The Federal Court and the *Access to Information Act*[1]

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[1] *Access to Information Act*, S.C. 1980-81-82-83, c. 111, Sch. I [hereinafter *Access to Information Act*].

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I. INTRODUCTION

THIS PAPER IS ABOUT how the Federal Court of Canada has treated the federal *Access to Information Act* in the 10 years since the Act came into force. In that time there have been more than fifty reported access decisions, yet there has been only one review of the case law, published in 1988.[2] Given the importance placed on the concept of court review during the development of the *Access Act,* it seems appropriate to consider how well court review has served the legislation and its objectives.

My analysis of the case law will focus on a few basic issues and the two exemptions that have proved most significant in the operation of the Act, the personal privacy and commercial information exemptions. Before considering the role of the court, some background about the Act and the access to information issue will be useful.

A. Why Worry About Access to Information?

The great thing in life is to be simple and the perfectly simple thing is to look through keyholes. — **George Bernard Shaw**[3]

There are many ways of justifying the importance of access to information, but perhaps the most basic has to do with the human fascination for uncovering secrets. Curiosity is one of the most common and persistent human traits, so we are bound to feel a strong reaction whenever we encounter secrecy. For most of us, few things are more frustrating than knowing someone has a secret they won't share. There is also a compelling sense of mystery and intrigue associated with secrecy; consider the popularity of spy movies,

[2] Willian Kaplan, "The Access to Information Act: A 1988 Review" (1988) 22 Labour/Le Travail 181.

[3] George Bernard Shaw,"Great Catherine" in *Heartbreak House, Great Catherine, and Playlets of the War* (London: Constable & Co., 1919) at 132.

investigative journalism and conspiracy theories. As a device for uncovering secrets, access legislation fulfils the same human need.

Access legislation is also important from a social point of view. Democratic principles favour broad access to information so that the people can understand and judge the performance of their government. As Carleton University Prof. Donald C. Rowat wrote in the seminal Canadian article on access to information:

> 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.[4]

Or, as the Canadian Bar Association argued in 1978, "[t]he citizen's ability to participate depends directly upon the amount of information at his disposal."[5] A healthy democracy requires that citizens receive as much information as possible, so that they can participate as fully as possible in government. In contrast, secrecy leads to distrust and cynicism since it is easy to imagine the worst reason for government action when no other reasons are available.

Another possible benefit of access legislation is an improvement in government decision-making.[6] Armed with information from government reports, special interest groups can take a more effective role in public policy debates. Citizens will be able to monitor government action more effectively, and the glare of publicity will force government to improve the decision-making process and the quality of decisions. Some have cautioned, however, that government documents will not provide an objective basis to assess government decision making because they already contain the biases of the decision-makers.[7]

Finally, access legislation can also be justified as a response to the increasing significance of information. Our society is increasingly dependent on computer systems which can manipulate, store and

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[4] Donald C. Rowat, "How Much Administrative Secrecy?" (1965) 31 Canadian Journal of Economics and Political Science 479 at 480.

[5] Canadian Bar Association, *Freedom of Information in Canada: A Model Bill* (Ottawa: CBA, March 1979) at 6.

[6] *Ibid.* at 9. See also: Canada. Dept. of Secretary of State, *Legislation on Public Access to Government Documents* (Ottawa: Supply and Services, 1977) at 3 and 7.

[7] See: D.G. Hartle, "Freedom of Information and the Political Process" in John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (Toronto: Butterworths, 1981) 33 at 36–38.

transfer large amounts of data. Information has become a valuable quantity in its own right, a source of power for those who know how to use it. And, as one federal discussion paper noted: "Government has become perhaps the most important single institutional repository of information about our society and its political, economic, social and environmental problems."[8] Theoretically, freer access to government information would put more power into the hands of people outside government. On the other hand, access legislation cannot address the distribution of power in society. Powerful corporations will tend to be the ones with the resources needed to process and use government information available under an access law.[9]

Whether or not these potential benefits are realized depends, in part, on the type of access legislation that is adopted. As well, the effectiveness of the Act will depend upon the way it has been treated by government and the courts. Before considering the track record of the Federal Court in interpreting Canada's *Access Act*, it will be helpful to offer an overview of the legislation and its history.

B. Access to Information in Canada

The history of access to information in Canada dates back to the mid-1960s, a time when the concept was prominent in the United States. There, the U.S. Congress adopted the *Freedom of Information Act* in 1966. But in Canada, the first developments came a year before, when NDP MP Barry Mather introduced a short private members' Bill. Only a page long, Bill C-39 required every government authority to "make its records and information concerning its doings available to any person at his request in a reasonable manner and time."[10]

In the same year, Prof. Rowat argued that the Canadian tradition of government secrecy had become obsolete. He wrote:

> There is so much evidence of the undesirable effects of administrative secrecy that I believe the time has come to question the entire tradition. After all, it is based on an earlier system of royal rule in Britain that is unsuited to a modern democracy in which people must be fully informed about the activities of their government. Has not this tradition been preserved by politicians and officials mainly for their own convenience?

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[8] Canadian Bar Association, *supra* note 5 at 9.

[9] Hartle, *supra* note 7 at 35: "More information could, in principle change the balance of power. However, in the event, is it not likely that those individuals and groups that are now winners remain winners? They could afford to analyze the additional information to their advantage and disseminate biased interpretations of it .... "

[10] Rowat, *supra* note 4 at 491.

Is it absolutely necessary? I wonder whether we have ever really faced these questions.[11]

But the interest in access remained largely academic until Pierre Trudeau's new Liberal government came to power in 1968. Although Mr. Trudeau later developed a reputation for his aloof style of leadership, he was known then as a supporter of greater democratic participation.[12] A year after his election, a federal task force produced a report which argued that government had an obligation to provide Canadians with "full, objective and timely information."[13]

Despite the task force report, there was little government action until 1973. That year, new Cabinet guidelines gave members of Parliament a right of access to government documents containing factual information.[14] But the guidelines were dismissed as useless because they contained many broad, vaguely-worded exemptions and offered no mechanism for the independent review of decisions to refuse information. The concept of independent review would be a key issue in later policy debates.

In 1974, a private member's access Bill received second reading in the House. Introduced by Conservative MP Gerald Baldwin, Bill C-225 would have created a general right of access to government records and a right to apply to the Federal Court for review of refusals of access.[15] The Bill was referred to the Standing Joint Committee on Regulations and Other Statutory Instruments, which endorsed the concept of greater access to information in its report.

In 1977, the government issued a green paper which considered different options for access legislation — but also made it clear that the government would continue to protect the policy-making process. The release of policy documents would threaten the neutrality of the

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[11] *Ibid.* at 480.

[12] "In 1968 a new Liberal regime swept to power promising 'a Just Society'. ... Prime Minister Pierre Trudeau was an advocate of the need to democratize the administration of government. Although many would argue that this has indeed not occurred, a commitment to participation was reiterated as late as the 1974 election campaign." Patrick Gibson, "The Role of Ideas" in Donald C. Rowat, ed., *The Making of the Federal Access Act: A Case Study of Policy-Making in Canada* (Ottawa: Carleton University, Dept. of Political Science) 1 at 7–8.

[13] Gibson, *supra* note 12 at 8.

[14] Canada. Secretary of State, *supra* note 6 at 31–33.

[15] David Johansen, *Public Access to Federal Government Information: Current Issue Review 79-E* (Ottawa: Library of Parliament, 1979) at 10.

civil service and the tradition of ministerial responsibility, the paper argued. Government tradition held each minister responsible for the actions of his or her department; broad access could dilute that responsibility and make ministers less accountable to the public. The paper also rejected the idea of court review as offensive to the principle that the minister was the ultimate decision-maker for the ministry.[16] Practically speaking, there was no way a judge could be made aware of "all the political, economic, social and security factors that led to the [access] decision in issue."[17]

The green paper was severely criticized in a research study published by the Canadian Bar Association. In the study, T. Murray Rankin of the University of Victoria called the green paper "a passionate attempt to avoid any meaningful legislation."[18] Freedom of information did not threaten the discussion of policy matters within government because only the underlying factual material would be available to the public. Furthermore, court review was an essential part of access legislation because only the court could offer the independence and authority needed to challenge decisions of Cabinet. "The fact of the matter is that the courts are the natural repository for decisions on the exercise of constitutional or civil rights and what is contemplated in freedom of information legislation is nothing less than the creation of a new citizen's right — a right of access to government documents."[19]

The green paper was reviewed by the Joint Committee on Regulations and Other Statutory Instruments, co-chaired by Baldwin and Liberal Senator Eugene Forsey. The committee's final report in 1978 recommended changes to tighten many of the exemptions contained in the green paper and also proposed a two-stage review process: an information commissioner with the power to make advisory rulings, followed by the opportunity to apply to court for final review.[20]

In March 1979, the Canadian Bar Association published a second study which argued forcefully that access legislation was essential to

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[16] Canada. Secretary of State, *supra* note 6 at 17–18.

[17] *Ibid.* at 18.

[18] T. Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (Ottawa: Canadian Bar Association, 1977) at 2.

[19] *Ibid.* at 126.

[20] Senate, Standing Joint Committee on Regulations and Other Statutory Instruments, *Report on Green Paper on Legislation on Public Access to Government Documents* (Ottawa: Queen's Printer, 1978).

the exercise of democratic rights. Freedom of information was needed to provide better access to government documents for civil lawsuits, to reveal internal policy directives followed by government decision-makers, and as a fundamental freedom in its own right. As might be expected, the CBA placed particular emphasis on the need for judicial review of government access decisions.[21]

Spring 1979 also saw the election of Joe Clark's minority Conservative government, which had promised access legislation as part of its electoral platform. In October, the government introduced Bill C-15, the *Freedom of Information Act*. The Bill established a right of access to government records, an elaborate scheme of exemptions, and the two-stage review process.[22] Unfortunately, the Conservative government fell on a non-confidence vote before the access Bill could be passed.

Finally, in July 1980, the new Liberal government introduced the predecessor to the *Access to Information Act*, Bill C-43. Similar in substance to C-15, Bill C-43 contained some changes which tended to widen the scope of some exemptions. Conservative leader Joe Clark criticized it particularly for changes to the exemptions for Cabinet records, national defence, federal-provincial affairs, and economic interests of the state.[23] As well, the new Bill contained a more complicated scheme of judicial review, which offered a more restrictive scope of review for certain sensitive exemptions.[24]

Introducing the Bill for second reading, Communications Minister Francis Fox emphasized its future importance in the Canadian democratic system. "This legislation will, over time, become one of the

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[21] Canadian Bar Association, *supra* note 5 at 16ff.

[22] For the text of C-15, see: Donald C. Rowat, ed., *The Right to Know: Essays on Government Publicity and Public Access to Information*, 3d ed. (Ottawa: Carleton University, Dept. of Political Science, 1981) at 307–326.

[23] *House of Commons Debates* (29 January 1981) at 6692–6695.

[24] T. Murray Rankin, "The New Access to Information and Privacy Act: A Critical Annotation" (1983) 15 Ottawa L. Rev. 1 at 31.

Bill C-43 also contained some minor improvements over Bill C-15. For example, Bill C-43 permitted access to documents which did not exist but could be assembled by computer, and required each government department to make annual reports on the operation of the law: *Access to Information Act*, ss. 4(3) and 72. For a discussion of these and other differences between Bill C-43 and Bill C-15 see: Stephen Brown, *The Right to Know: A Comparative Analysis of the Freedom of Information Act and the Access to Information Act* (Ottawa: 1980), an honours research project for the Carleton University School of Journalism.

cornerstones of Canadian democracy," he said.[25] Later, he spoke at length of its intended effect:

> The statutory framework of access to information will constitute a significant development for our political institutions. It will create opportunities for a more informed dialogue between public leaders and citizens. It will improve the nature of government decision-making by allowing greater input from the private sector. Finally, it will impose on ministers and officials a greater degree of responsibility for their actions and their decisions.[26]

The Bill was reviewed by the House Standing Committee on Justice and Legal Affairs, which received detailed briefs from various groups representing academics, consumers, journalists, business, and lawyers. No substantive changes were made as a result of these submissions.[27] But during the review, Prime Minister Pierre Trudeau expressed concern that the access Bill would threaten full debate in Cabinet by giving courts the power to review Cabinet memoranda. Last-minute amendments created the Act's exclusion of Cabinet documents, which ensured that court review powers did not extend to Cabinet material.[28] The Act was passed along with a companion statute, the federal *Privacy Act*,[29] in June 1982. Both statutes were proclaimed in 1983.

Many of the *Access Act's* provisions were harshly criticized by academic commentators. Academics were disappointed by the Act,

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[25] *House of Commons Debates,* (29 January 1981) at 6689.

[26] House of Commons. *Minutes of Proceedings and Evidence of Standing Committee on Justice and Legal Affairs,* issue no. 15 (March 31, 1981) at 15:6.

[27] Darrell J. Birker, "The Role of Interest Groups" in Donald C. Rowat, ed., *The Making of the Federal Access Act: A Case Study in Policy-Making in Canada* (Ottawa: Carleton University, Dept. of Political Science, 1985) 29 at 47.

[28] S.J. Brand, "The Prime Minister and Cabinet" in Donald C. Rowat, ed., *The Making of the Federal Access Act: A Case Study in Policy-Making in Canada* (Ottawa: Carleton University, Dept. of Political Science, 1985) 79 at 96–97.

[29] *Privacy Act*, S.C. 1980-81-82-83, c.111, Sch.II [hereinafter *Privacy Act*].

The *Privacy Act* gives individuals a right of access to their personal information held by the federal government and sets out principles for the collection and use of personal information. A full discussion of the *Privacy Act* is outside the scope of this paper, but see: Nanci-Jean Waugh, "A Critique of the *Privacy Act*" in Donald C. Rowat, ed., *Canada's New Access Laws: Public and Personal Access to Governmental Documents* (Ottawa: Carleton University, Dept. of Political Science, 1983) 45; T. Murray Rankin, "Privacy and Technology: A Canadian Perspective" (1984) 22 Alta. L. Rev. 323; Tom Onyshko, "Access to Personal Information: British and Canadian Legislative Approaches" (1989) 18 Man. L.J. 213.

particularly in comparison with American access legislation. After a detailed analysis of Bill C-43 in 1981, John D. McCamus of the University of Toronto concluded:

> Certainly, Bill C-43 must be considered to be a rather pale imitation of the American *Freedom of Information Act*. Indeed, on close inspection, the Bill has, in many respects, all the appearance of a freedom of information law drafted by individuals who have little sympathy for the basic objectives of such a scheme.[30]

Two years later, T. Murray Rankin wrote that despite "the most agonizingly detailed analysis" by Parliamentary committee, the final Act was "very seriously flawed."[31] In general, both writers criticized the Act's exemptions, court review provisions, and Cabinet records exclusion.

The Canadian Act's exemptions were more numerous and more broadly framed than equivalent exemptions in the U.S. access legislation.[32] In addition, the technical drafting left much to be desired; exemptions which permitted officials to withhold records based on the potential harm of disclosure provided "very little reference to the amount of injury which must occur before the record can be withheld."[33]

The Act's scheme of judicial review came under fire for its complexity and the more restrictive scope of review reserved for some exemptions. It was understandable to restrict the review of records with national security implications, but "not credible" to suggest that the court lacked experience needed for a full review of law enforcement or commercial records, McCamus wrote.[34]

Perhaps the harshest criticism was reserved for the Cabinet records exclusion. Rankin suggested that the exclusion would allow civil servants to develop a practice of Cabinet laundering to protect sensitive but otherwise harmless documents: "records which would have been accessible under the Act will be processed through a Cabinet briefing book or memorandum; thereafter, the Act does not

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[30] John D. McCamus, "Bill C-43: The Federal Canadian Proposals of 1980" in John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (Toronto: Butterworths, 1981) 266 at 299.

[31] Rankin, "Annotation," *supra* note 24 at 1.

[32] McCamus, "Bill C-43," *supra* note 30 at 279.

[33] Rankin, "Annotation," *supra* note 24 at 13.

[34] McCamus, "Bill C-43," *supra* note 30 at 278–279.

even apply to such records."[35] McCamus added that the exclusion "reflects the desire of the inner circle of government to immunize itself completely from the inconvenience and potential embarrassment of disclosure."[36]

By the Act's own terms, a comprehensive parliamentary review was required within three years of the Act's coming into force.[37] The review was completed by the Standing Committee on Justice and Solicitor General in 1987; *Open and Shut*, the committee's final report, recommended wide-ranging reforms to make the Act more effective.[38] But the government's formal response disputed many of the committee's key recommendations.[39] Later, the government failed to implement any of the substantive reforms recommended.

C. Overview of the *Access to Information Act*

Canada's *Access to Information Act* is intended to give individuals a right of access to information held by federal government. Section 2, the purpose clause, sets out three important principles that are supposed to be embodied in the Act: (1) government information should be available to the public, (2) exemptions to the access right should be "limited and specific" and (3) decisions on the disclosure of information should be reviewed independently of government.[40] While s. 2 provides strong rhetoric about the importance of access, its impact is diminished by the Act's actual contents.

Under current practice, the right of access is available to all individuals and corporations present in Canada.[41] Requesters must apply in writing to the institution which holds the record; their application must include enough detail to allow "an experienced

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[35] Rankin, "Annotation," *supra* note 24 at 26.

[36] John D. McCamus, "Freedom of Information in Canada" (1983) 10 Government Publications Review 51 at 56.

[37] *Access to Information Act*, s. 75.

[38] *Open and Shut: Enhancing the Right to Know and the Right to Privacy: Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act* (Ottawa: Queen's Printer, 1987).

[39] Canada, Dept. of Justice, *The Steps Ahead* (Ottawa: Dept. of Justice, 1987).

[40] *Access to Information Act*, s. 2(1). In general, future references to sections of the *Access to Information Act* will be contained in the body of the text set off by parentheses.

[41] Section 4 of the Act gives the access right only to citizens and permanent residents, but it was extended by later order-in-council: *Access to Information Act Extension Order*, No. 1, SOR/89, 207 (13 April 1989).

employee" to find the record with reasonable effort (s. 6). To help requesters choose the institution, government must publish an annual directory of records known as *InfoSource*[42] (s. 5).

Generally, the institution must make its decision to grant or deny access within 30 days of the request. However, the Act allows "reasonable" extensions of the 30-day limit where the request will involve a wide search, consultations with other institutions, or a third party's commercial information (s. 9). In practice, this means that many requests face significant delays: in 1989–90 almost one third of all requests took longer than 60 days.[43] When the institution fails to make an access decision within the 30-day limit or the extension period, a deemed refusal of access occurs (s. 10(3)).

Officials can charge a variety of fees for access, beginning with an initial fee simply to make an access request. Other fees are permitted for photocopying, preparing machine-readable records, and every hour of search or preparation time over five hours (s. 11). At present, the initial fee is $5.00 and photocopying costs $0.20 a page.[44]

Along with the general access right, the Act sets out several wide-reaching exemptions which allow officials to deny requests for certain types of information. Surprisingly, officials who deny access need not reveal whether the records exist (s. 10(2)). This unique provision — originally intended to protect sensitive law enforcement files — has been roundly criticized as being in conflict with the philosophy of the legislation.[45]

Exemptions come in two basic types: mandatory, which require officials to refuse the exempted material, and discretionary, which give officials the option of release. The key mandatory exemptions prohibit the release of information obtained in confidence from another government (s. 13), personal information (s. 19), and certain types of commercial information about third parties (s. 20). Statistically, these

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[42] Treasury Board, *InfoSource: Sources of Federal Government Information, 1992–93* (Hull, Que.: Supply and Services Canada, 1992).

[43] Treasury Board, *Access to Information Act/Privacy Act: Third Consolidated Annual Report by the President of the Treasury Board, 1989-90* (Hull, Que.: Supply and Services, 1990) at 13.

[44] *Access to Information Regulations*, P.C. 1983–1667 (June 1983) s. 7.

[45] See: Rankin, "Annotation," *supra* note 24 at 11: "It may be valid to argue that in cases of certain investigative files and intelligence information, confirmation of the existence of a record might of itself be injurious. However, it is very difficult to justify this blanket ability of the government to stonewall all information requests — ironically, under a freedom of information statute." See also: McCamus, "Bill C-43," *supra* note 30 at 271.

exemptions account for more than half of all refusals of access.[46] The commercial information exemption is responsible for the lion's share of refusals, but the personal information exemption has gained popularity in the last few years.[47]

Two further mandatory exemptions exist. One protects information kept confidential by more than 40 other federal statutes which are listed in a schedule to the Act (s. 24).[48] Recently, the federal information commissioner expressed concern about this exemption, noting that the Act's coverage is being eroded by additions to the schedule.[49] The final mandatory exemption (and perhaps the most narrow) applies to information obtained by the RCMP while performing policing services for a province, if the RCMP has agreed to keep the information secret (s. 16(3)).

Discretionary exemptions abound. The three most common permit officials to deny information harmful to the defence of Canada (s. 15), information about law enforcement activities (s. 16), and information about policy advice (s. 21). Of these, the policy advice exemption has proven to be the most popular and accounted for 17 per cent of all refusals in 1989–90.[50] It applies broadly to documents created during the policy development process, including records containing advice to ministers or deliberations between officials. Other permissive exemptions protect information about federal-provincial affairs, information posing a threat to the safety of individuals, information harmful to the economic interests of the federal government, information about auditing or testing procedures, and information covered by solicitor-client privilege.[51]

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[46] In 1989–90, the commercial information exemption, personal information exemption and confidences exemption accounted for 28, 23, and 3 per cent of all refusals, respectively: Treasury Board, *Third Consolidated Annual Report, supra* note 43 at 14.

[47] From 1985–86 to 1988–89, the commercial information exemption accounted for between 30 and 48 per cent of all refusals. But in 1989–90, it fell to 28 per cent while the personal information exemption rose to 23 per cent. See: Treasury Board, *Third Consolidated Annual Report, supra* note 43 at 14; Treasury Board, *Access to Information /Privacy Act: First Consolidated Annual Report* (Hull, Que.: Supply and Services Canada, 1988) at 14.

[48] See schedule II to the *Access to Information Act*.

[49] When the Act was proclaimed in force 33 statutes were included in the schedule, but by 1991 that number had grown to 41. Canada, Information Commissioner, *Annual Report 1991–92,* (Hull, Que.: Supply and Services Canada, 1992) at 31.

[50] Treasury Board, *Third Consolidated Annual Report, supra* note 43 at 14.

[51] *Access to Information Act*, ss. 15, 17, 18, 22, and 23, respectively.

In addition to this elaborate scheme of exemptions, certain types of information are excluded completely from the scope of the Act — most significantly, Cabinet documents.[52] Exclusion means there is no right of access to these documents and they will not be listed in the government's *InfoSource* directory. Unfortunately, the Act defines Cabinet documents very broadly to include draft legislation, agendas, background papers, and records of consultations between ministers or between ministers and officials (s. 69(1)). All Cabinet documents lose their exempt status after 20 years, and discussion papers lose their status if the decision is public, or after four years if the decision is secret (s. 69(2)).

To oversee the operation of the access system, the Act establishes the office of the federal information commissioner — an official with the power to investigate complaints about access refusals, delays and fees.[53] After investigating, the commissioner can recommend that the government change its position, but cannot issue binding orders. The commissioner serves a seven-year term and reports annually to Parliament. The present information commissioner, John Grace, was appointed in the summer of 1990; he replaced Inger Hansen who was known for her often adversarial relationship with government.

In the case of a refusal (or a deemed refusal), a requester unsatisfied by the commissioner's investigation can apply to Federal Court for further review (s. 41). The Act gives the information commissioner the power to take a refusal to court on behalf of the requester (s. 42); in this way, the commissioner can ensure that deserving cases receive court review.

Generally, the court can order disclosure whenever it finds the institution was "not authorized" to refuse access (s. 49). But in the case of four exemptions — federal-provincial affairs, the defence of Canada, the financial interests of government and some law enforcement matters[54] — a more restrictive scope of review applies. In these cases, the court can order disclosure only if it decides the institution "did not have reasonable grounds" to refuse access (s. 50). Apparently the court must uphold a refusal based on reasonable grounds, even if

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[52] *Access to Information Act*, ss. 68 and 69. Section 68 excludes published materials, some library and museum material, and materials donated by a private person or organization to the Public Archives or National Library.

[53] See: *Access to Information Act*, ss. 30–40 and 54–66, which deal with the commissioner's powers and duties and the structure of the commissioner's office, respectively.

[54] *Access to Information Act*, ss. 14, 15, 16(1)(c) or (d) and 18(d).

compelling reasons still favour disclosure.[55] Under either review, the government bears the legal burden of justifying its refusal (s. 48).

The Act contains special review provisions for third parties who have supplied commercial information to government. An institution must give notice whenever it intends to release third party information which might be protected by the commercial information exemption (s. 27). The third party can then apply for a review of the proposed disclosure under s. 44. Curiously, the Act provides no guidance on whether the third party should bear the onus of resisting disclosure.

II. COURT REVIEW: THE BASIC ISSUES

THE FIRST FEDERAL COURT case under the *Access Act* was decided more than nine years ago, in 1984. Since then, the court has had the opportunity to consider many of the key provisions of the Act. There are now 59 reported and two significant unreported decisions which interpret the Act's exemptions, review provisions and access procedures.[56] In addition to five main decisions from the Court of

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[55] Rankin "Annotation," *supra* note 24 at 32. For a discussion of the case law on the s. 50 court review power, see notes 96 to 103 and accompanying text.

[56] Note that these figures include separate decisions issued in the same court application (for example, an initial ruling on procedure followed by a decision on the merits). The decisions can be conveniently divided into six categories: court review powers, procedure under the *Access to Information Act*, procedure in Federal Court, the commercial information exemption, the personal information exemption, and other exemptions.

Court review powers: *Information Commissioner of Canada* v. *Canadian Radio-Television and Telecommunications Commission* (1986), 9 C.P.R. (3d) 1 (F.C.T.D.: Jerome); *Rubin* v. *Canada Mortgage and Housing Corp.* (1987) 8 F.T.R. 230, 14 C.P.R. (3d) 176 (Cullen); *Information Commissioner* v. *Canada (Minister of External Affairs)* (1988), 18 F.T.R. 278 (Jerome); *Rubin* v. *Canada Mortgage and Housing Corp.* (1988), 86 N.R. 186, 21 C.P.R. (3d) 1 (F.C.A.: Heald); *X* v. *Canada (Minister of Defence)* (1990) 41 F.T.R. 16 (Dubé); *Canada (Information Commissioner)* v. *Canada (Minister of External Affairs)* (1990), [1990] 3 F.C. 514 (T.D.: Muldoon); *X* v. *Canada (Minister of National Defence)* (1990), [1991] 1 F.C. 670 (T.D.: Strayer).

Procedure under the *Access to Information Act*: *Ciba-Geigy Canada Ltd.* v. *Minister of National Health & Welfare* (1986), 11 C.P.R. (3d) 98 (F.C.T.D.: Jerome); *Société de Transport de la Communuate de Montréal* v. *Canada (Minister of the Environment)* (1986), 9 F.T.R. 152 (Dubé); *Rubin* v. *Canada (Ministers of Finance, Regional Industrial Expansion and Transport)* (1987), 9 F.T.R. 317 (Jerome); *Vienneau* v. *Canada (Solicitor General)* (1988), [1988] 3 F.C. 336, 24 C.P.R. (3d) 104 (T.D.: Jerome); *Canada (Information Commissioner)* v. *Canada (Immigration Appeal Board)* (1988), 32 Admin. L.R. 94 (F.C.T.D.: Pinard); *Glaxo Canada Inc.* v. *Canada (Minister of Health and Welfare)* (1990), 31 F.T.R. 386, 44 Admin. L.R. 224 (Muldoon); *Canada*

(Information Commissioner) v. *Canada (Minister of National Defence)* (1990), [1990] 3 F.C. 22, 33 F.T.R. 234 (Reed).

Procedure in Federal Court: *Schneider Inc.* v. *Canada* (1986), 8 F.T.R. 119 (Strayer); *Ermineskin Band of Indians* v. *Canada (Minister of Indian Affairs)* (1987), 15 F.T.R. 42 (Collier); *Merck Frosst Canada Inc.* v. *Canada (Department of Health and Welfare)* (1988), 22 C.P.R. (3d) 177 (F.C.T.D.: Strayer); *Bland* v. *National Capital Commission* (1988), 20 F.T.R. 236 (Cullen); *Bland* v. *National Capital Commission* (1989), 29 F.T.R. 232 (Martin); *Hunter* v. *Canada (Consumer and Corporate Affairs)* (1990), 29 C.P.R. (3d) 321 (F.T.C.D.: Reed); *Hunter* v. *Canada (Consumer and Corporate Affairs)* (1991), 35 C.P.R. (3d) 492 (F.C.A.: Décary and Pratte dissenting).

Commercial information exemption: *Maislin* v. *Minister for Industry, Trade, Technology and Commerce* (1984), [1984] F.C. 939, 10 D.L.R. (4th) 417, 8 Admin. L.R. 305 (T.D.: Jerome); *DMR & Associates* v. *Minister of Supply and Services* (1984), 11 C.P.R. (3d) 87 (F.C.T.D.: Jerome); *Twinn (representing Sawridge Indian Band)* v. *McKnight* (1987), 26 Admin L.R. 197 (F.C.T.D.: Martin); *Piller Sausages* v. *Canada (Minister of Agriculture)* (1987), 14 F.T.R. 118 (Jerome); *Gainers Inc.* v. *Canada (Minister of Agriculture)* (1987), 14 F.T.R. 133 (Jerome); *Burns Meats Ltd.* v. *Canada (Minister of Agriculture)* (1987), 14 F.T.R. 137 (Jerome); *Intercontinental Packers Ltd.* v. *Canada (Minister of Agriculture)* (1987), 14 F.T.R. 142 (Jerome); *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1988), [1988] 1 F.C. 483, 87 N.R. 81 (Jerome); *Montana Band of Indians* v. *Canada (Minister of Indian Affairs)* (1988), 18 F.T.R. 17 (Jerome); *Ermineskin Band of Indians* v. *Canada (Minister of Indian Affairs),* (1988) 18 F.T.R. 27 (Jerome); *Samson Indian Band No. 137* v. *Canada (Minister of Indian Affairs)* (1988), 3 F.C. 153, 18 F.T.R. 29 (Jerome); *Sawridge Indian Band* v. *Canada (Minister of Indian Affairs)* (1988), 18 F.T.R. 32 (Jerome); *Louis Bull Band of Indians* v. *Canada (Minister of Indian Affairs)* (1988), 18 F.T.R. 33 (Jerome); *Blackfoot Tribe of Indians* v. *Canada (Minister of Indian Affairs)* (1988), 18 F.T.R. 34 (Jerome); *Stoney Tribe of Indians* v. *Canada (Minister of Indian Affairs)* (1988), 18 F.T.R. 36 (Jerome); *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1988), [1989] 1 F.C. 47, 26 C.P.R. (3d) 407 (C.A.: MacGuigan); *Burns Meats Ltd.* v. *Canada (Minister of Agriculture)* (1988), [1989] 1 F.C. D–1 (C.A.: MacGuigan); *Saint John Shipbuilding* v. *Canada (Minister of Supply and Services)* (1989), 24 F.T.R. 32 (Martin); *Ottawa Football Club* v. *Canada (Minister of Fitness and Amateur Sports)* (1989), 24 F.T.R. 62, 23 C.P.R. (3d) 297 (Strayer); *Merck Frosst Canada Inc.* v. *Canada (Minister of Health and Welfare)* (1989), 20 F.T.R. 73, 30 C.P.R. (3d) 473 (Jerome); *Air Atonabee Ltd.* v. *Canada (Minister of Transport)* (1989), 27 F.T.R. 194, 37 Admin. L.R. 245, 27 C.P.R. (3d) 180 (MacKay); *Saint John Shipbuilding* v. *Canada (Minister of Supply and Services)* (1990), 67 D.L.R. (4th) 315 (F.C.A.: Hugesson); *Canada (Information Commissioner)* v. *Canada (Minister of External Affairs)* (1990), [1990] 3 F.C. 665, 35 F.T.R. 177, 72 D.L.R. (4th) 113 (Denault); *Northern Cruiser Co.* v. *Canada* (1991), 47 F.T.R. 192, 7 Admin. L.R. (2d) 80 (Strayer); *Cyanamid Canada Inc.* v. *Canada (Minister of Health and Welfare)* (1992), 52 F.T.R. 22, 41 C.P.R. (3d) 512 (Jerome); *Glaxo Canada Inc.* v. *Canada (Minister of National Health and Welfare)* (1992), 52 F.T.R. 39, 41 C.P.R. (3d) 176 (Jerome); *Cyanamid Canada Inc.* v. *Canada (Minister of National Health and Welfare)* (1992), 45 C.P.R. (3d) 390 (F.C.A.: Stone).

Personal information exemption: *Information Commissioner* v. *Minister of Employment and Immigration* (1986), 5 F.T.R. 287, 11 C.P.R. (3d) 81 (Jerome); *Robertson v. Minister of Employment and Immigration* (1987), 13 F.T.R. 120 (Jerome); *Noel* v. *Great Lakes Pilotage Authority* (1987), 20 F.T.R. 257 (Dubé); *Information*

Appeal,[57] there have been several lengthy judgments written by Trial Division judges.[58] In all, a total of 18 different judges have written decisions.[59]

But how well has court review served the *Access Act*? Has the court tended to widen or narrow the scope of the access right? To answer

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Commissioner v. *Canada (Solicitor General)* (1988), 20 F.T.R. 314 (Jerome); *Information Commissioner* v. *Canada (Minister of Fisheries and Oceans)* (1988), 20 F.T.R. 116 (Denault); *Canada (Information Commissioner)* v. *Canada (Secretary of State for External Affairs)* (1989), [1990] 1 F.C. 395, 32 F.T.R. 161, 28 C.P.R. (3d) 301 (Dubé); *Bland* v. *(Canada) National Capital Commission* (1991), 41 F.T.R. 202, 4 Admin L.R. (2d) 171, 36 C.P.R. (3d) 289 (Muldoon); *Rubin* v. *Clerk of the Privy Council* (25 March 1993), Court File nos. T–2651–90, T–1587–91 and T–1391–92 (F.T.C.D.: Muldoon).

Other exemptions: *Bombardier* v. *Commission de la Fonction Publique du Canada* (1990), 41 F.T.R. 39 (Addy); *X* v. *Canada (Minister of National Defence)* (1991), 46 F.T.R. 206 (Denault, J.); *X* v. *Canada (Minister of National Defence)* (1992), 58 F.T.R. 93 (Strayer); *Information Commissioner (Canada)* v. *Prime Minister (Canada)* (1992), 57 F.T.R. 180 (Rothstein); *Rubin* v. *Clerk of the Privy Council* (2 March 1993), Court File no. T–2922–91 (F.C.T.D.: Rothstein).

[57] *Rubin* v. *President of Canada Mortgage and Housing Corp.* (1988), 86 N.R. 186, (1989) 21 C.P.R. (3d) 1 (F.C.A.), rev'g (1987), 8 F.T.R. 230, 14 C.P.R. (3d) 176 [hereinafter *CMHC* (1988) (C.A.) cited to N.R.]; *Canada Packers Inc.* v. *Minister of Agriculture* (1988), [1989] 1 F.C. 47, 26 C.P.R. (3d) 407 (C.A.), aff'g (1987), [1988] 1 F.C. 483, 87 N.R. 81 [hereinafter *Canada Packers* (1988) (C.A.) cited to C.P.R.]; *Saint John Shipbuilding* v. *Canada (Minister of Supply and Services)* (1990), 67 D.L.R. (4th) 315 (F.C.A.), aff'g (1989) 24 F.T.R. 32 [hereinafter *Saint John Shipbuilding* (1990) (C.A.)]; *Hunter* v. *Canada (Consumer and Corporate Affairs)* (1991), 35 C.P.R. (3d) 492 (F.C.A.), aff'g (1990), 29 C.P.R. (3d) 321; *Cyanamid Canada Inc.* v. *Canada (Minister of National Health and Welfare)* (1992), 45 C.P.R. (3d) 390 (F.C.A.), aff'g (1992), 41 C.P.R. 512.

[58] See, for example: *Piller Sausages* v. *Canada (Minister of Agriculture)* (1987), 14 F.T.R. 118 (Jerome) [hereinafter *Piller Sausages* (1987)]; *Montana Band of Indians* v. *Canada (Minister of Indian Affairs and Northern Developments)* (1988), 18 F.T.R. 17 (Jerome) [hereinafter *Montana Band of Indians* (1988)]; *Air Atonabee Ltd.* v. *Canada (Minister of Transport)* (1989), 27 F.T.R. 194, 37 Admin. L.R. 245, 27 C.P.R. 180, (MacKay) [hereinafter *Air Atonabee* (1989) cited to F.T.R.]; *Canada (Information Commissioner)* v. *Canada (Minister of External Affairs)* (1990), [1990] 3 F.C. 665, 35 F.T.R. 177, 72 D.L.R. (4th) 113 (Denault) [hereinafter *Minister of External Affairs* (1990) cited to D.L.R.]; *Bland* v. *Canada (National Capital Commission)* (1991), 41 F.T.R. 202, 4 Admin. L.R. (2d) 171, 36 C.P.R. (3d) 289 (Muldoon) [hereinafter *Bland* (1991) cited to C.P.R.]; *Information Commissioner (Canada)* v. *Prime Minister (Canada)* (1992), 57 F.T.R. 180 (Rothstein) [hereinafter *Prime Minister* (1992)].

[59] *Supra* note 56. The judges are: Associate Chief Justice Jerome (25 decisions), Justices Strayer (six), Dubé (four), Muldoon (four), Denault (three), Martin (three), Cullen (two), Reed (two), Rothstein (two), Addy (one), Collier (one), MacKay (one), Pinard (one), and Justices of Appeal MacGuigan (two), Décary (one), Heald (one), Hugessen (one), and Stone (one). In addition, Mr. Justice Pratte of the Court of Appeal has written dissenting reasons in one judgment.

these questions, three basic issues will be discussed: the Act's purpose clause, the severance principle and the court's own review powers. Later, the court's record of decisions on the two most popular mandatory exemptions — the personal and commercial information exemptions — will be considered.

A. The Purpose Clause

Perhaps the most basic question anyone can ask about a piece of legislation relates to its purpose. In the case of the *Access to Information Act*, that purpose is set out explicitly in s. 2(1):

> The purpose of this Act is 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 exemptions 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.

Section 2(2) adds that the Act is intended to "complement and not replace" existing procedures for access to information, so that it does not limit information normally available from the government.

As T. Murray Rankin pointed out, purpose clauses are only rarely included in Canadian legislation: "Even hortatory preambles are increasingly rare; it is significant, therefore, that a purpose clause of this sort is included in the body of the statute itself."[60]

Indeed, the purpose clause is the focus of argument for those who believe that the court should take a liberal approach to the *Access Act* and that court review should aggressively challenge government's information practices. Pointing to the general principles contained in s. 2, advocates argue that the court should resolve any doubt about the Act's meaning or application in favour of greater access.

A liberal approach to the *Access Act* was emphasized early, in the first case with written reasons: *Maislin Industries Ltd.* v. *Minister for Industry, Trade and Commerce* (1984).[61] Rejecting a third party's s. 44 application, Associate Chief Justice Jerome of the Trial Division wrote that since the basic principle of the Act was "to codify the right of public access to government information ... such public access ought not to be frustrated by the courts except upon the clearest grounds so

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[60] T. Murray Rankin, Case Comment on *Maislin Industries Ltd.* v. *Ministry of Industry, Trade and Commerce* (1985) 8 Admin. L.R. 314 at 317.

[61] [1984] F.C. 939 (T.D.), 10 D.L.R. (4th) 417, 80 C.P.R. (2d) 253, 8 Admin. L.R. 305 [hereinafter *Maislin* (1984) cited to Admin. L.R.].

that doubt should be resolved in favour of disclosure."[62] Praised by T. Murray Rankin as well in accord with "the spirit of the Act,"[63] the *Maislin* statement has been frequently quoted.[64]

Later cases have also stressed the importance of the purpose clause. In 1986, Mr. Justice Dubé wrote that "the existence of such a clause is worth emphasizing since it is quite rare and therefore significant."[65] In the same year, Mr. Justice Jerome expanded on his *Maislin* comment, noting that the Act was not intended to codify the right of refusal: "Access should be the normal course. Exemptions should be exceptional and must be confined to those specifically set out in the statute."[66]

Federal Court of Appeal decisions have followed a similar course. In *Canada Packers Inc.* v. *Minister of Agriculture* (1988), Mr. Justice MacGuigan referred to the purpose clause when deciding what likelihood of harm must exist before the commercial information exemption will apply.[67] He noted that previous Court of Appeal decisions had adopted the "words-in-total context" approach to statutory interpretation; here, that meant the commercial exemption must be interpreted "particularly in light of the purpose of the Act as set out in s. 2."[68] Given the mandate of the Act's purpose clause, the court adopted a high standard of harm.

Most recently, the Trial Division has confirmed that the purpose clause should form the basis for interpretation of the Act. In *Information Commissioner* v. *Prime Minister of Canada* (1992), Mr. Justice Rothstein rejected an argument that s. 2 was merely descriptive, without a substantive effect. He wrote: "When Parliament has been

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[62] *Ibid.* Admin L.R. at 309. Following this approach, Mr. Justice Jerome ruled that the third party in a s. 44 application bore the same burden to resist disclosure that was imposed on government in a s. 41 application.

[63] *Supra* note 60 at 317.

[64] See, for example: *Minister of External Affairs* (1990), *supra* note 58 at 117; *Information Commissioner* v. *Minister of Employment and Immigration* (1986), 5 F.T.R. 287 at 291–292 [hereinafter *Minister of Employment and Immigration* (1986)].

[65] *Société de Transport de la Communaute Urbaine de Montréal* v. *Canada (Minister of the Environment)* (1987), 9 F.T.R. 152 at 154.

[66] *Minister of Employment and Immigration* (1986), *supra* note 64 at 292.

[67] *Canada Packers* (1988) (C.A.), *supra* note 57. See also *CMHC* (1988) (C.A.), *supra* note 57 at 192, where Mr. Justice Heald cited s. 2 and noted that the "general rule" in access cases should be disclosure, with exemptions the exception.

[68] *Canada Packers* (1988) (C.A.), *supra* note 57 at 416.

explicit in setting forth the purpose of an enactment and principles to be applied in construing it, I am of the opinion that such purpose and principles must form the foundation on which to interpret the operative provisions of the Act."[69]

In general, cases dealing with the purpose clause recognize the importance of the right of access. But while they provide the theoretical basis for interpretation of the Act, the court has not always applied these principles in practice. Decisions on some issues show that while the court pays lip service to these principles, it often makes decision which seem to fly in their face.

B. Severance

The principle of severance set out in s. 25 of the Act holds that where an institution denies access to part of a record it must release any other part that "can reasonably be severed." The principle applies "notwithstanding any other provision" in the Act.

Without severance the access right would lose much of its meaning, since harmless information could be withheld simply because it appeared alongside exempt information in the same document. Given the purpose of the *Access Act*, a principle requiring as much access as possible seems common sense. T. Murray Rankin called severance an important qualification on the *Access Act's* elaborate scheme of exemptions.[70]

The Federal Court of Appeal has emphasized the importance of severance in the case of *Rubin* v. *Canada Mortgage and Housing Corp.* (1988).[71] Ordering the CMHC administrator to re-consider her refusal of access, Mr. Justice Heald wrote that it was significant that s. 25 applies "notwithstanding" the rest of the Act, and that the section uses the mandatory "shall": "In my view this means that once the head of a government institution has determined, as in this case, that some of its records are exempt, the institutional head, or his delegate, is required to consider whether any part of the material requested can reasonably be severed."[72] Failing to consider severance was an error in law which made the refusal invalid.

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[69] *Prime Minister* (1992), *supra* note 58 at 189.

[70] Rankin, "Annotation," *supra* note 24 at 13–14. The other qualification, Rankin wrote, was the statement in s. 2(2) that the Act was not intended to limit access to government information available through other means.

[71] *CMHC* (1988) (C.A.), *supra* note 57.

[72] *Ibid.* at 190.

The severance provision becomes more debatable when applying it strictly will result in the release of only fragmentary portions of a document. In my view, severance should occur even here, so that the requester can decide for him- or herself whether the information has meaning or value. In the same way that a requester need not identify his purpose for an access request, an administrator should not second-guess the requester by judging when severed information is useless. Where there are worries that fragmentary information will be deceptive, it can be disclosed along with a letter describing its shortcomings.[73]

Unfortunately, the Federal Court has a mixed record on this sort of fragmentary severance. One early case illustrates the lengths to which the Trial Division will go to ensure the release of as much information as possible. In *Robertson* v. *Minister of Employment and Immigration* (1987),[74] Mr. Justice Jerome made a paragraph-by-paragraph examination of a disputed letter. He decided that two paragraphs should be withheld because they contained personal information, but no justification existed to withhold the author's closing signature and employee identification number.

This rigorous approach was absent from another of Mr. Justice Jerome's decisions, *Information Commissioner* v. *Canada (Solicitor General)* (1988).[75] There, the Solicitor General refused to release portions of a report about the food services provided at a psychiatric institution in Saskatoon. Although the judge found that more information could be severed, he refused to make an order for further disclosure. The Act did not mandate a "surgical process" requiring the release of "disconnected snippets" of harmless information, he wrote.[76] Instead, Parliament intended that severance should be attempted only where the result would be a reasonable fulfilment of the purpose of the Act. Similarly, in *Montana Band of Indians* v. *Canada (Minister of Indian Affairs)* (1988), Mr. Justice Jerome suggested that severance was unnecessary where the effort required by the government institution "is not reasonably proportionate to the

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[73] For example, in the *Piller Sausages* case the Department of Agriculture proposed to release several meat plant audits along with a covering letter which explained that the audits did not give a fair assessment of the over-all operations of the plants: *Piller Sausages* (1987), *supra* note 58 at 123–124.

[74] 13 F.T.R. 120 [hereinafter *Robertson* (1987)].

[75] 20 F.T.R. 314 [hereinafter *Solicitor General* (1988)].

[76] *Ibid.* at 318.

quality of access it would provide."[77] Applying severance would have resulted in the release of only two or three lines which would be "worthless" without the context of the rest of the document.

In my view, this is a serious misreading of the Act, and one that certainly does not err on the side of access. In effect, Mr. Justice Jerome's comments suggest that severance is necessary only where it will produce a complete, coherent piece of releasable information. But, in my view, the word "reasonably" in s. 25 is intended to prevent severance only when releasable information is so intertwined with exempt information that the process of separation would be too difficult — where, for example, some words in a clause are releasable and some are not. The section does not require a certain quality of releasable information before it will apply.

Mr. Justice Jerome's approach has been followed in other cases. In *Canadian Football League* v. *Canada (Minister for Fitness and Amateur Sports)* (1989), Mr. Justice Strayer first considered whether the information would be meaningful without exempt portions, before he made an order requiring disclosure.[78] And in *Air Atonabee* v. *Canada (Minister of Transport)* (1989), Mr. Justice MacKay referred to Jerome's remarks on severance, but decided that severance could be done reasonably in his case.[79]

C. Court Review Powers

One crucial question concerning the court's review power is the scope of review for permissive exemptions. The review power which applies to most permissive exemptions is set out in s. 49 and permits the court to order disclosure where the institution was "not authorized" to refuse access. But there is some question as to how much power this section gives the court. If the court decides that information falls within a permissive exemption, can it then reconsider (and overturn) the institution's discretionary refusal of access?

The question is important because the majority of the exemptions in the *Access Act* are permissive. If the court cannot review the discretion to withhold, these permissive exemptions may become, in effect, mandatory. Following a cautious approach, government administrators may routinely deny information that falls within the permissive exemptions. In fact, statistics on the operation of the Act

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[77] *Montana Band of Indians* (1988), *supra* note 58 at 27.

[78] 24 F.T.R. 62 at 68, 23 C.P.R. (3d) 297 [hereinafter *CFL* (1989) cited to F.T.R.].

[79] *Air Atonabee* (1989), *supra* note 58 at 217.

suggest that permissive exemptions are cited frequently; between 1987 and 1990, the permissive exemptions for national defence, law enforcement and policy advice together accounted for about one quarter of all refusals.[80]

But in *Information Commissioner* v. *Canadian Radio-Television and Telecommunications Commission* (1986)[81] Mr. Justice Jerome ruled that he could not reconsider a decision to deny access based on s. 21, the policy advice exemption. He wrote:

> Once it is determined that a record falls within the class of records referred to subsection 21(1) the applicant's right to disclosure becomes subject to the head of the government institution's discretion to disclose it. In other words the applicant does not have an absolute right to disclosure of records under subsection 21(1).[82]

Although the decision was later followed in *Rubin* v. *Canada (Solicitor-General)* (1986),[83] it was harshly criticized by at least one academic. Prof. William Kaplan of the University of Ottawa wrote that the decision failed to consider the purpose of the Act:

> First of all, the intention of the Act is to give Canadians access to government information, with only limited and specific exemptions. If a test is to be developed it should be one in which this fundamental principle is given effect. A simple determination of whether or not information falls within a discretionary exemption absent inquiry about whether or not exempting that information is in accordance with the intention of the legislation falls short of the overall legislative scheme.[84]

Fortunately, the Federal Court of Appeal appears to have overruled the decision in *Canada Mortgage and Housing Corporation* (1988).[85]

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[80] Between 1987–88 and 1989–90, the three permissive exemptions together accounted for between 23 and 25 per cent of all denials. Note that for simplicity's sake I have included the s. 16 law enforcement exemption as a permissive exemption; however, one of the three subsections of s. 16 contains a mandatory exemption, which applies to information obtained by the RCMP while performing policing services for a province. If all refusals under the law enforcement exemption are excluded, the two remaining exemptions accounted for 18 to 21 per cent of all refusals. See: Treasury Board, *Third Consolidated Annual Report, supra* note 43 at 14; *Access to Information Act/Privacy Act: Second Consolidated Annual Report* (Ottawa: Supply and Services, 1989) at 12.

[81] [1986] 3 F.C. 413, 1 F.T.R. 317 (T.D.).

[82] *Ibid.* F.C. at 420.

[83] 1 F.T.R. 157.

[84] *Supra* note 2 at 188.

[85] *CMHC* (1988) (C.A.), *supra* note 57.

The *CMHC* case began in March 1985, when researcher Ken Rubin made an access request for the minutes of the CMHC's corporate board meetings from 1970 to 1985. By letter dated the next day, the institution refused access on the basis of the s. 21 policy advice exemption.[86] Later, the information commissioner's office reviewed a small sample of the 13 feet of records involved; it concluded that most of the records were "innocuous" and should be released even if, technically, they fell within the exemption.[87] When the CMHC stood by its refusal, Rubin took the case to the Federal Court.

In the Trial Division, Mr. Justice Cullen cited the *CRTC* case as identical to the present one and refused to review the refusal.[88] The judge added, however, that he was surprised by the CMHC's position, which seemed "at variance with the scheme of the Act."[89] Rubin appealed.

In the Court of Appeal, Mr. Justice Heald wrote that the discretion of administrators "must be used in a manner which is in accord with the conferring statute."[90] He cited the Supreme Court of Canada's *Oakwood Developments Ltd.* v. *Rural Municipality of St. Francis Xavier* (1985), where Madam Justice Wilson wrote that the administrative decision-maker must "be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function."[91] He also referred to a decision by the British House of Lords, *Padfield* v. *Minister of Agriculture, Fisheries and Food* (1968) where Lord Reid wrote that an administrator could not use his discretion "to thwart or run counter to the policy and objects of the Act."[92]

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[86] *Ibid.* at 187.

[87] *Rubin* v. *Canada Mortgage and Housing Corp.* (1987), 8 F.T.R. 230 at 233, rev'd (1988), 86 N.R. 186 (C.A.).

[88] *Ibid.* at 234.

[89] *Ibid.*

[90] *CMHC* (1988) (C.A.), supra note 57 at 191.

[91] [1985] 2 S.C.R. 153 at 175, 61 N.R. 321.

[92] [1968] A.C. 997 at 1030, Reid, J.: "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court. ... [I]f the Minister, by reason of his having misconstrued the Act, or for any other reason, so uses his discretion to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court."

Based on these principles, an administrator must "have regard to the policy and object of the *Access to Information Act*" when exercising the discretion inherent in the policy advice exemption, Mr. Justice Heald decided.[93] Considering the Act's purpose section, it was clear Parliament intended the exemptions to be interpreted strictly, he added.

The CMHC administrator had a duty to decide whether all the records requested fell within the s. 21 exemption. Given the large volume of the material involved and the fact that she responded by letter dated the day after the request, it seemed clear that she had not examined all the material before claiming the blanket exemption. The administrator had erred when she claimed the blanket exemption and erred again when she failed to sever releasable information as required by s. 25 of the Act. Allowing the appeal, Mr. Justice Heald referred the matter back to the CMHC administrator for reconsideration.

Most importantly, he expressly disagreed with the concept that the court had no power to review discretionary decisions taken under permissive exemptions. Quoting the key sentence from the *CRTC* case, Mr. Justice Heald commented:

> With every deference, I am unable to agree with that view of the matter. Such a conclusion fails to have regard to the objects and purposes of the Act. The general intent and purpose of the Act, as expressed in section 2 *supra* includes a clear intention by Parliament to provide a means whereby decision respecting public access to public documents will be reviewed "... independently of government."[94]

Instead, he wrote that the review power in s. 49 of the Act was enacted to allow the court to decide whether an administrator was "authorized" to allow disclosure; this included deciding whether the discretion given to the administrator "has been exercised within proper limits and on proper principles."[95]

While the *CMHC* case has clarified the s. 49 review power, the precise scope of the court's review power under s. 50 remains uncertain. Four specified exemptions must be considered under the

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[93] *CMHC* (1988) (C.A.), *supra* note 57 at 191.

[94] *Ibid.* at 192.

[95] *Ibid.* at 191 and 193.

more restrictive review power set out in s. 50,[96] which gives the court the power to order disclosure where it determines that the head of the institution "did not have reasonable grounds" to refuse to disclose the record. Only a few court cases have interpreted the section.

The first case to consider s. 50 viewed the section as essentially interchangeable with s. 49. In *X.* v. *Canada (Minister of National Defence)* (1991), Mr. Justice Denault considered a refusal under the Act's national defence exemption. He wrote that s. 50 gives the court, "the power to disclose information if the head of the government institution was not authorized to grant an exemption or, in other words, he did not have reasonable grounds on which to refuse disclosure ...."[97] Here, the judge has joined the wording of s. 49 and s. 50 together, apparently viewing the two sections as different expressions of the same test. This approach fails to explain the difference in wording of the sections and also stands in conflict with the view of academic observers.[98]

Mr. Justice Strayer provided a better explanation of the s. 50 review power in another case on the national defence exemption, *X.* v. *Canada (Minister of National Defence)* (1992).[99] There, he wrote that the court did not have the power to order disclosure simply because it disagreed with the government administrator. Instead, the court could intervene only if it concluded, based on the evidence, that "no reasonable person" would have applied the exemption.[100] Even on that narrow standard of review, the judge ruled that the Department of Defence could not withhold information about German codes used during World War II. "I can only say that it appears to me quite unreasonable that information in these documents ... could reveal anything pertinent to the conduct of Canada's international relations and its national defence over 50 years later in a time of peace," he wrote.[101]

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[96] The exemptions are: *Access to Information Act,* s. 14 (federal-provincial affairs), s. 15 (national defence), s. 16(1)(c) or (d) (law enforcement), and s. 18(d) (economic interests of government).

[97] 46 F.T.R. 206 at 224.

[98] See: Rankin, "Annotation," *supra* note 24 at 32 and McCamus, "Bill C-43," *supra* note 30 at 278.

[99] 58 F.T.R. 93.

[100] *Ibid.* at 97.

[101] *Ibid.*

Finally, in the recent case of *Information Commissioner* v. *Prime Minister of Canada* (1992),[102] Mr. Justice Rothstein considered a refusal to release polling information under the Act's exemption for federal-provincial affairs. Deciding in favour of disclosure, the judge suggested that the government must provide strong evidence to justify its refusal at a s. 50 review hearing. "[T]he heavy onus placed on the party seeking to maintain confidentiality must be satisfied in a formal manner on a balance of probabilities through clear and direct evidence," he wrote.[103] It is unclear whether this represents a new standard of review or simply a clarification of Mr. Justice Strayer's remark that the court must make its decision based on the evidence. In either case, the evidentiary burden imposed on government will make the justification of future refusals more difficult.

A final issue concerning the court's review power is the interpretation of override provisions included in the Act's commercial and personal information exemptions. These override provisions give administrators the power to release information that falls within the two mandatory exemptions, if certain conditions are met.

For example, the commercial information override found in s. 20(6) of the Act allows an administrator to release exempt information if

> such disclosure would be in the public interest as it related to public health, public safety, or the protection of the environment and, if such public interest disclosure clearly outweighs in importance any financial loss or gain to, or prejudice to the competitive position of or interference with the contractual or other negotiations of a third party (s. 20(6)).

Clearly, the override applies in a fairly limited set of circumstances, and requires the administrator to carefully weigh a number of complex factors. But assuming that an administrator chooses not to release an exempt record falling within the override, can that exercise of discretion be reviewed by the court?

The issue was briefly considered by the trial level decision in *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1987). There, Mr. Justice Jerome ruled that inspection audits for several meat-packing plants should be released because they did not qualify for protection under the commercial information exemption. But he went on to add that if the audits did fall within the exemption, "the public interest in disclosure in this case clearly outweighs any risk of harm

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[102] *Prime Minister* (1992), *supra* note 58.

[103] *Ibid.* at 213.

to the applicant and the reports should be released under s. 20(6) of the Act."[104]

On appeal, the Federal Court of Appeal ruled that s. 20(6) was not available to the court. The administrator had never considered the override but based the decision to release solely on his conclusion that the reports did not qualify for protection under the commercial information exemption. Without any exercise of the discretion in s. 20(6), the court could not use the override as a basis for ordering disclosure. Mr. Justice MacGuigan wrote:

> It is one thing for a court to review a discretion which a Minister of the Crown has exercised. It would be quite another thing, and in my view entirely inappropriate, for the court in the first instance to exercise the Minister's discretion in his/her stead. Even on an application for *mandamus*, a court can only order a Minister to act or not to act for him/her. Apart from the apparent impropriety, it does not take much imagination to conjure up the perils to a fair hearing which such an after-the-fact judicial decision could lead to in the absence of evidence adduced to that issue.[105]

From this, it appears that Mr. Justice MacGuigan was not averse to the idea of judicial review of the override, only its availability in the present circumstances. But this implicit support leaves much to be desired; it would have been preferable had the judge added that the minister's discretion, once exercised, could be reviewed.

The issue was decided more clearly in *Bland* v. *National Capital Commission* (1991),[106] a case which considered the public interest override to the Act's personal information exemption. Under the exemption, personal information will generally be withheld unless the disclosure of personal information is authorized by s. 8 of the *Privacy Act* (s. 19(2)). The public interest override is found in s. 8(2)(m)(i) of the *Privacy Act* and permits the release of personal information "for any purpose where, in the opinion of the head of the institution ... the public interest in disclosure clearly outweighs any invasion of privacy that could result from disclosure."

In *Bland*, the NCC refused a request for information about the names and rents of its residential tenants. It claimed that the information was protected by the personal information exemption, and

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[104] [1988] 1 F.C. 483 (T.D.) at 486, adopting reasons from *Piller Sausages* (1987), *supra* note 58.

[105] *Canada Packers* (1988) (C.A.), *supra* note 57 at 412.

[106] *Bland* (1991), *supra* note 58.

that the public interest in access was not significant enough to warrant release under the override.

Mr. Justice Muldoon decided that the court could prefer its own view of the public interest over that of the NCC. He cited the s. 2 principle that refusals of access should be reviewed independently of government and the Court of Appeal's judgment in the *CMHC* case. There, Mr. Justice Heald ruled that an administrator must have "regard to the policy and object of the *Access to Information Act* when exercising the discretion conferred by Parliament" and that the discretion must be exercised "within proper limits and on proper principles."[107] The same concepts applied to a review under the public interest override provision.

As a result, the issue to be decided was whether the NCC's decision balancing the invasion of privacy against the public interest had been taken in deference to the purpose of the *Access Act*. After critically examining the decision, Mr. Justice Muldoon decided the NCC had failed to give proper weight to the "paramount value" of public access.[108] He quoted a key passage from the NCC memo on the decision to withhold:

> A high standard both in terms of weight and nature of the public interest is requested to demonstrate the invasion of privacy is clearly outweighed by the public interest. *The mere fact that public lands are being leased certainly does not imply under the legislation that the public has a right to know.*[109]

The emphasized sentence was clearly antagonistic to the general intent and purpose of the *Access Act*: it did not accord with the right of access or the s. 2 principle that exemptions be interpreted in a "limited and specific" way. "It is clear that a blunt, bare assertion of the opposite is not a specific, limited exemption, no matter how simplistic its expression," he wrote.[110] As a result, the judge ordered the NCC to release the information.

In a more recent case, Mr. Justice Muldoon refused to use the s. 8(2)(m)(i) override to order disclosure of the precise salary paid to the

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[107] *CMHC* (1988) (C.A.), *supra* note 57 at 191 and 192 respectively.

[108] *Bland* (1991), *supra* note 58 at 306.

[109] *Ibid.* at 305.

[110] *Ibid.* at 306.

chairman of the Canada Council.[111] He ruled that the disclosure of this information was not in the public interest since, if the exact salaries of appointees were made public, the government might have difficulty attracting high-profile candidates from the private sector. However, he added that the same information would be available through the override if it appeared that the government was favouring its "pets" with lucrative appointments: "The greater the government's embarrassment over its own folly with the taxpayers' money, the greater the public interest in disclosure of the information, for this legislation must never operate to cover up folly and bad government," he wrote.[112]

IN SUMMARY, the court's record on court review issues is generally positive. Judges have displayed a willingness to challenge the discretionary decisions of government and have defined a fairly wide role for the court. On the other hand, there are few reported cases in this area. The court's powers remain newly-formed and may be narrowed in later cases.

III. COURT REVIEW: THE PERSONAL INFORMATION EXEMPTION

AS WE HAVE SEEN from the discussion of the purpose clause, the court has made several interpretative statements which emphasize the importance of the access right. To consider how well the court has lived up to these statements in practice, an examination of the case law on the Act's two most popular exemptions, the personal information and commercial information exemptions, is necessary.

Personal information is particularly sensitive because it raises the issue of personal privacy. Most members of our society feel instinctively that they should possess some control over their personal information. Canadian and American opinion polls confirm that the public attaches a great deal of importance to the privacy of personal information.[113] As one academic observed: "People sense they have

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[111] *Rubin* v. *Clerk of the Privy Council* (25 March 1993), Ottawa, Nos. T-2651-90, T-1587-91 and T-1391-92 (F.C.T.D.) [hereinafter *Clerk of the Privy Council* (1993)].

[112] *Ibid.* at 8.

[113] In the U.S., a 1983 opinion poll by Louis Harris and Associates found that 76 per cent of the public was concerned about privacy. In Canada, polls of Ontario residents in 1987 and 1988 by Decima Research found that 94 per cent thought that the protection of the personal information held by government was important or very important. See: David H. Flaherty, *Protecting Privacy in Surveillance Societies* (Chapel

lost control over the protection of their own privacy in a world dominated by computers, even if most individuals are as yet only vaguely aware of the real social cost and implications of dossiers on each of us."[114] Other theorists have emphasized the concept of "informational privacy," arguing that control over personal information is essential for individual development. Some have even defined privacy strictly in terms of information control.[115] In the criminal context, the Supreme Court of Canada has stressed the importance of privacy in personal communications, ruling in *R.* v. *Duarte* (1990)[116] that the *Charter of Rights* prohibits police recordings without the consent of the subject.

At the same time, the federal government routinely collects many different kinds of personal information: census information, tax returns, employment records and data about federal benefit programs, to name a few examples. The wide scope of federal responsibilities has required the government to intrude into many areas formerly considered private;[117] today the federal government has probably become the single largest collector of personal information in Canada.

The personal information exemption seeks to reconcile the claim of individual privacy with the benefit of broad public access. Here the *Access Act's* companion statute comes into play, as the exemption borrows provisions from the federal *Privacy Act.* As will be seen, this intermingling raises questions about how the exemption should be interpreted — with an emphasis on privacy or access.

The exemption itself is fairly complex and encompasses three separate statutory sections. (In contrast, the personal information exemption in the U.S. *Freedom of Information Act* is only a few lines

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Hill, N.C.: University of North Carolina Press, 1989) at 7 and 410, note 28.

[114] Flaherty, *supra* note 113 at 6–7.

[115] "Alan Westin, for example, defines privacy as the 'claim of individuals, groups, or institutions to determine for themselves, when, how and to what extent information about them is communicated to others.' Charles Fried defines privacy as 'the control we have over information about ourselves,' while A. Miller opts for the 'individual's ability to control the circulation of information relating to him.'" Arthur Schafer, "Privacy: A Philosophical Overview" in Dale Gibson, ed., *Aspects of Privacy Law: Essays in Honour of John M. Sharp* (Toronto: Butterworths, 1980) 1 at 8 (footnotes omitted).

[116] [1990] 1 S.C.R. 30, 103 N.R. 86, 65 D.L.R. (4th) 240.

[117] Nanci-Jean Waugh, "A Critique of the *Privacy Act*" in Donald C. Rowat, ed., *Canada's New Access Laws: Public and Personal Access to Governmental Documents* (Ottawa: Carleton University, Dept. of Political Science) 45 at 45.

long.)[118] The starting point is s. 19(1) of the *Access Act*, which states that an institution must refuse to disclose any record that contains personal information as defined by the *Privacy Act*. Section 3 of the *Privacy Act* defines personal information as "information about an identifiable individual that is recorded in any form."[119] The definition then sets out more than a dozen examples of personal information, including information about race, ethnic origin, colour, religion, age, marital status, criminal record and employment history. An individual's name, however, is considered personal information only when its disclosure would reveal other information (*PA* s. 3(i)). In addition, four types of information normally considered personal are expressly excluded. The exclusions apply to information about the position or functions of government employees, information about services that individuals provide to government under contract, information about discretionary benefits "of a financial nature," and information about individuals dead more than twenty years (*PA* ss. 3(j)-(m)).

Finally, the scope of the personal information exemption itself is limited by a set of exceptions in s. 19(2) of the *Access Act*, which permit the release of personal information in some cases. Section 19(2) states that an institution may disclose personal information if the individual consents, the information is already publicly available, or disclosure is possible under s. 8 of the *Privacy Act*. Section 8 permits disclosure for a variety of different reasons.[120] Most significantly, the public interest override in s. 8(2)(m)(i) allows the release of informa-

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[118] The U.S. exemption applies to "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy": *Freedom of Information Act*, 5 U.S.C. s. 552, para. (b)(6).

[119] *Privacy Act*, *supra* note 29. In general, further references to the *Privacy Act* will be included in the body of the text, set off by parentheses and preceded by "*PA*" to distinguish from references to the *Access to Information Act*.

[120] For example, release of personal information is permitted: for the reason it was collected; where another federal Act requires the release; in order to comply with a subpoena or warrant; to the federal Attorney General for use in Crown legal proceedings; to a specified investigative agency for the purpose of enforcing Canadian laws; to a province or another state government under a law enforcement agreement; to a member of Parliament for the purposes of resolving a problem about the individual; to government officials or the Comptroller General for audit purposes; to the National Archives for archival purposes; to researchers for statistical purposes; to Indian Bands for the purposes of researching claims or disputes; to an institution for the purposes of collecting a debt; and where, in the opinion of the head of the institution, disclosure would clearly benefit the individual: *Privacy Act*, ss. 8(2)(a)–(*l*) and (m)(ii).

tion where the head of the institution believes "the public interest in disclosure clearly outweighs any invasion of privacy." As the override has already been discussed, it will not be considered here.[121]

Turning to the operation of the exemption, Federal Court Trial Division cases to date have applied the exemption in several different situations. Judges have permitted access to the following types of information: the name of the author of a letter written on behalf of a union;[122] the names of ship's officers exempt from certain federal regulations;[123] security classifications required for temporary positions in the Department of External Affairs;[124] information about residential tenants of the National Capital Commission;[125] and non-monetary benefits paid to the chairman of the Canada Council.[126] On the other hand, judges have withheld: personal remarks in a letter written on behalf of a union;[127] qualitative information about the performance of specific federal government employees;[128] the names of people given permission to observe seal hunts;[129] and the specific salary of the chairman of the Canada Council.[130]

Details of this case law can best be discussed under four main issues: whether the purpose of the *Access* or *Privacy Act* should dominate the interpretation of the exemption, the scope of the definition of personal information, the scope of exclusions from the definition of personal information, and the application of the s. 19(2) exceptions permitting the release of personal information.

A. Purpose Clause Relevant to the Exemption

While the purpose clause has been emphasized in Federal Court cases as an important interpretive guide, the personal information exemp-

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[121] See notes 106–110 and accompanying text.

[122] *Robertson* (1987), *supra* note 74.

[123] *Noel* v. *Great Lakes Pilotage Authority* (1987), 20 F.T.R. 257 [hereinafter *Noel* (1987)].

[124] *Canada (Information Commissioner)* v. *Secretary of State for External Affairs* (1989), 28 C.P.R. (3d) 301 (F.C.T.D.) [hereinafter *Secretary of State for External Affairs* (1989)].

[125] *Bland* (1991), *supra* note 58.

[126] *Clerk of the Privy Council* (1993), *supra* note 111.

[127] *Robertson* (1987), *supra* note 74.

[128] *Solicitor General* (1988), *supra* note 75.

[129] *Information Commissioner* v. *Canada (Minister of Fisheries and Oceans)* (1988), 20 F.T.R. 116 [hereinafter *Minister of Fisheries and Oceans* (1988)].

[130] *Clerk of the Privy Council* (1993), *supra* note 111.

tion involves sections from both the *Access* and *Privacy Acts*. The *Privacy Act* contains its own purpose clause, which states that the Act is intended "to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution" (*PA* s. 2).

In my view, the purpose sections of the *Access* and *Privacy Acts* are clearly incompatible: one emphasizes the right to government information, while the other emphasizes the right to privacy in the treatment of personal information. Despite the fact that the two Acts are related, access and privacy statutes deal with separate issues which can easily conflict; thus, I believe that the two Acts should be treated as conceptually distinct. In addition, it seems common sense that the right to access should be the paramount consideration under access legislation, including its personal information exemption. So, for example, American courts have interpreted the balancing required under the U.S. personal information exemption as tilted "against privacy and in favour of disclosure."[131] For these reasons, I favour an approach that looks solely to the *Access Act's* purpose section when interpreting the personal information exemption.

Federal Court decisions tend to consider the purpose clauses of both Acts together when interpreting the personal information exemption. In *Information Commissioner* v. *Canada (Solicitor General)* (1988), the Trial Division rejected an argument by the information commissioner that the definition of personal information should be interpreted in a way that favoured the right of access. Mr. Justice Jerome wrote that the purpose clause in neither the *Access* nor *Privacy Act* should be given pre-eminence: "Clearly, what Parliament intended by the incorporation of a section of the *Privacy Act* in s. 19(1) of the *Access to Information Act* was to ensure that the principles of both statutes would come into play in the decision whether to release personal information."[132] Later, in *Information Commissioner* v. *Secretary of State for External Affairs* (1989), Mr. Justice Dubé added that the objects of the two Acts should be read together, and wrote that the joint objective was "that information should be provided to the public, except personal information relating to individuals."[133] Mr. Justice

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[131] Burt A. Braverman and Frances J. Chetwynd, *Information Law,* vol. 1 (New York: Practising Law Institute, 1985) at 414. However, this interpretation relies on the wording of the U.S. exemption, which requires disclosure unless there is a "clearly unwarranted" invasion of privacy.

[132] *Solicitor General* (1988), *supra* note 75.

[133] *Secretary of State for External Affairs* (1989), *supra* note 124 at 307.

Dubé's statement, however, provides no guidance on the key question confronting the court: whether to resolve borderline questions of interpretation in favour of access or privacy.

The schizophrenic approach of the court has led to results that seem inconsistent and arbitrary. For example, Mr. Justice Denault has interpreted the discretionary benefits exclusion narrowly, with an emphasis on privacy, while Mr. Justice Dubé has interpreted the contract worker exclusion broadly, with an emphasis on greater access.[134] As well, the court has taken conflicting positions on the issue of whether a simple list of names can be considered personal information in the cases of *Noel* v. *Great Lakes Pilotage Authority* (1987) and *Information Commissioner* v. *Canada (Ministry of Fisheries and Oceans)* (1988).[135] While this inconsistency can be explained, in part, by the fact that the two cases relied on different portions of the definition of personal information, it seems inexcusable that the later case failed to distinguish — or even mention — the earlier one.

In short, the "two purpose" approach permits judges to favour either access or privacy as they wish. In my view, the approach obscures the value judgment that lies at the heart of the conflict between the *Access* and *Privacy Acts*. As well, it has encouraged a case-by-case approach to the exemption which provides little predictability to the jurisprudence.

To make the situation more confusing, two Federal Court cases take an approach similar to my own. In *Information Commissioner* v. *Minister of Employment and Immigration* (1986),[136] Mr. Justice Jerome relied exclusively on the *Access Act's* purpose clause in interpreting the s. 19(2) exceptions to the personal information exemption. Clearly, the case conflicts with Mr. Justice Jerome's later statement that the two purpose clauses must be considered together. Later, in *Bland* (1991), Mr. Justice Muldoon considered the *Privacy Act's* public interest override and definition of personal information.[137] Throughout his reasons, he used the *Access Act's* purpose

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[134] See: *Minister of Fisheries and Oceans* (1988), *supra* note 129, and *Secretary of State for External Affairs* (1989), *supra* note 124.

[135] *Noel* (1987), *supra* note 123 and *Minister of Fisheries and Oceans* (1988), *supra* note 129.

[136] *Minister of Employment and Immigration* (1986), *supra* note 64. For a discussion of the case, see notes 160–166 and accompanying text.

[137] Apparently, the case marked the first time that the privacy commissioner and the information commissioner appeared to argue opposing positions at the same hearing: *Bland* (1991), *supra* note 58 at 290.

clause to interpret *Privacy Act* provisions in a way that favoured the right of access. His attitude was neatly summarized in his discussion of the public interest override, where he lamented the tendency of government institutions to withhold information which concerns individuals:

> Canada is not a nation quantified in terms of automatons, spirits or legal fictions, but in terms of people. In logic, then, of all the information in records under the control of a government institution, the overwhelmingly greater part simply must be about people. That factor does not make their privacy paramount, for if it were, the "public interest in disclosure" [in s. 8(2)(m)(i)] would be stillborn.[138]

Unfortunately, Mr. Justice Muldoon's willingness to challenge the basis of the privacy claim appears out of step with the remainder of the jurisprudence.

B. Definition of Personal Information

The core of the exemption is the definition of personal information found in s. 3 of the *Privacy Act*; the court's interpretation of the definition has been the deciding factor in most personal information cases. In general, the cases consider two separate but related issues: whether information falls within the definition and whether personal information falls within one of the definition's exclusions.

One case in the first category emphasizes the importance of distinguishing between personal and job-related information. In *Information Commissioner* v. *Secretary of State for External Affairs* (1989), the court considered whether the security classifications required for certain job positions should be disclosed. The dispute began after the Department of External Affairs released details about 25 contracts for temporary positions, including the names of people employed. When the requester asked for the security classifications that applied to those positions, the department refused. It reasoned that the classifications could be linked to the names and so amounted to personal information.

However, Mr. Justice Dubé found that the classifications were not personal information, since each classification was an attribute of the job position itself. Information that related primarily to a job — and not the individual who held it — fell outside the *Privacy Act* definition of personal information. "Clearly, security classification pertains to a

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[138] *Ibid.* at 306.

position and not to the individual who applied for that position or who eventually filled it," Mr. Justice Dubé wrote.[139]

Another question that has confronted the court is whether an individual's name alone is personal information. The *Privacy Act* definition includes a name as personal information only in certain circumstances — "where it appears with other personal information relating to the individual or where disclosure of the name itself would reveal information about the individual" (*PA* s. 3(i)).

In *Robertson* v. *Minister of Employment and Immigration* (1987),[140] Mr. Justice Jerome decided that the name of the author of a letter could be released if other personal information was withheld. The letter in dispute set out a union's opposition to a public utility's application for a federal grant. When the utility applied to see the letter, the Department of Employment and Immigration withheld two paragraphs where the author used the word "personally" and made observations based on personal experience; as well, it withheld the letter's closing, which included the author's name and employee number. Mr. Justice Jerome upheld the denial of the two paragraphs, but decided that the letter's closing must be disclosed.

In *Noel* v. *Great Lakes Pilotage Authority* (1987),[141] the requester wanted a list of the ship's officers who were exempt from certain regulations under the federal *Pilotage Act*. The regulations required all ships travelling on the Great Lakes be directed by a licensed pilot, unless one of the ship's officers had been certified as having completed 10 passages through the area in the last three years. The pilotage authority refused the access request, arguing that its documents contained personal information including the name of each officer's ship and employer. But Mr. Justice Dubé of the Federal Court Trial Division held that the names of the individuals could be severed and disclosed. Disclosure of the names alone would not reveal other information about the individuals; as a result, the list could not be withheld under the personal information exemption. Later, he noted that the identities of the exempt individuals were already public in some sense. The requester, a licensed pilot, could identify them by sight and later obtain their names from their employers.

While I generally support an interpretation of the Act which favours greater access, the approach taken in *Robertson* and *Noel*

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[139] *Secretary of State for External Affairs* (1989), *supra* note 124 at 306.

[140] *Robertson* (1987) *supra* note 74.

[141] *Noel* (1987), *supra* note 123.

appears to ignore the meaning of s. 3(i) of the *Privacy Act*. Releasing the name of the individual in the context of the access request does reveal other personal information — the fact that the individual falls within the class that the requester has asked to have identified. In *Robertson* the requester learned the name and the fact that the individual was the author of a particular letter; in *Noel*, the requester obtained a list of names and the fact that these individuals were exempt from certain regulations. The argument against disclosure becomes even stronger in *Noel*, since the name reveals some information about the individual's employment history (i.e., that a particular ship's officer has made at least 10 passages on the Great Lakes in the last three years). Prof. William Kaplan has also suggested that *Noel* was wrongly decided.[142]

Rather than adopt a strained interpretation of s. 3(i), I believe that the releasability of individuals' names should be considered under the exclusions from the definition of personal information (discussed below). So, for example, the names in *Noel* might be releasable depending on the court's interpretation of the discretionary benefits exclusion. If this approach is followed, however, the exclusions should receive a broad interpretation to ensure that there is reasonable access to individuals' names.

C. Exclusions From the Definition of Personal Information

As noted earlier, the exclusions from the definition of personal information permit access to information about individuals awarded discretionary benefits, government employees, contract workers and individuals dead for more than 20 years.[143]

The discretionary benefit exclusion in s. 3(l) of the *Privacy Act* permits access to "information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit." John D. McCamus saw the exclusion as permitting access to information about discretionary benefits, but not information about social welfare benefits conferred as a right (Canada Pension Plan payments, for example).[144] This interpretation is consistent with the *Access Act's* objective of making government

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[142] *Supra* note 2 at 191–192.

[143] See: *Privacy Act*, ss. 3(j)–(m). There have been no reported decisions interpreting the s. 3(m) exclusion for individuals dead more than 20 years.

[144] *Supra* note 30 at 294.

more accountable. By scrutinizing information about discretionary benefits, people can judge whether the government is being even handed in the use of its power. There is more justification to consider information about rights-based benefits exempt, since the prospect of government abuse is smaller.

The first case decided under s. 3(*l*) took a restrictive view of the exclusion. In *Information Commissioner* v. *Canada (Minister of Fisheries and Oceans)* (1988),[145] Mr. Justice Denault considered whether the wording of the section applied to licences or permits that were not "of a financial nature." The requester wanted access to the names of all individuals given permits to observe the East coast seal hunt between 1975 and 1983. While in *Robertson* and *Noel* the court debated whether names alone constituted personal information, Mr. Justice Denault ignored this issue entirely.

At the court hearing, the information commissioner argued that the use of the word "including" in the exclusion expanded its meaning to include permits and licences which did not involve financial benefits; counsel cited cases and a text on statutory interpretation to support this reading.[146] But Mr. Justice Denault rejected the argument. The plain meaning of the section required that the licences and permits pertain to benefits of a financial nature; the word "including" showed that the section intended to offer licences and permits as one example of a discretionary benefit, not an exception to the requirement that some financial element be involved.[147] The French text reinforced this view, since it used "notamment" (notably) instead of "including."

Then Mr. Justice Denault went further in his remarks, adding that the information commissioner's interpretation would be out of step with the purposes of the Acts:

> It is easy to imagine cases where information regarding the issuance of a licence would be profoundly personal and of little use or interest to the public. Should applications for marriage licences be disclosed? Or, within the federal jurisdiction, should the government be forced to release applications for private pilots' licences, or permits to camp or hold demonstrations on federal Crown land? Many of these would involve information which falls under the [definition of personal information]. I would be most reluctant, therefore, to interpret s. 3(*l*) to exclude from personal information relating to the grant of any licence or permit.[148]

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[145] *Minister of Fisheries and Oceans (1988), supra* note 129.

[146] *Ibid.* at 120.

[147] *Ibid.*

[148] *Ibid.* at 121.

In my view, this passage betrays Mr. Justice Denault's bias on behalf of withholding personal information. It is debatable whether the examples he suggests really are "profoundly personal and private." All involve activities which are usually conducted in public and which require the permission of government. (Even marriage can be seen as a public acknowledgement of a private commitment.) Whether the information is of "use or interest" to the public is not a matter for the court to determine. The *Access Act* does not require the requester to provide a reason for the access request and judges should not second-guess the utility of information.

If *Minister of Fisheries and Oceans* established the need for a financial element to the benefit, the more recent case of *Bland* (1991) provides a very loose interpretation of what that financial element must be. In *Bland*, the *Ottawa Citizen* made an access request for details about the residential leases held by the National Capital Commission, including the amount of rents and the names of tenants. The paper hoped to investigate rumours that some people with political connections were getting "sweetheart" deals from the institution. After the NCC denied the request, citing the privacy interest of its tenants, the paper applied to the court. Mr. Justice Muldoon ruled that the NCC was not justified in withholding information under the public interest override in s. 8(2)(m)(i) of the *Privacy Act* and ordered disclosure (see my discussion of the override, above).[149] However, he went on to consider whether the information would have qualified under the discretionary benefit exclusion, in any case.

Mr. Justice Muldoon decided that the consideration involved in any contract amounted to a discretionary benefit of a financial nature. In theory, all contracts involve a voluntary detriment on the part of the parties in order to achieve a benefit; that notional benefit was enough to invoke the discretionary benefit exclusion. "To have the advantage of a government contract or lease for reasonable, and especially for favourable consideration — the presumed *quid pro quo* exchanged by the parties — is to have a discretionary benefit of a financial nature," he wrote.[150] Leases, contracts for work, and even opportunities to perform in public all fell within s. 3(*l*). Where no money was exchanged, an opportunity to perform in public gave the individual

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[149] See notes 106–110 and accompanying text.

[150] *Bland* (1991), *supra* note 58 at 319–320.

valuable publicity which amounted to a benefit of a financial nature, even if not a direct pecuniary one.

The scope of this interpretation is impressive: it extends the exclusion to just about all agreements between government and individuals. While s. 3(*l*) remains tied to benefits "of a financial nature," the court's liberal approach makes the exclusion a powerful weapon in the hands of the requester.[151]

The government employee exclusion in s. 3(j) of the *Privacy Act* provides another qualification to the definition of personal information. The exclusion permits the release of some personal information about public employees, based on the assumption that their work is publicly funded and so justifies a higher degree of public interest. Section 3(j) applies to

> information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including:
> (i) the fact that the individual is or was an officer or employee of the government institution,
> (ii) the title, business address and telephone number of the individual;
> (iii) the classification, salary range and responsibilities of the position held by the individual,
> (iv) the name of the individual on a document prepared by the individual in the course of employment, and
> (v) the personal opinions or views of the individual given in the course of employment.

John D. McCamus criticized the wording of this section because it failed to define precisely how much information about an employee was accessible: Was all information about an employee's performance available, or was access limited to factual information of the type set out in paragraphs (i) to (iv)? On one hand, the exclusion appeared too narrow because it permitted access to things employees had said, but not to actions they had taken. On the other hand, the exclusion might be interpreted too widely and permit access to extremely sensitive information, such as discipline or grievance files of low-level employees.[152]

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[151] However, one recent case suggests that Mr. Justice Muldoon may be adopting a more cautious approach. In *Clerk of the Privy Council* (1993), *supra* note 111, he found that the s. 3(*l*) exclusion applied but that disclosure would conflict with another part of s. 3 of the *Privacy Act*. In order to promote the internal consistency of the section, he decided that the information should be withheld. For further discussion of the case, see notes 155–156 and accompanying text.

[152] *Supra* note 30 at 294.

From the two reported cases on the exclusion, it appears that McCamus' worry about a broad interpretation was unfounded. In *Information Commissioner* v. *Canada (Solicitor General)* (1988),[153] Mr. Justice Jerome ruled that the exemption will apply to factual matters about a worker but that qualitative job performance evaluations will be exempt from disclosure. At issue was a report about food services in a psychiatric centre in Saskatoon run by the Solicitor General. The government department had released some of the report but exempted portions about the adequacy of employees' training and supervision. The information commissioner argued that the s. 3(j) exclusion would not allow access to "truly personal" information — for example, evaluations used for promotion purposes. But it applied here, since the report was intended to provide a "snapshot" of the employees' functions for the purpose of recommending structural changes to the institution.

Mr. Justice Jerome rejected the argument based on the wording of s. 3(j). He reasoned that the examples in subparagraphs (i) to (v) illustrated the type of material that legislators had in mind when they drafted the exclusion. Except for item (v), all the examples were matters of objective fact. "There is no indication that qualitative evaluations of an employee's performance were ever intended to be made public," he wrote. "Indeed, it would be most unjust if the details of an employee's job performance were considered public information simply because that person is in the employ of the government."[154]

In my view, Mr. Justice Jerome's interpretation of the exclusion is unnecessarily narrow. While I agree with McCamus that some employee records should remain private, it seems that there will be occasions — as in this case — where reports about the performance of an institution will include comments about particular individuals. Without that personal information, the recommendations for institutional change will not make sense. Since the *Access Act* was intended as a tool to ensure government accountability, this sort of personal information should be released.

A second case under s. 3(j) has considered whether the exclusion applies to information about the precise salary of an individual appointed to serve on a government board. In *Rubin* v. *Clerk of the Privy Council* (1993),[155] Mr. Justice Muldoon upheld the government's

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[153] *Solicitor General* (1988), *supra* note 75.

[154] *Ibid.* at 318.

[155] *Clerk of the Privy Council* (1993), *supra* note 111.

refusal to release the *per diem* rate paid to the chairman of the Canada Council. The judge wrote that the "finely sculpted" exclusion in s. 3(j) permitted access only to the salary range of government officials.[156] Consequently, Parliament must have intended that information about precise salaries — paid *per diem* or yearly — would remain within the general definition of personal information. Surprisingly, he went on to find that information about any non-monetary remuneration should be disclosed. He reasoned that if the government could provide secret non-monetary remuneration, public information about an official's salary range would become meaningless.

In addition to the government employee exclusion, the court has also considered the related contract services exclusion in s. 3(k). The s. 3(k) exclusion permits access to information about an individual who is "performing services under contract for a government institution," as long as the information relates to the services.[157] Based on the English text, the section seems broad enough to apply to an individual consultant who has contracted directly with government, or the workers of a company which has a contract to perform services for government. However, the French text of the exclusion is worded slightly differently and refers to an individual "qui a conclu un contrat." This suggests that the exclusion will apply only where the individual has entered the contract with government personally.

The disparity between the French and English versions was resolved in *Information Commissioner* v. *Canada (Secretary of State for External Affairs)* (1988).[158] At issue was information about the security clearances required for 25 temporary government workers at the Department of External Affairs. The workers did not have direct contracts with government but were employed through a private personnel agency. In court, the department argued that information about these workers would fall outside the s. 3(k) exclusion because of the French text. Mr. Justice Dubé ordered disclosure based on his finding that the information did not constitute personal information at all. But he went on to consider whether the information would have fallen within the s. 3(k) exclusion in any case. He cited the purpose

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[156] *Ibid.* at 6.

[157] The exclusion makes accessible "the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of such services": *Privacy Act*, s. 3(k).

[158] *Secretary of State for External Affairs* (1989), *supra* note 124.

clauses from both *Access* and *Privacy Acts*, then wrote that the security clearances would fall outside the scheme of the *Privacy Act* because, while personal, they related to the position and not the individual. "There is nothing in the scheme of the Act which would provide more privacy to the individual who is hired by the government through a personnel agency," he wrote. "The French text 'qui a conclu un contrat de prestation de services' is, in my view merely a bad translation."[159]

While I support Mr. Justice Dubé's decision, this seems a case where the decision to favour the right to access was hidden behind an approach that purported to give equal weight to the purpose clauses of the *Access* and *Privacy Acts*. In fact, the court could have come to the opposite conclusion and upheld the French version of the exclusion, arguing that the joint purpose of the two Acts would protect the privacy of information with some connection to individuals.

D. Exceptions to the Personal Information Exemption

As noted above, s. 19(2) of the *Access Act* provides three exceptions to the personal information exemption. Disclosure "may" occur if the individual consents, the information is already publicly available or disclosure is in accordance with s. 8 of the *Privacy Act*. Two cases have interpreted this set of exceptions.

The first, *Information Commissioner* v. *Minister of Employment and Immigration* (1986),[160] involved an unusual set of facts. P.F., a woman living in a foreign country, was sponsored for permanent resident status in Canada by her husband. She wanted access to the file held by the Employment and Immigration Commission about the sponsorship application, so her Canadian lawyer made an access request. To permit access under s. 19(2), the lawyer enclosed a form signed by P.F. which consented to the release of the information. However, the Employment and Immigration Commission refused to disclose the file.

In the Federal Court, the commission argued that since s. 19(2) only stated that an institution "may" disclose information which fell within its exceptions, it gave the discretion to withhold as well. Mr. Justice Jerome rejected the commission's argument, ruling that it offended principles of statutory interpretation and ran directly against the purpose of the Act.

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[159] *Ibid.* at 308.

[160] *Minister of Employment and Immigration* (1986), *supra* note 64.

On the first point, the judge interpreted s. 19(2) as creating a duty to disclose once the conditions of the exceptions were met. "Had the legislators intended here to repose residual discretion in the head of the government institution not to disclose ... that appropriate and precise language would have been used," he wrote.[161] Instead,

> The language chosen expresses the intent to establish a discretion to release personal information under certain circumstances. Those conditions having been fulfilled, it becomes tantamount to an obligation upon the head of a government institution to do so, especially where the purpose for which the statute was enacted is, as here, to create a right of access to the public.[162]

To justify his reading, Mr. Justice Jerome referred to an interpretive principle cited by the Federal Court of Appeal in *Maple Lodge Farms* v. *Government of Canada* (1980).[163] There, Mr. Justice Le Dain wrote that "permissive words may be construed as creating a duty where they confer a power the exercise of which is necessary to effectuate a right."[164] The principle was also adopted by the Supreme Court of Canada in *Labour Relations Board of Saskatchewan* v. *The Queen* (1956), where the court held that statutory language which gave the labour board a permissive power to reconsider its decisions actually created a mandatory duty.[165]

Considering the purpose of the Act, Mr. Justice Jerome quoted the s. 2 purpose clause and the specific wording of the access right in s. 4. He also referred to the court's statement in *Maislin* that doubt should be resolved in favour of access. Clearly, the Act was intended to codify the right of access, not refusal, he wrote.[166] Once P.F.'s record was requested with a consent to disclosure, one of the conditions in s. 19(2) was met and the personal information should have been released.

This case marks one of the strongest Federal Court decisions in favour of the right to access. By removing a layer of discretion from government institutions, Mr. Justice Jerome ensured that exceptions

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[161] *Ibid.* at 290.

[162] *Ibid.* at 291.

[163] 42 N.R. 312, 114 D.L.R. (3d) 634, aff'd (1982), [1982] 2 S.C.R. 2, 44 N.R. 354.

[164] *Ibid.* N.R. at 320–321.

[165] [1956] S.C.R. 82. The court took the principle from an old British House of Lords case: *Julius* v. *The Right Rev. the Lord Bishop of Oxford* (1879–80), 5 App. Cas. 214.

[166] *Minister of Employment and Immigration* (1986), *supra* note 64 at 292.

to the personal information exemption would be used as often as possible. It remains to be seen whether future court cases will follow this lead; the only other reported case to consider s. 19(2) suggests a positive answer.

In *Bland* (1991), discussed above,[167] the court considered the s. 19(2) exception for information releasable under s. 8 of the *Privacy Act*. There, the NCC had refused information about its residential rents after considering the public interest override contained in s. 8(2)(m)(i) of the *Privacy Act*. Mr. Justice Muldoon held that the NCC had failed to give proper weight to the interests at stake; he ordered the head of the institution to disclose the disputed information. While he never stated that disclosure should occur automatically under s. 19(2), the assumption seems implicit in his decision.

IV. Court Review: The Commercial Information Exemption

THE COMMERCIAL INFORMATION EXEMPTION in s. 20 of the *Access Act* occupies the boundary between the government and private sector: it defines the right of the public to see business information held in government files. Because companies can better afford to bring court proceedings than individuals, the section has attracted more litigation than any other part of the *Access Act*. In a 1992 study, the information commissioner found that about two-thirds of the cases taken to the Federal Court involved corporate applications to prevent the release of commercial information.[168]

In general, the exemption protects commercial or technical information which might harm a party's business interests if released. Although most cases deal with corporations, the exemption applies to other third parties such as organizations and groups.[169] As a result, it is sometimes known as the third party exemption.

The core of the exemption is found in section 20(1), which sets out the four grounds on which an institution must deny a request for commercial information. It reads:

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[167] See notes 106–110 and accompanying text.

[168] *Supra* note 49 at 14. John W. Grace found that of the 309 cases taken to Federal Court, 206 involved s. 44 applications.

[169] Third parties are defined as "any person, group of persons or organization other than ... a government institution": *Access to Information Act*, s.3. Based on well-established common law principles, the term "person" includes a corporation.

20(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

Clearly, the four paragraphs in s. 20(1) can be viewed as separate exemptions, which take two substantially different approaches to withholding information. Paragraphs (a) and (b) both establish a class test: all information which falls within the class described is automatically withheld, even if it is harmless to the interests of the third party. In contrast, paragraphs (c) and (d) use an injury test. They require some type of potential harm to the third party before information will be withheld. Obviously, from the point of view of the access requester, injury tests are preferable since they hold out the possibility of access in some circumstances.

As some critics have noted, the four paragraphs in s. 20(1) are not as precise as they could be. In fact, they are so broadly worded that the same piece of information could fall within two or more paragraphs (so, for example, information that failed one of the injury tests might then be withheld under a class test). As David Schneiderman of the B.C. Bar wrote in 1987: "It would appear that the mandatory third party exemptions are vague and in need of legislative clarification. The exemptions are multitudinous and may even be inclusive of each other."[170]

Section 20(1) is qualified by a set of later exceptions, which give special access rights to information relating to public health, safety and the environment. First, the results of "product or environmental testing" carried out by the government can be released, unless the testing was done for a third party for a fee (s.20(2)).[171] Second, a

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[170] David Schneiderman, "The *Access to Information Act*: A Practical Review" (1987) 7 Advocates Quarterly 474–491 at 481.

[171] Oddly, preliminary tests aimed at establishing the criteria for standard testing are excluded from access through the product or environmental testing exception. However, where product or environmental information is disclosed, the Act requires the government institution to provide some context; a "written explanation of the methods used in conducting the tests" must be included along with the record. See: *Access to*

public interest override allows the institution to release any information protected by s. 20(1), except trade secrets. Release can occur where the disclosure would "be in the public interest as it relates to public health, public safety or protection of the environment" and the public interest clearly outweighs the financial loss, harm to competitive position or interference with negotiations that would result (s. 20(6)). The override has already been considered in the discussion of court review powers, above.[172] Finally, commercial information can be released if the company it applies to consents (s.20(5)). This is similar to the Act's personal information exemption, which allows the release of personal information with the consent of the individual.

Reported Federal Court cases have applied the commercial information exemption to a wide variety of situations. For example, judges have ordered disclosure of the following types of information: information about a company's application for a federal government grant or benefit;[173] details of the winning tender for a government contract;[174] rules developed by an Indian band to decide whether individuals qualified for membership;[175] audits of meat-packing plants conducted by the federal Department of Agriculture;[176] a summary of the contract to build eight frigates for the Canadian armed forces;[177] information about the government approval of a clinical drug, where the information also appeared in the drug mono-

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Information Act, ss. 20(4) and 20(3).

[172] See notes 104–105 and accompanying text.

[173] *Maislin* (1984), *supra* note 61; *CFL* (1989), *supra* note 78.

[174] *DMR & Associates* v. *Minister of Supply and Services* (1984), 11 C.P.R. (3d) 87 F.C.T.D.) [hereinafter *DMR* (1984)].

[175] *Twinn (representing Sawridge Indian Band)* v. *McKnight* (1987), 10 F.T.R. 48, 26 Admin. L.R. 197 [hereinafter *Twinn* (1987)]. In fact, the suggestion here that the Indian Band's rules would not be protected by the commercial information exemption was *obiter*, since Mr. Justice Martin decided the case on a procedural point.

[176] *Canada Packers* (1987), [1988] 1 F.C. 483, aff'd (1988), [1989] 1 F.C. 47 (C.A.); [hereinafter *Canada Packers* (1987)]; *Piller Sausages* (1987) *supra* note 58; *Intercontinental Packers* v. *Canada (Minister of Agriculture)* (1987), 14 F.T.R. 143; *Gainers Inc.* v. *Canada (Minister of Agriculture)* 1987), 14 F.T.R. 133; *Burns Meats Ltd.* v. *Canada (Minister of Agriculture)* (1987), 14 F.T.R. 137, aff'd (1988) [1989] 1 F.C. D–1 (C.A.) [hereinafter *Burns Meats* (1987)].

[177] *Saint John Shipbuilding* v. *Canada (Minister of Supply and Services)* (1988), 24 F.T.R. 32, aff'd (1990), 67 D.L.R. (4th) 315 (C.A.).

graph;[178] safety information gathered by government inspectors about an airline company;[179] and the termination clause from a contract to provide ferry services.[180] On the other hand, relatively few reported cases have decided that information should be withheld under the exemption. Information that has been denied includes: financial statements about the oil and gas royalties paid to Indian Bands;[181] safety information supplied by an airline to inspectors from the federal Department of Transport;[182] safety information about particular aircraft and processes owned by an airline;[183] and the largest foreign cheese import quota approved by the Department of External Affairs.[184]

A. The Third Party Procedure

Cases under the commercial information exemption can come to court in one of two ways. A requester can apply for a review of the government's denial of access under s. 41 of the Act. Alternatively, a third party itself can bring a s. 44 application to seek the protection of the exemption.

Under s. 44, a third party which has received notice that a government institution plans to disclose commercial information can apply within 20 days to Federal Court for a review of the decision (s. 44(1)). At the hearing, the government appears as the respondent to

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[178] *Merck Frosst Canada* v. *Canada (Minister of Health and Welfare)* (1988), 20 F.T.R. 73 [hereinafter *Merck Frosst* (1988)]; *Cyanamid Canada Inc.* v. *Canada (Minister of Health and Welfare)* (1992), 52 F.T.R. 22, 41 C.P.R. (3d) 512 (F.C.T.D.) aff'd (1992), 45 C.P.R. (3d) 390 (F.C.A.) [hereinafter *Cyanamid Canada* (1992) cited to F.T.R.]; *Glaxo Canada Inc.* v. *Canada (Minister of National Health and Welfare)* (1992), 52 F.T.R. 39, 41 C.P.R. (3d) 176 (F.C.T.D.) [hereinafter *Glaxo Canada* (1992) cited to F.T.R.].

[179] *Air Atonabee* (1989), *supra* note 58.

[180] *Northern Cruiser Co.* v. *Canada* (1991), 47 F.T.R. 192, 7 Admin. L.R. (2d) 80 [hereinafter *Northern Cruiser* (1991) cited to F.T.R.].

[181] *Montana Band of Indians* (1988), *supra* note 58; *Ermineskin Band of Indians* v. *Canada (Minister of Indian Affairs)* (1988), 18 F.T.R. 27; *Samson Indian Band No. 137* v. *Canada (Minister of Indian Affairs)* (1988), 18 F.T.R. 29; *Sawridge Indian Band* v. *Canada (Minister of Indian Affairs)* (1988), 18 F.T.R. 32.

[182] *Air Atonabee* (1989), *supra* note 58.

[183] *Ibid.*

[184] *Minister of External Affairs* (1990), *supra* note 58.

argue in favour of disclosure; the access requester and the information commissioner may also appear to contribute their views.[185]

The third party procedure has been criticized by John D. McCamus, who argued that the expense and delay of court proceedings would block the public's access right. He added that the s. 44 procedure was an anomaly in the Act, since the personal information exemption did not give individuals a comparable right to dispute the release of personal information:

> Ironically, individuals about whom an institution proposes to disclose sensitive personal information are not accorded similar rights of intervention and appeal. In this respect, Bill C-43 accords greater weight to the protection of commercial confidentiality than to the preservation of personal privacy. Many will consider this to be a rather perverse view of the relative importance of these interests.[186]

Experience has shown that McCamus' concern about delay was justified. A 1992 study found that it took an average of 22 months for a court decision on a s. 44 application; in contrast, it took 14 months for a requester to receive a court decision on the review of a refusal.[187] In the same study, the information commissioner expressed concern about the slow pace of government in responding to s. 44 applications.[188]

One technical problem with s. 44 is that it fails to state which party bears the evidentiary onus. In other review situations, the Act states that the government bears the burden of establishing that the refusal was authorized by the Act (s. 48). Should the same principle apply to a third party which resists disclosure? The question was answered in *Maislin* (1984); there Mr. Justice Jerome ruled that since the basic principle of the Act was to codify the right to access, "the burden of persuasion must rest upon the party resisting disclosure" whether it was a private corporation or the government.[189] T. Murray Rankin wrote that the decision followed the spirit of the Act and also made good sense on a practical level, since the third party was in the best

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[185] *Access to Information Act,* ss. 44(3) and 42(1)(c). Note that the information commissioner must receive leave of court to appear.

[186] *Supra* note 30 at 292.

[187] Grace, *supra* note 49 at 14.

[188] *Ibid.*

[189] *Supra* note 61 at 309.

position to substantiate its claim for confidentiality.[190] Later court decisions have confirmed that the onus on the third party is a heavy one, and the onus has proved to be the deciding factor in many s. 44 applications.[191]

A second issue that has confronted the court is the scope of the s. 44 review. The section provides little guidance, stating only that the court should conduct "a review of the matter" (s. 44(1)). In *Air Atonabee* v. *Canada (Minister of Transport)* (1989),[192] the third party argued that the court was limited to a review based on the evidence; because only the third party had filed affidavits, the court was bound to decide in its favour. Mr. Justice MacKay rejected such a mechanistic role, deciding instead that the court was entitled to conduct a *de novo* review of the entire matter. "If the applicant has produced all of the evidence that is because it is recognized that City Express has a heavy oar; that is, the onus of establishing the records here in issue are exempt from disclosure under the Act rests on the applicant," he wrote.[193]

At this point, the substantive law on the commercial information exemption will be examined. As we will see, the four paragraphs of s. 20(1) — particularly s. 20(1)(b) — have produced some complex case law tests. Afterwards, the exception for environmental and consumer testing information will be considered.

B. Trade Secrets

The first paragraph of the commercial information exemption, s. 20(1)(a), prevents the release of information about a third party's trade secrets. There is no definition of trade secret in the Act, and little jurisprudence interpreting paragraph (a). Writing before the introduction of the Liberal access Bill, Prof. M.Q. Connelly noted two competing meanings of the term in U.S. law. Taking a narrow approach, some American cases have held that trade secrets consist only of information about secret productive processes; other cases have extended the term to cover "any secret information giving the

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[190] *Supra* note 60 at 317

[191] See, for example: *Northern Cruiser* (1991), *supra* note 180 at 194; *Cyanamid Canada* (1992), *supra* note 178 at 35; *Glaxo Canada* (1992), *supra* note 178 at 45.

[192] *Air Atonabee* (1989), *supra* note 58.

[193] *Ibid.* at 205.

possessor a competitive advantage."[194] The trade secret exemption would likely receive a wide interpretation in Canada, since the love of competition was less ingrained in the national psyche, Connelly wrote. But he argued that under any interpretation, the exemption would not protect information "that is of no positive use to the corporation but that would simply be embarrassing — even severely so — if revealed."[195] Later, T. Murray Rankin added that Canadian courts have generally adopted a broad definition of trade secrets in cases prior to the *Access Act*.[196]

Two Federal Court Trial Division cases have considered, and dismissed, claims for trade secret protection; they suggest that the term will receive a narrow interpretation despite Connelly's prediction. In *Merck Frosst Inc.* v. *Canada (Minister of Health and Welfare)* (1988), a drug company argued that the Minister of Health and Welfare should withhold information about the government's approval of the drug Clinoril.[197] The company claimed that the trade secret exemption protected one document discussing its plans to issue the drug in a different dosage. Health and Welfare argued that the exemption did not apply since a trade secret should be defined narrowly as information about productive processes. Mr. Justice Jerome rejected the claim for protection, but on different grounds. He decided that the document had lost the secrecy that a trade secret required because the information had appeared in the product monograph, a document distributed to health professionals. He added that the government's argument was persuasive, but that a ruling on the point was unnecessary.[198] In one other case, Cyanamid Canada Inc. sought to protect drug information which appeared in its product monographs; Mr. Justice Jerome dismissed the claim for protection

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[194] M.Q. Connelly, "Freedom of Information and Commercial Confidentiality," in John D. McCamus, ed., *supra* note 7 at 106–107. See also: Braverman and Chetwynd, *Information Law, supra* note 131 at 300–306.

[195] Connelly, *supra* note 194 at 107.

[196] *Supra* note 24 at 19. Prof. Rankin referred to *R.I. Crain Ltd.* v. *Ashton*, [1949] O.R. 303 at 309, where the Ontario High Court defined a trade secret as "any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over the competitors who do not know or use it."

[197] *Merck Frosst* (1988), *supra* note 178.

[198] *Ibid.* at 76.

under the trade secret exemption, referring to the *Merck Frosst* case.[199]

C. Information Supplied in Confidence

The exemption in s. 20(1)(b) deals with information that lies at the core of the relationship between government and the private sector: information generated by a third party and then supplied to a government institution, often for a regulatory purpose. A third party may feel victimized when it learns that an anonymous requester — possibly one of its competitors — wants access to this information for purposes that may not coincide with its own. In addition, s. 20(1)(b) offers a technical advantage to a third party which seeks to protect its information from disclosure. Unlike ss. 20(1)(c) and (d), it does not require the third party to show that any particular harm will occur if the information is disclosed. As a result, s. 20(1)(b) is the paragraph cited most often in the case law on the commercial information exemption.

While the paragraph is deceptively simple on the surface, court decisions have ruled that the exemption requires third parties to satisfy a four-part test. To successfully claim the exemption, the third party must show: (1) the information is "financial, commercial, scientific or technical"; (2) the information is confidential in nature under an objective test; (3) the information was supplied by the third party; and (4) the information was treated consistently as confidential by the third party.[200]

Each of these four parts will be considered in turn. As we will see, the confidentiality test in part (2) has proven to be the most significant step, since it permits the court to go behind the company's own perception of the importance and sensitivity of the information.

1. Financial, Commercial, Scientific or Technical Information

The first part of the s. 20(1)(b) test derives from the wording of the paragraph itself, which refers to "financial, commercial, scientific or technical information." The issue here is whether that wording implies any special requirement that would narrow the type of information that can be considered. For example, the government has argued that the wording implies that the information must have independent value (like a customer list or property appraisal) before

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[199] *Cyanamid Canada* (1992), *supra* note 178 at 36.

[200] This four-part approach to the s. 20(1)(b) exemption was first set out in *Montana Band of Indians* (1988), *supra* note 58 at 23.

it will fall within s. 20(1)(b). This interpretation would narrow the scope of paragraph (b) substantially, forcing third parties to rely on other parts of the commercial information exemption. But in *Air Atonabee* (1989), Mr. Justice MacKay dismissed the argument, writing that all information is essentially neutral in value. The market value of information "ultimately depends on the use that may be made of it and its market value will depend upon the market place, who may want it and for what purpose, a value that may fluctuate wildly over time," he wrote.[201] Later, Mr. Justice MacKay's position was confirmed in *Information Commissioner* v. *Minister of External Affairs* (1990), where Mr. Justice Denault wrote that information will be considered "financial, commercial, scientific or technical" when it falls within the ordinary dictionary definition of those terms.[202]

2. Confidentiality Test

The second part of the s. 20(1)(b) test has received the most discussion and, ultimately, has become the most complicated. The basic question is whether s. 20(1)(b) requires that the confidentiality of information must be established by an independent standard, or if an agreement between the government and third party to keep the information secret will preclude later court review.

Obviously, an independent test is more likely to result in greater access, particularly given the inclination of government to guard its information (and, perhaps, to protect a cooperative third party). An independent test also finds support in the purpose section of the Act, which emphasizes that access decisions should be reviewed independently of government.

The first reported access case, *Maislin* (1984), suggested that an objective approach was correct. There, Mr. Justice Jerome considered whether information supplied by a company to obtain a government grant should be protected by s. 20(1)(b). He decided that the fact that the company believed the information would be kept confidential did not decide the matter. Instead, the company was required to establish that the information was "confidential in nature" by some objective standard.[203] But beyond these vague remarks, he provided no clues as to what that standard might be.

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[201] *Air Atonabee* (1989), *supra* note 58 at 207.

[202] *Minister of External Affairs* (1990), *supra* note 58 at 117.

[203] *Maislin* (1984), *supra* note 61 at 314.

Later decisions also failed to offer a definition of the confidentiality test. In another early access case, Mr. Justice Jerome decided that information about the winning tender for a government contract couldn't be withheld under s. 20(1)(b) because it was "quite likely" the information would be disclosed to other bidders in any case.[204] Later, Mr. Justice Strayer considered a case where the Canadian Football League supplied information to the federal government, in the hope of receiving public funding, then sought to oppose the brief's disclosure.[205] The judge ruled that the League's brief contained general information already known to most sports fans; as a result, the information could not be considered confidential by an objective test. He added that third parties could not make their information confidential merely by stating it was so:

> Such a principle would surely undermine much of the purpose of this Act which in part is to make available to the public the information upon which government action is taken or refused. Nor would it be consistent with that purpose if a Minister or his officials were able to exempt information from disclosure simply by agreeing when it is submitted that it would be treated as confidential.[206]

Finally, in *Montana Band of Indians* v. *Canada (Minister of Indian Affairs)* (1988),[207] the court offered some further comments on the nature of the test. Considering a case where the financial statements requested by a newspaper reporter had been made available to all members of an Indian Band, Mr. Justice Jerome wrote that the confidentiality test in s. 20(1)(b) did not depend on the number of people who had access to the information. Instead, the test "must have more to do with the content of the information, its purpose, and the conditions under which it was prepared and communicated."[208] Here, Mr. Justice Jerome withheld the information because the financial statements described private funds and had been prepared by parties with a fiduciary relationship to the Band.

The exhaustive definition of the confidentiality test was supplied a year later by Mr. Justice MacKay in *Air Atonabee* (1989). He wrote that to qualify as confidential, the information must possess three

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[204] *DMR* (1984), *supra* note 174 at 91.

[205] *CFL* (1989), *supra* note 78.

[206] *Ibid.* at 67.

[207] *Montana Band of Indians* (1988), *supra* note 58.

[208] *Ibid.* at 25.

characteristics: it must not be available from other public sources and could not be obtained by observation or independent study; it originated and was communicated to government in a reasonable expectation of confidence; it was communicated to government in a relationship that was fiduciary — or not contrary to the public interest — and the relationship was one that should be fostered for the public benefit.[209] Applying his test, the judge ruled that information supplied by a small Toronto airline to the federal government was confidential.

Mr. Justice MacKay's test was an attempt to reconcile earlier cases dealing with the exemption. Looking at those cases, he noted that claims of confidentiality had been rejected where the information was available from another source,[210] the information was available in another form,[211] and the information could be obtained by observation.[212] To this, Mr. Justice MacKay added ideas from the seminal Canadian privilege case, *Slavutych* v. *Baker* (1976).[213] There, the Supreme Court of Canada adopted a general test to determine whether confidential communications should be protected by privilege. Known as the "Wigmore Four" test, it holds a communication privileged where: the communication originated in confidence; the element of confidence was essential to the relationship between the parties; the relationship was one which in the opinion of the community "ought to be sedulously fostered"; and the injury that would result from disclosing the communication would be greater than the benefit gained from correct disposal of the litigation.[214]

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[209] *Air Atonabee* (1989), *supra* note 58 at 211.

[210] Drug information could not be withheld when it was already publicly available in the form of a monograph published by the company: *Merck Frosst* (1988), *supra* note 178. See also: *Cyanamid Canada* (1992), *supra* note 178; *Glaxo Canada* (1992), *supra* note 178.

[211] Copies of packing plant audits were released where they were already available from the U.S. government under the American *Freedom of Information Act*: *Canada Packers* (1988) (C.A.), *supra* note 57. See also *DMR* (1984) *supra* note 174, where information about a winning tender was released because it would likely be available to other bidders in any case.

[212] The names of certain crew members on ships in the Great Lakes were disclosed where the requester could have learned the names by observation: *Noel* (1987), *supra* note 123.

[213] [1976] 1 S.C.R. 254, 55 D.L.R. (3d) 224.

[214] *Ibid.* S.C.R. at 260.

There are some conceptual differences between privilege, which deals with communications sought to be introduced as evidence in court, and cases under the *Access Act*, which consider requests for information found in government records. The doctrine of privilege guards only a certain communication; the information that was included in the communication is not protected. If the information can be obtained from another source, privilege will not prevent its introduction in court. But in most access cases, there is no opportunity to gain access to the information *except* through a successful access request. In essence, the information itself is being protected, rather than a particular form of transmission of the information. Nonetheless, privilege does deal at least tangentially with the concept of when information should be available. Accordingly, it is analogous enough to justify Mr. Justice MacKay's use of it in an access case. Considering the MacKay test for confidentiality under s. 20(1)(b), it is clear that he relied on the *Slavutych* case heavily when constructing his second and third elements.

While I have some sympathy for Mr. Justice MacKay's attempt to construct a test that includes objective standards in order to decide whether information is confidential, I believe he fails to go far enough by ignoring the fourth — and crucial — part of the Wigmore Four test. The fourth part requires a court to weigh the damage caused by revealing the communication to the benefit gained in the court proceeding. In the context of access legislation, this would require the third party to justify the exemption of information against the presumed benefit to be gained by disclosure. This sort of balancing act seems precisely the sort of measure that would ensure that the exemption was interpreted in a limited and specific way and would ensure that the court keeps one eye on the ultimate purpose of the Act, the disclosure of information.

Unfortunately, experience since the *Air Atonabee* case gives little cause for optimism. In *Minister of External Affairs* (1990), Mr. Justice Denault purported to follow the *Air Atonabee*. But he suggested that the third part of the test was not a condition for confidentiality, merely an indication of confidentiality. "What must be objectively determined is whether the information was obtained in exchange for the explicit or implicit promise that it would be treated confidentially, he wrote.[215] This clearly violates the language of *Air Atonabee* where the requirements were stated as a three-part test.

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[215] *Minister of External Affairs* (1990), *supra* note 58 at 119.

As well, it produces a highly questionable result — one that was rejected in 1984 by the *Maislin* case, where Mr. Justice Jerome stated that confidentiality must be established on some objective basis. Mr. Justice Denault would let the government's position at the time of obtaining information govern in a future application to claim the s. 20(1)(b) exemption, effectively usurping the role of court as a source of independent review. Clearly, the purpose section of the Act would oppose such an interpretation, as Mr. Justice Strayer noted in the *Canadian Football League* case. One can only hope that the MacKay test will not be misinterpreted in future cases.

More recently, Mr. Justice Jerome has confused matters further in *Cyanamid Canada* v. *Canada (Minister of Health and Welfare)* (1992),[216]2 a case where a drug manufacturer sought to protect information about two of its prescription drugs, Methotrexate and Minocin. Although Mr. Justice Jerome referred to the *Air Atonabee* case, he did not repeat the MacKay test; instead, he cited his own, brief comments from the *Montana* case (i.e., the confidentiality test must consider the purposes and circumstances connected with the information). This suggests that the precise nature of the confidentiality test will depend on the particular Federal Court judge who hears the case, a situation that does not encourage predictability in future cases. (Recently, the *Cyanamid* case was affirmed, but the Federal Court of Appeal's judgment did not discuss the confidentiality test at length).[217]

One issue that was resolved early by the court was whether to accept the confidentiality test developed by American courts under the commercial information exemption in the U.S. *Freedom of Information Act.* The U.S. Act protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[218] In the case of *National Parks and Conservation Assoc.* v. *Morton* (1974),[219] the U.S Court of Appeals ruled that the commercial information exemption only protected information if the release would affect the government's ability to gather similar information in the future or would cause substantial harm to a third party. From the

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[216] *Cyanamid Canada* (1992), *supra* note 178.

[217] *Cyanamid Canada Inc.* v. *Minister of National Health and Welfare* (1992), 45 C.P.R. (3d) 390 (F.C.A.) at 403.

[218] *Freedom of Information Act,* 5 U.S.C. s. 552, para.(b)(4).

[219] 498 F.2d 765 (D.C. Cir. 1974). For a discussion of the *National Parks* test, see: Braverman and Chetwynd, *Information Law, supra* note 131 at 316–332.

point of view of ensuring as much access as possible, this approach looks promising.

But as the information commissioner argued in one case,[220] the *National Parks* test combines elements of two separate paragraphs under the Canadian exemption, ss. 20(1)(b) and (c). These paragraphs use a different and incompatible approach. Section 20(1)(b) applies automatically to all information that meets its requirements; s. 20(1)(c) requires that the party opposing access must meet an injury test before information will be withheld. As a result, the *National Parks* test requires an interpretation of the Canadian Act that appears to be at odds with the intent of the Act's legislators.

Surprisingly, the American test was accepted by Mr. Justice Dubé in *Noel* (1987),[221] a case that considered the release of the names of ship's officers exempt from pilotage regulations. Applying *National Parks*, he rejected the government's argument that s. 20(1)(b) protected the information. Disclosing the names would not affect the government's ability to gather information in the future, since shipowners were required by law to supply them; moreover, the government could not show that the disclosure of the information would affect the commercial positions of the shipowners. As a result, he ordered disclosure.

It seems clear that *Noel* was wrongly decided, particularly in light of later judgments. Two months after *Noel*, Mr. Justice Jerome rejected the *National Parks* test in *Piller Sausages* v. *Canada (Minister of Agriculture)* (1987).[222] Citing the differences between the Canadian and American Acts, he wrote that the American jurisprudence was helpful in understanding similar terminology but "the standard for refusing to disclose must be established with specific reference to the Canadian Act."[223] A few months later, Mr. Justice Jerome rejected the *National Parks* test a second time for similar reasons.[224]

3. Information Supplied to Government

In some cases, the question of whether information was "supplied to" government is in issue: for example, where information was gathered

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[220] *Piller Sausages* (1987), *supra* note 58.

[221] *Noel* (1987), *supra* note 123.

[222] *Piller Sausages* (1987), *supra* note 58.

[223] *Ibid.* at 130.

[224] *Montana Band of Indians* (1988), *supra* note 58 at 25.

by government inspectors on the third party's premises. In general, it appears that where the government takes an active role in gathering the information through its own inspectors, the court will rule that it was not supplied by the third party. In *Canada Packers* (1988), Mr. Justice MacGuigan of the Court of Appeal decided that s. 20(1)(b) did not apply to meat-packing plant inspection audits, since the audits contained "judgments made by government inspectors on what they themselves have observed."[225] Similarly, in *Air Atonabee,* Mr. Justice MacKay wrote that where the record in dispute "consists of the comments or observations of public inspectors based on their review of the records maintained by the third party in part for inspection purposes," the information cannot be considered as having been supplied by the third party.[226] Unfortunately, the judge added that in other cases where there was "real doubt" about whether the information was supplied, he would be willing to resolve the issue in favour of the third party; in my view, this strays from the approach suggested by the Act's purpose section, which requires that exemptions should be limited and specific.

4. Information Treated Consistently in a Confidential Manner

The final element of the s. 20(1)(b) exemption requires the information to be "treated consistently in a confidential manner" by the third party. Usually, this is not difficult for the third party, since it can present affidavits from corporate officers and industry experts establishing the sensitivity of the information.[227]

One case does provide some discussion of this requirement, however. In *Montana Band of Indians* (1988), Mr. Justice Jerome considered whether financial statements of an Indian Band had been treated in a confidential manner. The statements were kept in the Band office where any member could view them; no resolutions were passed by the Band council requiring secrecy. As a result, the government argued that the s. 20(1)(b) exemption was not available because the Band had not treated the information as confidential. However, Mr. Justice Jerome decided that the statements remained confidential since they were never available to non-Band members. There was no requirement for a resolution declaring statements confidential when they were so by their very nature. The fact that

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[225] *Canada Packers* (1988) (C.A.), *supra* note 57 at 412.

[226] *Air Atonabee* (1989), *supra* note 58 at 212.

[227] See, for example, *Minister of External Affairs* (1990), *supra* note 58 at 122.

band members could see the information without an oath of secrecy was not a cause for concern, since corporations and families didn't force their members to take oaths of secrecy in order to keep their information confidential.[228]

While the *Montana* case may be laudable for the sensitivity it shows toward native culture, it could cause problems if applied too widely. For example, its reasoning might throw doubt on Mr. Justice Jerome's rulings that the information contained in drug monographs has lost the confidentiality needed for trade secret status.[229] Drug companies could argue that monograph information was released only to health professionals who, like the Montana Band members, were expected to keep the information secret.

In summary, some aspects of the s. 20(1)(b) exemption appear fairly well-defined. The court has decided that the paragraph's reference to "financial, commercial, scientific or technical information" does not impose a special requirement on the type of information that can be considered. And no unusual elements have been introduced into the requirements that information be supplied to government and treated in a confidential manner by the third party. But the confidentiality test has produced a wealth of complex and sometimes confusing case law. Mr. Justice MacKay's proposed synthesis in *Air Atonabee* is admirable, but his test reflects a fundamental flaw in the jurisprudence; it does not include an element which balances the public interest in disclosure against the potential harm caused to the third party. Moreover, one later case has rejected the objective nature of the test itself.

D. Competitive Harm and Interference with Negotiations

Paragraphs 20(1)(c) and (d) of the commercial information exemption apply to information that could cause material financial loss to the third party, prejudice its competitive position or interfere with its negotiations. Both paragraphs use similar wording to describe the risk that must exist before information will be withheld: the court must find that the disclosure "could reasonably be expected to" result in one of the specified types of harm. The standard of certainty required by this phrase has been the main issue in the interpretation of para-

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[228] *Montana Band of Indians* (1988), *supra* note 58 at 26.

[229] See notes 197–199 and accompanying text.

graphs (c) and (d). The issue is important to the *Access Act* as a whole, since many other exemptions use the same phrase.[230]

The court has two well-recognized causality tests to consider when developing the standard under the *Access Act*: direct causation and reasonable foresight. Both tests were developed in tort law jurisprudence as a means of deciding when compensation should be available for harm caused by a defendant's negligent act.[231] Initially, tort law favoured direct causation, holding that all damages which could be traced to the tortious act deserved compensation.[232] But the British Privy Council case of *Wagon Mound (No. 1)* (1961)[233] adopted the reasonable foresight test, which limited damages to those reasonably foreseeable by the defendants. Later, the Privy Council case of *Wagon Mound (No. 2)* (1966)[234] appeared to widen the foresight test, suggesting that it required only the foresight of a possibility, not probability, of harm. In the context of negligence, the foresight test limited the scope of recoverable damages; in the context of the *Access Act*, the test would permit less access to information.

Applying a direct causation approach to paragraphs (c) and (d) would require third parties to prove that the disclosure of information would cause the specified harm. Thus, a direct causation test would tend to limit the court's attention to the information itself; requesters could argue that any harm occurring as a result of the perception of the information (harm caused by distorted media reporting, for example) would be indirect and therefore irrelevant to the exemption. In contrast, the foresight test would require proof only that there was a reasonable probability (or, following *Wagon Mound (No. 2)*, possibility) that the disclosure would cause harm. Obviously, this would involve a looser standard of proof and permit more leeway to argue that indirect harm should be considered.

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[230] See: *Access to Information Act* s. 14 (federal-provincial affairs); s. 15 (defence of Canada); ss. 16(1)(c), 16(1)(d) and 16(2) (law enforcement); s. 17 (security of individuals); s. 18(b), (c) and (d) (economic interests of Canada).

[231] For a general discussion of causality and the recovery of damages under the tort of negligence, see: Allen M. Linden, *Canadian Tort Law*, 4th ed. (Toronto: Butterworths, 1988) at 305–320; John G. Fleming, *The Law of Torts*, 7th ed. (Agincourt, Ont.: Carswell, 1987) at 183–194.

[232] *Re Polaris*, [1934] 3 K.B. 560 (C.A.).

[233] [1961] A.C. 388 (P.C.).

[234] [1967] A.C. 617, All E.R. 709 (P.C.).

In *Canada Packers* v. *Canada (Minister of Agriculture)* (1987),[235] the Trial Division of the court suggested that direct causation was the appropriate test. The dispute began when a reporter with the *Kitchener-Waterloo Record* made an access request for inspection audits of Canada Packer's meat-packing plant prepared by the federal Department of Agriculture. When the department proposed to release the information, Canada Packers brought a s. 44 application; it argued that the audits were exempt under paragraphs 20(1)(c) and (d). Sensational reporting of some of the incidents described in the audits could hurt sales of meat, the company claimed.

To support its case, the company filed affidavits from two corporate officers and a marketing expert. The expert said that because meat was a "low-involvement" consumer product, negative information could be expected to have an impact on sales. He also provided several examples where negative information had affected the sale of a consumer products, including Canada's tainted tuna scandal and the American Tylenol scare. But the Department of Agriculture pointed out that similar audits of American and Canadian plants were available under the U.S. *Freedom of Information Act,* and no problems had resulted from the public availability of that information.

In his reasons,[236] Mr. Justice Jerome cited an earlier Federal Court case, which suggested in *obiter* that evidence of harm under paragraphs (c) or (d) should be detailed and convincing.[237] Expanding on those comments, he proposed a more formal test: Evidence of harm "must be detailed, convincing and describe a direct causation between disclosure and harm. It must not provide merely grounds for speculation as to possible harm."[238] Based on that standard, he ruled that the meat-packing company had failed to make its case and dismissed the application.

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[235] *Canada Packers* (1987), *supra* note 176.

[236] In fact, the case did not discuss the appropriate causation test. On this point Mr. Justice Jerome simply adopted the reasons of a companion case decided at that same time, *Piller Sausages* (1987), *supra* note 58 at 128–131. See: *Canada Packers* (1987), *supra* note 176 at 486 and 488.

[237] *Twinn* (1987), *supra* note 175.

[238] *Piller Sausages* (1987), *supra* note 58 at 128–129. But note that Mr. Justice Jerome's view of the appropriate standard seemed to shift later in the discussion, after he considered cases decided under the U.S. *Freedom of Information Act*. For example, he wrote at 131: "The evidence must not require pure speculation, but must at least establish a likelihood of substantial injury. ... The expectation must be reasonable, but it need not be a certainty."

The *Canada Packers* case was appealed to the Federal Court of Appeal. There, Mr. Justice MacGuigan rejected the direct causation test that Mr. Justice Jerome proposed, calling it "imprecise and misleading in all its elements."[239] The need for detailed and convincing evidence overstated the requirements of paragraphs (c) and (d). More significantly, the concept of direct causation would prevent the court from considering media reporting — or at least sensational reporting — when assessing the effects of disclosure.

The appeal judge noted that paragraphs (c) and (d) applied to three different alternatives: disclosure that would "result in" material financial loss, "prejudice" competitive position or "interfere with" negotiations. The three alternatives used unqualified verbs, suggesting a standard of direct causation. But each alternative was governed by the introductory phrase, "could reasonably be expected to"; clearly, this phrase set a standard much closer to reasonable foreseeability.

Surprisingly, Mr. Justice MacGuigan refused to equate the phrase with the tort test of reasonable foresight. If the tort case of *Wagon Mound (No. 2)* was correct, the foresight test applied where there was only a possibility of harm; that set a standard too low to apply to the *Access Act,* he decided. Previous Court of Appeal decisions had established the principle that the wording of a statute must be interpreted in its total context. Here, the purpose clause of the Act provided that exceptions to the right of access should be limited and specific. "With such a mandate, I believe one must interpret the exceptions to access in paras. (c) and (d) to require a reasonable expectation of probable harm," he concluded. In a footnote, he implied that the test involved a "confident belief' in a certain outcome.[240]

Mr. Justice MacGuigan then considered whether the company's evidence of harm met the test. All of the affidavits about negative media reporting were based on speculation, he decided. None could show damage had resulted when similar audits were made available in the U.S. Moreover, the information itself did not warrant protection. The audits presented negative information about the company's meat-packing plants but, at worst, they merely raised the question of what steps had been taken to correct the problems. Accordingly, he dismissed the s. 44 application.

The "reasonable expectation of probable harm" test was challenged in another Federal Court of Appeal case, *Saint John Shipbuilding* v.

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[239] *Canada Packers* (1988) (C.A.), *supra* note 57 at 414.

[240] *Ibid.* at 417 note 4.

Canada (Minister of Supply and Services) (1990).[241] In that case, a company sought to prevent the release of a summary of its contract to build six frigates for the federal government. On appeal, it argued that the court should re-consider the test laid down in *Canada Packers*. But Mr. Justice Hugessen dismissed the appeal and reaffirmed the test. "The setting of the threshold at the point of probable harm seems to us to flow necessarily from the context, not only of the section but of the whole statute, and it is the only proper reading to give to the French text ('risquerait vraisemblement du causer des pertes')," he said in an oral ruling.[242]

Most recently, the Trial Division has confirmed that the same standard of causation should apply to other exemptions that use the phrase. In *Information Commissioner* v. *Prime Minister of Canada* (1992), the government argued that a refusal could be justified under the exemption for federal-provincial affairs where there was a mere possibility of serious harm. Mr. Justice Rothstein rejected the argument and ruled that the *Canada Packers* case applied. The judge also compiled a list of factors to consider when deciding whether the government's evidence has met the standard required for a refusal.[243]

In my view, the test adopted in *Canada Packers* is praiseworthy for its refusal to adopt the foresight standard, but undesirable because it encourages the court to consider the possible effects of media reporting. This makes disclosure dependent on the behaviour of the media, not on the contents of the information itself. Inevitably, the court will be drawn into a hypothetical consideration of media reporting and its effect on the public, an area that remains obscure even to media experts. Suggesting that the court should consider the possibility of distorted or sensational reporting makes matters worse; here, the court is invited to pre-judge the media's approach, beginning

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[241] *Saint John Shipbuilding* (1990) (C.A.), *supra* note 57.

[242] *Ibid.* at 316.

[243] *Prime Minister* (1992), *supra* note 58 at 191–192. Mr. Justice Rothstein listed several "guidelines" from previous cases, including the following evidentiary principles: (1) Evidence about whether the requested information has been disclosed elsewhere is relevant and should be presented. (2) Evidence about the passage of time between the date of the confidential record and the time of the proposed disclosure is relevant. (3) Evidence on the harm from disclosure must do more than describe the consequences of disclosure in a general way. (4) Each distinct document must be considered on its own and also in the context of all the other documents requested. (5) Exemptions should be justified by affidavit evidence clearly explaining the rationale for withholding each requested record.

on the assumption that the media will report dishonestly. Instead, the court should consider the information itself and decide whether, interpreted reasonably, it would hurt the financial interests or negotiations of the company. Thus, I favour a direct causation test, which would focus the court's attention on the information alone.

Although the court has expressed its willingness to consider media reporting as part of the potential harm of disclosure, no case has yet denied access on this basis — this despite the fact that the meat-packing companies in two s. 20(1)(c) cases could show previous reporting had caused them lost profits. In *Burns Meats Ltd.* v. *Canada (Minister of Agriculture)* (1987),[244] the company could show that previous stories in the *Kitchener-Waterloo Record* based on information obtained under the U.S. access law had caused $200,000 to $300,000 in lost sales. But the government argued that this loss was not a material one, since it amounted to less than one per cent of the company's annual sales in the Kitchener-Waterloo region. Mr. Justice Jerome agreed, ruling that Burns' experience showed that media reports would only affect its sales to "a relatively minor degree."[245] And, in *Gainers* v. *Canada (Minister of Agriculture)* (1987),[246] the court considered evidence that the company had lost money when the media reported that some of its hams were contaminated. Here, Mr. Justice Jerome decided the previous media reports were of a different type since they related to the quality of the meat products themselves; in contrast, the inspection audits concerned conditions in the Gainers meat-packing plant. While Mr. Justice Jerome's requirement for strict proof on this issue is admirable, these cases were decided before the Court of Appeal decision in *Canada Packers*. As a result, it remains uncertain how the court will approach the question of media reporting in the future.

Putting aside the issue of causality tests and media harm, only a few cases have interpreted the other elements of ss. 20(1)(c) and (d). One example where the court upheld a refusal under s. 20(1)(c) was *Minister of External Affairs* (1990).[247] There, the requester sought access to the largest import quota for foreign cheese allocated by the government in 1985. The Department of External Affairs refused the request, arguing that the import quotas had been treated as secret

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[244] *Burns Meats* (1987), *supra* note 176.

[245] *Ibid.* at 141.

[246] *Gainers* v. *Canada (Minister of Agriculture)* (1987), 14 F.T.R. 133.

[247] *Minister of External Affairs* (1990), *supra* note 58.

commercial information since the import quota system was established in 1974. The information commissioner disagreed, and eventually applied to court to argue for disclosure.

To support its case, the government filed affidavit evidence from members of the cheese importing industry. The affidavits suggested that industry insiders could easily match the quota to a particular company; revealing that company's quota would make negotiations with its customers more difficult and allow other importers to analyze the company's marketing strategy. Arguing in favour of access, the information commissioner filed an affidavit from her own expert. He said that disclosing the quota would have little effect because the major cheese importers already had a good idea of who their competitors were.

Mr. Justice Denault found that the information should be protected under s. 20(1)(c). The government had met the burden of showing that the information should be withheld, and the opposing expert's affidavit did not refute the government's case. "Given the nature of the information sought, its potential uses, and the great confidence with which it is guarded at all times, I find the respondents have established a reasonable expectation of probable harm exists regarding its disclosure," the judge wrote.[248]

While the Minister of External Affairs case turned on its facts, a later case applied an interesting principle to dismiss a claim for s. 20(1)(c) protection. In *Northern Cruiser Company Limited* v. *Canada* (1991),[249] the third party provided ferry services between St. Barbe, Nfld., and Blanc Sablon, Que. under contract with the federal government. In the fall of 1989, one public group which had criticized the ferry services as inadequate made an access request for a copy of the contract. The ferry company objected to the release of the contract's termination clause, claiming it should be exempt under s. 20(1)(c). The company argued that if the termination clause was released, the group would press the Minister of Transport to terminate the contract. Loss of the contract would remove the company's sole source of income.

Mr. Justice Strayer dismissed the company's s. 44 application on the basis that the company had failed to show a reasonable expectation of probable harm. But he added that the company's application should fail for a more fundamental reason. The application was based

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[248] *Ibid.* at 125.

[249] *Northern Cruiser* (1991), *supra* note 180.

on the proposition that the public should be denied information about the right to terminate a government contract "on the grounds that ministers are more likely to exercise those rights in a different way if their existence is no longer secret from the public."[250] As a general principle, that proposition was inconsistent with the purpose of the *Access Act* and should not be supported, Mr. Justice Strayer wrote.

The case law on s. 20(1)(d) is less well developed. In the *Canada Packers* case, the Court of Appeal made it clear that the reference in s. 20(1)(d) to contractual negotiations did not include matters like the day-to-day sale of a product, which should be dealt with under 20(1)(c).[251] Elsewhere, the court stressed that the potential interference with negotiations must be severe in nature: "interfere" is used in the sense of "obstruct."[252] Finally, in the *Minister of External Affairs* case, Mr. Justice Denault of the Trial Division dismissed a s. 20(1)(d) claim where the government could show only "hypothetical" problems that might interfere with third party negotiations if the information was released.[253]

E. Environmental and Product Testing Information

Section 20(2) provides an important qualification on the commercial information exemption by removing certain types of information from its scope. Under s. 20(2), the results of "product or environmental testing" carried out by the government will not be protected by the commercial information exemption, unless the testing was done for the third party as a paid service. Only one case deals with s. 20(2), and it suggests that the court will not use the section vigorously. In *Burns Meats* v. *Canada (Minister of Agriculture)* (1987),[254] the requester argued that meat-packing plant inspection audits should be considered product testing within the meaning of s. 20(2). But Mr. Justice Jerome took a technical interpretation of the information at issue and wrote that because the audits involved the inspection of meat-packing facilities and not the meat products themselves, they did not qualify as the result of products testing. He pointed out that a separate inspection system existed to monitor the quality of the meat products. This interpretation seems excessively technical, drawing too fine a

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[250] *Ibid.* at 195.

[251] *Canada Packers* (1988) (C.A.), *supra* note 57 at 412.

[252] *Saint John Shipbuilding* (1990) (C.A.), *supra* note 57 at 316.

[253] *Minister of External Affairs* (1990), *supra* note 58 at 126.

[254] *Supra* note 176.

distinction between various levels of the inspection process. After all, there is some connection between the cleanliness of a packing plant and the quality of its products; clearly, the point of the plant inspections was to ensure the continued quality of the meat products. Given the strong argument that s. 20(2) should apply, Mr. Justice Jerome's brief dismissal of it is particularly disappointing.

A second qualification on the commercial information exemption is found in the s. 20(6) override, which permits access to certain types of information that concern the public health and safety, or the protection of the environment. The override has already been discussed elsewhere in this paper.[255]

V. CONCLUSION

REVIEWING THE ACCESS CASE law in 1988, Prof. William Kaplan of the University of Ottawa concluded:

> All the cases brought to court pay lip service to the purpose provision of legislation. But, by and large, they have failed to give that purpose provision much meaning. The CRTC decision and [*Vienneau* v. *Canada (Solicitor General)*] stand as examples of missed judicial opportunities to give the Act some teeth although it need not have been at the expense of exempting government information which deserves special protection. While there have been some positive developments (the generally restrictive approach taken to third party rights being among them), the record of jurisprudence interpreting the legislation in its first five years has failed to give full effect to the legislative intention.[256]

Case law since the time of Prof. Kaplan's article has shown cause for more optimism. The Federal Court of Appeal has overruled the *CRTC* decision, holding that the court does have the power to review an institution's discretionary decision to withhold information under a permissive exemption.[257] As well, recent decisions on the personal

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[255] See notes 104–105 and accompanying text.

[256] *Supra* note 2 at 197–198. The *Vienneau* case referred to by Kaplan held that government institutions are not required to label each individual deletion from a record with the specific exemption relied on. Instead, an institution need only list all the exemptions relied upon in a cover letter supplied along with the record: *Vienneau* v. *Canada (Solicitor General)* (1988) 3 F.C. 336, 24 C.P.R. (3d) 104 (T.D.).

[257] *CMHC* (1988) (C.A.), *supra* note 57. For a discussion of the case see notes 90–95 and accompanying text.

and commercial information exemptions have favoured the right to access.[258]

However, it is hard to draw firm conclusions about the record of the court because both positive and negative trends exist in the jurisprudence. On the positive side, court decisions have emphasized the importance of the access right, shown a willingness to re-consider the discretion of government institutions, taken a broad view of exclusions to the definition of personal information, and required rigorous tests to be satisfied before information will be excluded under the commercial information exemption. On the negative side, cases have suggested that institutions need not perform severance where the information released would be fragmentary, that the purpose of the *Privacy Act* must be considered when interpreting the personal information exemption, and that the possibility of sensational reporting can be considered under s. 20(1)(c) and (d) of the commercial information exemption.

While the court's track record on specific issues is inconclusive, one general observation is possible: the court has failed to take an activist approach to the interpretation of the Act. This failure is reflected in several technical problems that exist throughout the jurisprudence.

In general, decisions make little use of interpretive aids other than the Act's purpose clause or previous Federal Court precedents.[259] Only one decision has cited any academic writing on the Act, despite the fact that several articles have been published;[260] none has mentioned any of the international literature on freedom of informa-

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[258] Notable decisions under the personal information exemption include *Secretary of State for External Affairs* (1989), *supra* note 124, and *Bland* (1991), *supra* note 58. Under the commercial information exemption, the Court of Appeal has confirmed that a fairly high level of causality applies to s. 20(1)(c) and (d): *Canada Packers* (1988) (C.A.), *supra* note 57. Recently, Mr. Justice Rothstein has held that the *Canada Packers* test applies to other exemptions which use the same phrasing: *Prime Minister* (1992), *supra* note 58.

[259] However, note that the court has drawn principles from other Canadian or British precedents in two narrow areas: the interpretation of court review powers under the Act and the development of the confidentiality test under s. 20(1)(b). On court review see: *Bland* (1991), *supra* note 58 at 307, or *CMHC* (1988) (C.A.), *supra* note 57 at 191 and 193. On s. 20(b), at least two cases consider the Supreme Court of Canada's seminal decision on the confidentiality of communications, *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254: see *Air Atonabee* (1989), *supra* note 58 at 209–210; *Noel* (1987), *supra* note 123 at 266–267.

[260] Mr. Justice Jerome cites an article by John McCamus in *Merck Frosst* (1988), *supra* note 178 at 75.

tion issues, which is fairly extensive since about a dozen countries now have access laws.[261] Occasionally, judges refer to precedents decided under the American *Freedom of Information Act*, but they usually emphasize the distinctiveness of the Canadian Act and distinguish the foreign jurisprudence with little discussion.[262] While there is some merit in this position, it also betrays an unwillingness to engage in more general discussion about the purpose or history of the access legislation. In fact, many access decisions seem too cursory, with their reasoning restricted to the factual circumstances or the particular section of the Act at issue.[263]

Another basic problem in the access jurisprudence is that judges adopt conflicting positions without distinguishing relevant case law. In the area of the personal information exemption, cases have taken different positions on whether the purpose clauses from both the *Access Act* and *Privacy Act* should be considered when interpreting the exemption.[264] Under the commercial information exemption, there is continuing disagreement over the precise nature of the confidential-

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[261] See, for example: Itzhak Galnoor, ed., *Government Secrecy in Democracies* (New York: New York University Press, 1977); Donald C. Rowat, ed., *Administrative Secrecy in Developed Countries* (New York: Columbia University Press, 1979); Tom Riley, "Freedom of Information Acts: A Comparative Perspective" (1983) 10 *Government Publications Review* 81–87; Tom Riley, ed., *Access to Government Records: International Perspectives and Trends* (Sweden: Studentlitteratur, 1986). All of these publications include chapters or passages on access to information in Canada.

[262] Cases citing American decisions usually involve the interpretation of the commercial information exemption. See, for example: *Piller Sausages* (1987), *supra* note 58 at 130–131; *Noel* (1987), *supra* note 123 at 264–266; *Montana Band of Indians* (1988), *supra* note 58 at 24–25; *Canada Packers* (1988) (C.A.), *supra* note 57 at 413; *Air Atonabee* (1989), *supra* note 58 at 108. For cases which cite precedents under Australian access legislation, see: *Air Atonabee* at 214; *X* v. *Canada (Minister of National Defence)* (1991), 46 F.T.R. 206 at 209; *Prime Minister* (1992), *supra* note 58 at 16.

[263] One of the few decisions to include some general discussion is *Bland* (1991), which contains strong rhetoric about the importance of access legislation to a democracy. There, Mr. Justice Muldoon wrote that the Act was needed to counter a "well-known compulsiveness on the part of government officials to keep secret matters which are of interest to the public in regard to the management of the taxpayers' money and property": *Bland* (1991), *supra* note 58 at 298.

Another recent case which considers the historical context of the *Access Act* is *Prime Minister* (1992). There, Mr. Justice Rothstein concluded that the passage of the Act in 1982 revealed that Parliament "was no longer satisfied with unjustifiably cautious approaches by government to disclosure": *Prime Minister* (1992), *supra* note 58 at 214.

[264] See notes 132–138 and accompanying text.

ity test in s. 20(1)(b).[265] To add to the confusion, judges do not always maintain a consistent approach. In the *CRTC* (1986) case, for example, Mr. Justice Jerome took a restrictive view of the Act and held that the court did not have the power to review an institution's discretionary decision to withhold under a permissive exemption.[266] But in *Minister of Employment and Immigration,* decided the same year, he took a liberal approach and ruled that permissive language in an exception to the personal information exemption actually created a mandatory duty to release information.[267]

These problems appear to share a common root cause — the court lacks a coherent approach to the *Access to Information Act* and appears unwilling to develop one. Judges seem inclined to follow their own instincts, often without reference to precedent. The general direction of the court is difficult to assess, since the case law lacks a solid foundation; no case has yet offered a substantial analysis of the Act's purpose, history or importance in a democratic system. Without this foundation, much of the court's progress could easily be reversed by a few well-placed cases.

In 1987, the Parliamentary committee that reviewed the Act wrote in its final report:

> The entrenchment of fundamental rights and liberties in the *Canadian Charter of Rights and Freedoms* has been widely heralded and has had an important impact on government and the courts. Of similar significance was the enactment of the *Access to Information Act* and the *Privacy Act* by Parliament in 1982. These laws have given Canadians potential instruments with which to strengthen Canadian democracy. The *Charter* and the two Acts represent significant limits on bureaucracy and have provided a firm anchor to individual rights.[268]

Clearly, the Federal Court has not treated the *Access Act* with a level of attention near that reserved for constitutional documents like the *Charter.* Yet, other pieces of legislation have been accorded special status; the Supreme Court of Canada has held that human rights statutes should receive special attention because they contain important social rights that protect the disadvantaged. As Mr. Justice Sopinka wrote in one recent case, human rights legislation is

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[265] See notes 203–224 and accompanying text.

[266] See notes 81–84 and accompanying text.

[267] See notes 160–166 and accompanying text.

[268] *Supra* note 38 at 1.

"amongst the most pre-eminent category of legislation";[269] it has "a special nature, not quite constitutional but certainly more than the ordinary."[270] In my view, the *Access to Information Act* should be treated with a similar level of priority, since it gives individuals new rights against the powerful institutions of the federal government. Unfortunately, the Federal Court's record on the *Access Act* falls far short of this ideal.

[269] *Zurich Insurance Co.* v. *Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 339.

[270] *Ontario Human Rights Commission* v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at 547.