over 5,000 orders dealing with access to information appeals under the *Act* and its companion legislation, the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*).

62 In *Reference re Municipal Freedom of Information and Protection of Privacy Act* (hereinafter referred to as *Reference re MFFIPA*),[15] the Court ruled that the City cannot by direct application to the Court circumvent the process set out in *MFIPPA.* In doing so, the Court stated as follows:

> Part III of *MFIPPA* sets out a comprehensive procedure for appealing a decision to the Commissioner. The process is convenient and inexpensive. The appeal is in writing. The parties have the right to file evidence, make submissions and be represented by counsel. The Commissioner has broad powers to compel witnesses and require the production of documents, giving her the ability to conduct a wide-ranging inquiry into all of the evidence. The Commissioner is required to conduct a de novo hearing on the appeal: *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.); aff'd [2005] O.J. No. 4047 (Ont. C.A.). At the conclusion of the hearing, the Commissioner shall make an order disposing of all of the issues raised on the appeal.

63 I agree with this analysis, which supports the conclusion that an appeal to the Commissioner is the appropriate forum for a determination of issues arising from an access request under *FIPPA.* Because of these statutory powers, the Commissioner is in a better position to adjudicate upon an appeal concerning access to records under *FIPPA.*

64 In addition, the process of determining whether a record is within an institution's custody or control, or whether an exemption from the right of access, or an exclusion from the application of the *Act,* might be applicable, is a complex one. The Commissioner's expertise in this area far outweighs that of the arbitrator. The Commissioner is empowered under the *Act* to determine, as a preliminary issue going to the Commissioner's jurisdiction to continue the inquiry, whether records sought by a requester are within an institution's custody or control, and/or whether they might fall within the scope of one of the exclusionary provisions in section 65 of the *Act.*[16]

65 Furthermore, the weight of judicial authority is to the effect that it is not possible to contract out of the *Act.*[17] In the context of an access request under the *Act*, in order to be withheld from disclosure, a record must fall outside the institution's custody or control, or alternatively, it must be excluded from the application of the *Act* under section 65 or an analogous provision, or qualify for an exemption according to its terms.

66 If, relying on the arbitrator's awards and the collective agreement, university professors are empowered to determine, without further review, whether disputed records are subject to the *Act*, and the related question of whether the university has custody or control of these records, the university and the IPC will be left unaware as to whether responsive records that may be in the university's custody or control even exist. Moreover, the university's decision-making power under section 10(1) of the *Act* would be unlawfully delegated to individual professors, and the IPC would be unable to fulfill its statutory obligation under section 52(1) of the *Act* to conduct an inquiry to review the university's access to information decisions. This would defeat or unlawfully restrict the legislative mandate of both the university and the Commissioner.

67 It is also significant that the collective agreement does not provide a mechanism for access to records under the custody or control of the university by members of the public. Similarly, there is no provision in the *Labour Relations Act* establishing a public right of access to records in the custody or control of an employer that is also an institution under the *Act.*

68 The legislature has expressly conferred on the head of an institution the authority to make access decisions and on the Information and Privacy Commissioner the authority to hear access appeals under the *Act* (see sections 10(1) and 50(1) of the *Act*, reproduced above). The *Act* provides a detailed code for establishing and determining public rights of access to information. It establishes the Commissioner as an independent arbiter of those rights,

and as an essential part of the legislative scheme, as expressed in the purposes of the *Act* set out in section 1, reproduced above. The *Labour Relations Act* does not contain a provision that operates to oust the application of the *Act*, or the Commissioner's authority to conduct an appeal under the *Act.*

69 Upon review of the statutory provisions of both the *Freedom of Information and Protection of Privacy Act* and the *Labour Relations Act*, I find that, in the context of an access-to-information request made under the *Act*, the legislature intended that the question of custody or control should be decided under the *Act.* A labour arbitrator is not statutorily empowered to make a determination under section 10(1) of the *Act* as to whether a record is within the custody or control of the university. Rather, under the *Act*, the head of the university or his or her lawful delegate have jurisdiction to make this determination, which decision may be appealed to this office.

70 Therefore, I find under part 2 of the test that the legislature intended that the issue was to be decided under the *Act* and not under the collective agreement. The *Act* stipulates that this determination is to be made by the university, at first instance, and on appeal, by the Commissioner. The university has the statutory authority to determine whether records responsive to an access request are in its custody or control. The university's decision is then subject to review by this office. The collective agreement cannot supersede the statutory obligations imposed under the *Act* on the university and the Commissioner.[18]

Concurrent, overlapping or exclusive jurisdiction?

71 The next question to consider is whether the arbitrator could be found to have concurrent or overlapping jurisdiction with the Commissioner in deciding the issues that arise from an access-to-information request made under the *Act*, including the question of custody or control. For the reasons outlined below, I find that this is not an appropriate case for concurrent or overlapping jurisdiction. On appeal, the Commissioner has exclusive jurisdiction to make these determinations.

72 In determining whether a model of concurrent or overlapping jurisdiction is appropriate in this case, the words of McLachlin, C.J. in *Quebec (Commission des droits de la personne et des droits de la jeunesse)*[19] provide guidance. As noted above, she states that "the model that applies in a given situation depends on the governing legislation, as applied to the dispute viewed in its factual matrix." In my view, the submissions of the university about the non-workability of Arbitrator Chodos' award, and the problems it faces in administering requests under the *Act,* are an important aspect of the "factual matrix" to be considered in making this determination.

73 With respect to the governing legislation, which as regards an access-to-information request is clearly the *Act*, it is important to note that the "head" is responsible for decision-making in relation to access requests made under the *Act.* Under section 10(1)(b), it is the "head" who determines whether a request is frivolous or vexatious; the "head" is also responsible for determining the application of exemptions as is made clear by the introductory wording of sections 12 through 22, and section 49; and the "head" is responsible for notifying the requester of whether access will be granted (section 26) and for notifying affected persons before making a disclosure that could affect their interests (section 28).

74 As noted above, any decision of the head regarding an access request under the *Act* may be appealed to this office [section 50(1)], which is given the authority to make binding orders in relation to the issues raised [section 54(1)], subject only to judicial review. It is apparent from a review of these provisions that the Legislature has clearly conferred the authority to determine such matters on the Information and Privacy Commissioner, not on the arbitrator.

75 In addition, the *Act* specifically provides that the person who requested access to a record (the requester -- in this case, the appellant) shall be given an opportunity to make representations to the Commissioner.[20] In an arbitration, there is no provision in the *Labour Relations Act* for the requester to participate in the arbitration, and in this case, the appellant, as a requester under the *Act*, was not a party to the proceedings before the arbitrator. By contrast, in an appeal under the *Act*, the appellant is a party, and is entitled to provide representations on all issues.

Accordingly, an appeal to the Commissioner is a fairer process for a determination of issues that arise from an access request under the *Act.*

76 Moreover, the following submissions by the university support a view that concurrent or overlapping jurisdiction would not be appropriate in this case:

* the application of the *Act* to universities is intended to promote transparency;
* the award of Arbitrator Chodos would have the effect of insulating large categories of records from potential disclosure, excluding the university from the process of determining whether the statutory exemptions are applicable, and preventing this office from providing independent review of decisions concerning disclosure;
* in the model established under the Chodos award, individual professors would be responsible for determining issues of custody and control and/or the potential application of exemptions, and individual professors are not generally knowledgeable about the *Act*;
* if professors are not required to provide potentially responsive records to the university, then not only would the university and this office be deprived of any meaningful oversight, but the university (and, by extension, this office) would be left unaware of whether responsive records exist.

77 From a review of the award and the APUO's proposal about which records are subject to the *Act* and subject to requests for access by the university administration, which was essentially adopted by the arbitrator in his third award, it is evident that the arbitrator's decisions apply a broad brush approach to the questions of custody and control and access to records by the university after it receives a request under the *Act.* As explored later in this order, this broad brush approach appears to capture records concerning which there may, in fact, be a dispute about custody and control.

78 Notably, the arbitrator characterizes his decision as "whether, *pursuant to the collective agreement*, the university administration has custody or control over documents that are normally in the possession of members of the APUO bargaining unit."[21] (Emphasis added.) On this basis, the award suggests that decisions made by professors about custody or control are not subject to review by either the university administration or this office, in contrast to the decision-making and review processes established under the *Act.* As already noted, the collective agreement cannot supersede the *Act.*

79 On this point, the university submits:

> ... [*T*]*he collective agreement as a contract cannot supersede the statutory obligations imposed on the University. The Chodos Awards have the potential to do just that.*
>
> Individual professors, unacquainted with and untrained in the statutory exemptions in *FIPPA*, cannot be permitted to be the final and unreviewable arbiters of access and disclosure at the University. *Such an outcome would prevent not only the University, but also the office of the IPC itself from fulfilling their obligations under FIPPA, and would be contrary to both the spirit and intent of the legislation.* It would be tantamount to the University having contracted out of its obligations under *FIPPA*, something the University is not permitted, and indeed has no wish to do. [Emphases added.]

80 I agree with these submissions. In the circumstances of this case, it is apparent that not only is there the potential for an arbitral award having the consequences outlined by the university; in fact, such an award (or awards) has actually been made. Given that the arbitrator's authority arises under the collective agreement, and implementation of the award would in fact have the consequences outlined herein by the university, I conclude that concurrent or overlapping jurisdiction is not appropriate in this situation. Concurrent or overlapping jurisdiction is also not consistent with the fact that, in disputes arising from a request under the *Act*, the legislature has conferred express appellate authority on the Commissioner.

81 Simply stated, decision-making in relation to access-to-information requests made to the university must be made under the *Act.* Such decisions are *not* made under the collective agreement, and therefore the awards of the

arbitrator, which purport to draw their authority from the collective agreement, are not determinative of the issue of custody or control arising from an access-to-information request made under the *Act.*

82 In addition, as noted earlier in this order, in the description of the arbitrator's final award of May 11, 2009, it is evident that the arbitrator simply accepted an acknowledgement by the university's counsel that "personal notes or annotations" of professors are excluded from the university's custody or control, finding that the university was "bound" by this acknowledgement without any analysis of this proposition as a question of law. What this represents, in fact, is an action which, like a decision-making process that gives the collective agreement primacy over the *Act*, has the effect of settling matters that should be dealt with under the *Act* by means of a private contract or agreement. This approach is not sustainable in law. This issue must be decided under the *Act*, and not by means of a "binding acknowledgement" or a finding made under the collective agreement. Moreover, this decision purports to exclude a very broad category of information that pertains to the university's business, based on the collective agreement and/or by simply accepting a position taken by counsel.

83 It is also to be noted that, unlike the arbitrator, the Commissioner is an established and ongoing tribunal whose purpose is to address issues under the *Act.* This means that if and when future issues arise with respect to custody and/or control of records by the university, the application of exclusions under section 65, and the application of exemptions, they are subject to determination by way of further appeals to the Commissioner.

84 The Commissioner's exclusive jurisdiction is confirmed by comments of the Divisional Court in *John Doe v. Ontario:*[22]

> The Commissioner exercises a supervisory function in respect of compliance by government institutions with provisions of the Act and has exclusive jurisdiction to review the decision of a head of an institution under the Act relating to a request for access (ss. 4, 50).

85 Applying the two-part test in *Weber*, it is clear that the legislature intended that issues arising from requests and appeals under the *Act* be determined by the head, and on appeal, by the Commissioner, and not by a labour arbitrator. Considering the governing legislation (that is, the *Act*) as applied to the dispute in the relevant factual matrix, as outlined in the foregoing analysis, and bearing in mind that the arbitrator's authority only arises under the collective agreement, an instrument that is not determinative of the issue of custody or control, I find that, in the context of an access-to-information request made under the *Act,* the Commissioner has the exclusive jurisdiction to determine this issue.

86 This conclusion is not impacted by the fact that, on occasion, a labour arbitrator, like any other adjudicator, may have occasion to consider and apply sections of the *Act* that may arise as a constituent part of a dispute which, under the *Weber* analysis, is properly before an arbitrator.[23]

87 I will now turn to the issue of whether the responsive records are within the university's custody or control within the meaning of the *Act.*

CUSTODY OR CONTROL

Introduction

88 In his clarified request, the appellant is seeking the following records:

> All (e.g., letter, fax and email) communications about [him] (other than messages sent by him), sent by or received by all professors (APUO members) at the University of Ottawa.

89 Under section 10(1), the *Act* applies to records that are in the custody or under the control of an institution. Section 10(1) (reproduced above, but repeated here for convenience) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

90 A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.[24] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it (Order PO-2836). A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 though 22 and section 49).

91 The courts and this office have applied a broad and liberal approach to the custody or control question.[25]

92 Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows.[26] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

* Was the record created by an officer or employee of the institution? [Order P-120]
* What use did the creator intend to make of the record? [Orders P-120 and P-239]
* Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* (1999), 47 O.R. (3d) 201, 1999 CanLII 3805]
* Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]
* Does the content of the record relate to the institution's mandate and functions? [*Ministry of the Attorney General v. Information and Privacy Commissioner*, cited at footnote 2, above; *City of Ottawa v. Ontario*, cited at footnote 1, above; Orders P-120 and P-239]
* Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120 and P-239]
* If the institution does have possession of the record, is it more than "bare possession"? [Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited at footnote 2, above]
* If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [Orders P-120 and P-239]
* Does the institution have a right to possession of the record? [Orders P-120 and P-239]
* Does the institution have the authority to regulate the record's content, use and disposal? [Orders P-120 and P-239]
* Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record? [*Ministry of the Attorney General v. Information and Privacy Commissioner*, cited at footnote 2, above]
* To what extent has the institution relied upon the record? [*Ministry of the Attorney General v. Information and Privacy Commissioner*, cited at footnote 2, above; Orders P-120 and P-239]
* How closely is the record integrated with other records held by the institution? [Orders P-120 and P-239]
* What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

93 In considering the issues of custody or control in the circumstances of this case, it is important to bear in mind that these are different issues than whether records are excluded under section 65(6) or 65(8.1). Those sections exclude particular classes of records that *are* in an institution's custody or under its control from the scope of the *Act.* Custody or control is the essential threshold question for determining whether, at first instance, records may be the subject of an access request. A decision to rely on section 65, or one of the exemptions in the *Act*, need only be made for records in an institution's custody or control.

94 Several recent decisions of the Divisional Court have expressly addressed the issue of custody and control.

95 *City of Ottawa v. Ontario*[27] applied a purposive approach in deciding that e-mail communications of an employee that related to non-work related volunteer activities of the employee, found on the city's server, were not in the city's custody or under its control. In this decision, made under the equivalent of section 10 of *MFIPPA*, the Court emphasized the importance of analyzing the purposes of the *Act*, and in particular, its purpose of transparency and accountability, in determining the issues of custody or control.

96 *Ministry of the Attorney General*[28] found that court statistical records prepared by Ministry staff at the request of the Chief Justice of the Ontario Court, which had been used by the Ministry for planning and other purposes, were in its "custody". The Court reached this conclusion because the Ministry had physical possession, and based on its use of the records and their relation to its mandate, this was more than "bare possession" and sufficient to constitute "custody" under the *Act.*

97 It is evident from both *City of Ottawa* and *Ministry of the Attorney General* that, where there is reason to question whether an institution has more than bare possession of records that appear to be in its physical possession, as is the case in this appeal, the relationship between the institution's public mandate and the records is a crucial one to consider, as is the question of whether a finding that the records are in the institution's custody and/or control would advance the transparency purposes of the *Act.* In addition, the other factors set out above must be considered.

98 This analysis will turn to a very significant degree on the nature and purpose of the records. In this case, the request is quite broad, seeking access to "all (e.g., letter, fax, and email)" communications" about the appellant, other than messages sent by him, sent by or received by all APUO members at the University of Ottawa.

99 As already discussed, the university's request that APUO members produce responsive records in their possession to the university administration in order to deal with this request is the basis of the grievance that led to the three arbitration awards. The arbitrator ruled that this request by the university should be withdrawn. Therefore, no search for records responsive to part 1 of the request has ever been conducted. Neither the university administration nor this office has seen the records or even a list of them.

100 In these circumstances, the only way to proceed is to evaluate the available evidence as to what types of responsive records might exist, and then evaluate whether any of these could be expected to fall within the university's custody or control.

Responsive Records

101 The appellant's representations indicated that the responsive records would include e-mails exchanged among APUO members about him. These would relate to projects he spearheaded, and would be exchanged as part of these professors' collegial governance responsibilities in evaluating projects and proposals. These e-mails would also contain comments about him personally, but under the collegial governance umbrella.

102 As already noted, after he provided his representations, I invited the appellant to clarify his request, and he did so. With respect to the portion of his request that relates to records held by APUO members, which is the portion at

issue in this order, he indicated that he seeks access to all (e.g. letter, fax and email) communications about him, (other than messages sent by him), sent by or received by all professors at the university.[29]

103 Earlier, in an e-mail attached to the university's request for responsive records that it sent to APUO members, which led to the eventual grievance, the university had identified a number of categories of responsive records that could mention the appellant, including the following:

> ... copies of all documents, written or electronic, which mention or refer to any of the following:
>
> a) [the appellant] (all documents, including complaints, grievances, privileges, etc.)
>
> b) [seven courses offered by the University, identified by subject and course number]
>
> c) [the appellant's] research direction in [a named article] including the graduate student ...

104 The e-mail went on to refer to a website and several other media-related items in which the appellant appears to have had some involvement.

105 In its initial representations, the university submits that responsive records would include faxes, letters, e-mails, notes in hard and soft copy, as well as recorded notes of telephone calls or voicemails, about or referring to the requester.

106 The APUO, relying on its proposal appended to the arbitrator's award, submits that the appellant's request is "too broad" because it encompasses records that are outside the university's custody or control. I disagree with this submission. Unless the request is frivolous or vexatious within the meaning of the *Act* and its accompanying regulation, which no party has argued it is, as long as a request is clear, it is a proper request under the *Act.* Custody or control is a separate question.

107 The APUO submits that the categories of responsive records are set out in its proposal that was attached to the third arbitration award of May 11, 2009, which is also set out in Appendix A to this order.

108 Although it is not possible to be definitive about the nature of the responsive records, it is clear that they encompass electronic and paper records that mention the appellant, including e-mails, correspondence, meeting notes, teaching-related materials and committee documents.

Representations and Analysis

Transparency, academic freedom, and "customary practice"

109 The representations of the APUO, the university and the appellant all address the relationship between academic freedom and the transparency purposes of the *Act.* As already noted, one of the factors involved in the custody/control analysis is the "customary practice" of the institution with respect to records of the type that are under consideration. Other factors mentioned above that are also inherent in this analysis include whether academic freedom imposes limits on the university's access to or use of the records, and the customary practices of other institutions of a similar nature.

110 All three parties submit that academic freedom is important, and all of them refer to historic practices intended to protect it. The principle of academic freedom and the practices that protect it are reflected in the collective agreement, but they were not newly created there; rather, it is clear that the principle of academic freedom has a long history. As already noted, the collective agreement does not supersede the *Act*, nor is it determinative of the question of custody or control. However, as discussed in more detail below, it is clear that the principle of academic freedom, quite independent of the collective agreement, is a significant factor in relation to custody and control.

111 The university refers to academic freedom and its impact on the nature of a professor's employment in the following passage from its initial representations, which is quoted above but repeated here for convenience:

> The employer-employee relationship between a university and a professor is not like the typical employment relationship. The university-professor employment relationship is unique because the philosophical principle of academic freedom has institutional and individual aspects and it lies at the core of university life and activities. The collective agreement and time honoured customs and practices within the university community support and promote the academic freedom of professors.

112 The APUO makes a similar submission, arguing that the analysis in Order 120 does not necessarily apply in the present circumstances because of the unique employment relationship between the university and its professors which is informed by the dictates of academic freedom.

113 The APUO also quotes from the first arbitration award, which explains the relationship in the following way:

> ... the academic staff are indeed employees of the University. Nevertheless, in light of the collective agreement and the age-old customs and practices of academic institutions, including the University of Ottawa, it can hardly be argued that university professors are typical employees who are subject to the close scrutiny of management. In general, the evidence demonstrates that in the context of the various governing structures of the University, which are described in detail above, the academic staff have a considerable degree of independence in the exercise of their academic functions, i.e. teaching, research and community activities. Indeed, it is hard to conceive how they could fulfill those functions without such latitude and independence.

114 The APUO also references the portions of the collective agreement that deal with the "customary practices" of the university as regards the three main duties of professors -- teaching activities, scholarly activities and academic service activities (sections 20.1, 20.2, 20.3.1, 20.3.2, 20.3.3 and 20.4 of the agreement), which are set out in Appendix B to this order. However, in my view, the description of these activities as part of the duties of a professor does not necessarily mean that all related records in the possession of faculty members are beyond the university's custody or control in order to protect academic freedom; in fact, from some of the descriptions of what happens to such records, it is clear that some of them *are* in the university's custody and/or control (e.g. examinations where a student contests the grade awarded). I therefore conclude that although relevant, these descriptions of professors' duties are not definitive in determining the boundaries of academic freedom or the customary practices of the university.

115 In a further implicit reference to the "customary practices" of the university, the APUO also submits that the application of the *Act* to the university does not give it custody or control over records which were not in its custody or control before the *Act* began to apply. I agree that the regulatory change that brought the university into the definition of "institution," thus making its records subject to the *Act*, did not have the effect of broadening the classes of records over which the university has custody or control. Thus the question to be determined is, taking customary practice and the other relevant factors into account, which records that may be responsive are in the university's custody or under its control?

116 On the subject of academic freedom, the university refers to *McKinney v. University of Guelph.*[30] In this case, in finding that actions of the University of Guelph imposing mandatory retirement on its professors did not invoke section 15 of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada acknowledged the importance of academic freedom in a vibrant and functioning democracy:

> Excellence in our educational institutions, and specifically in our universities, is vital to our society and has important implications for all of us. Academic freedom and excellence is essential to our continuance as a lively democracy.

117 The university expands upon this in its representations, stating that:

> ... through professors' exercise of academic freedom universities have an important function as a check on government action. Academic freedom allows professors to question government action, to dissent from predominant perspectives and to advocate even for unpopular points of view all critical to a healthy democracy. The Court noted that universities would strenuously resist government intrusion on these freedoms.

118 The APUO states that:

> Academic freedom has been recognized as a fundamental value in universities and a basic principle in democratic societies. Academic freedom provides academic staff with the conditions required to fulfill their duties free from threats to their career and independence, including the ability to conduct unconventional lines of inquiry and to engage in critical commentary on their own institution and society at large. ...
>
> APUO submits that failing to take into consideration the principle of academic freedom would have the effect of undermining a significant principle that is at the foundation of University institutions and democracy.

119 The appellant refers to the "statement of purpose" of the University of Toronto, which also affirms the importance of academic freedom. It states, in part, as follows:

> Within the unique university context, the most crucial of all human rights are the rights of freedom of speech, academic freedom, and freedom of research. And we affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself.
>
> It is this human right to radical, critical teaching and research with which the University has a duty above all to be concerned; for there is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the liberated human spirit.[31]

120 The meaning of the term "academic freedom" is explained in paragraph 9 of the Collective Agreement:

> Academic freedom is the right of reasonable exercise of civil liberties and responsibilities in an academic setting. As such it protects each member's freedom to disseminate her opinions both inside and outside the classroom, to practice her profession as teacher and scholar, librarian, or counsellor, to carry out such scholarly and teaching activities as she believes will contribute to and disseminate knowledge, and to express and disseminate the results of her scholarly activities in a reasonable manner, to select, acquire, disseminate and use documents in the exercise of her professional responsibilities, without interference from the employer, its agents, or any outside bodies.

121 The importance of both academic freedom and transparency is noted in the legislative debates that preceded the enactment of section 65(8.1), the exclusion from the *Act* that applies to records related to research and records of teaching materials. M.P.P. Wayne Arthurs, speaking on behalf of the government, stated:[32]

> . . . [T]his bill proposes to make Ontario's universities subject to the provisions of the Freedom of Information and Protection of Privacy Act and ensure that Ontario's publicly funded post-secondary institutions are even more transparent and accountable to the people of Ontario. That will be both our universities and our colleges of applied arts and science. *So as not to jeopardize the work being done at these institutions, though, the freedom-of-information provision would take into account and respect academic freedom and competitiveness. Clearly we understand the importance of the university post-secondary sector when it comes to doing research and innovative study programs.* Thus we wouldn't want to jeopardize that academic freedom, or the competitive environment that is created accordingly [my emphasis].

122 Although this is a reference to the underlying purpose of section 65(8.1) and other amendments to the *Act* made at that time, it is also noteworthy as a statement of legislative intent, in a general sense, to protect both transparency and academic freedom.

123 From these authorities, it is clear that academic freedom is an important right, and one with a vital role to play in a democracy such as Canada. These authorities also support the view that academic freedom does not arise solely from the collective agreement; rather, it is a pre-existing and independent right that informs the university's ability to access, use and regulate information and records in the possession of its faculty members.

124 The appellant takes quite a different approach to the question of academic freedom and its impact on custody

and control than either the university or the APUO. In his view, despite the guarantee of non-intrusion into the work of professors that academic freedom provides, the *Act* creates what would, in effect, be an exception to the rule of non-interference that is at the heart of academic freedom. He states:

> Under the protection of academic freedom, a professor's dean or chairman and the University administration cannot arbitrarily or unilaterally request records (from professors) that nonetheless are subject to FIPPA. Outside of a FIPPA request managed by a professionally-bound FIPPA Coordinator, such university administration requests would constitute undue interference and would be violations of academic freedom.

125 In response, the APUO submits that the effect of this approach would be that, by submitting an access request under the *Act*, outsiders could potentially gain access to records to which the university itself has never had access. Though the force of this submission is somewhat blunted by the exclusions provided by section 65(8.1) and the possible application of exemptions, I agree that this analysis significantly undermines the appellant's position.

126 In a related argument, the appellant submits that the definition of the university's role under the collective agreement, and the restrictions on its activities, do not impinge on its right to gather and make access decisions about information when a request is received under the *Act.* In his words, "the FIPPA coordinator is *not* the 'employer' of the collective agreement."

127 On this point, the university submits that although its relations with the APUO are governed by the collective agreement, that agreement cannot supersede the *Act.* This submission has already been applied in the discussion of jurisdiction, above. Rather than the collective agreement, it is the historic practice of academic freedom, and the consequent limits on the ways in which the university can access or use information in the possession of professors that must be considered in assessing custody and control.

128 For all these reasons, I disagree with the appellant's view that the *Act* creates a sort of carve-out from academic freedom in a manner that excludes the latter from consideration in the custody and control analysis. The question of academic freedom is vital to this whole analysis, and will have a significant impact on what records are, in the end, found to be in the university's custody or control.

129 Accordingly, I find that the principle of academic freedom, and the practices that exist to protect it at the university and at other similar institutions, and the limits that this places on the university's ability to access and use particular records, must be considered as important factors in assessing the question of custody or control. In the analysis of these factors related to academic freedom, neither the collective agreement nor any other agreement between the university and the APUO are determinative; to find so would contradict the important principle that an institution cannot avoid its statutory obligations under the *Act* by entering into contracts with third parties. Nevertheless, I find that the terms of the collective agreement provide relevant information about academic freedom.

130 I now turn to consider the principle of transparency, which is reflected in the purposes of the *Act* in section 1, which states, in part, as follows:

> The purposes of this Act are:
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; ...

131 As noted in *City of Ottawa*[33] above, this principle was explained by the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)*[34], which found that that the "overarching purpose" of access to information is to

"facilitate democracy" and stated (at para. 63) that "rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable." LaForest J. held at paras 61-62:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 Can. J. of Econ. and Pol. Sci. 479, at p. 480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

132 In its submissions responding to the Divisional Court decisions in *City of Ottawa* and *Ministry of the Attorney General*,[35] the APUO submits that applying a purposive approach, as was done in *City of Ottawa*:

> ... would not result in a conclusion that access to these documents is necessary to enhance the democratic process, or that refusing that access would interfere with the citizens' right to participate in democracy ...

133 It is to be noted, however, that "accountability" is also cited as a purpose of ***access to information*** legislation by the Supreme Court in *Dagg*, in a passage quoted with approval by the Court in *City of Ottawa.*[36] Thus it is clear that the goal of transparency is also vitally important to the question of ***custody and control***. As noted in the legislative debates quoted above, the addition of the universities as institutions under the *Act* was intended to make them "... even more transparent and accountable to the people of Ontario."

134 Because transparency is so clearly the legislative rationale underlying the inclusion of universities, which are important publicly-funded bodies, as institutions under the *Act*, it must not be given short shrift in this analysis. Consequently, the impact of academic freedom must not be overstretched. Its effect on custody and control must be confined to records or information that it truly protects.

135 The importance of both academic freedom and transparency in the analysis of custody and control is reflected in the university's initial representations, which in my opinion accurately summarize the balance that must be struck in deciding the issue of custody or control in this case:

> The University respectfully submits that the legislature intended [the *Act*] to be applied to the university community in a manner that does not impair this freedom that is so fundamental to the effective operation of Ontario's universities. Though perhaps difficult in practice to achieve, a balance needs to be found that respects the two legitimate public policy objectives of institutional transparency and academic freedom.

The university's statutory mandate

136 Among the purposes of the University of Ottawa stipulated by its governing statute, the *University of Ottawa Act, 1965*[37], section 4(a) provides as follows:

> The objects and purposes of the University are,
>
> > (a) to promote the advancement of learning and the dissemination of knowledge.

137 Accordingly, the professional work of APUO members as employees of the university, including their teaching activities, scholarly activities and academic service activities, all relate to the university's statutory responsibilities to promote the advancement of learning and the dissemination of knowledge. However, this does not inevitably lead to a conclusion that all records related to those activities are within the university's custody or control; rather, this is one factor to consider.

The university's "core", "central" or "basic" activities and its "mandate and functions"

138 The relationship between the contents of records and the university's core, central or basic activities, and/or its

mandate and functions, are identified above as factors to consider in assessing the question of custody or control. For the sake of simplicity, I will refer to these concepts, collectively, as the university's "mandate."

139 As I have already noted, the *University of Ottawa Act, 1965*, provides that the university's objects and purposes include promoting advancement of learning and the dissemination of knowledge. Accordingly, it is clear that the university's mandate includes teaching and research, and related administrative functions.

140 As outlined in *City of Ottawa*,[38] the relationship between an institution's mandate and the records at issue is a key factor to be considered when applying a purposive approach to custody or control. There, the Court excluded the records from custody or control because they did *not* relate to the City's mandate:

> The communications between CAS and [a named city's employee] have no connection whatsoever to the functioning of government nor to the business affairs of the City of Ottawa. It follows that providing public access to such documents does nothing to enhance participation in municipal affairs and prohibiting access does nothing to impair democratic values. Quite simply, these documents have nothing to do with municipal government and are not remotely connected to anything the legislation was intended to encompass.

141 The other side of the equation, however, is that where records *do* relate to an institution's mandate, this points to a strong transparency purpose in finding them to be in its custody or under its control.

142 While academic freedom and customary practice are countervailing factors with respect to the university's custody or control of many records pertaining to teaching and research, it is, nevertheless, evident that in some cases, the university must have access to such records to carry out its duties, and in that case, they would be in its custody and control. This applies most forcefully to administrative records that relate to the university's basic functions.

143 On a more specific note, the APUO's initial representations refer to records created or held in connection with the APUO itself. On this point, I conclude that records held by professors that relate to their status as members of the APUO, or relating to the business and affairs of the APUO, would generally be outside the university's custody and control for the reasons articulated in *City of Ottawa.*

144 On the other hand, if APUO-related records are held by a professor who *represents the university administration* in connection with APUO matters, these would be an exception to the finding in the preceding paragraph. They would, in my view, be in the university's custody and control because of their relation to its mandate. I would also expect that such records would not impinge on the professor's academic freedom.

Personal v. administrative records

145 The university also submits that a useful distinction can be made between personal records and those of an administrative nature. Records of a "purely" personal nature would not be in its custody or control, while those relating to the university's administration would be.

146 The APUO refers to and agrees with the arbitrator's view that "personal exchanges among staff" and "personal notes or annotations" are not within the university's custody or under its control. However, as I have already noted, both the arbitrator and the APUO appear to give a broad definition to "personal," and one that goes beyond the meaning of "personal information" in section 2(1) of the *Act*; "personal" exchanges and "personal" notes and annotations both appear to refer to the fact that they are generated, or occur between, individual professors. Many such notes, annotations or exchanges would encompass matters pertaining to the university's mandate, and most of those would therefore not constitute "personal information" within the meaning of the *Act.*

147 In *City of Ottawa*,[39] the Court ruled that personal e-mails unrelated to the city's mandate were not in its custody or control despite being stored on the city's server, and in my view, analogous "personal" records held by professors are similarly not within the university's custody or control. In order to be excluded from custody or control

on this basis, records or portions thereof in the possession of an APUO member would have to relate to personal matters or activities that are wholly unrelated to the university's mandate.

148 However, where records, including notes, annotations and exchanges between individual professors relate to the university's mandate, the question of custody or control would have to be determined by looking at the other factors examined in this order, and in particular, the questions of transparency, academic freedom and "customary practice."

149 With respect to "administrative" records, the APUO appears to adopt the arbitrator's conclusion that "consultations with colleagues [and] exchanges related to committee work outside the University" are beyond the university's custody or control.

150 The university argues that Arbitrator Chodos' determinations concerning the kinds of "administrative" records that would be within ***custody and control*** are too narrow, and suggests further that the APUO and its members could use the awards to argue that if 65(8.1) and 65(6) of the *Act* apply, the university's ***freedom of information*** staff cannot require such records produced to them. The APUO disputes this assertion, arguing that the arbitrator properly applied a two-step approach, recognizing that a record within custody or control might, under a separate analysis, be excluded from the scope of the *Act* under section 65.

151 The university further submits that:

> Subjecting records relating to the administrative or operational functions of the University to [the *Act*] does not infringe academic freedom because those records are not related to APUO members' exercise of their academic freedom, but rather to the APUO members' actions as administrative employees of the University, taken in furtherance of their administrative duties and the operations of the University.

152 In response, APUO argues that:

> ... By excluding [administrative duties] from the analysis, the University is depriving APUO members of any control of documents in their possession which were created while fulfilling academic service activities. Pursuant to article 20.4 of the collective agreement, academic service activities include, but are not limited to, specific activities such as: administrative activities, contributing to the effective operation of the Association, participating on CAUT [Canadian Association of University Teachers] and OCUFA [Ontario Confederation of University Faculty Association] committees, counseling students, serving as a chair of a thesis committee, editing scholarly activities, and contributing to the effective operation of granting agencies ...
>
> [I]t is essential that the analysis used to determine whether a document is in custody or control of an institution shall include an examination of the "nature of the document" and the nature of the institution's conduct in relation to the document [as appears at paragraph 42, *City of Ottawa*].

153 I have already addressed the role of the collective agreement in relation to the issue of custody or control; that is, it can provide guidance as to the meaning of academic freedom and customary practices, but it is not definitive; the real question relates to the extent of academic freedom and any consequent customary practices that may restrict the university's custody and/or control. I therefore do not accept the APUO's submission which, in effect, argues that if the activity in question is contemplated as part of a member's duties under the collective agreement, even duties of an administrative nature, then any associated records are, by definition outside the university's custody and control.

154 The APUO also argues that the university seeks to create a "class" of administrative employees. I disagree; in my view, what the university suggests does not create a new class of employees, but simply confirms that professors may function in a variety of ways, and that these may be determinative of whether particular records are in the university's custody or control. It is, moreover, consistent with my conclusion above that academic freedom must not be overstretched, and only impacts the question of custody or control for records or information that it truly

protects. There may be administrative records that are protected by historic custom based on academic freedom, but that must be decided on a case-by-case basis.

155 In my view, administrative records concerning university-related matters are, *prima facie*, connected to the university's mandate and less likely to be impacted by customary practices relating to academic freedom. Unless the latter is the case, such records would, in my view, be in the university's custody and control. As regards records relating to external committees, consideration must be given to how these relate to the university's mandate, as discussed above, and to customary practices pertaining to academic freedom.

156 With respect to the university's comment about section 65, there is ample evidence in the awards that, as argued by the APUO, the arbitrator correctly viewed custody and control (and hence the ability to require records produced to university administrative staff) as separate from the exclusions found in section 65, which relate to the question of whether records can be requested under the *Act.*

157 To be clear on this point, some categories of records that would otherwise be subject to sections 65(6) or 65(8.1) may be beyond the university's custody or control, but this would be on the basis of customary practices intended to protect academic freedom that pre-dated the application of the *Act* to the university, and *not* because of sections 65(6) or 65(8.1). The application of these sections, by itself, does not directly affect the question of custody or control, and does not prevent the university from requiring records that are in its custody or control to be produced to it, even if these sections apply. Once it is determined that a record is within the university's custody or control, the determination as to whether this record is subject to the exclusions in sections 65(6) or 65(8.1) is to be made by the head, which may be subject to an appeal to the Commissioner under the *Act.*

158 In summary, records or portions of records in the possession of an APUO member that relate to personal matters or activities that are wholly unrelated to the university's mandate, would not be in the university's custody or control for the reasons articulated in *City of Ottawa.* With respect to other potentially responsive records, the factors of transparency, academic freedom and "customary practice" must be considered. A record relating to purely academic matters is more likely to be outside custody or control, based on customary practice, than a record relating to administrative matters. Records pertaining to administrative matters are, *prima facie*, in the university's custody and control, subject to falling outside the university's custody or control based on customary practices relating to academic freedom.

Whether the records w ere created by an officer or employee of the university

159 The APUO acknowledges that many of the records that could be responsive were created by employees of the university, but argues that this is not determinative in the present appeal because of the nature of the relationship between the university and its academic staff, and the impact of academic freedom and customary practice as discussed above. While the creation of a record by an employee supports the university having custody and control of that record, I conclude that this factor must be considered in light of the customary practice/academic freedom analysis outlined above. Where a record would, by customary practice, have been outside the university's authority to inspect or require produced to it, because of academic freedom, this would not be overridden on the sole basis that it was created by an employee.

Physical possession, "bare possession" and right to possess

160 It is clear that many of the records would be on the physical premises of the university, or accessible to it on its computer or e-mail systems. For example, in its initial letter to professors asking for them to provide responsive records, the university stated:

> Please note that the University has the capacity to search your email accounts for the documents requested. If you would like to avail yourself of this service, please provide your consent to have your emails searched using the keywords outlined in the request. Should you opt for this service, you would still be responsible under the Law to search your computer for other types of electronic documents (e.g. word

processor files, spreadsheets, etc.) that refer to the keywords indicated in the request, as well as searching all your filing cabinets for paper files and documents.

161 The APUO submits that the format or transmission medium of a record, or the ability to have physical access to it, is not determinative of the custody and control question in the circumstances of this case. I agree with this submission; although physical access can be a persuasive indicator of custody or control, it can be overridden by more important factors in a given case, as occurred in the *City of Ottawa* case, where a purposive approach did not support a finding of custody or control even for records on the city's e-mail server just because the city had the ability to access them. In this appeal, the fact of mere physical accessibility is less significant than the question of whether they relate to the university's mandate, and if so, whether there was a customary practice of non-access by the university in keeping with academic freedom.

162 Referring to *City of Ottawa*, the university submits that records in the sole possession of APUO members relating to the exercise of professorial (as opposed to administrative) responsibilities or personal academic pursuits would not be in its custody or control. Referring to the *Ministry of the Attorney General* case, the university submits that if such records are in its possession, this amounts to no more than "bare" possession, and therefore insufficient to bring them within its custody, and that this conclusion applies to both electronic and paper records. Again, in my view, the question comes down to what would be available to the university by customary practice aimed at protecting academic freedom; to the extent that the principle applies, records relating to professorial responsibilities or personal academic pursuits, would not normally be in the university's custody or control.

163 The APUO submits that, except to the extent described in its proposed categories of records that were appended to the third arbitration award (and attached to this order as Schedule "A"), the university does not have a right to possession of records created, received or disseminated in the exercise of professional responsibilities of academic staff members.

164 For reasons already outlined above, I do not agree with this statement as regards administrative records, and I also find it to be subject to significant exceptions with respect to other records generated in relation to teaching and research. Where, by customary practice, there is a right to possess or access such records for administrative purposes, such as where a student contests an awarded grade, that is a relevant factor that strongly suggests that such records are in the university's custody or control.

165 On the other hand, physical possession does not, in and of itself, mean that records or portions of records in the possession of an APUO member that relate to personal matters or activities that are wholly unrelated to the university's mandate, being in its custody or control. Similarly, mere physical possession does not mean that records to which the university does not have access, by customary practice, based on academic freedom, are in its custody or control.

Regulating content, use and disposal

166 The right to regulate content, use and disposal often comes up with respect to electronic records. In *City of Ottawa*, the e-mails that were found to fall outside the City's custody and control were e-mails located on its server, which had been designated as City property. Staff had been advised that such e-mails were not private, and that the e-mail system could be monitored and inappropriate content deleted. Notwithstanding all these indicia of control, the Divisional Court found that because they were personal, and wholly unrelated to the institution's mandate, they were not in its custody or control.

167 In this case, extracts from the university's policies about use of its electronic systems, including e-mail, are found in Appendix "C" to this order, and like the situation in *City of Ottawa*, they do provide that the university owns the system and has the right to regulate content.

168 Based on *City of Ottawa*,[40] and taking into account the circumstances of this appeal, I conclude that the right to regulate the contents of the university's electronic systems, while relevant, is not sufficient to support a finding of

custody or control. Rather, with respect to records held by APUO members, a purposive interpretation must be applied that takes into account academic freedom and the related historic practice of whether the university has access to various records that may be found in such systems.

169 With respect to disposal, the evidence provided to the arbitrator, as described in the first award, suggests that when a professor retires, he or she would take their paper files with them, erase the computer hard drive and leave a CD ROM copy of it for the university. While that may be so, I do not find it to be conclusive; leaving a copy of the professor's hard disk for the university's use implies some degree of control by the university, and the contents of the disk might well overlap the contents of the paper records. In my view, this evidence is too general to be of much use in determining the question of custody or control.

170 On this point, the APUO submits that, except to the extent described in the appendix to the third arbitration award (reproduced as Appendix "A" to this order), the university does not have a right to possession of, or to regulate the use and disposal of, or regulate the content of the records created, received or disseminated in the exercise of professional responsibilities of academic staff members. Again, I do not agree with this statement as regards administrative records, and I also find it to be subject to potentially significant exceptions with respect to other records generated in relation to teaching and research. As already stated, where there is a right to possess or access such records based on customary practice, for example, where a student contests an awarded grade, that is a relevant factor that strongly suggests that related records are in the university's custody and control.

Integration with other records

171 The APUO submits that, except to the extent described in its proposed categories of records, attached to the third arbitration award and also set out in Appendix A to this order, records relating to the exercise of professional responsibilities of academic staff members are not integrated with other records of the university.

172 The APUO submits further that the university has never claimed it needs the requested records in connection with its normal operations. In this regard, I note that no definitive list of responsive records has been created, and in my view, this submission is entirely speculative.

173 On the overall question of the impact of "integration with other records" I have concluded that, like physical possession of the records, this does not dictate a finding that the university has custody or control. Again, the important question in the university context is which of these records would be available to the university administration by custom or practice, after taking academic freedom into account. Such records would, in my view, be in the university's custody and control.

Conclusions re: custody and control

174 From the foregoing analysis, the following conclusions emerge:

* academic freedom is a historic principle practised in university communities that has an impact on what records of professors have, by custom or practice, been available to university administrative staff;
* academic freedom exists independently of, and pre-dates the collective agreement, and is an important principle in a democracy;
* the relationship between a university and its academic staff is different from the standard employer-employee relationship because of the impact of academic freedom;
* the principle of academic freedom, and the practices that exist to protect it at the university and at other similar institutions, and the limits that this places on the university's ability to access and use particular records, must be considered as important factors in assessing the question of custody and control;

* neither the collective agreement itself, nor other agreements or acknowledgements is determinative on the issue of custody and control, but the collective agreement is relevant as a source of information about academic freedom;
* a purposive approach to custody and control must consider the principle of transparency, and in this case, the principle of transparency dictates that academic freedom only limit custody and control to the extent that it actually applies based on customary practice;
* the inclusion of the university as an institution under the *Act* does not broaden the records over which the university has, by custom or practice, had custody or control; which would depend on pre-existing practices arising from academic freedom;
* the *Act* does not create a "carve-out" from limits on custody or control that result from custom or practice arising from academic freedom;
* the university's statutory powers and duties are "to promote the advancement of learning and the dissemination of knowledge," and the university's "mandate" to be considered in determining custody or control therefore includes teaching, research, and related administrative functions;
* records or portions of records in the possession of an APUO member that relate to personal matters or activities that are wholly unrelated to the university's mandate are not in the university's custody or control;
* the question of whether records that are "personal exchanges among staff" or "personal notes or annotations" are in the university's custody or control will depend on whether they relate to the university's mandate and all other relevant factors, and in particular, the questions of transparency, academic freedom and customary practice;
* administrative records are *prima facie* connected to the university's mandate and unless they are impacted by customary practices relating to academic freedom, they are in the university's custody and control;
* academic freedom will impact many records relating to teaching and research but in some cases the university must have access to them to carry out its mandate; where this is the case, such records are in its custody and control;
* records pertaining to APUO activities are only in the university's custody or control where the APUO member who holds the records was representing the university administration;
* where a record would, by custom or practice, have been outside the university's authority to inspect or require produced because of academic freedom, this would not be overridden on the sole basis that it was created by an employee;
* in this appeal, the right to regulate the contents of the university's electronic systems, while relevant, is not sufficient to support a finding that the University has custody or control of records held by APUO members; in this case, a purposive interpretation must be applied that takes into account academic freedom and the related historic practice of whether the university has access to various records that may be found in such systems.

175 From the foregoing conclusions, several primary points may be drawn. The application of the *Act* does not extend the university's custody or control over records of academic staff beyond the scope that existed prior to the university becoming an institution. The historic principle of academic freedom, and the customary approach to custody and control that this engendered, as well as the limits on the university's access to records held by its professors, are therefore primary factors to consider with respect to custody and control. The collective agreement may provide useful guidance on the extent of academic freedom but it is not determinative of the question of custody and control. In addition, administrative records are, *prima facie*, in the university's custody and control. This includes administrative records in the possession of academic staff, unless academic freedom provides a basis to conclude that they would not, historically, have been subject to access by the university.

176 As a consequence of this analysis, I do not accept the overall position taken by the APUO in this appeal. The APUO essentially submits that the awards of the arbitrator should be taken as definitive. In particular, based on the principle of academic freedom, the APUO submits that:

> ... except to the extent described in the Appendix to Arbitrator Chodos' third award, the University does not have a right to possession of, or to regulate the use and disposal of, or regulate the content of the records created, received or disseminated in the exercise of professional responsibilities of academic staff members. Nor are such records integrated with records held by the University except to the extent described in the Appendix to the third arbitration award.

177 As already noted, the third arbitration award describes custody and control as being determined "pursuant to the collective agreement,"[41] and essentially adopts the APUO's proposal concerning which records would be within the university's custody or control (also set out in Appendix A to this order). More significantly, the arbitrator's findings on custody or control are largely based on the professional responsibilities of professors, which include administrative matters, as set out in the collective agreement. As already noted, the arbitrator's conclusions regarding "personal notes or annotations" are problematic with respect to notes or annotations relating to administrative matters, given that academic freedom may not require them to be excluded from the university's custody or control.

178 The university submits that the arbitrator interprets custody and control too narrowly, failing to take into account the principle that custody and control must be determined on a broad and liberal basis. For this reason, the university disagrees with the arbitrator's characterization of the categories of records proposed by APUO (set out in Appendix A to this order) as being within the university's custody or control as an "appropriate starting point."

179 More particularly, the university submits that:

> ... it has neither custody nor control, for the purposes of [the *Act*], over records in the possession of APUO members which are created, received or disseminated in the exercise of their professional responsibilities, including teaching, research, or other scholarly activities, but not including activities relating to the administration or operation of the university. The recent Divisional Court decisions suggest that the university does have custody or control, for the purposes of [the *Act*], over records that are in the custody of APUO members and which in their essential character relate to the administrative functions or operations of the university, rather than to the exercise by those members of their personal academic pursuits or professional responsibilities.
>
> ...
>
> However, subjecting records to [the *Act*] that are in the sole possession of APUO members, relating to the exercise of a professor's professional responsibilities or personal academic pursuits would be inconsistent with academic freedom, and thereby inconsistent with the underlying purposes of [the *Act*]. In accordance with the Divisional Court decision in *City of Ottawa*, the university submits that the test of custody or control over such records is not met.

180 I have already found that, as an issue arising from an ***access-to-information*** request made under the *Act*, the question of ***custody and control*** is to be determined under the *Act* and not under the collective agreement. The arbitrator states that he is determining this question "under the collective agreement," and, based on the foregoing analysis, he has taken an overly restrictive approach to ***custody and control***. In any event, in the circumstances of this appeal, it is this office, rather than the arbitrator, that has the exclusive jurisdiction to make this determination.

181 Accordingly, I conclude that the arbitral awards are not determinative with respect to the custody or control of records that may be responsive in this case. Rather, the determination is to be made based in the principles enunciated in this order. The significant conclusions I have reached in this regard are:

1. records or portions of records in the possession of an APUO member that relate to personal matters or activities that are wholly unrelated to the university's mandate, are not in the university's custody or control;

2. records relating to teaching or research are likely to be impacted by academic freedom, and would only be in the university's custody and/or control if they would be accessible to it by custom or practice, taking academic freedom into account;
3. administrative records are *prima facie* in the university's custody and control, but would not be if they are unavailable to the university by custom or practice, taking academic freedom into account.

182 Accordingly, the next steps should be for the university to request that APUO members produce records to it that would be responsive to the clarified request and are in the university's custody or under its control, taking these three criteria into account. The decision as to whether exclusions or exemptions apply to such records is for the university to make, subject to appeal to this office.

183 Given the lack of information about exactly which records would be responsive to the appellant's request in this case, some practical difficulties may arise, such as the potential over-exclusion of records from custody and control based on individual professors' interpretation of academic freedom. In order to resolve such doubts, without handing over the records or disclosing their specific contents, APUO members may wish to provide lists or indices of records or portions of records for which the question of custody or control may be in dispute, including a brief explanation of why a record or records would not be in the university's custody or control. This approach respects both academic freedom and the transparency purposes of the *Act.*

ORDER:

1. I order the university to request by **November 30, 2011** from its professors (APUO members) all written communications about the appellant (other than messages sent by the appellant) dated between September 1, 2004 and October 31, 2006 inclusive, sent by or received by all professors (APUO members) during the course of their employment at the University of Ottawa, that are in the university's custody or under its control, taking into account the three criteria enumerated in paragraph **181**, above.

2. I order the university to issue an access decision to the appellant within 60 days from the date of its request to the professors (APUO members).

November 7, 2011

Original Signed by:
Diane Smith
Adjudicator

* * * * *

Appendix "A"

APUO "Proposal with respect to final remedy" attached as Appendix to Third Arbitration Award, May 11, 2009

A. The Question of Custody or Control by the University

The University may have custody or control of documents in possession of bargaining unit members only with respect to the following categories of documents, whether in hardcopy or electronic format:

1) *Administrative duties:*

documents held by members of the bargaining unit acting in an administrative role such as chairs or directors of schools, vice-deans, associate deans, program directors, and which are related to those administrative duties, but excluding any personal notes or annotations (para. 207 & 235 of the award).

2) *Committees within the University regarding general policies:*

documents received by a member of the bargaining unit, acting in his or her capacity as a member of a department, faculty or University committee when the committee plays an official role in the University, such as Ethics in research committee, Internal research grants committee, parking committee, or space committee, etc, but excluding any personal notes or annotations added by the member. However, [the *Act*] does not apply to those documents if related to research or teaching as generally described in sections 20.2 and 20.3 of the collective agreement (i.e. to which [the *Act*] does not apply according to section 65 of the *Act*).

3) *Personnel or peer review committees:*

documents received or consulted by a member in his or her capacity as a member of a department, faculty or University committee, such as hiring committee, personnel committee, and tenure or promotion committee, excluding any personal notes or annotations added by the member. However, [the *Act*] does not apply to those documents as they are employment related documents under section 65 of the *Act.*

4) *Career path and performance evaluation:*

documents submitted to the University (i.e. to the personnel committees, deans, or Joint Committee) by the member, such as an application for tenure, promotion, or sabbatical leave. These documents, once sent by a member to the University in order to obtain those rights, are in the custody and control of the University. However, [the *Act*] does not apply to those documents as they are employment related documents under section 65 of the *Act.*

5) *General University communications:*

(documents sent to all members or a large group of members) the original is in the custody and control of the University. So far as the application of [the *Act*] is concerned, this is all that is needed. No access request to members is required.

6) *Student Exams:* (this category, depending on the different stages, could be qualified as a "transformed custody or control category".)

   a) draft of the exam (custody and control of academic staff)

   b) original as printed by the University (custody and control of academic staff)

   c) collected for and received by the academic staff for grading (shared custody or control between academic staff and student)

   d) annotated copy kept by academic staff (shared custody or control between academic staff and student)

   e) marks sent to Department (marks, not exams, in custody and control of the University)

   f) appeal by student, individual exam sent to Department (in University custody and control once received)

7) *Exam Copies that are Submitted to the University by the Member:*

   a) submitted under category 4 by faculty member (see above)

   b) University or departmental policy whereby exam copies are maintained in a "bank" or are used for accreditation purposes (those copies are in the custody and control of the University). Since the actual copy is in the custody and control of the University, no further action by the individual member is required. However, [the *Act*] likely does not apply according to section 65 of the *Act* (teaching materials).

[Note: issue of control and custody is separate from the issue of copyright of exam material, which is not being addressed in this arbitration.]

B. Which of the above documents are subject to the application of an access request under [the *Act*]?

Category 1

Category 2, unless related to research or teaching as generally described in article 20 of the collective agreement, as [the *Act*] would not apply according to section 65 of the *Act.*

Category 5

Category 6, (e) and (f)

C. Which of the above documents are subject to a request by the person designated as head under [the *Act*] to the members of the bargaining unit?

Category 1

Category 2, to the extent noted above

* * * * *

Appendix "B"

Extracts from the Collective Agreement

Section 20.1

General provisions

The functions of a member of the academic staff include, varying proportions:

(a) teaching activities;

(b) scholarly activities revealed by research, artistic or literary creation or professional work;

(c) academic service activities.

Specific activities corresponding to those 3 functions are listed in the next 3 sections, it being understood that these lists are not exhaustive and are not in order of priority.

Section 20.2 - Teaching

Teaching includes the following activities:

(a) giving courses, conducting seminars, guiding tutorials and laboratories, and supervising individual study projects;

(b) preparing and correcting assignments, tests and examinations;

(c) guiding the work of teaching assistants, markers and laboratory instructors;

(d) supervising, guiding and evaluating students' individual work, such as theses and papers;

(e) granting individual consultations outside of class or laboratory time;

(f) participating in the development of teaching methods, programs or course content,

(g) preparing instructional material, laboratory exercises and course notes for the member's own students;

(h) writing textbooks; and

(i) serving as a thesis examiner at the University of Ottawa.

All other activities in which the member engages for the purpose of preparing page courses and seminars, including those undertaken to ensure that her teaching is in keeping with the current state of the subject taught, are considered teaching activities.

Section 20.3 - Scholarly Activities

20.3.1 General provisions

20.3.1.1 Scholarly activities are those which contribute:

(a) through research, to the advancement of knowledge in a discipline;

(b) through artistic or literary creation, to the advancement of the arts and the letters;

(c) through various professional activities, to the advancement of a profession.

20.3.1.2 Scholarly activities referred to in this agreement are those whose form makes peer evaluation possible and those which aim at being communicated in a form permitting peer evaluation.

20.3.13 It is understood that the existence of scientific, artistic or literary works, or professional activities is not- in and of itself-proof of competence or satisfactory performance in scholarly activities.

20.3.2 Research

20.3.2.1 Research includes the following activities:

(a) conceiving, developing and carrying out research projects, individually or with others;

(b) conceiving, developing and carrying out critical analyses of existing knowledge;

(c) presenting the results of research or critical studies at, or actively participating in, scholarly meetings, colloquia, or research groups;

(d) preparing reports, articles, chapters or books presenting results of the member's research or critical studies, including works published in collaboration with others;

(e) guiding master's and doctoral theses, provided such guidance contributes to the advancement of knowledge;

(f) preparing innovative textbooks, and developing innovative teaching materials or methods, which may be used by others;

(g) work done under contract, provided it contributes to the advancement of knowledge, and the results are accessible in a form permitting peer evaluation;

(h) editing of a scholarly publication, where there is evidence that the member's work extends beyond customary editorial duties and includes a significant contribution to the advancement of knowledge.

20.3.2.2 Any work related to the immediate and normal preparation of courses is not considered part of research activities, in the sense of this collective agreement.

20.3.3 Artistic or literary creation Artistic or literary creation includes the following activities:

(a) producing original works or forms of expression;

(b) conceiving, developing and carrying out for publication artistic projects or literary criticism.

20.3.4 Professional activities Professional activities include:

(a) making contributions to the practice of a profession beyond those normally required of a practitioner who is not a university professor;

(b) making valuable contributions to the advancement of the profession itself.

Section 20.4 Academic service

Academic service activities include specific activities such as the following:

(a) administrative activities such as chairing a department, or coordinating undergraduate studies within a department;

(b) participating in the work of committees of a department, a faculty, or the university, or otherwise contributing to the effective operation of the University of Ottawa or one of its constituent parts;

(c) contributing to the effective operation of the Association by serving as an officer of the Association or on its Board of Directors, or participating in the work of one of its committees or constituent parts;

(d) contributing to the effective operation of AUCC, CAUT or OCUFA by serving on their governing bodies or participating in the work of their committees;

(e) counselling or advising students;

(f) serving as chair of a thesis committee at the University of Ottawa or thesis examiner or supervisor elsewhere;

(g) referring submissions for scholarly publications;

(h) editing scholarly publications;

(i) contributing to the effective operation of learned or professional societies by serving on their governing bodies or participating in the work of their committees;

(l) contributing to the effective operation of granting agencies or evaluation organizations, such as MRC, SSHR, NSERC or OCGS, as examiner or committee member;

(k) contributing to community projects which are related to the role of the university.

* * * * *

Appendix "C"

University of Ottawa Policies re:

Use of Electronic Systems

Extracts from "Policy 80 - Computing and Information Processing"

Definition of Information Processing

2. The term "information processing" refers to the use of general purpose computing systems and special purpose systems that process electronic digital data and have the capability of transmitting, receiving or storing such data. The terms "computing" and "information processing" are used interchangeably in this policy and related policies and procedures.

Ownership and Control

17. No matter which faculty, school or service budget is involved, all computing equipment and software procured through University funds, either by purchase or rental, belong to the University, subject to any conditions specified by the supplier.

18. In cases of necessity, the University may exercise control over such equipment, software, or services through the Computing Centre and not through the faculty, school or service in which they may be located or which provided the funds originally.

19. All computing equipment and software acquired under a research grant becomes the property of the University unless the terms of the grant specifically state otherwise. However, the use of the equipment or software remains under the control of the recipient of the grant for the duration of the research project insofar as this is feasible.

User Responsibilities

24. The University reserves the right to impose academic sanctions (for students) or disciplinary measures (for employees) and/or to revoke a user's access privileges, and/or to pursue legal remedies against anyone abusing the computing facilities and services.

Extracts from "User Code of Conduct

for Computing Resources"

Guiding Principle

The University of Ottawa's computing resources are intended to support its educational and research activities.

...

Definitions

1. Account: Any account number, access code, user identification code or authorization code granted for a computing resource.

2. Computing Resource: Includes, but is not limited to, computers, peripherals, software, data, network infrastructure, other hardware owned or managed by the University of Ottawa.

3. User: Any person who has been provided with an account or computing resources.

User Commitment and Responsibility

Users accept and agree that they are responsible for all use of their account and computing resources and further accept to abide by the User Code of Conduct set out below.

Rights of the University of Ottawa

The University reserves the right to remove material from an account or computing resource and to suspend access to an account or computing resource pending investigation into suspected violations of the User Code of Conduct.

Extracts from "Account Management

- Guidelines and best practices"

... The University of Ottawa uses access control and other security measures to protect the confidentiality, integrity, and availability of the information handled by computers and communications systems. In keeping with these objectives, management maintains the authority to:

1. restrict or revoke any user's privileges,
2. inspect, copy, remove, or otherwise alter any data, program, or other system resource that may undermine these objectives,
3. take any other steps deemed necessary to manage and protect its information systems. This authority may be exercised with or without notice to the involved users ...

---

1 *2010 ONSC 6835* (Div. Ct.), leave to appeal denied, Doc. M39606 (C.A.).

2 *2011 ONSC 172*.

3 See, for example, Orders PO-1868, PO-2536, MO-1285 and MO-1283.

4 See Order PO-1868.

5 *[1995] 2 S.C.R. 929*.

6 *2004 SCC 39*, *[2004] 2 S.C.R. 185*.

7 *2009 FC 857*.

8 *[1986] 1 S.C.R. 704* at paragraphs 15, 16, 19 and 20.

9 Cited above at footnote 5.

10 *[2000] 1 S.C.R. 360*.

11 *[2006] 1 S.C.R. 666*.

12 Cited above at footnote 6.

13 See *McNeil v. Brewers Retail Inc.*, *2008 ONCA 405* at paragraph 39.

14 *2009 ONCA 20* (reversing *[2007] O.J. No. 2441*).

15 *2011 ONSC 1495*.

16 See *Ontario (Minister of Health) v. Holly Big Canoe*, 1995 CanLII 512 (C.A.) and *Ministry of Attorney General and Toronto Star and Information and Privacy Commissioner of Ontario*, *2010 ONSC 991*.

17 See, in this regard *St. Joseph Corp. v. Canada (Public Works and Government Services)*, *[2002] F.C.J. No. 361* at paragraphs 51-55 (T.D.); *Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, *[2003] F.C.J. No. 348* at paragraphs 14-19 (T.D.); *Canadian Tobacco Manufacturers' Council v. Canada (Minister of National Revenue - M.N.R.)*, *[2003] F.C.J. No. 1308* at paragraphs 122-124 (F.C.); *Ontario (Ministry of Transportation)*, *[2004] O.J. No. 224* at paragraph 33 (Ont. Div. Ct.); affirmed (Ont. C.A.), *[2005] O.J. No. 4047*; application to Supreme Court of Canada for leave to appeal dismissed *[2005] S.C.C.A. No. 563*.

18 See the authorities listed at footnote 17.

19 Cited above at footnote 6.

20 *Act*, section 52(13).

21 at paragraph 21 of the award of May 11, 2009.

22 *(1993) 13 O.R. (3d) 767*; 1993 CanLII 3388; see also *Reynolds v. Binstock*, *2006 CanLII 36624* (ON SCDC).

23 See, for example, *Laurentian University Faculty Association v. Laurentian University*, 2010 CanLII 32256 (ON LRB), and *Amalgamated Transit Union Local 1587 v. GO Transit*, 2010 CanLII 45247 (ON GSB). See also section 48(12)(j) of the *Labour Relations Act*.

24 Order P-239; *Ministry of the Attorney General v. Information and Privacy Commissioner*, *2011 ONSC 172* (Div. Ct.).

25 *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, 1999 CanLII 3805, *[1999] O.J. No. 4072*; *Canada Post Corp. v. Canada (Minister of Public Works)* *(1995), 30 Admin. L.R. (2d) 242* (Fed. C.A.); and Order MO-1251.

26 Orders 120, MO-1251, PO-2306 and PO-2683.

27 Cited at footnote 1, above.

28 Cited at footnote 2, above.

29 As discussed at the beginning of this order, the other part of the request, dealing with non-APUO members, was dealt with in Order PO-2776-I.

30 *[1990] 3 S.C.R. 229*.

31 Available on the University of Toronto website at http://www.governingcouncil.utoronto.ca/policies/mission.htm. Also, as cited by the APUO, see the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel, November 1997, paras. 27-29, found at http://portal.unesco.org/e n/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html.

32 Third reading of Bill 197, on November 21, 2005 (also quoted in Order PO-2693).

33 Cited above at footnote 1, above.

34 *1997 CanLII 358* (S.C.C.), *[1997] 2 S.C.R. 403* per LaForest J. at paras. 61-62, adopted by the majority on this point at para 1.

35 Cited at footnotes 1 and 2, above.

36 at para. 27 of *City of Ottawa*, cited at footnote 1, above.

37 S.O. 1965, C.137.

38 Cited at footnote 1, above.

39 Cited at footnote 1, above.

40 Cited at footnote 1, above.

41 See paragraph 21 of the third award dated May 11, 2009.

End of Document

Tab 17

2021 CarswellOnt 11969
Ontario Information and Privacy Commissioner

University of Toronto, Re

2021 CarswellOnt 11969

University of Toronto

Daphne Loukidelis Adjud.

Judgment: August 12, 2021
Docket: PO-4176, PA17-528

Counsel: Counsel — not provided

Subject: Public

Related Abridgment Classifications

Privacy and freedom of information
V Freedom of information
V.3 Provincial legislation
V.3.d Miscellaneous

Headnote

Privacy and freedom of information --- Freedom of information — Provincial legislation — Miscellaneous

Table of Authorities

Cases considered by *Daphne Loukidelis Adjud.*:

British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal) (2011), 2011 SCC 52, 2011 CarswellBC 2702, 2011 CarswellBC 2703, 25 Admin. L.R. (5th) 173, 337 D.L.R. (4th) 413, [2011] 12 W.W.R. 1, 23 B.C.L.R. (5th) 1, 421 N.R. 338, 95 C.C.E.L. (3d) 169, (sub nom. *B.C. (W.C.B.) v. Figiola)* 2012 C.L.L.C. 230-001, (sub nom. *British Columbia (Workers' Compensation Board) v. Figliola)* [2011] 3 S.C.R. 422, 311 B.C.A.C. 1, 529 W.A.C. 1, (sub nom. *British Columbia (Workers' Compensation Board) v. Figliola)* 73 C.H.R.R. D/1, 2011 CSC 52 (S.C.C.)

Canada (Information Commissioner) v. Canada (Minister of National Defence) (2011), 2011 SCC 25, 2011 CarswellNat 1474, 2011 CarswellNat 1475, 18 Admin. L.R. (5th) 181, 331 D.L.R. (4th) 513, 416 N.R. 105, [2011] 2 S.C.R. 306 (S.C.C.)

Canada Post Corp. v. Canada (Minister of Public Works) (1995), 30 Admin. L.R. (2d) 242, 179 N.R. 350, (sub nom. *Societe canadienne des postes v. Canada)* [1995] 2 F.C. 110, 91 F.T.R. 320 (note), 60 C.P.R. (3d) 441, 1995 CarswellNat 652, (sub nom. *Societe canadienne des postes v. Canada)* 1995 CarswellNat 688 (Fed. C.A.)

David v. Ontario (Adjudicator, Information & Privacy Commissioner) (2006), 2006 CarswellOnt 6755, 27 M.P.L.R. (4th) 47, (sub nom. *David v. Hale)* 217 O.A.C. 112 (Ont. Div. Ct.)

Education Quality and Accountability Office, Re (April 27, 2005), Doc. PO-2386-F, PA-030211-1 (Ont. Information & Privacy Comm.)

Greater Vancouver Mental Health Service Society v. British Columbia (Information & Privacy Commissioner) (1999), 1999 CarswellBC 184, 3 B.C.T.C. 161 (B.C. S.C.)

Halton (Regional Municipality) Police Services Board, Re (1993), 1993 CarswellOnt 7033 (Ont. Information & Privacy Comm.)

King (Township), Re (1999), 1999 CarswellOnt 7708 (Ont. Information & Privacy Comm.)

Laurentian University, Re (2020), 2020 CarswellOnt 14341, 56 C.C.P.B. (2nd) 265 (Ont. Information & Privacy Comm.)

London Public Library Board, Re (2010), 2010 CarswellOnt 18674 (Ont. Information & Privacy Comm.)

Ontario (Attorney General) v. Ontario (Assistant Information & Privacy Commissioner) (1997), 101 O.A.C. 140, (sub nom. *Walmsley v. Ontario (Attorney General))* 34 O.R. (3d) 611, 1997 CarswellOnt 2688, 3 Admin. L.R. (3d) 42 (Ont. C.A.)

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Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner) (2011), 2011 ONSC 172, 2011 CarswellOnt 2810, (sub nom. *Ontario (Ministry of the Attorney General) v. Ontario (Information & Privacy Commissioner))* 104 O.R. (3d) 588, (sub nom. *Ontario (Ministry of the Attorney General) v. Ontario (Information & Privacy Commissioner))* 331 D.L.R. (4th) 481 (Ont. Div. Ct.)

Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner) (2018), 2018 ONCA 559, 2018 CarswellOnt 9575, 34 Admin. L.R. (6th) 331, 141 O.R. (3d) 481, 424 D.L.R. (4th) 272 (Ont. C.A.)

Ontario (Criminal Code Review Board) v. Ontario (Inquiry Officer) (1999), 1999 CarswellOnt 3436, (sub nom. *Criminal Code Review Board (Ontario) v. Hale)* 126 O.A.C. 92, (sub nom. *Ontario (Criminal Code Review Board) v. Ontario (Freedom of Information and Protection of Privacy Act, Inquiry Officer))* 180 D.L.R. (4th) 657, (sub nom. *Ontario (Criminal Code Review Board) v. Ontario (Freedom of Information and Protection of Privacy Act, Inquiry Officer))* 140 C.C.C. (3d) 400, (sub nom. *Ontario (Criminal Code Review Board) v. Doe)* 47 O.R. (3d) 201 (Ont. C.A.)

Ontario (Criminal Code Review Board), Re (1995), 1995 CarswellOnt 7256 (Ont. Information & Privacy Comm.)

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Ontario (Ministry of Government Services), Re (1991), 1991 CarswellOnt 7960 (Ont. Information & Privacy Comm.)

Ontario (Ministry of Government Services), Re (1989), 1989 CarswellOnt 5492 (Ont. Information & Privacy Comm.)

Ontario (Ministry of Government Services), Re (November 22, 1989), Doc. P-120; 890087 (Ont. Information & Privacy Comm.)

Ottawa (City) v. Ontario (Information and Privacy Commissioner) (2010), 2010 ONSC 6835, 2010 CarswellOnt 9790, 79 M.P.L.R. (4th) 21, 328 D.L.R. (4th) 171, 272 O.A.C. 162, 2011 C.L.L.C. 210-030 (Ont. Div. Ct.)

Ottawa (City) v. Ontario (Information and Privacy Commissioner) (March 30, 2011), Doc. CA M39605 (Ont. C.A.)

Thunder Bay Hydro, Re (1995), 1995 CarswellOnt 7255 (Ont. Information & Privacy Comm.)

Toronto Board of Education, Re (1994), 1994 CarswellOnt 7414 (Ont. Information & Privacy Comm.)

University of Ottawa, Re (2011), 2011 CarswellOnt 19197 (Ont. Information & Privacy Comm.)

University of Toronto, Re (2008), 2008 CarswellOnt 11403 (Ont. Information & Privacy Comm.)

University of Toronto, Re (2009), 2009 CarswellOnt 17234 (Ont. Information & Privacy Comm.)

University of Western Ontario, Re (2018), 2018 CarswellOnt 25491 (Ont. Information & Privacy Comm.)

Wilfrid Laurier University, Re (2009), 2009 CarswellOnt 17063 (Ont. Information & Privacy Comm.)

Statutes considered:

Corporations Act, R.S.O. 1990, c. C.38

Generally

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally

s. 2(1) "ecclesiastical records"

s. 2(1) "institution" (0.a) [en. 2002, c. 34, Sched. B, s. 3]

s. 2(1) "institution" (a)

s. 2(1) "institution" (a.1) [en. 2006, c. 34, Sched. F, s. 1(1)]

s. 2(1) "institution" (b)

s. 10(1)

ss. 12-22

s. 49

s. 65

s. 65(5.3) [en. 2010, c. 25, s. 24(17)]

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University of Toronto Act, 1971, S.O. 1971, c. 56
Generally

s. 1(1)(e) "constituent college"

s. 1(1)(m) "teaching staff"

s. 1(1)(n) "University"

s. 2a [en. 1978, c. 88, s. 3]

s. 2a(a) [en. 1978, c. 88, s. 3]

s. 2a(b) [en. 1978, c. 88, s. 3]

s. 2a(c) [en. 1978, c. 88, s. 3]

s. 2a(d) [en. 1978, c. 88, s. 3]

s. 10(4)

s. 10(4) ¶ 1

s. 10(6)

s. 11(2)

s. 13

s. 13(1)

s. 13(2)

Regulations considered:

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31
General, R.R.O. 1990, Reg. 460

Generally

***Daphne Loukidelis Adjud.*:**

OVERVIEW:

1 This appeal decides the issue of the University of Toronto's custody or control over email records held by the Toronto School of Theology and Knox College related to the appellant's Doctor of Theology studies. In this order, I find that these records are not in the custody or under the control of the University of Toronto for the purpose of section 10(1) of the Freedom of Information and Protection of Privacy Act (FIPPA or the Act). It follows that there is no right of access to the records under *FIPPA*.

2 As background, the Toronto School of Theology (TST) is a federation of seven Christian theological colleges with degree-granting powers, of which Knox College (Knox) is one. The appellant was a student at Knox College, a seminary of the Presbyterian Church of Canada, and was enrolled in a Doctor of Theology (ThD) program, which was administered in conjunction with TST. [1] The appellant had to leave the program as a result of the grade he received in a major examination. He subsequently submitted a *FIPPA* request to the University of Toronto (the university) for access to emails between several named professors affiliated with TST, [2] dated from November 1, 2015 to August 30, 2016 and from January 1, 2017 to October 4, 2017, about his "second major exam."

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3 The next day, the appellant submitted another request under the Act to the university seeking access to emails between one of the professors named in the first request and the Registrar of Knox College (Knox), dated from July 25, 2017 to August 16, 2017, regarding his "second major exam." The appellant also sought emails between the same two individuals relating to the mailing of his enrollment history and transcript to another named seminary college.

4 The university responded to the two access requests in one decision letter, [3] and stated the following about the first one:

> The University of Toronto (the university) has made confidential enquiries of the Toronto School of Theology (TST) to enquire whether any of the records responsive to your request might be under the university's custody or control. We have been advised that there are no records in that category.
>
> However, we have also been advised that if your request is transferred to TST, that school is prepared to provide you with the records even though it is not covered by the *Freedom of Information and Protection of Privacy Act*[.]

5 The university offered to send the first access request to TST and, as an alternative, provided the appellant with the contact information for the Director of TST to pursue access to the records himself.

6 For the second request, the university provided the appellant with contact information for the Principal of Knox College to pursue access to Registrar's records about the sending of his enrollment history and transcript to the named seminary college.

7 The appellant appealed the university's decision to the Information and Privacy Commissioner of Ontario (IPC), which opened Appeal PA17-528 to deal with both requests and appointed a mediator to explore resolution.

8 The appellant subsequently contacted TST to follow up on the university's suggestion of obtaining the records directly from TST and appears to have received paper copies of the records TST had located. However, the appellant was not satisfied with paper copies of the records and wanted TST to send him the emails electronically for "forensic" purposes. TST declined to do so, claiming that it no longer had electronic copies. [4]

9 During the mediation of the appeal, the university clarified that its position is that the records responsive to the appellant's access requests are not in its custody or under its control for the purpose of section 10(1) of FIPPA. The university also claimed, in the alternative, that the records fall outside the Act, because they are "ecclesiastical records" as defined in section 2(1), and are excluded from the Act under section 65(5.3). The university provided the mediator and the appellant with a letter further explaining its position. The university explained that, in the IPC's 2008 Annual Report:

> ... the IPC clearly called for the scheduling of federated and affiliated universities. The Government then carefully consulted. It amended FIPPA to exclude ecclesiastical records of a church or religious organization affiliated with an educational institution, but it did not proceed to schedule these organizations as institutions. It is the position of the University that the individual members of TST such as Knox are religious organizations, each with close connections to a parent church, as described in FIPPA s. 65(5.3). Their own constituting documents, and the general description of them on the TST website, make this clear. In addition, the TST itself exists solely to support the activities of those religious educational institutions that are its members, and that in turn are supported by, and support, the churches to which they are connected. Therefore, FIPPA does not apply to the records of Knox or TST.
>
> In addition, and in the alternative, as stated previously, neither Knox nor TST has been designated in the Schedule to Regulation 460 as being covered by FIPPA. Moreover, TST is not a "university" within the meaning of s. 2 of FIPPA's definition of "educational institution", and Knox, while obviously involved in education, is not covered because it has not been designated under Regulation 460.

10 As the university's explanation of its position in that correspondence did not resolve the appellant's concerns, he decided to proceed to the adjudication stage of the appeal to pursue access to the records. Accordingly, the appeal was transferred to the adjudication stage where an adjudicator may conduct an inquiry.

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11 Upon review of the appeal, I decided to conduct an inquiry and to bifurcate the appeal to decide the custody or control issue first and then proceed with a determination of the application of the ecclesiastical records exclusion in section 65(5.3) only if required.

12 I began my inquiry by sending a Notice of Inquiry to the university, initially, to seek representations on the custody or control issue. Shortly thereafter, I also sent Notices of Inquiry to TST and Knox as parties whose interests might be affected by the outcome of the appeal. After receiving representations from the university and Knox, and learning that TST adopted the university's position, I invited the appellant to provide representations on the custody or control issue. The representations I received from the appellant were subsequently provided to the university and both affected parties to seek their reply. The university, Knox and TST provided reply representations, and I shared them with the appellant who submitted sur-reply representations.

13 In this order, I find that responsive records, if any exist, are not in the university's custody or under its control for the purpose of section 10(1) of the Act. As the appellant has no right of access to the records under the Act, it is unnecessary for me to determine whether the exclusion in section 65(5.3) of the Act would apply to them, and I dismiss the appeal.

RECORDS:

14 The university says that it does not have copies of the records that would be responsive to the requests. Accordingly, no records have been provided to the IPC.

15 The records that would be responsive to the request are 1) emails exchanged between the TST-affiliated professors named by the appellant regarding the specified exam, and 2) emails between the Knox Registrar and one of those same named professors about the specified exam or the mailing of the appellant's enrollment history and transcript to a named seminary college.

ISSUES:

A. Are TST or Knox part of the University of Toronto for the purposes of the Act?

B. Are the records at issue nevertheless in the custody or under the control of the University of Toronto under section 10(1) of the Act?

DISCUSSION:

16 Based on the circumstances of this appeal and my review of the mediator's report, the issues are whether TST or Knox are part of the university for the purposes of the Act, and if not, whether the university nevertheless has custody or control of the records under section 10(1). The actions of the university, TST or Knox in relation to the appellant and his graduate studies program are not issues before me.

17 The right of access under the Act is established in section 10(1), which reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless ...

18 Under section 10(1), the Act applies only to records that are in the custody or under the control of an institution.

19 A record will be subject to the Act if it is in the custody or under the control of an institution; it need not be both. [5]

20 A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it. [6] A record within an institution's custody or control may be excluded from the application of the

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Act under one of the provisions in section 65, or may be subject to a mandatory or discretionary exemption (found at sections 12 through 22 and section 49).

21 The courts and the IPC have applied a broad and liberal approach to the custody or control question. [7] The IPC has developed a non-exhaustive list of factors to consider in determining whether or not a record is in the custody or control of an institution, [8] and I will address these factors below under Issue B.

22 The university, TST and Knox all take the position that any responsive records are not in the custody or control of the university for the purposes of *FIPPA*. TST and Knox adopt the university's representations that describe the legal, administrative and business relations between them, as well as the university's arguments specific to custody or control that respond to the questions I set out in the Notice of Inquiry sent to the parties. [9]

23 Knox states that when the appellant sought the above-noted records from the University of Toronto, the university referred him to TST in respect of the first request and to Knox in respect of the second. Knox notes that its representations therefore only address the second request related to emails exchanged between professors at Knox College. In addition to adopting the university's position that it does not have custody or control over such records, Knox also takes the position that no responsive records even exist. Knox states, specifically, that:

> In this case, there were no records to produce, and therefore the appeal in respect of Knox is moot; but if there had been such records, Knox was prepared to produce them on a voluntary basis. In either case, such records would not have been in the custody or control of the University of Toronto.

24 As I explain below, I do not need to decide whether the appeal is moot respecting Knox, because I find that records responsive to either request, if such records exist, are not in the custody or under the control of the university.

Background

25 As context for the parties' positions in this appeal, I set out below certain facts about the relationship between Knox, TST and the university that are not in dispute.

FIPPA

26 As stated, under section 10(1), the right of access in the Act applies only to records that are in the custody or under the control of an institution. The part of the definition of "institution" in in section 2(1) that is relevant in this appeal states as follows:

> "institution" means,
>
> . . .
>
> (b) any agency, board, commission, corporation or other body designated as an institution in the regulations[.]

27 Regulation 460 under FIPPA includes a schedule that lists designated institutions. The University of Toronto appears at number 174 of this list, with the Head identified as the Executive Head. Neither TST nor Knox appear in the list of designated institutions.

University of Toronto Act, 1971 [10]

28 The University of Toronto is a corporation without share capital continued under the *University of Toronto Act, 1971.*

29 The *University of Toronto Act* defines "the University" in section 1(1)(n) as the University of Toronto. Further, as the university points out, the *University of Toronto Act* does not assign to the President any powers in respect of TST or Knox, even if the act does include provisions about TST and Knox. For example, the definition of "teaching staff" in section 1(1)(m) of the

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University of Toronto Act includes the teaching staff of the arts and science faculties of the federated universities; there is no mention of theological teaching staff of the federated universities. [11]

30 Section 2a allows the university (the Governing Council), TST and any or all of its members to "enter into agreements for the purpose of enabling the University to participate in the direction of theological education programs offered by the said School and its member institutions, for: (a) the conjoint registration of students; (b) the granting and conferring of conjoint earned degrees in theology; (c) the disciplinary jurisdiction of the member institutions over their students and teaching staffs; and (d) the relationships between the member institutions and their teaching staffs."

31 Sections 10(4) [12] and 10(6) continue the university's federation with Knox College, one that dates back to the late 1800s, and affirms that the federation may be brought to an end.

32 Section 11(2) provides that although the *University of Toronto Act* grants academic status at the university to students of federated universities, this is not true of students at federated colleges like Knox.

33 Section 13 of the University of Toronto Act establishes the university's secular mandate. Under section 13(1), no religious test shall be required of teaching or administrative staff, or students, and no religious observances of any denomination can be imposed on them. An exception is created under section 13(2) for "a federated university or college to make such provision in regard to religious instruction and religious worship for its own students as it may deem proper, and to require the same to be observed as a part of its own discipline," except where the federated university or college declares itself to be non-denominational, in which case section 13(1) applies to it.

Toronto School of Theology

34 Because the University of Toronto did not historically have authority to grant degrees in theology, the Toronto School of Theology was created in 1969 as a consortial arrangement of seven theological schools that did have independent authority to grant theology degrees. [13] TST is a corporation without share capital [14] governed independently by a board of trustees and led by a CEO. TST and its member schools make up one of the largest ecumenical centres for theological education in the English-speaking world and has the largest graduate theology program in Canada.

35 The seven member schools of TST are Emmanuel College (United Church of Canada), [15] Knox College (Presbyterian Church in Canada), Regis College (Jesuit, Roman Catholic), St. Augustine's Seminary (Diocesan, Roman Catholic), St. Michael's College (Basilian, Roman Catholic), Trinity College (Anglican Church of Canada), and Wycliffe College (Evangelical, Anglican). Each member of the consortium has its own authority to admit students, create programs, appoint faculty, and grant degrees. Faculty members of TST are appointed by TST itself, by any of its member schools or by any of its affiliated members, who are approved by TST to give instruction in any of the conjoint degree programs of TST. TST's seven member schools offer several basic master's degrees in theology, which provide students with an introduction to theological study as well as preparation for professional ministry. Most TST degrees are awarded conjointly by a TST member college and the University of Toronto, while a few degrees, certificates and diplomas are solely awarded by a TST college. [16] The ThD program in which the appellant was registered falls into the former category and would have been granted conjointly by the University of Toronto and Knox, as the TST member school.

Knox College

36 Knox is also a corporation and was chartered in 1858 by the province to grant degrees. [17] Knox is governed by its own governing council and has its own CEO. As stated above, it is "federated college" under section 10(4)1 of the University of Toronto Act, 1971. Knox's mission is to teach theology and to prepare students for Christian ministry. In addition to basic degrees such as the Master of Divinity, Knox also offers graduate degrees in Theology and Ministry, degrees that formerly included a Doctor of Theology (ThD) program, which the appellant was registered in. All of Knox's graduate theology degree programs are administered in conjunction with TST.

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The 2014 Memorandum of Agreement

37 An important document in this appeal is the Memorandum of Agreement between the University of Toronto, TST and its member schools, [18] dated July 1, 2014 (the MOA). [19]

38 As the university explains, a change in provincial policy in the mid-1970s led to the need for the university to grant theology degrees conjointly with TST and its member schools. This is because, as noted above, its charter as a secular institution did not include the power to grant theology degrees, which was solely the purview of other institutions, such as the University of Trinity College and Knox College. [20] The former federation agreements between these institutions and the university allowed these federated universities to retain independent authority respecting degrees in theology while suspending their authority to grant all other degrees.

39 The MOA was provided to me by the university as part of its representations. It includes provisions that:

a. confirm that students, teaching staff and administrative staff of the member schools will not, by virtue of the MOA, become students, teaching staff or administrative staff of the university within the meaning of the *University of Toronto Act, 1971* (paragraph 6);

b. establish that TST and its member schools are solely responsible for conjoint degree program delivery and academic support (paragraph 8);

c. address new programs of the member schools, program changes, program closures and program reviews (paragraphs 11-15);

d. invite the joint formal conferral of earned conjoint degrees (paragraph 16). In particular, subparagraph 16.iv confirms that conjoint degrees are awarded by the conjoint exercise of the authority of the university and the member school concerned, and shall be signed by the university's chancellor, the head of the member school and the director of TST;

e. confer "conjointly registered" status and alumni status on TST students and graduates, such that they are considered both a student of the university and of the TST member school. Conjointly registered students are not eligible for university funding, including research and teaching assistantships (paragraphs 17-20);

f. confirm that enrollment of students in the conjoint degree programs will be carried out by TST and its member schools. TST is required to maintain comprehensive records of all such students and will either provide or make available to the University and its external auditors all data required by the Ontario Operating Funds Distribution Manual: A Manual Governing the Distribution of Ontario Government Operating Grants to Ontario Universities and University-Related Institutions (Formula Manual) in relation to grants received by the U of T on behalf of the TST (paragraph 21);

g. leave grading and grading policy to TST, but requires that grading policy and procedures on petitions and appeals to be consistent with university policy and procedures (paragraph 22);

h. make the university solely responsible for academic discipline for conjointly registered students and gives conjointly registered students a right to appeal academic standing decisions of a TST divisional appeal body to the Academic Appeals Committee of Governing Council (paragraphs 24 and 25);

i. affirm that the teaching staff in theology of the TST and its member schools will be appointed by and hold their contracts of employment with their respective schools and be subject to the procedures and disciplinary jurisdiction of those schools, not the university (paragraph 27);

j. impose quality standards and related procedural requirements to ensure that TST teaching staff have research, scholarly and pedagogical profiles consistent with both the standard of the university and the employing TST member school (paragraphs 28-32);

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k. establish a governance committee to consider issues arising under the agreement and make changes to the MOA's schedules to facilitate operation of the MOA (paragraph 33);

l. provide for limited university representation on TST boards and committees and consultation with the university regarding the selection of a TST director (paragraphs 34 and 35); and

m. vests full responsibility with TST and its member schools for their own capital and operating budgets and expenditures, with no obligation for the university to deal with the TST or member schools on any financial basis other than the flow-through of provincial monies from it to TST (only) for conjoint degree program students and the receipt of reimbursement funds from TST for the cost of specified services provided to conjoint degree students (paragraphs 37-39).

n. lists, in Schedule B to the MOA, the conjoint degrees offered by TST and its member schools, including (as of the time of the appeal) the Doctor of Theology degree at Knox.

o. sets out, in Schedule C to the MOA (8 pages), administrative guidelines for Financial Transactions under the MOA between the university and TST. Schedule C describes the calculations of income transfers and expense charges referred to in paragraph 39 of the MOA for the cost of administrative, academic and student services provided to students registered in Schedule B conjoint degree programs. Under Schedule C, the university remits government grants to TST and TST is responsible for allocating funds to the member schools. The schedule also describes which services TST must pay for, and this includes Information Technology, including email, network connectivity, security, student information system access and learning management system access.

40 According to TST's Program Handbook for the ThD program, most doctoral graduates are appointed either to teaching positions or to roles of theological leadership in the Church. [21]

A: Are TST or Knox part of the University of Toronto for the purposes of the Act?

41 The appellant relies on Order PO-2775-R. In that order from 2009, the adjudicator held that Victoria University was part of the University of Toronto for *FIPPA* purposes and concluded that a report that had been prepared for Victoria and the United Church of Canada was in the custody or under the control of the university. The appellant submits that the issue as to the university's relationship with its federated colleges has been resolved and the doctrine of *res judicata* applies. [22] The appellant argues that the reasoning in that order applies in the circumstances in this appeal and that, therefore, TST and Knox are both part of the University of Toronto for the purposes of the Act.

42 The university provides a pointed critique of Order PO-2775-R, claiming that it is both wrongly decided and unreasonable because "it rests almost entirely on the Government's stated intention, which [the adjudicator] relies upon instead of construing the relevant text." The university says that if I do "not reconsider and expressly overrule Order PO-2775-R, [I] ought to distinguish it based on its facts." Regarding the appellant's *res judicata* argument in respect of Order PO-2775-R, the university says that although the order addresses a relevant point of law, it is not the same matter: the parties were different, the request and the records at issue were different and the affiliated entity at issue was Victoria University, not TST and Knox. Therefore, the doctrine of *res judicata* is inapplicable to the present circumstances.

43 I agree with the university that the doctrine of *res judicata* does not apply in the circumstances. The facts of this appeal are considerably different from those before the adjudicator in Order PO-2775-R. In any event, having considered the parties' arguments about Order PO-2775-R, I find that order distinguishable on the facts from the appeal before me and there is therefore no need to make any finding about whether it was wrongly decided.

Representations of the university, TST and Knox

44 As stated, TST and Knox adopt as their own the representations provided by the university that describe the legal, administrative and business relations between them.

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45 The university begins by stating that it has not seen the records at issue and that it cannot obtain the records because the appellant is "not a student of the university." The university states that the requester is a student of TST and Knox, which are

> ... legally distinct and autonomous entities affiliated with the University pursuant to an agreement that has limited scope and applies to a limited number of programs, that is premised on the independent legal status of each institution and that intentionally preserves operational independence, including independence concerning "day-to-day" matters such as those that appear to relate to the two requests at issue in this appeal.

46 TST and Knox are entities "that are organized and exist for and because of their connections and commitment to religion and theological education." The university submits that the emails at issue in this appeal are about a student enrolled at TST and Knox, who is participating in a program of study that is "developed and directed by Knox to meet Knox's distinctly theological mandate."

Neither TST nor Knox are designated as "institutions" in Regulation 460 and the reference in the regulation to the University of Toronto does not include them

47 Observing that *FIPPA* defines "institution" to include designated institutions that are listed in Regulation 460, the university submits that the reference to the "University of Toronto" in Regulation 460 does not include and is not meant to include the TST or Knox. The university maintains that "University of Toronto" for the purpose of the Act means the Governing Council of the University of Toronto alone, the university's "common name" as set out in the University of Toronto Act, 1971. The university says there is significance to the absence of the words "and its federated colleges and universities" beside its common name in the list of designated institutions in Regulation 460.

48 The university states that its designated head is the "executive head", the university's President, who has the powers and duties of the President's office as established by the *University of Toronto Act.* The university adds that the *University of Toronto Act* does not assign to the President any powers in respect of TST or Knox. The university maintains that the intent behind the "University of Toronto" designation in the schedule to Regulation 460 was to designate the University of Toronto alone. The university adds that:

> First, making TST, Knox or any other federated university or college subject to *FIPPA* requires a simple designation.
>
> Second, the right of access to records applies to records in the "custody or control" of an institution; the *Act* already features a mechanism for addressing whether records belonging to a related or affiliated entity are subject to the right of access. This record-specific mechanism is the only mechanism contemplated by the Legislature to apply to matters such as the one raised by this appeal.

49 The university also says that when the government amended *FIPPA* in 2005 to deem universities to be educational institutions and later designated all the major publicly funded universities, including the University of Toronto, as *FIPPA* institutions, it did not so designate TST and Knox. According to the university, the government's decision respecting these smaller, federated institutions "should be presumed to be a purposeful choice, consistent with government aims."

TST, Knox and the University of Toronto are separate legal entities

50 The university submits that TST, Knox and the university are separate legal entities, with their own property, assets, employees, policies and practices, which is supported by their separate incorporation status. The university maintains that each have their own independent governance bodies, whether governing council or board of trustees, and each has a CEO that operates fully independently of the others.

51 Knox submits that although the university, TST and Knox engage in joint projects, pursuant to contract, none of them "have the capacity to govern, direct or compel the record-keeping processes of the others; and each has a distinct relationship to the provincial government and the provisions of the Act."

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52 The university submits that while the *University of Toronto Act* establishes the legal relationship between the university, TST and Knox, it does not give the university any measure of control over TST or Knox, or their record holdings, and makes their independence clear. The university maintains that the *University of Toronto Act* does two things: empowers the university to enter into an agreement with TST, in part, "for the granting and conferring of conjoint earned degrees in theology"; [23] and continues the university's federation with Knox College, unless brought to an end by the Governing Council of the university. [24] The university points out that although the *University of Toronto Act* grants academic status at the university to students of federated universities, this is not true of students at federated colleges like Knox. [25]

The university's secular mandate and the Memorandum of Agreement

53 The university explains that maintaining the insularity of the theological colleges is important to protecting the university's secular mandate, [26] and also contemplates that federated entities will engage in day-to-day matters autonomously. The university's secular status "is maintained by statutory delineations differentiating it from autonomous religiously-affiliated institutions such as Knox and TST."

54 The university submits that in addition to the federation provided for in the *University of Toronto Act*, the relationship between it, TST and Knox is structured and governed by the terms of the 2014 MOA, which provides for the granting of conjoint degrees and for the delivery of services by the university to TST and its members, including Knox. The MOA, says the university, balances the need for sound governance and quality assurance with the need for day-to-day autonomy of TST.

55 The university submits that under this framework, the MOA confirms several important measures of independence between it and TST and the member schools that are relevant to this appeal. For example, paragraph 21 of the MOA makes clear that TST and its members own and control student records and information, while being responsible for maintaining comprehensive records of all students enrolled in conjoint degree programs. The university states that paragraph 21 gives it a limited right of access to "data" (not student records) for the purpose of auditing the per student grant monies that the university flows through to TST.

56 The university adds that paragraph 22 of the MOA leaves grading and grading policy, "a significant day-to-day matter", expressly to TST, while paragraph 27 confirms that teaching staff of TST and its members are not university employees. The university describes this provision as helping to ensure the quality of teaching and research without inviting any university control over TST and TST member teaching staff.

57 The university submits that the MOA establishes what TST and its member schools have agreed they and their employees will do, but it does not establish TST as an institution that is acting for and on behalf of the university. The university adds that the MOA also does not otherwise give the university control over TST and its members with respect to the matters in issue in this appeal.

Reconsideration Order PO-2775-R is distinguishable

58 The university argues that Order PO-2775-R is distinguishable on the facts because it addressed a federated university, which TST and Knox are not, and because the finding was based on "the operational and financial affairs" of the university and Victoria being integrated to a significant degree, including their academic affairs. The conduct of both universities indicated an acceptance that the Act applied to Victoria, including entering into an agreement regarding the administration of access to information requests received pursuant to the Act. Among other things, this agreement provided for the creation of mechanisms and structures to enable the administration of access requests.

59 The university says that despite the IPC's call to amend Regulation 460 to include federated and affiliated universities, the provincial government consultations that followed, and the university's own support for scheduling Victoria University but not TST and Knox, no scheduling of any affiliated and federated universities happened. [27]

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60 Knox, in addition to adopting the university's submissions on the structures and other features that separate them, submits that it is fundamentally different in character from Victoria University, and that even if Order PO-2775-R "had been correctly decided, the reasoning therein could not be applied to it by analogy." The main distinction, Knox argues, is that unlike Victoria, Knox is not a secular institution, but rather a religious one, with a mission to teach theology and to prepare students for Christian ministry. Knox points to the legislative recognition of the distinction between religious and secular education that is embodied by the "ecclesiastical records" exclusion in section 65(5.3). [28]

61 Referring to the evidence before the adjudicator in Order PO-2775-R that Victoria had a created a policy on access and privacy protection internally and its integrated response to *FIPPA* requests with the university, Knox says that it has no comparable policy or agreement. It says that although it has a Privacy Policy, that policy specifically advises students and the public that *FIPPA* does not apply to its records. [29]

Representations of the appellant

62 The appellant explains that he was a student in the ThD program at the Graduate Centre for Theological Studies, Toronto School of Theology, [30] but had to leave the program as a result of the grade he received in the "major examination" that formed the basis of the request. [31]

63 The appellant sets out the response given by TST when he inquired into the basis of his grade and says that it did not provide "sufficient particulars regarding his assessment by the three named examiners, including 'their score sheets or any communications between the examiners as it relates to his examination'." Having been refused this information and believing that his termination from the doctoral program represented a "clear abuse of his evaluators' supervisory powers," the appellant sought to obtain access through *FIPPA* to the information he says he requires to pursue his academic appeal.

64 The appellant maintains that at the core of this matter is his entitlement to records related to an academic matter. The appellant argues that the Governing Council under the *University Of Toronto Act* includes Knox and TST where the matter or request is academic in nature. He submits that the Governing Council, established by the *University of Toronto Act, 1971*, is the final means of recourse for ThD students in respect to academic matters. He points to part 14.2.7 of the ThD Handbook, which provides a right of appeal to the Academic Appeals Committee of the Governing Council of the University of Toronto for the final result of a TST appeals process.

65 The appellant submits that the emails and other communications he seeks are academic, not ecclesiastical, records as Knox claims and that they are relevant to an academic appeal because they will accurately portray what happened, including the reasons for the decision to terminate his registration in the ThD program. The appellant argues that these records are all related to academic matters that are governed by the University of Toronto's appeal process. The appellant also argues that for the purposes of the application of *FIPPA* respecting academic matters, the University of Toronto includes TST and Knox. He points out that all faculty identified in the requests are cross-appointed to the University of Toronto's Department for the Study of Religion. In response to this particular argument, the university states that although the three examiners at some point held a "status only" appointment at the University of Toronto, such appointments are without pay or other remuneration and are usually only available to individuals who hold a full-time academic employment relationship with another institution, such as Knox or TST.

66 The appellant argues that the ThD Student Handbook is clear that student conduct is governed by the University of Toronto's Code of Behavior on Academic Matters, including discipline and complaints. He says that every ThD and PhD student registered at TST or one of the participating colleges is subject to the university's disciplinary jurisdiction in respect of academic matters including plagiarism, forging of academic documents and cheating on examinations or papers. The appellant relies on Knox and TST's internal dispute resolution mechanism respecting academic matters and its relationship with the university as an indicator of control over the responsive records.

Reply from TST, Knox and the university

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67 In reply, the university states that the academic matters referred to by the appellant are "operational, day-to-day matters that TST and Knox handle independently of the University," as confirmed by paragraph 8 of the MOA. The university points out that the three examiners are employees of TST member entities, not the university, and the university has no role in dealing with the kind of misconduct allegations made against them by the appellant. [32]

68 Regarding the MOA's provision for appeal to the university's Academic Appeals Committee for students in conjoint degree programs, Knox says that although TST member schools must pay a portion of the university's expenses to cover the costs of hearing those appeals, the MOA does not grant the university "any entitlement to custody or control of any TST member college's records."

69 Regarding the appellant's argument that the requested records "are relevant to an academic appeal," TST maintains that he did not appeal that decision and "the time to do so has long lapsed." TST says that if the appellant had appealed the termination of his registration, he may have been able to obtain records that were relevant to that appeal because of the principles of procedural fairness, and outside the Act. In response, the appellant says that such an appeal was filed, [33] that there is nothing in the Act that would prohibit the disclosure of the records sought and that "TST or its privies" should disclose or be ordered to disclose such records.

Analysis and findings

70 The university, TST and Knox are united in their opposition to a finding that TST or Knox are part of the university for the purposes of the Act. Based on my consideration of the circumstances and the representations of the parties, and for the reasons provided below, I agree.

Order PO-2775-R

71 In Order PO-2775-R, the adjudicator found that the University of Toronto had custody or control of a consultant's report in the possession of Victoria University, a report that had been prepared for a United Church of Canada/Victoria University Archives Task Force as part of a program renewal exercise. The adjudicator was persuaded that Victoria, as a federated university operating "in the University of Toronto," was part of the University of Toronto for the purposes of the Act. The appellant urges me to apply the reasoning in Order PO-2775-R to make a similar finding respecting TST and Knox in this appeal.

72 As I said above, I find Order PO-2775-R distinguishable and I provide grounds for that conclusion below. Order PO-2775-R nevertheless provides a useful framework for my analysis in this appeal.

73 As stated, section 10(1) of the Act provides that every person has a right of access to records in the custody or under the control of an "institution," a term that is defined in section 2(1) of the Act. [34] The relevant part of the definition of "institution" in this appeal is paragraph (b), which states that it "means ... any agency, board, commission, corporation or other body designated as an institution in the regulations[.]"

74 The relevance of the definition and the reasons underlying the finding in Order PO-2775-R, were summarized in Order PO-4066 as follows:

> Regulation 460 under the *Act* contains a schedule listing the institutions covered by the *Act*. Victoria is not listed in the relevant schedule. The parties and the adjudicator framed the issue to be decided as whether Victoria was nevertheless part of U of T for the purposes of the *Act*, and was subject to the *Act* for that reason.
>
> The adjudicator found that Victoria was part of U of T, and therefore subject to the *Act*, for three main reasons:
>
> > The legislative history of the amendments that brought Ontario's universities under the ambit of the *Act* suggests that all universities receiving public funding were intended to be included. In the adjudicator's view, there is no principled

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> reason why this would not include those universities whose largest source of public funding is derived from a flow-through of monies, like Victoria, from a scheduled university, like U of T.
>
> The degree of integration of the administrative, financial and academic operations of Victoria and U of T supports a finding that Victoria is part of U of T for the purposes of the *Act*. Here, the adjudicator pointed to U of T's flow-through funding of Victoria, and the fact that Victoria suspended its degree-granting authority for all except divinity students, which results in its students receiving a degree not from Victoria but from U of T.
>
> Victoria and U of T took various steps to prepare for their inclusion in the freedom of information and privacy protection regimes under the *Act* at the time of the amendments. This showed that they considered Victoria to be subject to the requirements of the *Act*. [35]

75 Having applied this same framework in my analysis of the relationship between TST and Knox, on one hand, and the university, on the other, to determine whether the former two entities are part of the university, I find substantial evidence of an intention to create and maintain separation between the university on one hand and TST and Knox on the other.

76 I have considered, in particular, the degree of integration of the administrative, financial and academic operations as between the university, on one hand, and Knox and TST on the other. Based on my review of the relevant governing statutes, the MOA (affiliation agreement) and the parties' representations, I find strong evidence of Knox and TST's independence from the university. TST and Knox pursue a mandate founded in Christian theological and religious education that is distinct from the university's secular mandate. I accept the university's evidence that TST and Knox each maintain their own governance structure, executive officers, capital assets (including property), employees, financial statements, policies (with some exceptions where there may be conflict between them and the university's) and records pertaining to their activities. In this way, I find TST and Knox to be entities operating, in most respects, autonomously and independently from the university.

The University of Toronto Act, 1971

77 I accept that the *University of Toronto Act* affirms the university's secular mandate while at the same time enshrining the separate religious and theological mandate of TST and its member schools. Section 13 provides that "no religious test" will be required of any member of the university's teaching staff, administrative staff or any student, or any religious observances according to the forms of any religious denomination or sect imposed. Section 13(2) provides, however, that the right of a federated university or college to make such provision regarding religious instruction and religious worship for its own students is not to be interfered with.

78 Further, section 2a.(b) of the *University of Toronto Act* ("Degrees in theology") allows the university to enter an agreement with TST, or any or all of its member schools "for the granting and conferring of conjoint earned degrees in theology". [36] Although students of federated universities are granted academic status under the *University of Toronto Act*, students at federated colleges like Knox are not given such status with the university. [37] I accept the position taken by Knox, in seeking to distinguish this appeal from Order PO-2775-R, that it is not similarly situated to Victoria because, unlike Victoria, it is not a secular institution that grants arts and science degrees. Knox is organized and exists for and because of its commitment to religious and theological education.

79 In my view, these provisions affirm the separate and independent mandates of the university on one hand and Knox and TST on the other.

The Memorandum of Agreement

80 As outlined above, the relationship between TST, Knox and the university is defined in a 2014 Memorandum of Agreement between them and other Christian-affiliated colleges and universities operating within the University of Toronto. I agree with the university that the MOA does not establish TST as a body that is acting for and on behalf of the university in its dealings

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with Knox, a federated college, nor does it give the university control over TST or Knox with respect to their activities as educational institutions.

81 The MOA creates a clear demarcation between the administration of theology programs at TST and Knox and the purely secular programs and associated faculties of the university. The MOA provides for the granting of conjoint degrees and for the delivery of services by the university to TST and its members, including Knox. Schedule B of the MOA confirms that the appellant's ThD degree program is a conjoint degree; [38] that is, he was jointly registered at Knox and the university and took classes and examinations through TST. Nonetheless, paragraph 6 of the MOA makes clear that he did not, by this conjoint registration, become a student of the university within the meaning of the *University of Toronto Act, 1971*.

Academic integration

82 I find paragraph 8 of the MOA (Responsibility) to be a strong indicator of the independence of TST and Knox from the university in teaching and delivering conjoint theological degree programs. This part affirms that:

> The TST and its Member Institutions are solely responsible for the delivery of the conjoint degree programs, for the academic support of students in these programs, and for faculty development in relation to the conjoint degree programs.

83 As stated, the appellant was conjointly registered at Knox and the university. Paragraph 18 limits the scope of this joint registration to the purposes agreed to in the MOA only and subject, in particular, to the circumscription of paragraph 8. Paragraph 18 also states that students registered in conjoint degree programs are not eligible for U of T funding including any and all research or teaching assistantships.

84 The responsibility given in paragraph 8 for the delivery of the conjoint programs also includes, under paragraph 22 (Grading Practices Policy), vesting in TST the authority for, and oversight of, grading and grading policy for all students registered in conjoint degree programs listed in Schedule B, like the appellant. I agree with the university that this is a significant indicator of the autonomy of TST with regard to its daily operations and functions.

85 This is not to say that the MOA provides a complete code of policy and practice for students registered in conjoint degree programs with a TST member school. Under paragraph 24, as the appellant notes, the university's Code of Behaviour on Academic Matters applies to such students. Paragraph 25 (Academic Appeals) also provides that a student in a conjoint degree program listed in Schedule B may have access to the university's Academic Appeals Committee of the Governing Council in order to appeal a decision of the TST divisional appeals body. However, I do not interpret these provisions to stand as evidence of TST or Knox's integration on an academic level with the university. In my view, these are more suggestive of practical and procedural fairness considerations than integration of academic operations as a whole. In this respect, I note that Knox is obligated to reimburse the university a portion of the costs incurred in carrying out the final stage academic appeals function, another consideration I find weighs against concluding there is a substantial degree of integration in the academic operations of the university on one hand and TST and Knox on the other.

Financial integration

86 Additionally, I find that the evidence provided respecting TST and Knox's financial affairs does not support a finding that their financial affairs are integrated with the university's to any significant degree.

87 I accept that the university is not responsible or liable for the financial obligations of Knox or TST. Knox and TST each have budgets, generate revenue and manage their own finances. Knox and TST each own their buildings and assets and have their own employees.

88 Paragraphs 37 to 39 of the MOA address financial arrangements between the university and TST and its members colleges, including the colleges' responsibility for its own capital and operating budgets and expenditures. In my view, these provisions, particularly paragraph 37, establish the financial independence of Knox, as a member school of TST. There is an exception, in paragraph 38, for the transfer of certain funds to the member colleges, such as the university's remittance of provincial operating

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grants for conjoint degree programs to TST, subject to reimbursements by TST for "administrative, academic and student services" rendered by the university under paragraph 39 (including appeals). Paragraph 39 confirms that the MOA "shall be the primary agreement governing the exchange/transfer of funds between the U of T and the TST" with Schedule C, Administrative Guidelines for Financial Transactions *under the MOA*, forming the comprehensive record of all such financial arrangements.

89 TST and Knox receive flow-through public monies for their conjoint theology programs, including the one in which the appellant was registered. However, *FIPPA* was not created in such a way as to cover all entities receiving public funding. In my view, the flow-through funding from the university to TST (and on to Knox) does not by itself justify a finding that Knox or TST are part of the university, absent a greater degree of financial and other integration between them. [39] I find there to be a low level of financial integration between TST and Knox on the one hand and the university on the other that supports their independence and acts as another reason for distinguishing the finding in Order PO-2775-R from the situation before me in this appeal.

Administrative integration

90 I have also considered the evidence, and I accept it, that Knox and TST are separate legal entities, as corporations in their own right. Knox and TST are independently governed by a governing council and board of trustees, respectively, and each has a CEO that operates independently of the others within the federation. Paragraphs 34 and 35 of the MOA provide for some university representation on TST boards and committees, as well as consultation with the university regarding the selection of a TST director. However, neither has the capacity to govern the other; nor can they direct the administrative affairs of the others.

91 Paragraph 21 of the MOA provides that the enrolment of students in conjoint degree programs, such as the appellant's, shall be carried out by the TST and its member schools, in this case Knox. Under this provision, it is clear that TST is responsible for maintaining "comprehensive records of all such students" but only data related to operating funds about them is intended to be shared with the university. This is a caveat. The university submits, and I accept, that it enjoys a limited right of access to "data" for the purpose of auditing the per student grant monies that the university flows through to TST, but this does not extend to access to student records.

92 As the university has noted, the MOA provides for a form of quality assurance respecting certain academic and administrative matters. TST and its member schools have obligations under the MOA to ensure consistency with corresponding university policy and procedures in respect of code of conduct matters and grading practices (paragraph 22), while certain policies of the university apply to students of TST and its member schools, such as the research ethics and sexual harassment policies (paragraph 23).

93 Based on my consideration of the factors above, I find the evidence suggestive of only limited administrative integration between TST and Knox on the one hand and the university on the other.

Conduct of Knox, TST and the university

94 In Order PO-2775-R, the adjudicator considered the actions of Victoria and the university following the enactment of Bill 197. [40] In that appeal, the adjudicator was provided with what he construed as evidence of Victoria's intention to participate in the access to information regime under *FIPPA* in a cooperative, if distinct, capacity to the university. There is no suggestion, on the facts before me in this appeal, that either TST or Knox has evidenced, through their actions or internal policy measures, an intention to assume the responsibilities of a *FIPPA* institution. While it is true that nothing precludes TST or Knox from disclosing information in accordance with the spirit and principles of the Act, I find that they have acted consistently as though they are not bound by it.

95 Having considered the relevant provisions of the *University of Toronto Act* and the MOA, along with the other evidence as to academic, financial and administrative integration and the actions of the university, TST and Knox, I find no reasonable basis to conclude that TST and Knox are part of the university under the Act.

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96 This finding means that the question of whether responsive records held by TST or Knox are subject to the Act must be determined on a case-by-case basis, applying the principles of custody or control. It is to that question that I turn next.

B: Are the records at issue nevertheless in the custody or under the control of the University of Toronto under section 10(1) of the Act?

97 The university, TST and Knox all take the position that any responsive records are not in the custody or control of the university for the purposes of *FIPPA*. The university argues that it has no relationship with the appellant, his professors, TST and Knox that invites it to deal with the records at issue in any manner, let alone in a manner that would give rise to custody or control over them by the university.

98 I must consider, therefore, whether the university has custody or control of, first, the requested emails between the named TST professors regarding the appellant's "second major exam" and, second, the requested emails between one of the same named TST professors and Knox College's Registrar regarding the appellant's "second major exam," and the mailing of his enrollment history and transcript to a named seminary college.

Factors relevant to determining custody or control

99 In the overview of the appeal given above, I set out the principles of custody or control and referred to the IPC having developed a non-exhaustive list of factors to consider in determining the issue. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply. The non-exhaustive list of factors considered includes consideration of the following:

- Was the record created by an officer or employee of the institution? [41]
- What use did the creator intend to make of the record? [42]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [43]
- Is the activity in question a "core", "central" or "basic" function of the institution? [44]
- Does the content of the record relate to the institution's mandate and functions? [45]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [46]
- If the institution does have possession of the record, is it more than "bare possession"? [47]
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [48]
- Does the institution have a right to possession of the record? [49]
- Does the institution have the authority to regulate the record's content, use and disposal? [50]
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record? [51]
- To what extent has the institution relied upon the record? [52]

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• How closely is the record integrated with other records held by the institution? [53]

• What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [54]

100 The following factors may apply where an individual or organization other than the institution holds the record:

• If the record is not in the physical possession of the institution, who has possession of the record, and why? [55]

• Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the Act?

• Who owns the record? [56]

• Who paid for the creation of the record? [57]

• What are the circumstances surrounding the creation, use and retention of the record? [58]

• Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [59]

• Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution? [60] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

• Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

• Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? Did the agent have the authority to bind the institution? [61]

• What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [62]

• To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue? [63]

101 The factors are to be considered contextually in light of the purpose of the legislation. [64] Where an institution does not have possession of the record, a relevant factor is whether it could reasonably be expected to obtain a copy on request.

102 In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [65] the Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?

2. Could the government institution reasonably expect to obtain a copy of the document upon request?

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Representations

The university

103 The university maintains that the custody or control analysis must be informed by the context in which separate entities relate to one another. It refers to the *Children's Lawyer* decision of the Court of Appeal [66] and identifies its importance as a reminder that a finding of custody or control can threaten independence - independence that exists for legitimate and important purposes. The university states that:

> In *Children's Lawyer*, the Court held that independence was important because the Children's Lawyer is in a confidential relationship with the children who it represents. In this appeal, independence is essential to the University, TST and Knox mandates. The independence that these entities have purposely maintained despite their affiliation should not be frustrated by a finding that causes the University to deal with matters and records for which it has no responsibility.

104 The university adds that it does not have any power to access, or any practice or custom of accessing, TST emails, including TST faculty member emails about examinations, exam questions and exam grades, or registrar functions, such as providing information to outside institutions. Moreover, the university submits, it has no power to conduct a search for records or say to Knox and TST, "We are taking this over. You must give us access to your people to give them search instructions. We want to see what may be responsive. We want to assess whether fee estimates are required."

105 The university provided the following submissions on the custody or control factors applied by the Court of Appeal in *Children's Lawyer* and others considered in the usual analysis of custody or control:

Was the record created by an officer or employee of the institution?

106 The university submits that the responsive records, if they exist, are communications between employees of TST or Knox, (and Knox denies it has any). [67] The university adds that each of the three examiners identified by the appellant is employed by one of the TST member schools, and not by the university, and the university has no role in dealing with the type of misconduct allegations against these examiners alleged by the appellant. [68] The university also submits that although the examiners may have cross-appointments, paragraph 31 of the MOA provides for TST faculty to be granted status-only appointments based on mutual agreement between the employing TST member school, TST and the university, but the member school remains the employer.

What use did the creator intend to make of the record?

107 The university initially stated that the records were "presumably created to address some issue with which the University has had no involvement and no way of knowing or assessing." After learning from the appellant's representations of the academic subject matter of the records, the university relies on paragraph 8 of the MOA and maintains that these are operational, day-to-day matters that TST and Knox handle independently of the university.

108 Regarding the fact that the university's Academic Appeals Committee is available to appeal TST decisions that have been processed through TST's own appeal procedure, the university reiterates that this does not give the university custody or control of TST records, though it may cause the university to receive TST records in the event of an academic appeal.

Does the institution have possession of the record?

109 Relying on the Divisional Court decision in *City of Ottawa v Ontario*, [69] the university submits that it is an arms-length IT service provider to TST. It maintains that while it possesses the systems and data, it does not possess the records at issue, nor does its powers as an IT service provider support a custody finding for the purposes of *FIPPA*.

Does the institution have a right to possession of the record?

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110 The university submits that it has no power or authority "to cause TST, Knox or their employees to deliver up records" and says that this factor is especially significant. Specifically, it argues that under paragraph 21 of the MOA, TST and its members own and control student records and information and while the university has bargained a limited right to data for enrollment auditing purposes, it has "no greater right to access" student records and information. The university submits that in this context, it has no power to administer a freedom of information request for the kinds of communications at issue.

111 Further, the university states that, as there has been no appeal to its Academic Appeals Committee about the matter described in the appellant's representations, the university therefore "has no records related to the matter and has no basis for requesting, compelling or otherwise obtaining records related to the matter."

Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [70]

112 The university submits that the MOA establishes the university as a service provider to TST, in the form of being a provider of IT and email service under Schedule C to the MOA. Under this arrangement, the university maintains, it acts simply as a service provider, with no right of access to data "beyond the limited rights that are enjoyed by any arm's length IT service provider."

Does the content of the record relate to the institution's mandate and functions?

113 The university also maintains that the content of the records, if any exist, would not relate to its mandate and functions, because it has a secular mandate that is distinct from the mandate of TST and Knox to which the records directly relate.

Does the institution have the authority to regulate the record's use?

114 The university states that it does not have the authority to regulate the records' use, because the communication of TST and Knox employees with students is governed by TST and Knox as employers.

To what extent has the record been relied on by the institution?

115 The university submits that it has not seen or relied upon the communications sought by the access request.

How closely has the record been integrated with the other records held by the institution?

116 The university submits that there is no integration of responsive records, if any exist, with the records of the university. It states that, "the email correspondence at issue is presumably in an 'account' or similar resource controlled by individual custodians who are employed by TST and/or Knox and not the University."

Does the institution have the authority to dispose of the record?

117 The university denies that it has the authority to dispose of the records that would be responsive to the request and submits that it may only dispose of TST and Knox faculty emails at the direction of TST and Knox.

Knox

118 Knox begins by stating that the only records responsive to either request were in the possession of TST and have already been disclosed to the appellant. Knox says that no records responsive to the appellant's second request exist in its record holdings and, regardless, had any records existed, the university would not have been in a position to disclose them, as it would have had neither custody nor control of them.

119 Regarding the factors relevant to determining custody or control of "a series of email communications between its professors," Knox states that it maintains all records for its basic degree programs and that TST is responsible for the

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administration of its graduate degree programs. Knox submits that if such email correspondence between its professors using their official e-mail addresses had existed, it would have been a record of Knox's employees and Knox would have the right to possess it, though it would also have been in the possession of TST, as of right, because the student was enrolled in a TST-administered graduate program.

120 Knox submits that if responsive records had existed, they would have related to Knox's mandate and functions in respect of providing students with an education in theology, divinity and ministry; though they would equally have related to TST's mandate and functions. The authority to regulate the records would have been under TST's administration and authority, but it would also have been subject to Knox's authority to regulate the business records of its employees. Both TST and Knox would have had the authority to dispose of them.

121 In response to the appellant's representations, Knox aruges that the academic appeal process does not affect custody or control. Knox agrees that, pursuant to the MOA, students of TST member schools in conjoint degree programs may appeal to the university's Academic Appeals Committee and it acknowledges that this "outsourcing arrangement" requires TST member schools to pay a portion of the university's expenses to cover the costs of hearing those appeals. Knox maintains, however, that the MOA does not grant the university any entitlement to custody or control of any TST member college's records and "the fact that a final appeal might be made to the university's Academic Appeals Committee does not alter this fact."

TST

122 TST adopts the university's representations and also adopts the university's and Knox's reply representations.

The appellant

123 The appellant submits that the university has custody or control over responsive records in this appeal because it is the owner of the "information technology services such as email, network connectivity, security, student information system (currently ROSI) access and learning management system (currently Blackboard) access" used by TST, including its professors and students.

124 The appellant submits that the MOA establishes "a clear and substantial connection" between the university and the operations and activities of TST in the areas of quality assurance, information technology, degrees and governance that is sufficient to support a finding that responsive records are in the university's custody or control. The appellant also relies on Knox and TST's internal academic dispute resolution mechanism and its relationship with the university as an indicator of control over the responsive records.

125 The appellant challenges Knox's position that no responsive records exist, and refers to an obligation on the part of the professors involved to maintain documentation about students, particularly as it relates to the assessment of a doctoral student. The appellant argues that the university's search for responsive records was not reasonable. In response to this point, Knox repeats that its cross-appointed faculty members are not employees of the university and, in any event, it rejects what it calls the implicit assumption that, because doctoral records in general should be kept, specific emails concerning the appellant's exam must have been created, sent and retained, which it maintains, were not.

Analysis and findings

126 The appellant submitted two requests to the university, seeking emails exchanged between identified TST professors and/or the Knox Registrar. The university's response was that such records were not in its custody or control under the Act and that he could only obtain access to such records outside of *FIPPA*, because it does not apply to either TST or Knox. The appellant received access to the paper records that TST located, but has stated that he wants electronic copies of those records for "forensic purposes."

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127 I found above that neither TST nor Knox are part of the university for the purposes of the Act, and the question I must now consider is whether the university nevertheless has custody or control of responsive records, if they exist, under section 10(1) of FIPPA.

128 The responsive records - email correspondence between professors at TST, Knox or one of the other TST member schools - are about a specific exam of the appellant's during his ThD studies and/or the mailing of his enrollment history and transcript to another seminary by Knox.

129 I discuss below the possibility that responsive emails, if any exist, are in the university's possession (by virtue of being on its servers). However, I begin by looking at the following two-part test developed by the Supreme Court of Canada in *National Defence* on the question of whether an institution has control of records that are not in its physical possession:

(1) Do the contents of the document relate to a departmental matter?

130 While the responsive records in this appeal may relate in a broad sense to the university because they are about a student who was enrolled in one of its conjoint degree programs, this alone is not sufficient to establish that the records relate to a university matter within the meaning of the *National Defence* test. As Senior Adjudicator Gillian Shaw stated in Order PO-3894,

> The context of the creation of a record is important in determining what constitutes a "university matter", and previous orders of this office have suggested that for this part of the test to be satisfied, the records must arise out of a decision-making function of the institution or be integral to an institutional matter.

131 I find that the emails at issue do not arise out of a decision-making function of the university, nor are they integral to a university matter. The responsive records, to the extent they exist (or once existed), arose out of decision-making functions of TST and Knox, and not those of the university.

132 Even if I were to accept that this part of the *National Defence* test were satisfied, I find that the second part is not.

(2) Could the university reasonably expect to obtain a copy of the document upon request?

133 The appellant was a student of TST and Knox enrolled in a program of study that I accept is "developed and directed by Knox to meet Knox's distinctly theological mandate." I find that part two of the *National Defence* test is also not met, and in making this finding, rely on the usual custody or control factors outlined below for concluding that, in the ordinary course, the university could not reasonably be expected to obtain from TST or Knox a copy of the records sought by the appellant.

Whether or not the university has possession, it does not determine custody or control

134 Knox argued in this appeal that the only records responsive to either request were in the possession of TST and had already been disclosed to the appellant. Knox says that both it and TST would have been entitled to possess such records, because the appellant was enrolled in a TST-administered graduate program. For its part, the university rejects that it has any power or authority to possess responsive records. It relies on *City of Ottawa* to argue that it merely acts as an arms-length IT service provider to TST: while it possesses the systems and data, it does not possess the records at issue and its powers as an IT service provider do not support a custody finding for the purposes of *FIPPA*. The appellant disagrees, viewing the MOA's provisions relating to information technology and other TST operations and activities as sufficient to establish that responsive records are in the university's custody or control.

135 Given the evidence before me, such as the parts of Schedule C of the MOA relating to the university's provision of information technology services to TST and its member schools, including email, it appears that the responsive records, if they exist, would be in the university's possession by virtue of them existing on or transiting through the university's servers. It is not necessary for me to decide this matter, however, because given my review of all the factors, the result would be the same regardless of the matter of possession. That is, if the records are not in the university's possession (as not being on its servers), I find, based on *National Defence* and my review of the relevant factors below, that there is no control over the records. If, on

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the other hand, they are in the university's possession, I find below that such possession does not amount to custody for the purposes of the Act, again as a result of looking at the relevant factors.

136 Supposing there to be possession of responsive records by the university, there is insufficient evidence to support a finding that this possession amounts to more than "bare possession" under section 10(1) of the Act. This is because there must be something more than mere physical possession to establish custody for the purposes of the Act. There must be some right to deal with the records and some responsibility for their care and protection, and I accept that this threshold has not been met in the circumstances. This conclusion follows from my discussion above about the existence of the university, TST and Knox as separate legal entities with their own property, assets, employees, policies, practices, functions and mandates. The university has a clear secular mandate, distinct from the Christian theological mandate of TST and its member schools, both affirmed and protected in section 13 of the University of Toronto Act, 1971. The provisions of the MOA support their intentional separate existences.

137 Next, supposing the university does not have physical possession of the responsive records, my conclusion would be that it has no control over them, which is consistent with my findings on the *National Defence* test above, particularly that the university could not expect to receive copies of the responsive records, even if it was to request them. I find support for this in paragraph 21 of the MOA, which provides that TST and its member schools own and control student records and information, subject only to making available the information necessary for the university and external auditors to review enrollment data related to the distribution of funding. I accept that the university may not, under the MOA or otherwise, access or possess records related to TST or Knox's students of the nature sought in this appeal. It follows that the university has no right to possess the responsive records, other than in its capacity as IT provider and for that limited purpose.

The records were not created by an officer or employee of the institution and are not held by the university

138 The evidence before me is clear that the records sought by the appellant, communications between employees of TST or Knox, concern individuals all employed by TST or one of its member schools, and not by the university. Under paragraph 27 of the MOA, "the teaching staff in theology of the TST and its member institutions shall continue to be appointed by and to hold their contracts of employment with their respective institutions." With respect to the appellant's argument about the examiners of his "second major exam" having cross-appointments at the University of Toronto, I agree with the university's position. Specifically, paragraph 31 of the MOA addresses situations where, by mutual agreement between them, TST faculty may be granted status-only appointments with the university, but this does not affect the employment relationship: the employing TST member remains the employer.

139 Moreover, the responsive records are not, and would not be, held by an officer or employee of the University of Toronto for the purposes of their duties as an officer or employee because the individuals named in the request are all employees of TST or one of its member schools, not the university.

The records relate to day-to-day matters of TST or Knox that are handled independently of the university

140 Regarding the use the creator intended to make of the records, I find that the responsive records would relate to academic and administrative matters within the purview of TST and Knox. The appellant relied on the fact that students in conjoint programs, such as his ThD program, may have access to the university's Academic Appeals Committee. The appellant also argues that the nature of Knox and TST's internal dispute resolution mechanism respecting academic matters and its relationship with the university strongly support a finding that "the locus of control for the responsive records rests with the university."

141 Paragraph 25 of the MOA provides for the route of appeal for academic matters. However, even if the appellant's intent may have been to put the requested records to use in an academic appeal proceeding contemplated by paragraph 25 of the MOA, I do not consider this persuasive in my analysis of custody or control over them. As the university points out, the mere fact that such an academic appeal may result in the university receiving records of the nature sought in the event of an academic appeal does not, on its own, give the university custody or control of any TST or Knox records.

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142 Moreover, I accept that the university does not have any practice or custom of accessing TST or TST member school emails, including faculty member emails about examinations, exam questions, or exam grades in this particular context. Further, there is insufficient evidence that any academic appeal was made, which might have led to a right of access for the purposes of that appeal, pursuant to the rules of procedural fairness (not under the Act).

The university does not have the authority to regulate the records' content, use or disposal

143 I accept the university's position that it does not have the authority to regulate the records' use, because communications between TST and Knox employees and with their students is governed by TST and Knox as employers. I find that the authority to regulate, control or dispose of the responsive records would have been under both Knox's and TST's administration and authority, and not that of the university. [71]

144 As indicated above, Schedule C of the MOA "establishes the university as a service provider to TST," but I do not take this service provision to confer any authority upon the university to access, regulate the content, or dispose of the responsive records. Past orders have considered that, in the case of postsecondary institutions, the university owns the IT system and, in some cases, this has led to the finding that it has the concomitant right to regulate use or content. [72] Determining whether an authority to regulate the content, use or disposal of a record exists in such a context focuses on whether the institution has some kind of responsibility for the substance of the information. In *City of Ottawa* , the Divisional Court found that the mere possibility that the city had the authority, pursuant to its IT policy, to monitor the employee's email account for misuse, was not sufficient to bring the employee's personal emails (that were at issue) within the city's custody under the Act. The records must be directly connected to a business purpose of the institution and were not.

145 I make a similar finding in this appeal. The records sought by the appellant were (or would have been) created by employees of TST or Knox, not the university, and to the extent that any existed, such records would have been held in the email accounts of those TST or Knox employees. I accept the university's position that such records are not integrated with those of the university notwithstanding that they may exist on, or have transited through, university servers due to TST and Knox's reliance on the university to provide IT services. Under the MOA. I find that the university does not have the requisite authority to regulate the content or use of email communications between employees of TST or Knox or the registrar functions of Knox or TST, to support a finding that the responsive records are in the university's custody or control.

Conclusion

146 Although the university may have bare possession of any responsive records because of its role as IT service provider, the other factors I have considered do not support a finding that the records are, or would be, in the custody or control of the university for the purposes of section 10(1) of the Act, if they exist, and I find they are not.

147 In determining whether the records are in the "custody or control" of the university, I am required to consider the factors contextually in light of the purpose of the legislation. [73] The purpose of the Act is to promote accountability by shining light on the activities of institutions. In my view, given the independence of Knox and TST from the university as outlined above, finding the responsive records to be in the custody or control of the university would not promote the accountability purpose in the Act.

148 Given my finding that the responsive records are not in the university's custody or control, it follows that the university was under no obligation to search for responsive records. Further, having found that the records are not in the university's custody or control, there is also no need for me to determine the university's alternate claim that the exclusion in section 65(5.3) of the Act applies to them.

ORDER:

I uphold the University of Toronto's decision that the records requested by the appellant are not in its custody or control, and I dismiss the appeal.

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Footnotes

1 The appellant's ThD program was provided through the Graduate Centre for Theological Studies at TST.

2 But also employed by other member institutions of TST governed by the Memorandum of Agreement between them at the university, as described further below.

3 The university identified the first request as 17-0060 and the second one as 17-0061.

4 Knox's representations suggest that these records were, in fact, provided to the appellant by TST. However, this is not affirmatively established by the information before me. Regardless, whether or not TST actually provided paper copies of the requested emails to the appellant is not relevant to my custody or control finding in this order.

5 Order P-239 and Ministry of the Attorney General v. Information and Privacy Commissioner, 2011 ONSC 172 (Div. Ct.).

6 Order PO-2836.

7 Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner), [1999] O.J. No. 4072; Canada Post Corp. v. Canada (Minister of Public Works) (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.); and Order MO-1251.

8 Orders 120, MO-1251, PO-2306 and PO-2683.

9 TST states: "The University of Toronto has accurately described the nature of the relationship between the University of Toronto and the Toronto School of Theology, which are separate and distinct institutions."

10 SO 1971, Ch 56, as am. by the University of Toronto Amendment Act, 1978, SO, 1978, Ch 88.

11 "teaching staff" means the employees of the University, University College, the constituent colleges and *the arts and science faculties of the federated universities* who hold the academic rank of professor, associate professor, assistant professor, full-time lecturer or part-time lecturer, unless such part-time lecturer is registered as a student, or who hold any other rank created by the Governing Council and designated by it as an academic rank for the purposes of this clause[.] (emphasis added) "Constituent college" means a college established by the Governing Council or any predecessor thereof, under section 1(1)e.

12 Section 10(4) states, in part, that "The following colleges are federated with the University: 1. Knox College."

13 The 1964 Letters Patent created the Toronto Graduate School of Theological Studies, while the 1970 Supplementary Letters Patent changed the name to the current name, Toronto School of Theology.

14 TST was incorporated under the *Corporations Act of Ontario* by Letters Patent dated November 24, 1964, as supplemented by Supplementary Letters Patent dated April 30, 1970.

15 Emmanuel College is a college of Victoria University in the University of Toronto.

16 *https://www.tst.edu/academic/programs/graduate-degree-programs*

17 Knox was incorporated by the *Statutes of the Province of Canada, 1858*, 22 Victoria, Ch 69.

18 Although the "member schools" are also referred to as "member institutions," "member universities" and "member colleges" by the parties, I avoid use the first term, in particular, in this order to avoid possible confusion with the defined term "institutions" in *FIPPA*.

19 TST and its member schools entered into the first MOA in 1978 for the granting of conjoint degrees in theology by the university and the member schools of TST. In August 2020, the parties to the MOA signed an Extension Amendment Agreement providing for a one-year extension of the term of the July 1, 2014 MOA to June 30, 2022. This amendment has no bearing on my findings in this order.

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20 I take the university to be using "institution" here in the broader sense, not as that term is used under the Act.

21 October 2019; accessed https://www.tst.edu/resources/ThDPhD_Handbook_2019-2020_0.pdf

22 Relying on British Columbia (Workers' Compensation Board). v. Figliola2011 SCC 52.

23 Section 2(a).

24 Sections 10(4) and (6).

25 Section 11(2).

26 Based on the university's "Statement of Institutional Purpose" set out in the university's representations and section 13 of the University of Toronto Act, 1971.

27 "Scheduling" refers to the designation and listing of an entity as an "institution" under Regulation 460 under FIPPA. The university and Knox both refer to the university's correspondence with the Ministry of Government Services at that time, which was attached to the university's representations. In this letter, the university described the federated institutions that it viewed as "similarly situated" to Victoria University for the purposes of the Act, identifying Trinity College and the University of St. Michael's College, and supported their being designated as "Institutions" under Regulation 460. Neither Knox nor TST were identified as candidates for scheduling.

28 "Ecclesiastical records" are defined at Section 2 of the Act as the "operational, administrative and theological records ... of a ... religious organization".

29 Dated August 24, 2018, Knox College Privacy Policy, online: <https://knox.utoronto.ca/prlvacy-policy/>, attached as Tab "B" to Knox's representations. The relevant part states: "As a church-related organization, Knox College is not bound by the Freedom of Information and Protection of Privacy Act (FIPPA, 2006, Government of Ontario) but in respect for our academic relationships within the University of Toronto, we strive to maintain consistent standards of privacy."

30 As noted, the appellant was enrolled as a student at Knox College, but his ThD program was administered by TST.

31 The appellant notes that a minimum A- or 80% is required for continuation in the program.

32 The university relies on paragraphs 27 and 31 of the MOA.

33 The appellant did not provide documentation to support this assertion.

34 Under section 2(1) of the Act, an "institution" means: (0.a) the Assembly, (a) a ministry of the Government of Ontario, (a.1) a service provider organization within the meaning of section 17.1 of the Ministry of Government Services Act, (a.2) a hospital, and (b) any agency, board, commission, corporation or other body designated as an institution in the regulations.

35 Order PO-4066, paragraphs 16 and 17.

36 Sections 10(4) and (6).

37 Section 11(2).

38 Or, at least, was. TST's website indicates that the conjoint Doctor of Theology (ThD) program in which he was registered has been replaced by a conjoint PhD in Theological Studies.

39 Order PO-4066.

40 The Bill 197 amendments brought universities under the *FIPPA*.

41 Order 120.

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42 Orders 120 and P-239.

43 Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

44 Order P-912.

45 *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; City of Ottawa v. Ontario, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); and Orders 120 and P-239.

46 Orders 120 and P-239.

47 Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

48 Orders 120 and P-239.

49 Orders 120 and P-239.

50 Orders 120 and P-239.

51 *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

52 *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; Orders 120 and P-239.

53 Orders 120 and P-239.

54 Order MO-1251.

55 Order PO-2683.

56 Order M-315.

57 Order M-506.

58 Order PO-2386.

59 Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner), [1999] B.C.J. No. 198 (S.C.).

60 Orders M-165 and MO-2586.

61 Walmsley v. Ontario (Attorney General)(1997), 34 O.R. (3d) 611 (C.A.) (*Walmsley*); and David v. Ontario (Information and Privacy Commissioner) et al(2006), 217 O.A.C. 112 (Div. Ct.).

62 Order MO-1251.

63 Order MO-1251.

64 Ottawa (City) v. Ontario (Information and Privacy Commissioner), 2010 ONSC 6835 (.

65 2011 SCC 25, [2011] 2 SCR 306 (National Defence).

66 Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner), 2018 ONCA 559 (CanLII).

67 Responsive to the second request, that is.

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68 The university refers to paragraph 27 of the MOA, which states that "the teaching staff in theology of the TST and its member institutions shall continue to be appointed by and to hold their contracts of employment with their respective institutions and shall continue to be subject to the procedures and disciplinary jurisdiction of those institutions and not subject to those of U of T."

69 2010 ONSC 6835, para 42 (CanLII).

70 Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner), [1999] B.C.J. No. 198 (S.C.).

71 Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner), [1999] B.C.J. No. 198 (S.C.).

72 Order PO-3009-F, for example.

73 *City of Ottawa v. Ontario*, cited above.

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Tab 18

CITATION: YUDC v. Information and Privacy Commissioner, 2022 ONSC 1755
DIVISIONAL COURT FILE NOS.: 133/20;134/20
DATE: 20220401

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEDERER, MATHESON & COPELAND JJ.

BETWEEN:	
YORK UNIVERSITY DEVELOPMENT CORPORATION Applicant	*Jeffrey E. Feiner* and *Michelle Stephenson* for York University Development Corporation, Applicant/Respondent
– and –	*Christine L. Lonsdale and Alana Robert*, for York University, Applicant/Respondent
INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, YORK UNIVERSITY and JOHN DOE/JANE DOE REQUESTERS Respondents	*Linda H-C. Chen*, for the Respondent Information and Privacy Commissioner of Ontario, Respondent
AND BETWEEN:	Marcia Macaulay and Jody Berland, self-represented requesters, Respondents
YORK UNIVERSITY Applicant	
– and –	**HEARD at Toronto (by videoconference):** January 18, 2022
INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, YORK UNIVERSITY DEVELOPMENT COPORATION and JOHN DOE/JANE DOE REQUESTERS Respondents	

Copeland J.:

REASONS FOR DECISION

2022 ONSC 1755 (CanLII)

Overview

[1] In these applications for judicial review, York University ("York") and York University Development Corporation ("YUDC") challenge the decision of the Information and Privacy Commissioner ("the IPC") dated February 14, 2020, with reasons reported at 2020 CanLII 15337, denying their request for reconsideration of an order requiring the production of certain records (the "Reconsideration Order").

[2] The applicants argue that the IPC Adjudicator ("the Adjudicator") committed reviewable error in her interpretation and application of the test for whether records are under the control of an institution pursuant to s. 10(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*"). They further submit that the Adjudicator committed reviewable error in her approach to reconsideration of a decision under s. 18 of the *IPC Code of Procedure*.

[3] For the reasons set out below, I find that the Adjudicator's decision denying the request for reconsideration is reasonable, and dismiss the applications.

The Factual Background

[4] YUDC was created to assist York with the planning and development of York's lands. York is YUDC's sole shareholder. Two York professors (the "requesters") sought records from both York and YUDC under the *FIPPA*. The access to information requests related to renovations to the York University Bookstore and to the York Lanes Pharmacy. York processed the requests regarding the bookstore renovations and York Lanes separately. These applications for review relate only to the access request relating to renovations to the bookstore.

[5] I note at the outset that the access request at issue was broader in scope than the records that remain in issue in the review. Only four records are still in dispute, records 2, 3, 6, and 11. My summary of the factual background is focussed on the history as it relates to those four records.

[6] In generic terms, the four records at issue are described in the IPC orders as follows:

- three memoranda (in their entirety) addressed to members of YUDC's Board of Directors dated March 19, 2014 (record 2), September 15, 2015 (record 3), and December 16, 2015 (record 11);

- a document about York Lanes refinancing and projects (record 6).

The four records at issue were filed as part of the record on the applications for review, subject to a sealing order pending the decision on the applications.

[7] Section 10(1) of *FIPPA* provides for a right of access to records that are "in the custody or under the control of" an institution subject to *FIPPA*. York is an institution subject to *FIPPA*; however, YUDC is not. The central issue in this review turns on the statutory interpretation and application of "under the control of" an institution in s. 10(1) as it applies to the records at issue in

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the access request in this case. However, some further background is helpful to understand the issue.

[8] York's Director, Information, Privacy & Copyright Office considered the access request. As part of its consideration of the access request, pursuant to s. 28 of *FIPPA*, York gave notice to YUDC as an affected party and an opportunity to make submissions in relation to records which might be covered by the s. 17 exemption for third-party information in *FIPPA* (Letter of March 24, 2016).

[9] In its submissions to York on the access request with respect to the four records in issue on this review,[1] YUDC took the position that all four records qualified for the third-party exemption in s. 17 of *FIPPA* (Letter of April 1, 2016). YUDC made submissions on the various branches of the test for the exemption under s. 17 of *FIPPA*. In addressing the branch of the test under s. 17 regarding whether the information was supplied by the third party to the institution in confidence, YUDC's submission stated:

> YUDC's Board of Directors memos and packages are only distributed to members of our Board of Directors, and not to any other parties inside or outside of the University. We have a reasonable expectation that the materials are provided in confidence.

[10] On April 23, 2016, York issued a decision granting access to the requesters to some records, and denying access to others (Decision Letter, April 23, 2016). The Decision letter advised that York had considered the representations of the third party (YUDC) and notified the third party that York had made a decision to grant access to some records, and claim exemptions for parts, notwithstanding the third party's representations. The letter then explained that it enclosed an index of records which contained a general description of each record, indicated whether access was being granted or denied, and where access was denied in whole or in part, indicated the applicable section of *FIPPA* under which access was denied. As it relates to the records in issue

---

[1] As I have noted above, in both IPC decisions, the four records at issue are referred to as records 2, 3, 6, and 11. In York's notice and opportunity to make submissions to YUDC as a third party, the index of records is numbered differently than in York's final decision on the access request sent to the requesters. The reasons for the different numbering are twofold. First, York only asked YUDC for submissions on records containing third-party information. Some of the documents that York refused to disclose to the requesters were refused on the basis of solicitor-client privilege and did not have to do with YUDC. Second, after receiving submissions from YUDC, York agreed that three documents under consideration in the access request were not responsive, and removed them from the index of responsive records. I point out the differences in the numbering systems because in both YUDC's submission to York dated April 1, 2016, and the letter from York to YUDC dated April 23, 2016, the numbering used for the records is different than in York's decision letter dated April 23, 2016 sent to the requesters, and in the IPC decisions (which uses the numbering system from the index in York's decision letter sent to the requesters). Throughout these reasons, I refer to the four records using the numbering used in the IPC decisions (and in York's decision to the requesters) as records 2, 3, 6, and 11. For purposes of cross-referencing, these records are referred to in the York letter requesting submissions from YUDC dated March 24, 2016, and YUDC's response dated April 1, 2016 as, respectively records 2, 3, 10, and 16 (i.e., record 10 is ultimately renumbered 6, and record 16 is ultimately renumbered 11).

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in this review, records 2, 3, 6, and 11, access was denied pursuant the third-party information exemption in s. 17 of *FIPPA*. At the close of the letter, York's Director, Information, Privacy & Copyright Office wrote:

> The University reaffirms its position that the York University Development Corporation is a separate legal entity from York University. Records generated through operations of its affairs are under the custody and management of the YUDC's Board of Directors, not under the control of the University, and are consequently not subject to FIPPA.

[11] In addition to the decision letter to the requesters, York also wrote to YUDC to advise it of the decision as it related to YUDC (Letter to YUDC, dated April 23, 2016). That letter advised that for some documents access was being granted, and for some access was being denied. It reported that three documents had been removed from the index on the basis that they were not responsive to the access request. With respect to the documents at issue in these reviews, the letter stated:

> York University has also decided to deny access in full to those records deemed to be under the direct custody and control of the York University Development Corporation. These include document numbers 2, 3, [6], and [11].

[12] The requesters appealed York's decision to the IPC. As part of its intake process, the IPC sent a request to York for documents related to the access request and decision (Letter dated May 27, 2016). York provided the requested documentation (Letter of June 13, 2016).

[13] Before the appeal proceeded, a mediation between York and the requesters was conducted pursuant to s. 51 of *FIPPA*. I will not summarize the mediation in detail, but I note that during the mediation York agreed to give access to portions of one document (record 4 – which is no longer in issue and has been disclosed), and clarified the scope of the exemptions it was relying on to deny access to the remainder of record 4 (Mediation Report, September 28, 2016, p. 3). In addition, the requesters agreed that they were not pursuing access to a number of specific records. This left five records as the subject of the IPC appeal, records 2, 3, 6, 11, and the withheld portions of record 4. At the close of the Mediation Report, the Mediator listed the only issue remaining in dispute as it related to records 2, 3, 6, and 11 as being whether the s. 17 third-party information exemption applied to those records. In the cover letters sent with the Mediation Report to York and to the requesters, the Mediator asked the parties to review the report and to contact her if there were any errors or omissions.

[14] Although YUDC was not formally a party to the mediation, it was consulted during the mediation. In the Mediation Report, the Mediator wrote (at p. 3): "During the mediation, the mediator had discussions with the appellant, the University and the affected third party." Similarly, in the Reconsideration Order at paragraph 19, the Adjudicator noted that during the mediation stage, the mediator exchanged communications with the then-President of the affected party (YUDC) by phone and email.

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[15] During the mediation, no party raised the issue of whether York had custody or control of the four records at issue in this review. Nor was the issue of custody or control of the records raised by any party after the Mediation Report was sent, despite the invitation by the Mediator for the parties to contact her about any omission in the report.

[16] Following the mediation, the appeal proceeded before the IPC Adjudicator. York and YUDC were given notice of the appeal and an opportunity to participate throughout. As a first step, the Adjudicator sent a Notice of Inquiry, dated October 30, 2017, to all parties, and sought representations from York and YUDC.

[17] The Notice of Inquiry included a summary of the history of the access request and decision, as well as the mediation, and the issues in the appeal. The Notice of Inquiry also included a discussion of the process for IPC appeals, and listed issues on which the Adjudicator was requesting representations.

[18] Importantly, the Notice of Inquiry listed the anticipated issues on the inquiry as the application of the exemptions in ss. 17 and 18 of *FIPPA* (third-party information and economic and other interests), and sought representations on the issue of the application of those exemptions. The Notice of Inquiry did not list the issue of custody or control by York of the four remaining records at issue as an anticipated issue on the appeal.

[19] In the October 30, 2017 cover letters sent with the Notice of Inquiry to all parties, the Adjudicator stated: "I am enclosing a Notice of Inquiry which summarizes the facts and issues in the appeal. If you believe there are additional factors which are relevant to this appeal, please refer to them" (emphasis added).

[20] Thus, as a first step in the appeal, the Adjudicator advised both York and YUDC that the issues in the appeal, as she saw them, were the application of the exemptions in ss. 17 and 18 of the *FIPPA*, and requested their submissions. She invited both York and YUDC to raise any other factors they believed to be relevant to the appeal. Neither York nor YUDC at any point during the inquiry raised the issue of whether the four records still at issue were in the custody or under the control of York.

[21] In its submissions to the Adjudicator on the inquiry, York addressed the issues of the application of the exemptions in s. 17 and s. 18. York did not take the position in its submissions that the four documents at issue were not under its control and thus not subject to *FIPPA*. YUDC did not make any new submissions in the IPC appeal process, but advised the adjudicator by phone, later confirmed by email, that its position was that York's decision should be upheld.

[22] The Adjudicator subsequently requested submissions from the requesters, and also requested and received a further reply submission from York.

[23] In a decision rendered January 30, 2019, with reasons reported at 2019 CanLII 8591, the Adjudicator ruled that neither of the exemptions relied on by York to withhold the records at issue applied. The adjudicator held that the mandatory s. 17(1) exemption did not apply to the records at issue because neither York nor YUDC had made the required evidentiary showing of reasonable expectation of the types of harms from disclosure listed in s. 17(1). Similarly, for the discretionary

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exemption in s. 18(1)(c), the adjudicator found that York had not made the required evidentiary showing of the type of harm covered by s. 18(1)(c). The adjudicator ordered disclosure of the five records then at issue.

[24] I note that the issue of the application of the ss. 17(1) and 18(1) exemptions is not before this court on review, as neither YUDC nor York has sought review of that aspect of the IPC Order.

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[25] After the Adjudicator rendered her decision, YUDC and York sought a reconsideration of her decision pursuant to s. 18 of the *IPC Code of Procedure*. Section 18 permits an IPC adjudicator to reconsider an order or other decision where it is established that there was a fundamental defect in the adjudication process; some other jurisdictional defect in the decision; or a clerical error, accidental error or omission, or other similar error in the decision. By the time of the reconsideration request, only four records were still in dispute, as record 4 had been disclosed in accordance with the January 30, 2019 decision.

[26] In the application for reconsideration, both YUDC and York made the submission that the records at issue were not in the custody or under the control of York within the meaning of s. 10(1) of *FIPPA*, and as such, were not subject to *FIPPA*. The basis for the submission was the assertion that there was an error by staff of York in including the four documents as responsive to the request, because York's then Vice-President Finance and Administration also sat on the Board of Directors of YUDC, and kept his YUDC documents in his York office.

[27] In an order rendered on February 14, 2020, the Adjudicator ruled that neither York nor YUDC had established that grounds existed to reconsider the initial order under s. 18.01 of the *IPC Code of Procedure*, and denied the reconsideration request. In coming to that conclusion, the Adjudicator found that York and YUDC had not shown that the records at issue were not "under the control of" York, within the meaning of s. 10 of *FIPPA*. I discuss the reasons of the Adjudicator for denying the reconsideration request in more detail in the analysis below.

[28] York and YUDC now seek review of the Adjudicator's order to deny the request for reconsideration.

Issues raised in the review

[29] The applicants raise two central issues in the applications for judicial review:

(i) Did the Adjudicator err in her interpretation and application of the concept of whether records are "under the control of" an institution subject to *FIPPA*, within the meaning of s. 10(1)? In particular, did the Adjudicator err in failing to apply principles of corporate law in assessing whether the four records were under control of York, and did she err in failing to find that that York did not have control of the four records at issue because YUDC was a separate corporate entity from York?

(ii) Did the Adjudicator err in her interpretation of the threshold for granting reconsideration, including in placing the onus on York and YUDC to show, in the

context of a reconsideration request, that the four records were not under control of York?

Standard of review

[30] YUDC and York submit that the standard of review on the issue of the interpretation and application of s. 10(1) of *FIPPA* is correctness. They submit the issue raises a question of law of central importance to the legal system that requires a single correct answer, that of separate corporate personality.

[31] I disagree. The analysis of standard of review starts with a presumption that reasonableness is the applicable standard. In order for an exception to the presumptive reasonableness standard of review to apply to a question of law, the issue must be a general question of law of central importance to the legal system as a whole. The fact that a question touches on an important issue is not sufficient to fall into this category of correctness review. Rather, the question must have broad applicability to the legal system as a whole, beyond the particular context in the review: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paras. 16-17, 23, 58-62.

[32] The issue of the interpretation and application of whether records are "in the custody or under the control of" an institution in s. 10(1) of *FIPPA* is a question of statutory interpretation and application of the IPC's home statute. Although the nature of the relationship between YUDC and York was a factor that the Adjudicator considered in her decision, she considered the nature of the relationship as one factor in the assessment of all of the circumstances in the context of interpreting and applying s. 10(1) of *FIPPA*. Further, the Adjudicator's consideration of the relationship between YUDC and York was limited to the context of the particular records at issue in the access request, not the relationship more broadly between YUDC and York. The Adjudicator's decision does not make general pronouncements about the law in relation to separate corporate entities, nor does it have application outside of the access to information context: *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413, 3 M.P.L.R. (6th) 222 (Div. Ct.) at paras. 24-25.

[33] Accordingly, the presumptive standard of review of reasonableness applies to the issues about the interpretation and application of s. 10(1) of *FIPPA* in these applications.

[34] Neither York nor YUDC made specific submissions about the standard of review applicable to considering the denial of a request for reconsideration, with the exception that YUDC made submissions in relation to the burden of proof applied by the Adjudicator as it related to the assessment whether the records were under the control of York within the meaning of s. 10(1) of *FIPPA*. YUDC submits that the question of the onus of proof applied by the Adjudicator in the Reconsideration Order is an issue of central importance to the legal system as a whole because in this case the central issue in the reconsideration request related to the IPC's jurisdiction, and thus the correctness standard of review should apply.

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[35] I do not accept this submission. As I explain in more detail below, the issue in relation to the onus of proof relates solely to the onus imposed in the context of an application for reconsideration under the *IPC Code of Procedure*. This issue is limited to the access to information context, and further limited to the context of a party seeking reconsideration after an order has been made by an adjudicator. This issue involves the IPC interpreting its own *Code of Procedure*. It raises no issue of central importance to the legal system. The standard of review is reasonableness. I note as well that in a pre-*Vavilov* decision, the Ontario Court of Appeal recognized that reconsideration under the *IPC Code of Procedure* is a discretionary decision, and that a decision of the IPC on reconsideration is entitled to deference: *Barker v. Ontario (Information and Privacy Commissioner)*, 2019 ONCA 275, 433 D.L.R. (4th) 514 at paras. 124-127.

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Was the Adjudicator's interpretation and application of s. 10(1) of *FIPPA* unreasonable?

[36] York and YUDC submit that if this court finds that the standard of review is reasonableness, as I have found above, the Adjudicator's decision on the reconsideration was unreasonable. York and YUDC submit that the Adjudicator erred in failing to apply principles of corporate law in assessing whether the four records were under the custody or control of York. They submit that because YUDC was a separate corporate entity from York, the Adjudicator erred in finding that York and YUDC had failed to establish that York did not have control of the four records at issue.

[37] I find that the decision of the Adjudicator that four records at issue were under the control of York within the meaning of s. 10 of *FIPPA* is reasonable. I begin by summarizing the law in relation to assessing whether records are under the control of an institution subject to *FIPPA*. I then consider the reasons given by the Adjudicator for reaching the conclusion that the four records were under the control of York.

The Relevant law

[38] In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306, the Supreme Court set out a two-part test for assessing whether records are under the control of an institution subject to access to information legislation (at paras. 49-60):

(i) Do the contents of the document relate to a department matter; and

(ii) Could the government institution reasonably expect to obtain a copy of the document on request?

[39] The parties agree that the test from *National Defence* is the applicable test to assess whether records are "under the control" of an institution subject to access to information legislation. The test from *National Defence* is the test that the Adjudicator applied in this case.

[40] In *National Defence*, the Supreme Court recognized the importance of interpreting the "control" provisions of access to information legislation in a manner consistent with the purpose of the legislation. As a result, the Court held that "the notion of control must be given a broad and liberal meaning in order to create a meaningful right of access to government information" (at para. 54). In light of this approach, the Court provided guidance on how each of the two steps of the analysis should be approached (at paras. 55 and 56):

> Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the *Access to Information Act* is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.
>
> Under step two, *all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the *Access to Information Act* (A.F., at para. 169). The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly. [emphasis in original]

[41] The factual context at issue in *National Defence* was different that the context in this case. *National Defence* involved the assessment of whether records in a ministerial office (which was not subject to federal access to information legislation) were under the control of a government department (which was subject to the legislation). Although the context was different, the problem is the same as in this case – when are records possessed by an entity not subject to access to information legislation in the custody or control of an institution subject to the legislation, such that the right of access applies?[2] The test in *National Defence* is contextual and requires a decision-maker to consider all of the circumstances in assessing whether records are under the control of an institution subject to the act. Thus, it is flexible enough to apply to a variety of factual contexts.

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[2] Subject to any applicable statutory exemptions.

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Analysis of the reasonableness of Adjudicator's reasons and conclusion

[42] Reasonableness review finds its starting point in judicial restraint, and respects the distinct role of administrative decision-makers. A reasonable decision is one that is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras. 82-86, 99-135; *Attorney General for Ontario v. Information and Privacy Commissioner*, 2020 ONSC 5085 (Div. Ct.) at para. 17. Thus, I begin my analysis of whether the Adjudicator's conclusion was reasonable with the reasons she gave for that conclusion.

[43] After considering the scope of the grounds for reconsideration under s. 18 of the *IPC Code of Procedure*, the Adjudicator turned to the meaning of a record being "in the custody or under the control of" an institution under s. 10(1) of *FIPPA*.

[44] The Adjudicator first discussed the legal principles applicable to determining if records are in the custody or under the control of an institution subject to *FIPPA*. This discussion culminated in setting out the two-part test for control in *National Defence*. Neither of the applicants contends that there is any error in the Adjudicator's explanation of the statutory interpretation of s. 10(1) of *FIPPA* or the legal test involved in its application.

[45] The Adjudicator summarized the submissions of York, YUDC, and the professors who had made the access request in relation to custody or control.

[46] The Adjudicator then explained that she was not satisfied that there was an error in the finding implicit in her original decision that York had custody or control of the records at issue.

[47] With respect to the custody branch of s. 10(1) of *FIPPA*, the Adjudicator accepted that York only had "bare possession" of the records at issue. This was based on her accepting the evidence of York's former Vice-President Finance and Administration ("VPFA"), who also sat on the YUDC board, that he kept the records at his office at York only for convenience, because YUDC did not provide him with a dedicated office in his role as board member. She also accepted that he kept the records at issue and other documents relating to YUDC in separate binders from documents relating to his role as York's VPFA (Reconsideration Order at para. 61).

[48] Under the "control" branch of s. 10(1), the Adjudicator found that there was substantial evidence before her that York had control of the records at issue, applying the two-part test from *National Defence* (Reconsideration Order at paras. 62-70). In coming to that conclusion, she considered the following factors:

- She recognized that a relevant factor in the analysis was whether the records at issue were created by an officer or employee of York (the institution subject to *FIPPA*). She accepted that the four records at issue in this case were created by YUDC, not by York, and that this was a factor pointing away from a finding of control.

- She found that the records satisfied the first branch of the *National Defence* test in that they related to York's mandate to manage and lease its real property and to have any revenues applied to achieve its objects and purposes.

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- She based this finding on the fact that the records relate to the renovation of York Lanes, a building on land owned by York, and provisions of the *York University Act, 1965*, S.O. 1965, c. 143, relating to York's authority to manage and lease its real property (s. 16). She noted that the *York University Act, 1965* also provided that all of the income, revenues, issues, and profits of all of York's property (such as York Lanes) "shall be applied solely to achieving the objects and purposes of the university" (s. 21). She found that York had a direct interest in the progress and outcome of the renovation of York Lanes, as evidenced by record 4 (which had been disclosed), which was a memorandum from YUDC's Director Commercial land Use to the York Board of Governors, Land and Property Committee discussing the Shoppers Drug Mart lease and the York Lanes General lease in relation to the long-term improvements to York Lanes.

- She noted that YUDC was created to assist York with the planning and development of York's lands.

- She considered that if York had planned and developed York Lanes itself, without contracting out the work to YUDC, there would be no question that records in relation to the development would be within York's custody and control, and subject to access request under *FIPPA*.

- She found that York could not divest itself of responsibility and accountability for records directly related to its statutory mandate by choosing to create a corporate entity to discharge its mandate to manage its real property in aid of achieving its objects and purposes. In this respect, relying on the decision of *Ontario (Criminal Code Review Board) v. Doe*, 1999 CanLII 3805, 47 O.R. (3d) 201 (C.A.), she found that York could not avoid the application of *FIPPA* by entering into an arrangement with YUDC to assist it in carrying out an aspect of York's statutory mandate.

[49] Based on these factors, the Adjudicator was satisfied that York could reasonably expect to obtain a copy of the four records at issue from YUDC on request.

[50] The Adjudicator also considered gaps in the records before her. She noted that a relevant factor in considering the issue of control is whether there are any provisions in any contracts between the institution subject to *FIPPA* and the entity in possession of the records which might shed light one way or the other on the institution's right to obtain a copy of the records if requested. In this case, the Adjudicator had not been provided with any contractual or other documents setting out the terms upon which YUDC arranged for the renovations at issue, or addressing one way or the other York's right to obtain documents from YUDC relating to the renovations of the bookstore. She also noted a gap in the record relating to the role of officers of York on the YUDC board. She noted that YUDC is a wholly-owned subsidiary of York, and it is mandated that five officers of York sit on YUDC's board, and that at present only three of the eight board members of YUDC were independent of York. The submissions before her did not address what control the five officers of York who sat on the YUDC board exercised over YUDC's organization. In the context of the burden on a party seeking reconsideration to establish one or more grounds for reconsideration is met, she found that it was up to York or YUDC to put forward all the necessary evidence to establish a ground for reconsideration, and this gap in the evidence was a factor in her

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finding that there were not grounds for reconsideration (Reconsideration Order at paras. 38, 67, 68).

[51] Based on reviewing the Adjudicator's reasons, and the record before the court, I find that her decision is reasonable. She used the correct law for the scope of the control test under s. 10 of *FIPPA*, the test set out in *National Defence*. She then applied the relevant law to the facts before her. The assessment that the Adjudicator was required to make on the control issue pursuant to *National Defence* was a contextual one, considering all of the relevant circumstances. And that is what she did. She considered all relevant factors, as *National Defence* directs, including York's mandate to manage its real property, the substantive content of the records at issue, the circumstances in which they were was created, and the nature of the relationship between the York (the institution subject to the Act) and YUDC (the record holder).

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[52] The applicants' submissions place significant weight on corporate law principles in relation to separate corporate entities. However, their submissions misconstrue the effect of the Adjudicator's order. The Adjudicator accepted the separate corporate personality of YUDC. At paragraph 45 of her reasons, in summarizing the applicants' submissions, she stated as follows:

> The university and the affected party stress that they are separate entities. I agree, and I will not set out the parties' representations on that issue in any detail. The issue is whether the university has custody or control of the records at issue, notwithstanding the fact that the affected party and the university are separate entities.

[53] The Adjudicator did not reason that because YUDC was a wholly-owned subsidiary of York, therefore York had control over the records at issue. Rather, her analysis was based on considering all of the relevant circumstances, as set out above. She referred to the fact of YUDC being wholly owned by York, and the make-up of YUDC's board in the context of pointing to gaps in the records before her. It was one factor referred to among several factors in her contextual analysis.

[54] I accept that, the fact that YUDC is a wholly-owned subsidiary of York is not sufficient to establish custody or control by York of records in the possession of YUDC. The fact that a corporation is a wholly-owned subsidiary of an institution to which *FIPPA* applies is not sufficient to establish that the institution has custody or control of the corporation's records – whatever the make-up of the corporation's board. But that is not the analysis that the Adjudicator engaged in in this case.

[55] It is important not to overstate the nature of the Adjudicator's finding. Considering all of the circumstances, as *National Defence* instructs, the Adjudicator found that York could reasonably expect to obtain a copy of each of the four records at issue from YUDC on request. Her finding was not a finding that York had a legal entitlement to obtain a copy of these records from YUDC, or that YUDC had a legal obligation to provide them to York. Rather, it was a finding that, considering all of the circumstances, one could reasonably expect that YUDC would provide York a copy on request. Further, the finding of the Adjudicator only applies to the four

records at issue. It is not a finding that York could reasonably expect to obtain a copy of any record in possession of YUDC.

[56] The applicants submit that the Adjudicator erred in stating at paragraph 51 that law in relation to "piercing the corporate veil" was not relevant to the issue of whether York had custody or control of the records at issue. At paragraph 51, the Adjudicator stated:

> The affected party [YUDC] makes lengthy submissions on the principles that corporations are distinct legal entities, the test for piercing the corporate veil and why the test for piercing the corporate veil has not been met in this case. I will not discuss these arguments as they are not relevant to the issue of whether the university has custody or control of the records.

[57] The applicants' submission reads this passage as if it said that the fact that YUDC is a separate corporation from York is not relevant.

[58] With respect, the applicants are misconstruing what the Adjudicator stated at paragraph 51, and taking it out of context. The Adjudicator was not saying that the fact that YUDC was a separate corporate entity from York was irrelevant to the custody or control analysis. She was saying that test for piercing the corporate veil was not relevant, because that is a different legal issue from whether the four records were under the control of York within the meaning of s. 10(1) of *FIPPA*, despite YUDC being a separate corporate entity. This is clear when paragraph 51 is read in the context of the Adjudicator's full analysis. At paragraph 45, she expressly accepted as a fact that York and YUDC are separate entities. She then stated: "The issue is whether the university has custody or control of the records at issue, notwithstanding the fact that the affected party [YUDC] and the university are separate entities" (emphasis added). In her analysis of whether the custody or control test was met for the four records at issue, the Adjudicator acknowledged and considered that YUDC was a separate corporation as part of her analysis.

[59] Simply, put, the fact that York and YUDC are separate legal entities, and that only York is an institution covered by *FIPPA* is why an analysis of whether York had custody or control of the four records at issue was required. The fact that they are separate legal entities is relevant to the control analysis, but it is not determinative. Nor was it necessary for the Adjudicator to apply the body of law relating to piercing the corporate veil in her assessment of whether the four records were under the control of York.

[60] The applicants submit that the Adjudicator erred in not following the approach in the British Columbia decision of *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1481, 6 Admin. L.R. (5th) 136 at para. 81, aff'd 2011 BCCA 334, 339 D.L.R. (4th) 32, and other British Columbia decisions which followed the reasoning similar to *Simon Fraser*. In the *Simon Fraser* case, the British Columbia Supreme Court held that the British Columbia Information and Privacy Commissioner ("BC IPC") had erred in not applying common law principles related to piercing the corporate veil in considering whether records held by a corporate subsidiary of a university were under the control of the university and thereby subject to access to information legislation.

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[61] The *Simon Fraser* decision is different from the current case. In *Simon Fraser*, the BC IPC had held that all records in the possession of the corporate subsidiary SFUniventures were under the control of Simon Fraser University based a finding by the Information Commissions that the university and SFUniventures should be treated as "one entity", and that SFUniventures was "wholly within [the university's] domination" (at para. 71, quoting from the BC IPC decision). Thus, it was a finding that the two entities were one. That was not the reasoning of the Adjudicator in this case.

[62] In this case, the Adjudicator did not reason that solely because YUDC is a wholly-owned subsidiary of York the four records were in York's control. Rather, as I have outlined above, the Adjudicator in this case engaged in a contextual analysis of all of the relevant factors in coming to her conclusion. Further, the Adjudicator's conclusion was not that York had control of all of YUDC's records. Rather, it was a conclusion that given the subject-matter of the records at issue, York's statutory mandate to manage its real property, and the nature of the relationship between York and YUDC, York had control of the four records at issue.

[63] I note as well that *Simon Fraser* was decided before both *National Defence* and *Vavilov*. The British Columbia Supreme Court in *Simon Fraser* did not have the benefit of the Supreme Court's contextual approach to custody or control of records in the access to information context in *National Defence*. Further, the British Columbia Supreme Court in *Simon Fraser* applied a correctness standard of review, which I have found above is not the appropriate standard of review in this case.[3]

[64] Further, without commenting on the correctness of the *Simon Fraser* decision on the record before the court in that case, the notion that the interpretation and application of the concept of custody or control of records under s. 10(1) of *FIPPA* should be determined by common law principles of corporate law is an uneasy fit with the modern rule of statutory interpretation enunciated in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 1998 CanLII 837, and with both the pre- and post-*Vavilov* approach to a reviewing court considering a specialized tribunal's interpretation of its home statute.

[65] York and YUDC also submit that the Adjudicator erred in not following the conclusion in another IPC order, PO-2738, reported at 2008 CanLII 68864, involving York and a different corporate entity (although they acknowledge that IPC adjudicators are not bound by previous IPC orders). In that case, a different adjudicator found that records of the York University Foundation, a corporate subsidiary of York, were not in the custody or control of York.

[66] I find that the fact that the Adjudicator reached a different conclusion on the record before her than was reached in Order PO-2738 does not render her decision unreasonable. Importantly, in Order PO-2738, the control issue was framed as whether all of the records of the subsidiary

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[3] Subsequent authority from the British Columbia Court of Appeal holds that reasonableness is the appropriate standard of review for the section of the British Columbia access to information legislation analogous to s. 10 of *FIPPA*: *University of British Columbia v. Lister*, 2018 BCCA 139, 9 B.C.L.R. (6th) 386 at paras. 22-24.

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corporation were under the university's control. By contrast, the Adjudicator in this case focussed her assessment of the control issue on the question of whether the particular four records at issue were under control of York. As I have explained above, the Adjudicator reasonably concluded that the four records were under control of York, taking into consideration all of the circumstances, including York's statutory mandate to manage and lease its property and use the proceeds to achieve its statutory objects, the subject-matter of the records relating to that mandate, and the nature of the relationship between York and YUDC.

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[67] The control analysis from *National Defence* is contextual and fact-specific. It is in the nature of a contextual test that different results will sometimes be reached in different cases where, although there is some factual similarity, the facts of two cases are never identical. The Adjudicator in this case explained at paragraph 69 of the Reconsideration Order why she did not reach the same result as in Order PO-2738. I find no error in her reasons for reaching a different result. Further, this court has recognized that a tribunal's decision will not be unreasonable for not following a previous tribunal decision in similar circumstances, where the tribunal provides a reasoned explanation for reaching a different result: *Brockville* at para. 41. This is particularly so in the context of these applications for review, where the control issue was raised in the context of a request for the discretionary remedy of reconsideration (which I discuss further below).

[68] The Adjudicator applied the correct legal test from *National Defence*. She considered all of the circumstances, and made the finding that York could reasonably expect to obtain a copy of the four records at issue from YUDC, and thus had control over the records at issue. On this basis, she found that neither of the applicants had established grounds for reconsideration. I am satisfied that this finding is reasonable.

Was the Adjudicator's approach to reconsideration unreasonable?

[69] York and YUDC submit that the Adjudicator erred in her interpretation of the threshold for granting reconsideration. In addition, YUDC submits that the Adjudicator erred in placing the onus to show that the four records were not under the control of York on York and YUDC. As I have set out above, I find that these issues are reviewable on a standard of reasonableness.

[70] This issue is related to the issue of the interpretation and application of the custody or control test in s. 10(1) of *FIPPA*, in the sense that the substantive issue on the reconsideration was the custody or control test, but the procedural mechanism to access reconsideration was for the applicants to show that they met one of the grounds for reconsideration. Thus, the IPC's s. 18 allowing for reconsiderations was the means by which York and YUDC raised the s. 10(1) issue. I separate out the analysis of this issue for purposes of clarity.

[71] Sections 18.01 and 18.02 of the *IPC Code of Procedure* provide as follows:

> Grounds for Reconsideration
>
> 18.01 The IPC may reconsider an order or other decision where it is established that there is:

(a) a fundamental defect in the adjudication process;

(b) some other jurisdictional defect in the decision; or

(c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[72] York and YUDC relied on all three branches of s. 18.01 in their request for reconsideration. In the Reconsideration Order, the Adjudicator considered each subsection. I will address the Adjudicator's consideration of each subsection in the order followed in the Adjudicator's reasons: (a), (c), and then (b).

[73] Before turning to each subsection of s. 18.01 of the *IPC Code of Procedure*, I underline that a decision whether or not to grant reconsideration is discretionary, and is owed deference on review: *Barker* at paras. 124-127; *Mohmand v. Human Rights Tribunal of Ontario and Ultimate Currency Exchange*, 2021 ONSC 528 (Div. Ct.) at paras. 17-19.

[74] With respect to s. 18.01(a), which is based on "a fundamental defect in the adjudication process", the Adjudicator held as follows (at para. 22 of the Reconsideration Order):

> Section 18.01(a) refers to a fundamental defect in the adjudication process. A fundamental defect would be a breach of procedural fairness, such as a party not being given notice of an appeal or not being given an opportunity to provide submissions during the inquiry [Citing in a footnote IPC Order PO-3960-R]. Neither the university nor the affected party has raised any breach of procedural fairness, and I am not satisfied that there was a defect in the adjudication process in this case. The parties in this appeal were given notice of the appeal and were given an opportunity to provide submissions during the inquiry. The miscommunication between and within the affected party and the university does not amount to a defect in the adjudication process.

[75] I find that the Adjudicator's interpretation of s. 18.01(a) as applying to breaches of procedural fairness during the IPC inquiry and appeal process is reasonable, based on both the text of s. 18.01(a), and the context of the rest of s. 18.01. The language in subsection (a) of "a fundamental defect in the adjudication process" (emphasis added) speaks to procedural fairness. Further, because s. 18.01(b) addresses jurisdictional defects, it is reasonable to read s. 18.01(a) as not addressing jurisdictional defects.

[76] I further find no error in the Adjudicator's conclusion under s. 18.01(a) that none of the issues raised by York or YUDC on the reconsideration established a breach of procedural fairness. Both York and YUDC were given procedural fairness during the inquiry in the form of notice and an opportunity to provide submissions. Thus, the Adjudicator reasonably found that neither York nor YUDC had established grounds for reconsideration under s. 18.01(a).

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[77] With respect to s. 18.01(c), which is based on a clerical error, accidental error, or other similar error in the decision, the Adjudicator held as follows (at paras. 23-24 of the Reconsideration Order):

> Section 18.01(c) refers to a clerical error, accidental error or other similar error in the decision. A clerical error, accidental error or other similar error would commonly be a typographical error in the decision or a misplaced word, such as "not", in the decision. It is an error that generally originates with this office rather than with a party, and is usually obvious to the reader.
>
> I understand that both the university and the affected party argue that a clerical error or accidental error occurred in Order PO-3922. They argue that the clerical error or accidental error was the university's implicit position that it has custody and control of the records at issue. In my view, this is not a clerical error or accidental error in the order itself. As such, I am not satisfied that an accidental error or clerical error has occurred.

[78] I find that the Adjudicator's interpretation of s. 18.01(c) is reasonable, in particular based on the text of the provision. The section speaks to a clerical, accidental, or similar error "in the decision". I find that the Adjudicator reasonably interpreted the qualifier "in the decision" in s. 18.01(c) as limiting its application to errors originating with the IPC, in particular, errors in the decision, as the section states.

[79] The clerical or accidental errors put forward by York and YUDC, both in the reconsideration request and before this court, involve the asserted error that the assistant of the then VPFA of York, who was also a director of YUDC, mistakenly comingled documents that he possessed as a board member of YUDC with documents that he possessed as VPFA of York, and the failure of York to assert in the earlier proceedings that the records at issue were not in its custody or control. I find no error in the Adjudicator's conclusion that these asserted errors were not clerical, accidental, or similar errors "in the decision". Thus, the Adjudicator reasonably found that neither York nor YUDC had established grounds for reconsideration under s. 18.01(c).

[80] York relies on the decision of this court in *Ontario (Employment Standards Officer) v. Metro International Trucks Ltd.*, 1996 CanLII 12481, 28 O.R. (3d) 67 (Div. Ct.), in support of the submission that the Adjudicator erred in not granting the reconsideration request. I find that the circumstances in *Metro International Trucks* were different than in this case. In *Metro International Trucks*, the tribunal had refused to grant reconsideration on the basis that it did not have jurisdiction to reconsider a decision and was *functus officio*, in circumstances where there was no legislation or rule permitting reconsideration. In those circumstances, this court held that the tribunal erred in finding that it had no jurisdiction to grant reconsideration. In this case, the Adjudicator accepted that she had jurisdiction to grant reconsideration under the *IPC Code of Procedure*. Indeed, she referred to the leading Supreme Court of Canada decision on the issue, *Chandler v. Alberta Assn. of Architects*, [1989] 2 S.C.R. 848, 1989 CanLII 41, and to *Metro International Trucks* (Reconsideration Order at para. 27). However, she exercised her discretion not to grant the requested reconsideration. I see no basis to interfere with her exercise of discretion,

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which was reasonable and considered all of the circumstances before her as well as the legislative context.

[81] In any event, the Adjudicator's conclusion that the grounds for reconsideration in s. 18.01(a) and (c) were not established had no practical effect, because the Adjudicator accepted that the custody or control issue was capable of amounting to a jurisdictional defect in the decision under s. 18.01(b). Based on that finding, she considered the substance of York and YUDC's submission in relation to reconsideration – that York did not have custody or control of the four records at issue – and rejected it. As I have outlined above at paragraphs 36-68, I find that the Adjudicator's decision on the control issue was reasonable.

[82] This brings me to York and YUDC's submission in relation s. 18.01(b) and the onus on a reconsideration application in relation to the issue of whether the four records at issue were under control of York within the meaning of s. 10(1) of *FIPPA*. Section 18.01(b) addresses "some other jurisdictional defect in the decision".

[83] The fundamental distinct argument made by York and YUDC in relation to s. 18.01(b) is that the s. 10(1) arguments raised by York and YUDC relate to the IPC's jurisdiction over the records, and as such, they submit, the Adjudicator erred in the Reconsideration Order in placing the onus on York and YUDC to show that the four records were not under control of York.

[84] I will not quote all of the Adjudicator's reasons in relation to the onus as they are somewhat lengthy, and intertwined with her analysis of s. 10(1) of *FIPPA*, which I have addressed above. The key components of her analysis of the onus were as follows:

- York did not decide the initial access request on the basis that the records were not in its custody or control, but rather found that the ss. 17(1) and 18(1) exemptions applied to exempt the records from disclosure (Reconsideration Order at para. 13).

- Neither York nor YUDC raised the issue of whether York had custody or control of the records at issue in the original IPC appeal. She found that York and YUDC "had ample opportunity" to raise the custody or control issue in the appeal, and did not do so. She further found that the fact that York in its submissions took the position that the ss. 17(1) and 18(1) exemptions applied to the records at issue was implicitly a position that it had custody or control of the records (since the structure of *FIPPA* is such that there is no need to claim exemptions for records not in the custody of or under the control of an institution subject to *FIPPA* because *FIPPA* does not apply if records are not under the custody or control of an institution) (Reconsideration Order at paras. 14, fn 2, 26).

- She found that the reconsideration process is not intended to be a forum for parties to reargue their cases, relying on previous IPC orders on this issue as persuasive. One of the factors discussed in the previous orders she referred to is the importance of finality of proceedings before administrative tribunals (Reconsideration Order at paras. 27-29).

- She accepted that an error with respect to the issue of the institution's custody or control of the records at issue could amount to a jurisdictional issue under s. 18.01(b). However,

2022 ONSC 1755 (CanLII)

she held that since the custody or control issue was raised for the first time on the reconsideration request, and not during the appeal, York and YUDC bore the onus to show that the records were not in the custody of or under the control of York. She held that allowing the parties to raise the issue for the first time on reconsideration, and treat it as if it had been raised earlier, would undermine the principle of finality of the IPC's orders (Reconsideration Order at paras. 30-32).

- She then explained why she found that York and YUDC had not established that the records were not in the custody or control of York (Reconsideration Order at paras. 32-71).

[85] I find that the Adjudicator did not err in allocating the onus to York and YUDC to show that the records were not in the custody of or under the control of York, in light of the context of the issue being raised in a request for reconsideration. The Adjudicator's decision that, in the context of this issue being raised for the first time in the reconsideration request, the onus lay with York and YUDC to show that the records at issue were not in the custody or control of York is reasonable.

[86] The parties disagree on where the onus in relation to custody or control of the records under s. 10(1) of *FIPPA* would lie if the issue had been raised in the initial IPC appeal. The IPC position is that previous IPC orders place the onus on an institution to show that records subject to an access request are not in the custody of or under the control of the institution. The IPC submits that the reason for allocating the burden to the institution is that the institution has the information relevant to assessing whether the records are in the custody or control of the institution (i.e., a requester has no way to make this showing, since they have not seen the records and likely know nothing about how they are kept). Counsel for YUDC took the position that since custody or control of records by an institution is a threshold to the right of access existing, it must be established on a balance of probabilities that the records are in the custody or control of an institution subject to *FIPPA*. However, this issue was not fully argued by the parties, as it arose from questions from a member of the panel during oral argument. It is not necessary in this case for this court to decide the issue of where the onus would lie on the issue of custody or control if it had been raised at first instance in the IPC inquiry.

[87] The Adjudicator found that s. 18 of the *IPC Code of Procedure* places the onus on the party seeking reconsideration to show that there are grounds within one or more of s. 18.01(a), (b), or (c) to grant the reconsideration.

[88] I find that this is a reasonable interpretation of where s. 18 places the onus, based on both the text of s. 18.01, and the nature of a request for reconsideration.

[89] The opening words of s. 18.01 state: "The IPC may reconsider an order or other decision where it is established that there is [one of the grounds in (a), (b), or (c)]". The underlined passage is reasonably interpreted to place the onus on the party seeking reconsideration to show that one of the grounds in s. 18.01(a), (b) or (c). Further, the context of a reconsideration also supports that the party seeking the reconsideration bears the onus to show that there are grounds for relief. Our system of justice, both in the courts and administrative tribunals, values efficiency of litigation, and finality. Where a party is seeking reconsideration of a decision, as here, which was made with

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the benefit of notice, an inquiry, and an opportunity to make submissions, the interests of efficient conduct of litigation and finality support an interpretation of this section as allocating the onus on a reconsideration to the party seeking reconsideration. This is an issue of interpretation by the tribunal of its own rules of procedure, as they apply to an issue under its home statute. The Adjudicator's decision is owed significant deference in this context.

[90] Thus, I find that the Adjudicator's decision that the onus was on York and YUDC to show that s. 18.01(b) (and indeed any of the grounds in s. 18.01) applied was reasonable. And as I have addressed above, her further conclusion that York and YUDC had not met their onus to show that the records were not in control of York was reasonable. The process before the IPC was fair, and the applicants have not shown any error by the Adjudicator.

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Conclusion

[91] For these reasons, the applications are dismissed.

[92] As agreed by the parties, there is no order as to costs.

Copeland J.

I agree

Lederer J.

I agree

Matheson J.

Released: April 1, 2022

CITATION: YUDC v. Information and Privacy Commissioner, 2022 ONSC 1755
DIVISIONAL COURT FILE NOS.: 133/20;134/20
DATE: 20220401

2022 ONSC 1755 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEDERER, MATHESON & COPELAND JJ.

BETWEEN:

YORK UNIVERSITY DEVELOPMENT CORPORATION

Applicant

– and –

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, YORK UNIVERSITY and JOHN DOE/JANE DOE REQUESTERS

Respondents

AND BETWEEN:

YORK UNIVERSITY

Applicant

– and –

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, YORK UNIVERSITY DEVELOPMENT COPORATION and JOHN DOE/JANE DOE REQUESTERS

Respondents

REASONS FOR JUDGMENT

Released: April 1, 2022

Tab 19

2012 CarswellOnt 17579
Ontario Information and Privacy Commissioner

Vaughan (City), Re

2012 CarswellOnt 17579

Vaughan (City), Re

Bernard Morrow Member

Judgment: June 13, 2012
Docket: MO-2750, MA09-103

Counsel: Counsel — not provided

Subject: Public; Municipal

Related Abridgment Classifications

Privacy and freedom of information

II Provincial privacy legislation

II.3 Miscellaneous

Headnote

Privacy and freedom of information --- Provincial privacy legislation — Miscellaneous

Requester submitted request to city for access to information related to various expense accounts of two city councillors, including charges for use of 407 Express Toll Route (ETR) — City conducted two searches and agreed to provide partial access to some records — Requester appealed — Appeal allowed — Councillors' detailed 407 ETR invoices for years 2007 and 2008 were in city's control, and city was ordered to obtain them and issue access decision — Invoices sought by requester related to departmental matter, as they revealed expenses incurred by councillors while conducting city business, and expenses were reimbursed by city — City was public institution and publicly funded, and therefore had duty to account for expenditure of public funds — City was entitled to obtain copy of records in question upon request.

Table of Authorities

Cases considered by *Bernard Morrow Member*:

Canada (Information Commissioner) v. Canada (Minister of National Defence) (2011), 331 D.L.R. (4th) 513, 416 N.R. 105, [2011] 2 S.C.R. 306, 2011 CarswellNat 1474, 2011 CarswellNat 1475, 2011 SCC 25, 18 Admin. L.R. (5th) 181 (S.C.C.) — followed

Canada Post Corp. v. Canada (Minister of Public Works) (1995), 1995 CarswellNat 652, (sub nom. *Societe canadienne des postes v. Canada)* 1995 CarswellNat 688, 30 Admin. L.R. (2d) 242, 179 N.R. 350, (sub nom. *Societe canadienne des postes v. Canada)* [1995] 2 F.C. 110, 91 F.T.R. 320 (note), 60 C.P.R. (3d) 441 (Fed. C.A.) — referred to

Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner) (2011), (sub nom. *Ontario (Ministry of the Attorney General) v. Ontario (Information & Privacy Commissioner))* 104 O.R. (3d) 588, (sub nom. *Ontario (Ministry of the Attorney General) v. Ontario (Information & Privacy Commissioner))* 331 D.L.R. (4th) 481, 2011 ONSC 172, 2011 CarswellOnt 2810 (Ont. Div. Ct.) — referred to

Ontario (Criminal Code Review Board) v. Ontario (Inquiry Officer) (1999), 1999 CarswellOnt 3436, (sub nom. *Criminal Code Review Board (Ontario) v. Hale)* 126 O.A.C. 92, (sub nom. *Ontario (Criminal Code Review Board) v. Doe)* 47 O.R. (3d) 201, (sub nom. *Ontario (Criminal Code Review Board) v. Ontario (Freedom of Information and Protection of Privacy Act, Inquiry Officer))* 140 C.C.C. (3d) 400, (sub nom. *Ontario (Criminal Code Review Board) v. Ontario (Freedom of Information and Protection of Privacy Act, Inquiry Officer))* 180 D.L.R. (4th) 657 (Ont. C.A.) — referred to

Ottawa (City) v. Ontario (Information and Privacy Commissioner) (2010), 328 D.L.R. (4th) 171, 79 M.P.L.R. (4th) 21, 2011 C.L.L.C. 210-030, 272 O.A.C. 162, 2010 ONSC 6835, 2010 CarswellOnt 9790 (Ont. Div. Ct.) — referred to

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Ottawa (City) v. Ontario (Information and Privacy Commissioner) (March 30, 2011), Doc. CA M39605 (Ont. C.A.) — referred to

Statutes considered:

Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56

Generally — referred to

s. 4(1) — considered

ss. 6-15 — referred to

s. 10 — considered

s. 11 — considered

s. 11(a) — considered

s. 11(b) — considered

s. 11(d) — considered

s. 14(1) — considered

s. 14(3)(f) — considered

s. 38 — referred to

s. 52 — considered

APPEAL by requester from city's decisions to provide partial access to some records.

***Bernard Morrow Member*:**

Overview:

1 The appellant submitted a detailed and comprehensive three-part request to the City of Vaughan (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to various expense accounts of two city councillors (the councillors), including charges for the use of the 407 Express Toll Route (407 ETR). The text of the request is as follows:

> 1. A copy of any and all detailed 407 ETR Toll Charge Invoices incurred by [a named individual], Regional Councillor processed for the years 2007 and 2008 by Account Number [103 # omitted] These invoices can be found in the City of Vaughan's Finance Department - Accounts Payable Section and/or by her assistants own records. In addition, please confirm whether any cheques to reimburse any portion of the payment has been made by [the named individual]. *Please note that these are recent records easily obtainable and I understand her assistant keeps at least one prior year's records on site as well - itemized cost for this section separate from other requests herein would much assist and can be provided separate from the completion of this entire request. *To act as a check list, please provide me with a GL Detailed Summary for this GL for these years.
>
> 2. A copy of any and all detailed 407 ETR Toll Charge Invoices incurred by [a named individual], Ward [Councillor] processed for the years 2007 and 2008 by Account Number[103 # omitted] These invoices can be found in the City of Vaughan's Finance Department - Accounts Payable Section and/or by her [sic] assistants own records. In addition, please confirm whether any cheques to reimburse any portion of the payment has been made by [the named individual]. *Please note that these are recent records easily obtainable and I understand her [sic] assistant keeps at least one prior year's records on site as well - itemized cost for this section separate from other requests herein would much assist and can be provided

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separate from the completion of this entire request. *To act as a check list, please provide me with a GL Detailed Summary for this GL for these years.

3. A copy of all furniture purchase[s] detailed invoices and any backup therein (including model, quality, etc.) made from Account Number [210 # omitted] in the Operation Budget Years 2003 (being 2002 actuals), 2004 (being 2003 actuals), 2005 (being 2004 actuals), 2006 (being 2005 actuals), 2007 (being 2006 actuals), and 2008 (being 2007 actuals) including any purchase orders and/or FPOs The location of these records can be found in the City's Financial Department - Accounts Payable Department and/or maintained by the assistant in their own records. Please note 2007 and 2008 should be easily obtainable, in fact, she may even have in her office 2006. but more specifically the City's Accounts Payable Department-Finance. * To act as a checklist, please provide me with the GL Detailed Summary for these years. In fact, I do not want to think that there is a large search for this area you may wish to run a GL report for these years and you may find that some years nothing was purchased thereby making the search quicker and narrowing the scope of the search The other item I wish to point out is that many times it is just one invoice that has 4 items and not 4 invoices. If there was any cheque made in reimbursement of any of the items, even partially by [a named individual], I would ask that you provide me with a copy of the cheque, including a cancelled cheque.

2 The city conducted a search for responsive records and agreed to provide partial access to some of them. In its decision letter, the city indicated that it was denying access to the withheld portions of the records pursuant to sections 10 (third party information), 11 (a)(b) and (d) (economic interests) and section 14(1) (personal privacy) of the *Act*.

3 After receiving the city's access decision, the requester contacted the city and advised that she believed additional records should exist. As a result, the city agreed to conduct an additional search for responsive records. The city located additional records and issued a second decision letter to the appellant, disclosing the additional records in part. The city denied access to the withheld portions of these records pursuant to section 14(1). In support of its section 14(1) exemption claim, the city raised the application of the presumption in section 14(3)(f) (finances).

4 The appellant appealed the city's two decisions.

5 At the outset of the mediation stage of the appeal process, the appellant narrowed the scope of her appeal to include only the adequacy of the city's search with regard to records responsive to parts 1 and 2 of her request. The appellant takes the position that additional records should exist and, in particular, she points to the invoices to support the 407 ETR charges that were claimed on the councillors' expenses which were then, in turn, reimbursed by the city.

6 Part 3 of the appellant's request was removed from the scope of the appeal, as was the application of the exemptions in sections 10, 11 and 14(1) to the withheld information.

7 Also during mediation the question of whether the city has custody or control of the councillors 407 ETR invoices was raised as an issue. The city advised the mediator that section 4.1.13 of its Council Budget/Expenditure Policy (the policy), which addresses the reimbursement of certain expenses, including 407 ETR charges, does not require councillors to submit invoices when claiming for reimbursement of 407 ETR expenses, making it the responsibility of each member of council to retain supporting invoices and documentation. The city added that when expense claims were submitted for reimbursement, some expense claims had the 407 ETR invoices or partial invoices attached, while other expense forms did not.

8 The city indicated that if invoices were not attached to the expense claims then it could not provide an access decision under the *Act* in relation to them. The city explained that if invoices were in possession of the city then a decision on access to those invoices would have been made.

9 The city acknowledged that invoices may exist (or may have existed) for the periods in question. However, it is the city's position that the invoices requested are not in its possession and are not, therefore, within its custody or control. The city argues that the invoices would be in the custody and control of the individual councillors noted in the request.

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10 Conversely, the appellant asserts that the invoices are in the city's custody and control and that the city is required to obtain the records and issue an access decision. The appellant believes that the invoices can be obtained by either asking the councillors to produce them or, alternatively, contacting the 407 ETR offices and asking for a duplicate copy of the invoices.

11 In light of the exchange between the parties regarding the status of the councillors 407 ETR invoices, custody or control was added as an issue.

12 The parties were unable to resolve the search and custody or control issues during the course of mediation.

13 The file was referred to the adjudication stage of the appeal process for an inquiry.

14 During the course of my inquiry I sought and received representations from both the city and the appellant on both the search and custody or control issues, which were shared in accordance with *Practice Direction 7* and section 7 of the *IPC Code of Procedure*.

15 In this order, I find the councillors detailed 407 ETR invoices for the period in question are in the control of the city and I order the city to obtain copies of these records and issue a new decision letter respecting access to them. As the detailed invoices are the sole focus of the appellant's narrowed request, and in light of my finding that these records are in the city's control, I find that I do not need to address the reasonable search issue in this order.

Issues:

Are the councillors' 407 ETR toll charge invoices "in the custody" or "under the control" of the city pursuant to section 4(1)?

Discussion:

Are the councillors' 407 ETR toll charge invoices "in the custody" or "under the control" of the city pursuant to section 4(1)?

16 Section 4(1) reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless ...

17 Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution.

18 A record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both. [1]

19 A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it. [2] A record within an institution's custody or control may be excluded from the application of the *Act* under one of the provisions in section 52, or may be subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

20 The courts and this office have applied a broad and liberal approach to the custody or control question. [3]

21 Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution, as follows. [4] The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply.

- Was the record created by an officer or employee of the institution? [5]
- What use did the creator intend to make of the record? [6]

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- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [7]
- Is the activity in question a "core", "central" or "basic" function of the institution? [8]
- Does the content of the record relate to the institution's mandate and functions? [9]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [10]
- If the institution does have possession of the record, is it more than "bare possession"? [11]
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [12]
- Does the institution have a right to possession of the record? [13]
- Does the institution have the authority to regulate the record's content, use and disposal? [14]
- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record? [15]
- To what extent has the institution relied upon the record? [16]
- How closely is the record integrated with other records held by the institution? [17]
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [18]

Parties' representations

22 The city relies on the policy to establish that members of council are charged with the responsibility of retaining supporting invoices and documentation and that, accordingly, such documentation remained in the custody and control of the councillors in this case. The relevant portions of section 4.1.13 of the policy state:

> Reimbursement of expenditures for [...] 407 charges. It shall be the responsibility of each Member of Council to retain supporting invoices and documentation. Please note, under Canada Customs and Revenue Agency guidelines, mileage from home to and from the place of work is considered personal mileage and therefore is not an allowable expense.

23 The city asserts that the supporting documentation relating to the 407 ETR charges incurred by the councillors never formed part of the city's record holdings. The city states that the 407 ETR created the records to communicate account information to its account holders (the councillors) and not to the city, pursuant to a contractual relationship between the account holders and the 407 ETR. The city submits that:

- it does not have physical possession of the records as there is no mandatory, statutory or employment requirement for their submission
- it does not have a right of possession to the records under the terms of the policy
- it does not have the authority to regulate the records' content, use or disposal
- it has not relied upon the contents of the records to fulfill its requirements under the policy

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24 The appellant provides extensive representations on the question of whether the city has custody or control of the records at issue. I found the appellant's representations somewhat unfocused and, at times, difficult to follow. However, after several reviews of them, the following points emerge:

1. the city has "control" of the records at issue

2. the legal basis for finding control in this case is rooted in an application of the two-part test for "control" established by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)* [19]

25 With regard to the appellant's first point, I note that the appellant's representations are focused exclusively on the "control" issue. The appellant does not offer representations on whether the city has "custody" of the records at issue. It appears, therefore, that while the appellant may concede that the records at issue are not in the city's custody, she believes they are in its control.

26 With regard to the appellant's second point, she articulates the following two-part test for institutional control of a record established by the Supreme Court of Canada in *Minister of National Defence*:

1. whether the record relates to a departmental matter, and

2. whether the institution could reasonably be expected to obtain a copy of the record in question upon request.

27 The appellant also notes that in regard to the two-part test, control can only be established if both parts of the test are met.

28 The appellant then proceeds to make representations on why, in the circumstances of this case, the two-part test has been met.

29 With regard to part 1 of the test, the appellant states that she is seeking information about the reimbursement of expenses incurred by the councillors in conducting city business. The appellant further states that the records relate to expense reimbursement paid from the city's operational budget. The appellant notes that section 2.1 of the "Guiding Principles" of its policy states:

Public funds may not be expended for personal use, non-City business use, campaign or election related purposes.

30 The appellant also refers to section 4.1.13 of the policy (referenced above by the city in its representations).

31 The appellant concludes that the information she seeks relates to a departmental matter as it will reveal the expenses incurred by the councillors to conduct city business and the amounts reimbursed by the city to these councillors, pursuant to its policy.

32 With regard to part 2 of the test, the appellant relies on the wording of section 4.1.13 of the policy and, in particular, the section of that policy that states:

It shall be the responsibility of each Member of Council to retain supporting invoices and documentation.

33 In the appellant's view, the import of that wording is that members of council are required to retain supporting invoices and documentation in the event they are needed to substantiate a claim. The appellant argues that the city therefore has a "right to possession of the *full* records." The appellant asserts that this is particularly important because the records that were disclosed (the summary pages) indicate that the councillor's invoices were reimbursed in full, so in order to substantiate what was allowable as a business expense, the complete invoice would have had to be viewed. The appellant argues that following such a protocol would be expected and in keeping with generally accepted accounting principles and practices.

Analysis and findings

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34 The courts and this office have applied a broad and liberal approach to the custody or control question.[20] As well, a record will be subject to the *Act* if it is in the custody OR under the control of an institution; it need not be both.[21]

35 I have carefully reviewed the parties' representations in this case. I find that while the city does not appear to have custody of the detailed invoices showing the councillors 407 ETR usage for business and personal purposes, it has control of these records based on the clear directive wording of section 4.1.13 of the policy and the application of the two-part test for institutional control articulated by the Supreme Court of Canada in *Minister of National Defence*.

36 The Supreme Court of Canada's two-part test, as set out in *Minister of National Defence*, is the accepted test for institutional control in Canada. I note that in past decisions, this office has taken a similar approach to the issue (see, for example, Orders P-120 and P-239). I accept the Supreme Court's test and apply it in this case.

37 With respect to part 1 of the test, I accept that the detailed invoices sought by the appellant relate to a departmental matter, as the contents of these records will reveal certain expenses incurred by the councillors while conducting city business. Further, I note that these expenses were reimbursed by the city to these councillors for performing city business. Accordingly, I find that part 1 of the test has been met.

38 I now turn to examine part 2 of the test. The city is a public institution and publicly funded. Accordingly, it has a duty to account for the expenditure of public funds. Section 4.1.13 of the policy exists to ensure that the city is able to account for the disbursement of public funds to members of council, as reimbursement for expenses they incur during the course of conducting business in their role as councillor, and in the event it is asked to respond to an audit request. In my view, in order for the city to properly discharge its duty to account for the expenditure of public funds it would need to be able to distinguish between expenses incurred by a member of council for business rather than personal purposes. This can only be achieved by providing the city with the ability to obtain access to the detailed invoices, where it is necessary for it to do so.

39 While it is not clear whether the detailed invoices ever formed part of the city's record holdings, it is plain from the wording of section 4.1.13 of the policy that the city exercised control over these records by directing members of council to retain supporting invoices and documentation in the event they were required for audit or other accounting reasons. Based on the wording of section 4.1.13 of the policy, I am satisfied that the city could reasonably be expected to be entitled to obtain a copy of the records in question upon request from the councillors and, therefore, I find that part 2 of the test has been met.

40 To conclude, I find that the councillors' detailed 407 ETR invoices for the years 2007 and 2008 are in the city's control and I will order the city to obtain them from the councillors and issue an access decision with respect to these records.

41 I note that the appellant has also raised reasonable search with regard to the whereabouts of the councillors' detailed invoices for their 407 ETR expenses for the years 2007 and 2008. However, having found that the councillors detailed invoices are in the city's control and having ordered the city to obtain copies of them and make an access decision, I need not address the reasonable search issue at this time.

Order:

1. The councillors' detailed invoices for their 407 ETR expenses for the years 2007 and 2008 are in the city's control, within the meaning of section 4(1) of the *Act*, and I order the city to obtain copies of these records from the councillors and issue an access decision.

2. I remain seized of this matter in order to ensure compliance with Provision 1.

Appeal allowed.

Footnotes

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1 Order P-239, *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)*, 2011 ONSC 172 (Ont. Div. Ct.).

2 Order PO-2836.

3 *Ontario (Criminal Code Review Board) v. Ontario (Inquiry Officer)*, [1999] O.J. No. 4072 (Ont. C.A.), *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.

4 Orders 120, MO-1251, PO-2306 and PO-2683.

5 Order P-120.

6 Orders P-120 and P-239.

7 Order P-912, upheld in *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)*, cited above at note 3.

8 Order P-912.

9 *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)*, cited above at note 1; ***Ottawa (City) v. Ontario (Information and Privacy Commissioner)***, 2010 ONSC 6835 (Ont. Div. Ct.), leave to appeal refused (March 30, 2011), Doc. CA M39605 (Ont. C.A.); Orders P-120 and P-239.

10 Orders P-120 and P-239.

11 Order P-239; *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)*, cited above at note 1.

12 Orders P-120 and P-239.

13 Orders P-120 and P-239.

14 Orders P-120 and P-239.

15 *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)*, cited above at note 1.

16 *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)*, cited above at note 1; Orders P-120 and P-239.

17 Orders P-120 and P-239.

18 Order MO-1251.

19 2011 SCC 25 (S.C.C.)

20 *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)*, cited at note 3 above, *Canada Post Corp. v. Canada (Minister of Public Works)*, cited above at note 3 above, and Order MO-1251.

21 Order P-239, *Ontario (Attorney General) v. Ontario (Information & Privacy Commissioner)*, cited at note 1 above.

End of Document

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Tab 20

Re Walmsley and Attorney General of Ontario et al.

Re Attorney General of Ontario and Glasberg et al.

[Indexed as: Walmsley v. Ontario (Attorney General)]

1997 CanLII 3017 (ON CA)

34 O.R. (3d) 611
[1997] O.J. No. 2485
Dockets: C25156 and C25158

Court of Appeal for Ontario,
Osborne, Doherty and Goudge JJ.A.
June 19, 1997

Administrative law -- Freedom of information -- Assistant Information and Privacy Commissioner determining that documents in possession of members of Judicial Appointments Advisory Committee relating to selection of certain person to position of Provincial Court Judge were records under control of Ministry of the Attorney General for purpose of s. 10(1) of Freedom of Information and Protection of Privacy Act -- Standard of review of decision of assistant commissioner being that of correctness -- Decision incorrect -- Committee members not part of Ministry of the Attorney General and documents in possession and control of members not also under control of Ministry -- Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, s. 10(1).

A request was made for access to certain records relating to the appointment of a specific individual as a judge of the Ontario Court (Provincial Division). The documents in issue were in the personal possession of individual members of the Judicial Appointments Advisory Committee. The Assistant Information and Privacy Commissioner determined that the documents were records under the control of the Ministry of the Attorney General for the purposes of s. 10(1) of the Freedom of

Information and Protection of Privacy Act. The Divisional Court dismissed an application to quash that decision. The Attorney General and the Chair of the committee appealed.

Held, the appeal should be allowed.

The decision of the assistant commissioner was to be reviewed on the standard of correctness.

The assistant commissioner erred in concluding that the committee could be said to be a part of the Ministry. Individual members of the committee were not employees of the Ministry. Even if they were in some respects agents of the Ministry, that was not enough to make them part of the Ministry.

The documents in the possession and control of individual committee members were not also under the control of the Ministry. The assistant commissioner erred in determining that they were on the basis of the Ministry's authority over the documents under the right to privacy part of the Act, since that authority would itself arise only if the documents were indeed under the control of the Ministry. Individual members were neither employees nor officers of the Ministry. The Ministry had no statutory or contractual right to dictate to the committee or its individual members what documents they could create, use or maintain or what use to make of the documents they did possess. The Ministry had no statutory or contractual basis upon which to assert the right to possess or dispose of these documents, nor was there any basis for a finding that the Ministry had a property right in them. While there may have been elements of agency in the relationship between individual committee members and the Ministry, nothing suggested that that agency carried with it the right of the Ministry to control the documents. Finally, there was nothing to indicate that the documents were in fact controlled by the Ministry.

Cases referred to

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Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385, 168 N.R. 321, 92 B.C.L.R. (2d) 145, 14 B.C.L.R. (2d) 217

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 42
Courts of Justice Amendment Act, 1994, S.O. 1994, c. 27, s. 43
Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 1, 2(1) "institution", "record", 10(1)

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APPEAL from a judgment of the Divisional Court dismissing an application to quash a decision of the Assistant Information and Privacy Commissioner.

David W. Stratas and Penelope S. Bonner, for appellant/ respondent, Associate Chief Judge Robert Walmsley.
Leslie M. McIntosh, for respondent/appellant, Attorney General of Ontario.
Mary C. O'Donoghue and William S. Challis, for respondent, Irwin Glasberg, Assistant Information and Privacy Commissioner.

The judgment of the court was delivered by

GOUDGE J.A.: -- Both the Attorney General of Ontario and the Honourable Associate Chief Judge Walmsley appeal from the judgment of the Divisional Court released March 27, 1996 which dismissed the Attorney General's application to quash the order of Assistant Information and Privacy Commissioner Glasberg dated June 16, 1994. The Assistant Commissioner found that, for the purposes of s. 10(1) of the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 (the "Act"), the Ministry of the Attorney General had control over the records in the hands of the Chair, Judge Walmsley, and the individual members of the Judicial Appointments Advisory Committee (the "committee"). He ordered the Ministry to obtain from these members copies of all documents relating to the selection of a certain individual to the position of judge of the Ontario Court (Provincial Division).

For the reasons that follow, I have concluded that the assistant commissioner erred in his finding, that the appeal should be allowed, and his order quashed.

The Legislation

Broadly speaking, the Act provides a scheme for controlled access to records in the hands of the Provincial Government and a parallel scheme for the regulated protection of privacy of those whose personal information is documented in those records. The purposes of the Act are set out in s. 1 as follows:

1. The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

The important definitions for this case are found in s. 2 as follows:

2(1) In this Act,

. . . . .

"institution" means,

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(a) a ministry of the Government of Ontario, and

(b) any agency, board, commission, corporation or other body designated as an institution in the regulations;

. . . . .

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

(a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution . . .

The critical section for this appeal is s. 10(1). It reads as follows:

PART II

FREEDOM OF INFORMATION

ACCESS TO RECORDS

10(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.

The process for exercising this right of access begins with a

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request to the head of the institution who must first determine if the records sought fall within the access scheme of the Act. Then the Act provides a number of bases upon which the head may refuse access to those records that come within s. 10(1). The requester is entitled to appeal any decision of the head to the Commissioner or his designee, in this case the assistant commissioner.

Part III of the Act is entitled "Protection of Individual Privacy". While not central to this appeal, it can be noted that this part contains the parallel scheme for retaining and storing personal information and regulating its use where such information is in the control of an institution.

The Factual Background

This matter began with a request made by the respondent Jane Doe for access to certain records relating to the appointment of a specific individual as a judge of the Ontario Court (Provincial Division). By the time the matter reached the assistant commissioner, the only records in issue were the documents in the personal possession of individual members of the committee, including Judge Walmsley.

Judges of the Ontario Court (Provincial Division) are appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General, pursuant to s. 42 of the Courts of Justice Act, R.S.O. 1990, c. C.43.

The committee was set up in December 1988 by the Attorney General of the day, Ian Scott. Attorney General Scott described its purpose and mandate to the legislature as follows:

> The lay-dominated advisory committee will do a great deal to remove any unwarranted criticism of political bias or patronage in appointments to the judiciary while enhancing community and public involvement and reinforcing confidence in the judiciary and the justice system. Such a committee, with a broad base of representation from across the province, will ensure that the justice system reflects the needs, the values and the attitudes of the community as a whole.

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> The Advisory Committee on Judicial Appointments will have the following mandate: First, to develop and recommend comprehensive, sound and useful criteria for selection of appointments to the judiciary, ensuring that the best candidates are considered; and second, to interview applicants selected by it or referred to it by the Attorney General and make recommendations. ([1988] Ont. Leg. Debates 6835)

In its Final Report dated June 1992, the committee described its role this way at p. 20:

> The committee is a true nominating committee. It is a completely independent body with a mandate to select, interview and recommend to the Attorney General suitable candidates for judicial appointment.

At the time relevant to this case the committee had no statutory or regulatory foundation. [See Note 1 at end of document.] Its members, two judges, four lawyers and four laypersons had never been employees of the Ministry or of the Government of Ontario. Nor were they appointed to the committee by order-in-council. They received no salary but only a per diem honorarium paid out of Ministry funds. The Ministry also paid for travel and other expenses and provided an administrative officer to co-ordinate administrative support for the committee and act as liaison between committee members and Ministry personnel in order to maintain an arm's length relationship between the two groups. There was no contract or memorandum of understanding codifying the relationship between the Ministry and the committee or its individual members.

The application form filled out by persons interested in judicial appointment conveyed much information to the committee. It did not refer to the Attorney General nor suggest that the Attorney General played any role in the consideration of the application by the committee. The committee members made all the inquiries concerning applicants (except for an inquiry to the Law Society of Upper Canada which was made by the administrative officer). The consideration of the candidates

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was done entirely by the committee members. The Attorney General was not involved in any discussions or decisions by committee members regarding candidates to be recommended for consideration by the Attorney General.

The Decisions Below

In determining whether the documents in the possession of individual committee members were records "in the custody or under the control of" the Ministry for the purposes of s. 10(1) of the Act, the assistant commissioner addressed two questions. He first determined that the committee must be considered a part of the Ministry rather than a completely distinct advisory body. He did so on the basis that the work of the committee was so closely connected to the activities of the Ministry that it could be said to be a part of the Ministry.

The assistant commissioner then went on to determine that the documents in the possession of individual committee members fell under the control of the "Committee/Ministry" for the purposes of the Act. He relied for this conclusion primarily on the documents being held by members because of their role on the committee, the relevance of these documents to the function of both the committee and the Ministry, the likely reliance on these documents in deciding appointments, and the conclusion that the Ministry had the authority under the Act to regulate the use, disclosure and destruction of the personal information in the documents.

The assistant commissioner made clear that his decision that these documents came within s. 10(1) of the Act left open the applicability of the various criteria in the Act on the basis of which access could be denied by the Ministry to records under its control. He then ordered the Ministry to obtain copies of the documents from the individual committee members and provide the requester with its decision concerning access.

The Divisional Court dismissed the application for judicial review of this decision. Using the standard of review of correctness it determined that the documents acquired by individual committee members were acquired by them as agents of

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the Attorney General. The court said that the documents, being under the control of his agents, were, in law, under the control of the Attorney General. It then agreed with the two conclusions of the assistant commissioner and refused the application.

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Analysis

There are two issues presented by this appeal. First, what is the appropriate standard of review to be applied to the decision of the assistant commissioner? Second, on that appropriate standard, can the documents in the possession of individual committee members be said to be in the custody or under the control of the Ministry pursuant to s. 10(1) of the Act?

The Standard of Review

Against a backdrop that accords a growing recognition to the specialized expertise of an increasing variety of administrative tribunals, and hence a general attitude of reasonable deference to their decisions, the courts have developed a flexible approach to determining the appropriate standard of review. In Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557 at p. 590, 114 D.L.R. (4th) 385, Iacobucci J., speaking for the full court, put it this way:

> Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. . . .

> At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights.

In my opinion, the circumstances of this case require that the decision of the assistant commissioner be reviewed using the standard of correctness. The issue before the assistant commissioner was whether the documents in question were under the control of the Ministry. In other words, does s. 10(1) of the Act stretch to these records? That section is a jurisdiction-limiting one in the sense that records under the control of an institution are subject to the workings of the Act, both as to access and as to protection of privacy. Records not under the control of an institution are not so subject and are beyond the jurisdiction of the commissioner or his designee. Moreover, the test found in s. 10(1), namely, "custody or control", is not one requiring a specialized expertise to interpret. By contrast, once records are found to be in the control of the institution, the applicability of the many legislated exemptions would clearly call on the particular expertise of the commissioner. Finally, the legislation has not seen fit to clothe the commissioner with the protection of any privative clause. Hence, using a pragmatic and functional approach, I conclude that the legislature did not intend the decision in issue here to be considered one within jurisdiction. Rather, it is one to be reviewed on the standard of correctness.

Was the Decision of the Assistant Commissioner Correct?

The assistant commissioner found that s. 10(1) of the Act extended to the documents in the possession of individual members of the committee, as being records under the control of the Ministry. It was not argued (nor could it be argued) that these records were thereby in the custody of the Ministry.

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The finding of control was based in part on the conclusion that the committee could be said to be a part of the Ministry. With respect, I disagree. Individual committee members were not employees of the Ministry. Even if they were in some respects agents of the Ministry, that is not enough to make them part of the Ministry. If it were, any agency of a ministry would automatically be subject to the Act and s. 2(1)(b), designating specified agencies to come within the Act, would be superfluous. Nor could the nature of the work of the committee have made its members part of the Ministry. Nothing in the definition in s. 2(1)(a) suggests this. Nor would the legislature have intended that simply by giving independent advice to the Attorney General individuals would be subjected to the access provisions and recordkeeping obligations of the Act. Hence, in my view, the records in question could not be said to have come within s. 10(1) on the basis that individual committee members were part of the Ministry. They were not.

The question that remains is whether the documents in the possession and control of individual committee members were also under the control of the Ministry. In my opinion, the assistant commissioner was in error to base his answer in part on the Ministry's authority over the same documents under the right to privacy part of the Act, since that authority would itself arise only if the documents were indeed under the control of the Ministry. Rather, in light of the purposes of the Act, the answer properly depends on an examination of all aspects of the relationship between committee members and the Ministry that are relevant to control over the documents.

It is true, as the assistant commissioner said, that the documents in question were held by these individuals because of their role on the committee and that the contents of the documents related to the work of the Ministry. While these factors are of some limited relevance to the question of Ministry control, much more important are the following considerations. Individual committee members were neither employees nor officers of the Ministry. They constituted a committee that was set up to provide recommendations that were arrived at independently and at arm's length from the Ministry.

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The Ministry had no statutory or contractual right to dictate to the committee or its individual members what documents they should create, use or maintain or what use to make of the documents they do possess. The Ministry had no statutory or contractual basis upon which to assert the right to possess or dispose of these documents, nor was there any basis for finding that the Ministry had a property right in them. While there may have been elements of agency in the relationship between individual committee members and the Ministry, nothing suggests that that agency carried with it the right of the Ministry to control these documents. Finally, there is nothing in the record that allows the conclusion that these documents were in fact controlled by the Ministry. Hence, it cannot be said that the documents in the possession of individual committee members were under the control of the Ministry. In my opinion, the assistant commissioner was wrong in so deciding.

I would therefore allow the appeals and quash the decision of the assistant commissioner with costs here and in the Divisional Court.

Appeals allowed.

Notes

Note 1: The Courts of Justice Amendment Act, 1994, S.O. 1994, c. 27, s. 43 established the Judicial Appointments Advisory Committee as a creature of statute.

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Important Information
(Includes details about the availability of printed and electronic versions of the Statutes.)

Table of Public Statutes **Main Site** **How current is this statute?**

Responsible Department

SNL2015 CHAPTER A-1.2

ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT, 2015

Amended:

2016 c6 s2; 2016 cR-15.2 s30; 2017 c10 s3; 10/18 s2; 2018 c4 s1;
2018 cI-7.1 s24; 2018 cC-12.3 s112; 2019 cO-6.1 s49;
2019 cP-44.01 s30; 2021 c4; 2021 cA-4.02 s40; 2021 cA-22.1 s41;
2022 c15; 2022 cP-30.1 s38; 2022 cW-11.1 s153; 2023 c16; 2023 c18 s38

CHAPTER A-1.2

AN ACT TO PROVIDE THE PUBLIC WITH ACCESS TO INFORMATION AND PROTECTION OF PRIVACY

(Assented to June 1, 2015)

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134. SNL2005 cR-15.1 Amdt.

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Schedule A

Schedule B

Be it enacted by the Lieutenant-Governor and House of Assembly in Legislative Session convened, as follows:

Short title

1. This Act may be cited as the *Access to Information and Protection of Privacy Act, 2015* .

2015 cA-1.2 s1

PART I
INTERPRETATION

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Definitions

2. In this Act

(a) "applicant" means a person who makes a request under section 11 for access to a record, including a record containing personal information about the person, or for correction of personal information;

(b) "business day" means a day that is not a Saturday, Sunday or a holiday;

(c) "Cabinet" means the executive council appointed under the *Executive Council Act* , and includes a committee of the executive council;

(d) "commissioner" means the Information and Privacy Commissioner appointed under section 85 ;

(e) "complaint" means a complaint filed under section 42 ;

(f) "coordinator" means the person designated by the head of the public body as coordinator under subsection 110 (1);

(g) "dataset" means information comprising a collection of information held in electronic form where all or most of the information in the collection

(i) has been obtained or recorded for the purpose of providing a public body with information in connection with the provision of a service by the public body or the carrying out of another function of the public body,

(ii) is factual information

(A) which is not the product of analysis or interpretation other than calculation, and

(B) to which section 13 of the *Statistics Agency Act* does not apply, and

(iii) remains presented in a way that, except for the purpose of forming part of the collection, has not been organized, adapted or otherwise materially altered since it was obtained or recorded;

(h) "educational body" means

(i) Memorial University of Newfoundland ,

(ii) College of the North Atlantic ,

(iii) Centre for Nursing Studies,

(iv) Western Regional School of Nursing,

(v) a school board, school district constituted or established under the *Schools Act, 1997,* including the conseil scolaire francophone, and

(vi) a body designated as an educational body in the regulations made under section 116 ;

(i) "employee", in relation to a public body, includes a person retained under a contract to perform services for the public body;

(j) "head", in relation to a public body, means

(i) in the case of a department, the minister who presides over it,

(ii) in the case of a corporation, its chief executive officer,

(iii) in the case of an unincorporated body, the minister appointed under the *Executive Council Act* to administer the Act under which the body is established, or the minister who is otherwise responsible for the body,

(iv) in the case of the House of Assembly the Speaker and in the case of the statutory offices as defined in the *House of Assembly Accountability, Integrity and Administration Act,* the applicable officer of each statutory office, or

(v) in another case, the person or group of persons designated under section 109 or in the regulations as the head of the public body;

(k) "health care body" means

(i) the authority as defined in the *Provincial Health Authority Act* ,

(ii) the Mental Health Care and Treatment Review Board,

(iii) [Rep. by 2022 cP-30.1 s38]

(iv) a body designated as a health care body in the regulations made under section 116 ;

(l) "House of Assembly Management Commission" means the commission continued under section 18 of the *House of Assembly Accountability, Integrity and Administration Act* ;

(m) "judicial administration record" means a record containing information relating to a judge, master or justice of the peace, including information respecting

(i) the scheduling of judges, hearings and trials,

(ii) the content of judicial training programs,

(iii) statistics of judicial activity prepared by or for a judge,

(iv) a judicial directive, and

(v) a record of the Complaints Review Committee or an adjudication tribunal established under the *Provincial Court Act, 1991* ;

(n) "law enforcement" means

(i) policing, including criminal intelligence operations, or

(ii) investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment;

(o) "local government body" means

(i) the City of Corner Brook ,

(ii) the City of Mount Pearl ,

(iii) the City of St. John's ,

(iv) a municipality as defined in the *Municipalities Act, 1999* , and

(v) a body designated as a local government body in the regulations made under section 116 ;

(p) "local public body" means

(i) an educational body,

(ii) a health care body, and

(iii) a local government body;

(q) "minister" means a member of the executive council appointed under the *Executive Council Act* ;

(r) "minister responsible for this Act" means the minister appointed under the *Executive Council Act* to administer this Act;

(s) "officer of the House of Assembly" means the Speaker of the House of Assembly, the Clerk of the House of Assembly, the Chief Electoral Officer, the Auditor General of Newfoundland and Labrador, the Commissioner for Legislative Standards, the Citizens' Representative, the Child and Youth Advocate, the Seniors' Advocate and the Information and Privacy Commissioner, and a position designated to be an officer of the House of Assembly by the Act creating the position;

(t) "person" includes an individual, corporation, partnership, association, organization or other entity;

(u) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, address or telephone number,

(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,

(iii) the individual's age, sex, sexual orientation, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, blood type or inheritable characteristics,

(vi) information about the individual's health care status or history, including a physical or mental disability,

(vii) information about the individual's educational, financial, criminal or employment status or history,

(viii) the opinions of a person about the individual, and

(ix) the individual's personal views or opinions, except where they are about someone else;

(v) "privacy complaint" means a privacy complaint filed under subsection 73 (1) or (2) or an investigation initiated on the commissioner's own motion under subsection 73 (3);

(w) "privacy impact assessment" means an assessment that is conducted by a public body as defined under subparagraph (x)(i) to determine if a current or proposed program or service meets or will meet the requirements of Part III of this Act;

(x) "public body" means

(i) a department created under the *Executive Council Act* , or a branch of the executive government of the province,

(ii) a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown,

(iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister,

(iv) a local public body,

(v) the House of Assembly and statutory offices, as defined in the *House of Assembly Accountability, Integrity and Administration Ac* t, and

(vi) a corporation or other entity owned by or created by or for a local government body or group of local government bodies, which has as its primary purpose the management of a local government asset or the discharge of a local government responsibility,

and includes a body designated for this purpose in the regulations made under section 116 , but does not include

(vii) the constituency office of a member of the House of Assembly wherever located,

(viii) the Court of Appeal, the Trial Division, or the Provincial Court , or

(ix) a body listed in Schedule B;

(y) "record" means a record of information in any form, and includes a dataset, information that is machine readable, written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;

(z) "remuneration" includes salary, wages, overtime pay, bonuses, allowances, honorariums, severance pay, and the aggregate of the contributions of a public body to pension, insurance, health and other benefit plans;

(aa) "request" means a request made under section 11 for access to a record, including a record containing personal information about the applicant, or correction of personal information, unless the context indicates otherwise;

(bb) "Schedule B" means the schedule of bodies excluded from the definition of public body; and

(cc) "third party", in relation to a request for access to a record or for correction of personal information, means a person or group of persons other than

(i) the person who made the request, or

(ii) a public body.

2015 cA-1.2 s2; 2017 c10 s3; 2022 cP-30.1 s38

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Purpose

3. (1) The purpose of this Act is to facilitate democracy through

(a) ensuring that citizens have the information required to participate meaningfully in the democratic process;

(b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and

(c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

(2) The purpose is to be achieved by

(a) giving the public a right of access to records;

(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;

(c) specifying the limited exceptions to the rights of access and correction that are necessary to

(i) preserve the ability of government to function efficiently as a cabinet government in a parliamentary democracy,

(ii) accommodate established and accepted rights and privileges of others, and

(iii) protect from harm the confidential proprietary and other rights of third parties;

(d) providing that some discretionary exceptions will not apply where it is clearly demonstrated that the public interest in disclosure outweighs the reason for the exception;

(e) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and

(f) providing for an oversight agency that

(i) is an advocate for access to information and protection of privacy,

(ii) facilitates timely and user friendly application of this Act,

(iii) provides independent review of decisions made by public bodies under this Act,

(iv) provides independent investigation of privacy complaints,

(v) makes recommendations to government and to public bodies as to actions they might take to better achieve the objectives of this Act, and

(vi) educates the public and public bodies on all aspects of this Act.

(3) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.

2015 cA-1.2 s3

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Schedule of excluded public bodies

4. When the House of Assembly is not in session, the Lieutenant-Governor in Council, on the recommendation of the House of Assembly Management Commission, may by order amend Schedule B, but the order shall not continue in force beyond the end of the next sitting of the House of Assembly.

2015 cA-1.2 s4

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Application

5. (1) This Act applies to all records in the custody of or under the control of a public body but does not apply to

(a) a record in a court file, a record of a judge of the Court of Appeal, Trial Division, or Provincial Court, a judicial administration record or a record relating to support services provided to the judges of those courts;

(b) a note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity;

(c) a personal or constituency record of a member of the House of Assembly, that is in the possession or control of the member;

(d) records of a registered political party or caucus as defined in the *House of Assembly Accountability, Integrity and Administration Act;*

(e) a personal or constituency record of a minister;

(f) a record of a question that is to be used on an examination or test;

(g) a record containing teaching materials or research information of an employee of a post-secondary educational institution;

(h) material placed in the custody of The Rooms Corporation of Newfoundland and Labrador by or for a person other than a public body;

(i) material placed in the archives of a public body by or for a person other than the public body;

(j) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

(k) a record relating to an investigation by the Royal Newfoundland Constabulary if all matters in respect of the investigation have not been completed;

(l) a record relating to an investigation by the Royal Newfoundland Constabulary that would reveal the identity of a confidential source of information or reveal information provided by that source with respect to a law enforcement matter; or

(m) a record relating to an investigation by the Royal Newfoundland Constabulary in which suspicion of guilt of an identified person is expressed but no charge was ever laid, or relating to prosecutorial consideration of that investigation.

(2) This Act

(a) is in addition to existing procedures for access to records or information normally available to the public, including a requirement to pay fees;

(b) does not prohibit the transfer, storage or destruction of a record in accordance with an Act of the province or Canada or a by-law or resolution of a local public body;

(c) does not limit the information otherwise available by law to a party in a legal proceeding; and

(d) does not affect the power of a court or tribunal to compel a witness to testify or to compel the production of a document.

2015 cA-1.2 s5; 2016 cR-15.2 s30

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Relationship to Personal Health Information Act

6. (1) Notwithstanding section 5 , but except as provided in sections 92 to 94 , this Act and the regulations shall not apply and the *Personal Health Information Act* and regulations under that Act shall apply where

(a) a public body is a custodian; and

(b) the information or record that is in the custody or control of a public body that is a custodian is personal health information.

(2) For the purpose of this section, "custodian" and "personal health information" have the meanings ascribed to them in the *Personal Health Information Act* .

2015 cA-1.2 s6

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Conflict with other Acts

7. (1) Where there is a conflict between this Act or a regulation made under this Act and another Act or regulation enacted before or after the coming into force of this Act, this Act or the regulation made under it shall prevail.

(2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in Schedule A, that provision shall prevail over this Act or a regulation made under it.

(3) When the House of Assembly is not in session, the Lieutenant-Governor in Council may by order amend Schedule A, but the order shall not continue in force beyond the end of the next sitting of the House of Assembly.

2015 cA-1.2 s7

PART II
ACCESS AND CORRECTION

DIVISION 1
THE REQUEST

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Right of access

8. (1) A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.

(3) The right of access to a record may be subject to the payment, under section 25 , of the costs of reproduction, shipping and locating a record.

2015 cA-1.2 s8

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Public interest

9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

(2) Subsection (1) applies to the following sections:

(a) section 28 (local public body confidences);

(b) section 29 (policy advice or recommendations);

(c) subsection 30 (1) (legal advice);

(d) section 32 (confidential evaluations);

(e) section 34 (disclosure harmful to intergovernmental relations or negotiations);

(f) section 35 (disclosure harmful to the financial or economic interests of a public body);

(g) section 36 (disclosure harmful to conservation); and

(h) section 38 (disclosure harmful to labour relations interests of public body as employer).

(3) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

(4) Subsection (3) applies notwithstanding a provision of this Act.

(5) Before disclosing information under subsection (3), the head of a public body shall, where practicable, give notice of disclosure in the form appropriate in the circumstances to a third party to whom the information relates.

2015 cA-1.2 s9

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Right to request correction of personal information

10. (1) An individual who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.

(2) A cost shall not be charged for a request for correction of personal information or for a service in response to that request.

2015 cA-1.2 s10

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Making a request

11. (1) A person may access a record or seek a correction of personal information by making a request to the public body that the person believes has custody or control of the record or personal information.

(2) A request shall

(a) be in the form set by the minister responsible for this Act;

(b) provide sufficient details about the information requested so that an employee familiar with the records of the public body can identify and locate the record containing the information with reasonable efforts; and

(c) indicate how and in what form the applicant would prefer to access the record.

(3) An applicant may make an oral request for access to a record or correction of personal information where the applicant

(a) has a limited ability to read or write English; or

(b) has a disability or condition that impairs his or her ability to make a request.

(4) A request under subsection (2) may be transmitted by electronic means.

2015 cA-1.2 s11

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Anonymity

12. (1) The head of a public body shall ensure that the name and type of the applicant is disclosed only to the individual who receives the request on behalf of the public body, the coordinator, the coordinator's assistant and, where necessary, the commissioner.

(2) Subsection (1) does not apply to a request

(a) respecting personal information about the applicant; or

(b) where the name of the applicant is necessary to respond to the request and the applicant has consented to its disclosure.

(3) The disclosure of an applicant's name in a request referred to in subsection (2) shall be limited to the extent necessary to respond to the request.

(4) The limitation on disclosure under subsection (1) applies until the final response to the request is sent to the applicant.

2015 cA-1.2 s12

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Duty to assist applicant

13. (1) The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

(2) The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.

2015 cA-1.2 s13

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Transferring a request

14. (1) The head of a public body may, upon notifying the applicant in writing, transfer a request to another public body not later than 5 business days after receiving it, where it appears that

(a) the record was produced by or for the other public body; or

(b) the record or personal information is in the custody of or under the control of the other public body.

(2) The head of the public body to which a request is transferred shall respond to the request, and the provisions of this Act shall apply, as if the applicant had originally made the request to and it was received by that public body on the date it was transferred to that public body.

2015 cA-1.2 s14

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Advisory response

15. (1) The head of a public body shall, not more than 10 business days after receiving a request, provide an advisory response in writing to

(a) advise the applicant as to what will be the final response where

Tab 22

CANADA

CONSOLIDATION

CODIFICATION

Canada Not-for-profit Corporations Act

Loi canadienne sur les organisations à but non lucratif

S.C. 2009, c. 23

L.C. 2009, ch. 23

Current to June 20, 2024

Last amended on August 31, 2022

À jour au 20 juin 2024

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(7) Members that are party to a unanimous member agreement may not vote in accordance with section 171 when exercising the authority delegated to them under the agreement.

Termination

(8) If the unanimous member agreement does not provide for its termination, the members may terminate the agreement by a special resolution.

Absentee voting

171 (1) The by-laws of a corporation may provide for any prescribed methods of voting by members not in attendance at a meeting of members. If the by-laws so provide, they shall set out procedures for collecting, counting and reporting the results of any vote.

Application for authorization

(2) On application of the corporation, the Director may authorize the corporation, on any terms that the Director thinks fit, to permit members to vote by any method if the Director reasonably believes that the members and the corporation will not be prejudiced.

PART 11

Financial Disclosure

Annual financial statements

172 (1) The directors of a corporation shall place before the members at every annual meeting

(a) prescribed comparative financial statements that conform to any prescribed requirements and relate separately to

(i) the period that began on the date the corporation came into existence and ended not more than six months before the annual meeting or, if the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than six months before the annual meeting, and

(ii) the immediately preceding financial year;

(b) the report of the public accountant, if any; and

(c) any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous member agreement.

Exception

(2) Despite paragraph (1)(a), the financial statements referred to in subparagraph (1)(a)(ii) may be omitted if the reason for the omission is set out in the financial statements, or in a note to those statements, to be placed before the members at an annual meeting.

Tab 23

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Important Information
(Includes details about the availability of printed and electronic versions of the Statutes.)

Table of Public Statutes **Main Site** **How current is this statute?**

Responsible Department

RSNL1990 CHAPTER C-36

CORPORATIONS ACT

Amended:

1992 c54 s3 (Rep. before being proclaimed); 1993 c53 s4; 1994 c28 s4; 1996 cR-10.1 s20; 1996 cJ-1.1 s192;
1997 c13 s11; 2001 cN-3.1 s2; 2004 c14; 2007 cS-13.01 s107;
2007 cT-9.1 s5; 2010 c31 s6; 2018 c21 s1; 2020 c29; 2021 c26

CHAPTER C-36

AN ACT TO REVISE AND REFORM THE LAW RESPECTING CORPORATIONS

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1. Short title
2. Definitions
3. Purposes of Act
4. Application of Act
5. Certain societies exempt from Act
6. Prohibited associations
7. Affiliated corporations
8. Control of a body corporate
9. Holding and subsidiary bodies corporate
10. Distribution to the public

PART I
INCORPORATION

11. Power to incorporate
12. Articles of incorporation
13. Special majorities
14. Delivery of articles
15. Certificate of incorporation

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Restraining order

257. (1) Where a form of proxy, management proxy circular or dissident's proxy circular contains an untrue statement of a material fact or omits to state a material fact required in it or necessary to make a statement contained in it not misleading in the light of the circumstances in which it was made, an interested person or the registrar may apply to a court.

(2) On an application under this section the court may make an order it thinks appropriate including

(a) an order restraining the solicitation, the holding of the meeting, or a person from implementing or acting upon a resolution passed at the meeting to which the form of proxy, management proxy circular or dissident's proxy circular relates;

(b) an order requiring correction and a form of proxy or proxy circular and a further solicitation; or

(c) an order adjourning the meeting.

(3) An applicant under this section shall give to the registrar notice of the application and the registrar is entitled to appear and to be heard in person or by counsel.

PART XIII
FINANCIAL DISCLOSURE

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Annual financial statements

258. (1) The directors of a corporation shall place before the shareholders at an annual meeting

(a) comparative financial statements, as prescribed, relating separately to

(i) the period that began on the date the corporation came into existence and ended not more than 6 months before the annual meeting or, where the corporation has completed a financial year, the period that began immediately after the end of the last completed financial year and ended not more than 6 months before the annual meeting, and

(ii) the immediately preceding financial year;

(b) the report of the auditor; and

(c) further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or a unanimous shareholder agreement.

(2) Notwithstanding paragraph (1)(a), the financial statements referred to in subparagraph (1)(a)(ii) may be omitted where the reason for the omission is set out in the financial statements, or in a note to it, to be placed before the shareholders at an annual meeting.

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Exemption

259. Notwithstanding subsection 258(1), upon the application of a corporation for authorization to omit from its financial statements an item prescribed, or to dispense with the publication of a particular financial statement prescribed, the registrar may, where the registrar reasonably believes that disclosure of the information contained in it would be detrimental to the corporation, permit its omission on those reasonable conditions that the registrar thinks appropriate.

1986 c12 s255

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Consolidated statements

260. (1) A corporation shall keep at its registered office a copy of the financial statements of each of its subsidiary bodies corporate and of each body corporate the accounts of which are consolidated in the financial statements of the corporation.

(2) Shareholders of a corporation and their agents and legal representatives may upon request for them examine the statements referred to in subsection (1) during the usual business hours of the corporation and may make extracts from them free of charge.

(3) A corporation may, within 15 days of a request to examine statements under subsection (2), apply to a court for an order barring the right of a person to examine those statements; and the court may, where it is satisfied that the examination would be detrimental to the corporation or a subsidiary body corporate, bar the right and make a further order it thinks appropriate.

(4) A corporation shall give the registrar and the person asking to examine statements under subsection (2) notice of application under subsection (3); and the registrar and that person may appear and be heard in person or by counsel.

1986 c12 s256; 1987 c38 Sch A

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Approval of financial statements

261. (1) The directors of a corporation shall approve the financial statements referred to in section 258 and the approval shall be evidenced by the signature of 1 or more directors.

(2) A corporation shall not issue, publish or circulate copies of the financial statements referred to in section 258 unless the financial statements are

(a) approved and signed in accordance with subsection (1); and

(b) accompanied by a report of the auditor of the corporation.

1986 c12 s257

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Copies to shareholders

262. A corporation shall, not less than 21 days before each annual meeting of shareholders or before the signing of a resolution under paragraph 240(1)(b) instead of the annual meeting, send a copy of the documents referred to in section 258 to each shareholder except a shareholder who has informed the corporation in writing that he or she does not want a copy of those documents.

1986 c12 s258

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Important Information
(Includes details about the availability of printed and electronic versions of the Statutes.)

Table of Public Statutes **Main Site** **How current is this statute?**

Responsible Department

RSNL1990 CHAPTER I-19

INTERPRETATION ACT

Amended:

1992 c48 s16; 1994 c28 s11; 1999 c22 s14; 2001 cN-3.1 s2;
2009 cR-10.01 s42; 2010 c30 s4; 2013 c16 s25; 2019 c8 s15;
2019 c11 s1

CHAPTER I-19

AN ACT RESPECTING THE INTERPRETATION OF STATUTES

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5. Acts to be considered public
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7. Date of operation
8. Powers before commencement
9. Continuing Act
10. Law always speaking
11. Interpretation of certain words
12. Binding of Crown
13. Private Acts
14. Preamble
15. Marginal notes and headings
16. Rule of construction
17. Words in regulations
18. Proclamations

(2) The word "shall" shall be construed as imperative and the word "may" as permissive and empowering.

RSN1970 c182 s12

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Binding of Crown

12. No provision in an Act is binding on the Crown or affects the Crown or the Crown's rights or prerogatives unless it is expressly stated in it that the Crown is bound by it.

RSN1970 c182 s13

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Private Acts

13. Where an Act is of the nature of a private Act no provision of the Act affects the rights of a person save only as mentioned or referred to in the Act.

RSN1970 c182 s14

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Preamble

14. The preamble of an Act shall be considered a part of the Act intended to assist in explaining the purport and object of the Act.

RSN1970 c182 s15

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Marginal notes and headings

15. The marginal notes and headings in the body of an Act and the reference to former enactments do not form part of the Act and shall be considered to be inserted for convenience of reference only.

RSN1970 c182 s16

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Rule of construction

16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.

RSN1970 c182 s17

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Words in regulations

17. Where an Act confers power to make regulations or to grant, make, or issue an order in council, proclamation, order, writ, warrant, scheme, or letters patent, expressions used in them have the same respective meanings as in the Act conferring the power.

RSN1970 c182 s18

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Table of Public Statutes **Main Site** **How current is this statute?**

Responsible Department

RSNL1990 CHAPTER M-7

MEMORIAL UNIVERSITY ACT

Amended:

1991 c38; RSN 1990 cD-5 s9; 1993 c13; 1994 c28 s18;
1995 cP-31.1 s53; 1996 cS-12.1 s112; 1997 c13 s42; 1998 c6 s7;
2004 c32 ss2&3; 2006 cC-37.001 s14; 2018 cR-14.2 s59;
2021 cA-22.1 s47; 2023 c13; 2024 c10

CHAPTER M-7

AN ACT RESPECTING THE MEMORIAL UNIVERSITY OF NEWFOUNDLAND

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17. Elective officers of convocation

58. Restriction on power of senate

59. Affiliated institutions

60. Outside affiliation prohibited

61. Internal management

62. No restriction on religious education

63. Financial year

64. Restriction on compulsory religious examinations

65. Prohibition against use of university name, etc.

66. No duty charge

67. Institute of Fisheries & Marine Technology

68. Advisory committee

69. Newfoundland and Labrador Resident

70. Regulations

Short title

1. This Act may be cited as the *Memorial University Act.*

RSN1970 c231 s1

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Definitions

2. In this Act, unless the context otherwise requires

(a) "board" means the Board of Regents of the university;

(b) "college" means a college affiliated with Memorial University ; and

(c) "university" means the Memorial University of Newfoundland.

RSN1970 c231 s2; 1996 cS-12.1 s112

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The Memorial University of Newfoundland

3. (1) The Memorial University of Newfoundland, consisting of a Chancellor, Convocation, Board of Regents, Senate, faculty councils and the faculties, is continued as a corporation.

(2) Another university having corporate powers capable of being exercised within the province shall not be known by the same name.

(3) The university shall have full power and authority to establish and maintain those faculties, colleges, schools, institutions, departments, chairs and courses that may seem appropriate to the board, and

(a) to give instructions and training in all branches of knowledge and learning, including physical instruction and training;

(b) to grant degrees, including honorary degrees, diplomas and certificates of proficiency;

(c) to provide facilities for the prosecution of original research in every branch of knowledge and learning and to conduct and carry on that research work; and

(d) generally, to promote and carry on the work of a university in all its branches.

RSN1970 c231 s3; 1990 cD-5 s9; 1998 c6 s7

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Property

4. (1) The university may acquire, by gift, purchase, or another manner, and hold, for the purposes of the university, all property, real and personal, of every kind; and, subject to the approval of the Lieutenant-Governor in Council and to the terms of a grant, conveyance, gift, devise, or bequest of property to the university, shall have power to mortgage, sell, transfer, lease for not more than 99 years, or otherwise dispose of all its property, real or personal, and to make and execute all necessary and proper conveyances, transfers, or leases in order to do so.

(2) Subject to the approval of the Lieutenant-Governor in Council, the university may erect and construct all buildings that the board considers necessary or convenient for the purpose of the university, to lay out grounds for university purposes, to maintain and keep in proper order and condition, and to alter, repair, renovate and improve all grounds and all university buildings, with their appurtenances; and to spend the money required for these purposes, and for the furnishing and equipping of university buildings.

RSN1970 c231 s4

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Investments

5. (1) Subject to the terms of a trust relating to a donation and to the express terms of a donor making a donation , the university may convert trust property held by the university and may invest or reinvest the proceeds of that conversion, other trust money, money belonging to the university and available for investment and other property and rights of the university in

(a) bonds or debentures of a municipality in Canada or a public school corporation or other corporation, which are guaranteed by the Government of Canada or a province;

(b) investments in which life insurance companies are authorized by the Parliament of Canada to invest funds, subject to the limitation on investments in stocks, bonds, debentures and real estate mortgage as set out in the *Insurance Companies Act* (Canada);

(c) other securities on terms and conditions that are approved for the purpose by the Lieutenant-Governor in Council; or

(d) securities or investments referred to in paragraphs (a), (b) and (c).

(2) Nothing in this section prevents the university from holding a type of bond, debenture, stock, share or other investment donated or bequeathed to it or from carrying out the terms of a deed of trust.

RSN1970 c231 s5; 1994 c28 s18

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Property taken as security

6. The university shall have power to acquire, take, and hold all property, both real and personal, as shall in good faith be mortgaged, hypothecated, or pledged to it by security, or foreclosed, or conveyed to it in satisfaction of debts previously contracted, or purchased at judicial sales upon levy for indebtedness, for the purpose of avoiding a loss to the university in respect of that indebtedness.

RSN1970 c231 s6

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Specific powers of board

34. (1) The board shall have the following powers

(a) to make rules and regulations concerning the meetings of the board and its transactions;

(b) to have full and exclusive power and authority to exercise, in the name and for the benefit of the university and as the act and deed of the university, any or all of the powers, authorities and privileges conferred upon the university as a corporation by this Act;

(c) to maintain and keep in proper order and condition real property which it may consider necessary for the use of the university and to erect and maintain those buildings and structures on the property of the university that in its opinion are proper and necessary;

(d) to lay out and spend sums that may be considered necessary for the support and maintenance of the university and for the improvement of existing buildings, and the erection of new buildings that the board may consider necessary for the use or purposes of the university and for the furnishing and equipping of existing and newly erected buildings;

(e) to lay out and spend sums of money that it considers expedient for the erection, equipment, furnishing and maintenance of residences for members of the staff of the university, residences and dining halls for the use of the students of the university, whether those students are graduates or undergraduates and to make rules and regulations as to the management, government and control of them that may seem appropriate;

(f) to appoint the deans of all the faculties, the librarian, the registrar, the bursar, the professors, associate professors, assistant professors, lecturers, instructors, demonstrators and other teachers in the university and all officers and employees that the board considers necessary for the purposes of the university and to fix their salaries or remuneration and to define their duties and their tenure of office or employment which, unless otherwise provided, shall be during the pleasure of the board, provided that

(i) a person shall not be appointed a member of the teaching staff of the university or of a faculty unless the person is first nominated for the position to which it is proposed to appoint the person by the president of the university,

(ii) a member of the teaching staff of the university or a faculty shall not be promoted without the concurrence of the president of the university, and

(iii) a member of that teaching staff shall not be removed without the concurrence of the president of the university,

but subparagraphs (i), (ii) and (iii) shall not apply where there is a vacancy in the office of president;

(g) to establish faculty councils and other bodies within the university, to prescribe how they shall be constituted, and to confer upon them powers and to assign to them duties in relation to discipline, conduct of libraries or other matters that the board may consider expedient;

(h) to fix, determine and collect all fees and charges to be paid to the university;

(i) to exercise disciplinary jurisdiction over the students of the university, with power, to take the following actions:

(i) admonish,

(ii) suspend,

(iii) expel,

(iv) fine, or

(v) levy assessments upon them for damage to property;

(j) to appoint committees that it considers necessary and to confer upon the committees power and authority to act for the board in and in relation to matters that the board considers expedient;

(k) on behalf of the university to print and publish books, pamphlets, brochures, magazines, journals, newspapers and other literary works, to carry on the business of printers, publishers, booksellers, stationers in all its branches and to purchase literary productions of all kinds and rights of copyright in them;

(l) to select a seal and arms for the university and to have the sole custody and use of the seal;

(m) to determine the number of students that may in the opinion of the board, having regard to the resources available, be accommodated with safety and efficiency in the university or in the faculties of the university; and to make rules and regulations that are considered advisable for limiting the admission or accommodation of students to the number determined and for selecting from applicants possessing the required academic and other qualifications those who are to be admitted as students in the university or in a faculty of the university;

(n) to pay money, directly or indirectly, as contributions towards pensions, annuities, retiring allowances and gratuities for employees of the university upon terms that the board may prescribe;

(o) to hear appeals from the decision of an officer, body or organization of or in the university, by a person affected by a decision and to decide finally upon all matters of university policy;

(p) to provide for representation of a faculty or school established in the university, on the senate, and to fix the number of representatives;

(q) to provide for the establishment of faculties, departments, chairs, lectureships, exhibitions, bursaries, scholarships, fellowships and prizes and to change or abolish them;

(r) to make regulations with respect to the academic and other qualifications that students shall meet and maintain in order to be eligible to be appointed to the board and to continue to serve as a member of the board when appointed; and

(s) to do and perform all other matters and things which may seem appropriate and useful for the well ordering and advancement of the university, the doing of things not repugnant to this Act or to a law in force in the province.

(2) Law enforcement on property owned or occupied by the university, in the following subsections referred to as "university property", shall be provided by the province.

(3) Notwithstanding subsection (2), the board may, subject to the approval of the Minister of Justice and Public Safety, appoint special constables, who shall hold office during the pleasure of the board and a special constable has and may exercise on university property all the powers possessed by or given to a member of the Royal Newfoundland Constabulary.

(4) Special constables appointed under subsection (3) shall, in the performance of their duties and the exercise of their powers, be subject to the lawful directions and orders of the board

and of the Minister of Justice and Public Safety, but in case of a conflict the lawful directions and orders of the minister shall prevail.

(5) A special constable appointed under subsection (3) shall be supplied by the board with an identification card and shall, before entering upon the special constable's duties, take and sign, before a Provincial Court judge, the same oaths or affirmations, with the necessary changes, that are required of members of the Royal Newfoundland Constabulary under section 5 of the *Royal Newfoundland Constabulary Act, 1992* and those oaths or affirmations shall be retained by the board as part of its records.

(6) Nothing in this section affects the power of the province or the Minister of Justice and Public Safety to provide for the performance of police duties on university property by members of the Royal Newfoundland Constabulary or the Royal Canadian Mounted Police.

(7) Notwithstanding subsection (3), of the security force of the university not more than 5 members of the supervisory staff of that force shall be special constables under this section.

(8) All laws in force in the province for the protection of justices in the execution of their offices, including the *Justice and Public Authorities Protection Act,* shall extend to a special constable appointed under subsection (3) when acting under this Act.

RSN1970 c231 s36; 1974 No86 s3; 1978 c79 s3; 1981 c79 s8; 2023 c13 s5

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Parking and traffic regulations

35. (1) The board may make regulations for prohibiting the parking of vehicles on land owned, occupied or leased by the university, in this section referred to as "university land", or for permitting the parking of vehicles on land under permit or otherwise and may set out in the regulations the conditions to which the permits are subject or on which parking is otherwise permitted.

(2) The board may issue a permit to a person to park a vehicle on the university land referred to in the permit and may attach further conditions to the permit, and the board may attach different conditions to different permits.

(3) The holder of a permit referred to in subsection (2) shall park a vehicle in accordance with the conditions attached to the permit or to which it is subject, or, where there are no conditions, as directed by the board.

(4) The board may make different regulations in respect of different pieces of university land and regulations may be made so as to apply generally or during particular periods or at or between specified times or in particular circumstances or subject to particular conditions, and the university land to which regulations refer shall be referred to by name or other description in the regulations.

(5) The board may erect signs containing the words "NO PARKING" or "NO PARKING EXCEPT UNDER PERMIT" to show whether parking is permitted on the university land to which the sign refers and other words, symbols, figures or letters to show that the university land is owned, occupied or leased by the university and to indicate the days on which or the periods during which or the hours between which parking is permitted on the university land, and the university land to which a sign refers may be indicated by additional words or symbols inscribed on the sign that may describe or refer to the university land by name or other description or by reference to another sign erected on or near the university land or to another object or mark.

(6) A person who contravenes

(a) the regulations referred to in this section;

(b) a condition attached to or prescribed in respect of a permit issued under subsection (2); or

(c) a direction of the board referred to in subsection (3),

is guilty of an offence and liable on summary conviction to a fine of not less than $10 and not exceeding $20 and in default of payment of a fine to imprisonment for a period not exceeding 10 days.

(7) The board may make regulations respecting

(a) the towing away and impounding of vehicles parked in contravention of the regulations made under this section; and

(b) [Rep. by 1997 c13 s42]

(c) the terms and conditions of the release of vehicles towed and impounded by the university.

(8) The board may erect on university land at places where the board considers necessary signs

(a) conveying by words or symbols the order not to enter the university land or a part of the land or roads on university land;

(b) conveying by words or symbols the order to drive a vehicle in 1 direction only on university land or on a road on university land;

(c) conveying by words or symbols the order to stop;

(d) conveying by words or symbols the order to yield right of way;

(e) indicating by words, symbols, figures or letters

(i) the maximum or minimum speed at which vehicles may be driven on land or roads of the university,

(ii) the portion, or the beginning and the end, of a road to which the maximum or minimum speed limit applies, and

(iii) the period within which or the hours or days during which the maximum or minimum speed limit is in force;

(f) indicating by words or symbols the direction in which vehicles may be driven or moved on the university land or on a road on that land;

(g) designating roads to be used by vehicles moving in a particular direction; and

(h) for the safe and expeditious control of traffic, the signs having inscribed on them words, symbols, figures or letters that the board shall determine,

and a person failing to obey an order, direction or instruction inscribed on or an indication given or conveyed by a sign erected under this subsection is guilty of an offence and liable on summary conviction to a fine of not less than $10 and not exceeding $50 and in default of payment of a fine to imprisonment for a period not exceeding 14 days.

(9) Signs erected on university land, which are of a kind or of a description prescribed or authorized by this section, shall be considered to have been lawfully erected by the board.

(10) For the purposes of subsection (8) the word "road" includes a road, street, avenue, driveway, lane, pathway, square, place, bridge, culvert, viaduct or trestle on the university land.

(11) The board or some person authorized by it in writing may, either before or after the institution of proceedings against a person for an offence under this section, accept from the person

Tab 26

REPORT OF THE 2014 STATUTORY REVIEW

Access to Information
and
Protection of Privacy Act

NEWFOUNDLAND AND LABRADOR

VOLUME I: EXECUTIVE SUMMARY
VOLUME II: FULL REPORT

Clyde K. Wells, Chair | Doug Letto | Jennifer Stoddart

applying to a council for the grant of any such benefit, that citizen does so in the full knowledge that any information provided to justify the granting of the requested benefit must be accessible to the rest of the citizens of the municipality and the citizen requesting the benefit is consequently consenting to its release. The Council should only be expected to hold in confidence any information the requesting citizen asks to be kept confidential. The council will then have to decide whether it would be proper to make a decision on the application without that information being available to the public. The other option is that the confidential information be returned to the applicant and the decision made without the benefit of it, unless the applicant agrees to withdraw the request for confidentiality.

Of course, preparation of such a list of information by the Department of Municipal Affairs and Municipalities Newfoundland and Labrador should be done with respect for the importance of protection of personal information. The list should contain only that information that is necessary to ensure accountability and transparency and protection of the rights of other citizens discussed above. Consultation with the Commissioner will be an important factor before finalizing the list. Making the information available in the municipal council offices for the public to examine should, generally, be sufficient. However, municipal public bodies should be mindful of the greater privacy risk of publishing such information on the Internet without a careful examination of the possible consequences for the individuals concerned.

An amendment could then be made to the *Municipalities Act, 1999* based on the conclusion reached to indicate clearly the information that proper municipal governance requires be disclosed. That provision should then be added to the list of legislative provisions that prevail over the *ATIPPA*. By that means the dilemma in which many municipal officials, as well as citizens and journalists, now find themselves can be overcome.

There is one other point that the Committee must address. The Commissioner recommended that the definition of public body be expanded to include a corporation or entity owned by or created by or for a public body or group of public bodies. In support of this, the Commissioner wrote:

> How should the *ATIPPA* deal with entities created by or for a public body or group of public bodies? Separate entities are sometimes created by local public bodies (often municipalities) to carry out public policy objectives and provide public services, usually using public funds to do so. Currently, those entities do not fall within the scope of the *ATIPPA*. Some are created directly by a single municipality, while others may involve an organization of which several municipalities are jointly members. Such entities should be subject to the *ATIPPA* in order to maintain an appropriate level of accountability. [23]

Based on the views expressed by the Commissioner and his emphasis on municipalities, the Committee concludes that the expansion of the definition of public body should be limited to entities owned by or created by or for a local government body or group of local government bodies.

23 OIPC Submission, 16 June 2014, p 11.

Recommendations

The Committee recommends that

71. The Department of Municipal and Intergovernmental Affairs, after consultation with the Office of Public Engagement and the Commissioner, develop a standard for public disclosure generally acceptable in the provision of good municipal governance that takes reasonable account of the importance of personal privacy, but does not subordinate good municipal governance to it.

72. That standard be enacted in a section of the *Municipalities Act*, 1999 and the *ATIPPA* be amended to add that provision to the legislative provisions that prevail over the *ATIPPA*.

73. Additional language be added to the definition of public body under section 2(p) of the *ATIPPA* to include municipally owned and directed corporations.

74. The Office of Public Engagement formalize and provide the necessary support to assist municipalities in conforming with the *ATIPPA*, including

- a help desk at the ATIPP Office
- refresher courses offered through webinars or regional meetings
- *ATIPPA* guidance web pages on municipal council websites

75. That municipal access to information and protection of privacy policies be developed in line with the suggestion in the Municipal Handbook 2014 and be published on municipal council websites.

76. It is urgent that thorough and adapted training be given to municipal ATIPP coordinators throughout the province. The Office of Public Engagement should continue in its training, updating, and resource provision role in consultation with the Department of Municipal and Intergovernmental Affairs and the Commissioner's office.

77. A final version of the Guide to the interpretation of the *ATIPPA* in the context of municipalities, taking account of the concerns raised by this Committee, should be developed by the Office of Public Engagement as soon as possible after implementation of Recommendation 71, in consultation with the Department of Municipal and Intergovernmental Affairs and the Office of the Information and Privacy Commissioner.