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A-70-96

Ken Rubin (*Appellant*)

v.

The Minister of Transport (*Respondent*)

Indexed as: Rubinv. Canada (Minister of Transport) (C.A.)

Court of Appeal, Stone, Linden and McDonald JJ.A. "Ottawa, September 23 and November 26, 1997.

Access to information — Appeal from F.C.T.D. decision ordering Minister of Transport to disclose only those parts of report prepared following 1991 Nationair DC-8 aircraft crash in Saudi Arabia obtainable through regulatory means without relying on confidential sources — Trial Judge holding exempted from disclosure under Access to Information Act, s. 16(1)(c) i.e. reasonably expected to be injurious to —conduct of lawful investigations— — Holding s. 16(1)(c) contemplating general investigative process, not particular investigation — Trial Judge failed to consider purpose of Act stated in s. 2(1): exemptions to access must be limited, specific — Where ambiguity, Court must choose interpretation least infringing on public's right to access — Trial Judge's interpretation also making other provisions redundant, at odds with principles of statutory construction — S. 16(1)(c) to apply to information, disclosure of which will have impact on specific investigations ongoing or about to be undertaken.

Construction of statutes — Access to Information Act, s. 16(1)(c) exempting from disclosure information reasonably expected to be injurious to conduct of lawful investigations — French text employing phrase —déroulement d'enquêtes licites— to correspond to —conduct of lawful investigations— — —Déroulement— translating as —development, progress, unfolding— — Having temporal quality not found in —conduite— (used to correspond to —conduct— in other sections) — Suggesting s. 16(1) concerned with unfolding of particular, ongoing investigation, rather than general investigative process — Use of future tense in other sections indicating had Parliament wanted s. 16(1)(c) to refer to future could have so specified — Use of plural of investigations meaning more than one investigation concerning same event may be undertaken — To apply to future, exemption must be limited, specific, known — Examples in 16(1)(c)(i), (ii), (iii) not limiting general nature of s. 16(1)(c).

Air law — Nationair DC-8 crash in Saudi Arabia kills 263 — Post-Accident Safety Review undertaken under Aeronautics Act, s. 4.2 into carrier's organization, operations, maintenance, management — Access to Information Act requester denied Safety Review Report as

exempted under s. 20(1)(b) — F.C.T.D. Judge held reasonable expectation of harm to future Reviews if report disclosed — F.C.A. holds that, on proper interpretation of legislation, disclosure cannot be denied on ground would have chilling effect on future investigations — Should Court's decision negatively impact upon willingness of individuals to participate in Reviews, Parliament could amend Aeronautics Act to provide broader confidentiality protection.

This was an appeal from a decision of the Trial Division ordering the Minister of Transport to disclose only those parts of a Safety Review Report prepared following the 1991 Nationair DC-8 aircraft crash in Saudi Arabia in which 263 people died, which could have been obtained through regulatory means or otherwise, without relying on confidential sources. The Review, conducted under the authority of *Aeronautics Act*, section 4.2, was of the carrier's organization, operations, maintenance and management. *Access to Information Act*, paragraph 16(1)(*c*) permits the head of a government institution to refuse to disclose any record that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information (i) relating to the existence or nature of a particular investigation, (ii) that would reveal the identity of a confidential source of information or (iii) that was obtained or prepared in the course of an investigation. On judicial review of the Information Commissioner's decision upholding the Minister's decision not to produce the report under paragraph 16(1)(*c*), the Trial Judge found that paragraph 16(1)(*c*) contemplates a situation in which the disclosure of information may reasonably be expected to be injurious to the conduct of lawful investigations in the future. Thus the injury need not be limited to a particular investigation, but can extend to the general investigative process as well. The Trial Judge found that a reasonable expectation of probable harm to the conduct of future accident safety reviews existed if the report was disclosed, and that the public interest in maintaining confidential reviews outweighed the public right to access contemplated in subsection 2(1). Subsection 2(1) provides that the purpose of the 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 exceptions to the right of access should be limited and specific, and that decisions on the disclosure of government information should be reviewed independently of government. Subsection 4(1) grants the right to be given access to any record under the control of a government institution.

The issue was whether paragraph 16(1)(*c*) contemplates a situation in which the disclosure of information may reasonably be expected to be injurious to the conduct of lawful investigations in the future or whether the harm is confined to injury to a particular investigation in progress.

Held, the appeal should be allowed.

The Trial Judge erred in law when he found that paragraph 16(1)(*c*) contemplates a process rather than a particular investigation and can affect past, present and future investigations.

All exemptions must be interpreted in light of subsection 2(1), that is, all exemptions to access must be limited and specific. Where there is ambiguity within a section, the Court must, given the presence of section 2, choose the interpretation that least infringes on the public's stated right to access to information contained in section 4. If the meaning is plain, it is not for any Court to alter it.

The Trial Judge failed to consider the purpose of the Act as stated in subsection 2(1) when defining the ambit of paragraph 16(1)(*c*). To allow his judgment to stand would protect from public review most non-regulatory investigations"past, present and future"on the nebulous ground that to disclose this information might have a chilling effect on future investigations. As the purpose of the Act is to broaden the public's access to government information, this cannot have been Parliament's intent.

The Trial Judge also erred in that his broad interpretation of paragraph 16(1)(*c*) effectively makes other provisions of the Act redundant. By interpreting paragraph 16(1)(*c*) as a process, everything done during an investigation would be incorporated by this section. Information gathered during an investigation (as is specified in paragraph 16(1)(*a*)) would fall under paragraph 16(1)(*c*). The 20-year time limit set out in paragraph 16(1)(*a*) would be meaningless as there is no corresponding time limit found in paragraph 16(1)(*c*). As long as the information could reasonably be expected to impact on some future investigation, it would remain protected. Similarly, the third party information exemption found in section 20 would also not be necessary if the information in question was obtained in the course of an investigation as it would also be protected under paragraph 16(1)(*c*).

The Trial Judge's interpretation of paragraph 16(1)(*c*) was also at odds with the principles of statutory construction, specifically, the modern interpretation rule. Further support that paragraph 16(1)(*c*) refers to a specific, ongoing investigation is found in the French version of the phrase "conduct of lawful investigations" used in paragraph 16(1)(*c*). When the word "conduct" is used in other sections of the Act, the French text employs the word "*conduite*", which means direction or management in English. But in paragraph 16(1)(*c*) Parliament employed the phrase "*déroulement d'enquêtes licites*" to correspond to the English "conduct of lawful investigations". This phrase translates into English as the "development, progress or unfolding" of lawful investigations. The word "*déroulement*" has a temporal nuance or quality which the word "*conduite*" does not have. It suggests that paragraph 16(1)(*c*) is concerned with the unfolding of a particular, ongoing investigation, rather than the unfolding of a general investigative process. Also, when other sections of the Act speak to the future they use the future tense. Had Parliament wanted the harm contemplated to be harm to future investigations, it would have so specified by using the future tense. Paragraph 16(1)(*c*) should be interpreted so that the word "conduct" refers to something specific about the development or progress of a particular investigation. It does not refer to the general investigative process. The use of the plural in investigations simply means that more than one investigation concerning the same event may be undertaken and may possibly be affected by the disclosure of information. As to future investigations, it is possible that information may affect an investigation that has not yet been undertaken, but is about to be undertaken. To apply to the future, the exemption must be limited, specific and known. It cannot apply to all safety reviews.

It is possible to protect past information that will have an effect on an investigation currently underway. However, the investigation to be affected must be specified, limited to that one investigation and it must be in progress or about to be undertaken. The examples specified in subparagraphs (i), (ii) and (iii) do not limit the general nature of the words in paragraph 16(1)(*c*). They are illustrative of the types of information or situations that may be protected under paragraph 16(1)(*c*). Paragraph 16(1)(*c*) when read in light of the Act's purpose, is intended to apply to information the disclosure of which will have an impact on specific investigations which are ongoing or about to be undertaken. None of the enumerated examples in

subparagraphs (i), (ii) or (iii) refers to a broad investigative process. Instead, they focus on a specific aspect of a single investigation.

If there is a negative impact on the willingness of individuals to participate in these reviews due to public disclosure, Parliament can change the *Aeronautics Act* to provide for wide-scale confidentiality protection, or add these reviews to the section 24 category of broad exemptions in the *Access to Information Act*. It is also open to the Minister to protect certain aspects of the report under other exemptions in this Act.

statutes and regulations judicially considered

Access to Information Act, R.S.C., 1985, c. A-1, ss. 2(1), 4(1), 14, 15, 16(1)(*c*),(4), 20(1)(*b*),(*c*), 21(1)(*a*),(*b*), 22, 24, 25.

Aeronautics Act, R.S.C., 1985, c. A-2, s. 4.2 (as enacted by R.S.C., 1985 (1st Supp.), c. 33, s. 1).

Privacy Act, R.S.C., 1985, c. P-21, s. 3.

cases judicially considered

applied:

Maislin Industries Limited v. Minister for Industry, Trade and Commerce, [1984] 1 F.C. 939; (1984), 10 D.L.R. (4th) 417; 8 Admin. L.R. 305; 27 B.L.R. 84 (T.D.); *Information Commissioner (Canada) v. Canada (Minister of Employment and Immigration)*, [1986] 3 F.C. 63; (1986), 11 C.P.R. (3d) 81; 5 F.T.R. 287 (T.D.); *Communauté urbaine de Montréal (Société de transport) v. Canada (Minister of Environment)*, [1987] 1 F.C. 610; (1986), 9 F.T.R. 152 (T.D.); *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1993] 1 F.C. 427; (1992), 12 Admin. L.R. (2d) 81; 49 C.P.R. (3d) 79; 57 F.T.R. 180 (T.D.); *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1989] 1 F.C. 265; (1988), 52 D.L.R. (4th) 671; 32 Admin. L.R. 196; 21 C.P.R. (3d) 1; 86 N.R. 186 (C.A.); *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; (1997), 213 N.R. 161; *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47; (1988), 53 D.L.R. (4th) 246; 32 Admin. L.R. 178; 26 C.P.R. (3d) 407; 87 N.R. 81 (C.A.).

considered:

Rubin v. Canada (Clerk of the Privy Council), [1993] 2 F.C. 391; (1993), 14 Admin. L.R. (2d) 246; 48 C.P.R. (3d) 348; 63 F.T.R. 1 (T.D.); revd [1994] 2 F.C. 707; (1994), 113 D.L.R. (4th) 275; 25 Admin. L.R. (2d) 241; 54 C.P.R. (3d) 511; 167 N.R. 43 (C.A.); *Noël v. Great Lakes Pilotage Authority Ltd.*, [1988] 2 F.C. 77; (1987), 45 D.L.R. (4th) 127; 20 F.T.R. 257 (T.D.); *Slavutych v. Baker et al.*, [1976] 1 S.C.R. 254; (1976), 55 D.L.R. (3d) 224; [1975] 4 W.W.R. 620; 75 CLLC 14,263; 38 C.R. (N.S.) 306.

referred to:

Rubin v. Canada (Clerk of the Privy Council), [1994] 2 F.C. 707; (1994), 113 D.L.R. (4th) 275; 25 Admin. L.R. (2d) 241; 54 C.P.R. (3d) 511; 167 N.R. 43 (C.A.); *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; (1985), 19 D.L.R. (4th) 1; [1985] 4 W.W.R. 385; 35 Man. R. (2d) 83; 59 N.R. 321; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; (1996) 113 D.L.R. (4th) 289; 17 C.C.E.L. (2d) 141; 10 C.C.P.B. 213; [1996] 1 C.T.C. 303; 96 DTC 6103; 193 N.R.

241; *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.).

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Report of the Commission of Inquiry on Aviation Safety, Vol. 1, Ottawa: Supply and Services Canada, 1981. (Commissioner: Charles L. Dubin).

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APPEAL from a Trial Division decision (*Rubin v. Canada (Minister of Transport)* (1995), 39 Admin. L.R. (2d) 301; 105 F.T.R. 81) ordering the Minister of Transport to disclose only those parts of the 1991 Post-Accident Review Report into Nationair Canada's operations which could have been obtained without relying on confidential sources. Appeal allowed.

counsel:

Geoffrey S. Lester for respondent.

appearance:

Ken Rubin on his own behalf.

solicitor:

Deputy Attorney General of Canada for respondent.

appellant on his own behalf:

Ken Rubin, Ottawa.

The following are the reasons for judgment rendered in English by

McDonald J.A.: This is an appeal from a decision of the Trial Division dated December 21, 1995 [(1995), 39 Admin. L.R. (2d) 301], ordering the Minister of Transport to disclose only those parts of a Post-Accident Review Report conducted in August 1991 into Nationair Canada's operations which could have been obtained through regulatory means or otherwise, without relying on confidential sources.

Facts

This case arose as a result of a request made by the appellant, Mr. Ken Rubin, under the *Access to Information Act,* R.S.C., 1985, c. A-1. Mr. Rubin submitted an *Access to Information Act* application to Transport Canada asking for the August 1991 Nationair Safety Review Report and for records relevant to Nationair's safety and licence status. The Post-Accident Review was undertaken as a result of the Nationair DC-8 aircraft crash in Jeddah, Saudi Arabia on July 11, 1991. In that crash, 249 Nigerian passengers and 14 Canadian crew members were killed. It was the worst airline disaster in Canadian history. The review was

undertaken at the direction of the Assistant Deputy Minister, Aviation under the authority of section 4.2 of the *Aeronautics Act* [R.S.C., 1985, c. A-2 (as enacted by R.S.C., 1985 (1st Supp.), c. 33, s. 1)]. The Review was into the organizational, operational, maintenance and management components of Nationair Canada's operation in planning, executing and supporting certain commercial arrangements undertaken by that company. Transport Canada denied Mr. Rubin the Nationair Safety Review Report on the grounds that it fell under the paragraph 20(1)(*b*) exemption of the *Access to Information Act.*

Mr. Rubin complained about Transport Canada's refusal to disclose the report to the Information Commissioner on February 14, 1992. Almost one year later, January 13, 1993, Transport Canada added to its list of reasons for denying Mr. Rubin's request, the paragraphs 16(1)(*c*) and 20(1)(*c*) exemptions of the Act. The Information Commissioner upheld the Minister of Transport's decision not to produce the report under paragraph 16(1)(*c*) of the Act. In the Commissioner's opinion, the entire report was protected from disclosure by this section.

Mr. Rubin wrote a letter to the Commissioner expressing his concerns with the decision and proceeded on April 19, 1993, to file an application for judicial review of the Commissioner's decision. He also filed another Court application dated September 2, 1993, requesting the Court to review both the remaining records exempted and the incomplete production of records requested. On November 14, 1994, the Minister of Transport Canada informed the Court that it would no longer be relying on the paragraphs 20(1)(*b*) and (*c*) exemptions.

Decision of the Court Below

As mentioned, the Trial Judge, by order dated December 21, 1995, ordered the Minister of Transport to disclose only those parts of the 1991 report which could have been obtained through regulatory means or otherwise, without relying on confidential sources.

In his reasons, the Trial Judge found that the review was an investigation within the meaning of subsection 16(4) and that it fell under the exemption in paragraph 16(1)(*c*). He also found that paragraph 16(1)(*c*) is not restricted to a specific investigation but relates to records that fall within the general language of that paragraph. He stated that paragraph 16(1)(*c*) contemplates a situation in which the disclosure of information may reasonably be expected to be injurious to the conduct of lawful investigations in the future. Thus, the injury does not need to be limited to a particular investigation but can be to the general investigative process as well.

In discussing the test that must be met under paragraph 16(1)(*c*), the Trial Judge found that a reasonable expectation of probable harm to the conduct of future post-accident safety reviews exists if the report is disclosed, and that the public interest in maintaining confidential reviews outweighs the public right to access contemplated in subsection 2(1) of the Act. The Trial Judge also found that while subsection 2(1) is to be considered, there is no obligation to consult the public interest as an independent step in the analysis leading to the decision of whether or not to disclose.

The Trial Judge further found that the respondent's refusal to disclose certain information under paragraphs 21(1)(*a*) and (*b*) of the Act was justified, as the information refused was information that falls within these exemptions. He also held that the obligation to sever under section 25 had been met in this case, and that there was insufficient evidence to support an allegation of missing records.

On the issue of the timing of the Minister of Transport's decision to invoke paragraph 16(1)(*c*) as a grounds for refusal, the Trial Judge held that the Commissioner had the opportunity to investigate the grounds relied upon in Court and therefore Transport Canada was not barred from using this section.

Issues

The parties indicate that there are three issues on appeal:

1. What is the scope of paragraph 16(1)(*c*) of the *Access to Information Act*?

2. Were the evidentiary and threshold requirements necessary to prove reasonable harm met in this case?

3. What is the role of subsection 2(1) in the interpretation of paragraph 16(1)(*c*) of the *Access to Information Act*?

The central issue in this case is the correct interpretation of paragraph 16(1)(*c*) and, in particular, whether the Trial Judge erred in law in holding that paragraph 16(1)(*c*) contemplates a situation in which the disclosure of information may reasonably be expected to be injurious to the conduct of lawful investigations in the future or, whether the harm is confined to injury to a particular investigation in progress?

Appellant's Submissions

The appellant's submissions are quite long and can be summarized as follows: The essence of the appellant's argument is that paragraph 16(1)(*c*) only refers to specific investigations where past problems are reviewed and cannot be invoked once an investigation is completed. The appellant claims that the judgment of Rothstein J. in *Rubin v. Canada (Clerk of the Privy Council)*[1] holding that this section is limited to specific investigations is to be preferred to the Trial Judge's interpretation, as paragraph 16(1)(*c*) does not apply to existing and future investigations. The Act is records-based and does not contemplate a broad information process. Upon completion of an investigation, it is only subject to section 25 and very specific exemptions.

The appellant also argues that investigations (plural) refers to more than one specific investigation. It does not imply a process. The word conduct refers to a means or method and not a process.

Respondent's Submissions

The respondent argues that paragraph 16(1)(*c*) should not be confined to the conduct of a specific lawful investigation and also should not be restricted to physical activity. The respondent claims that the Trial Judge's interpretation of paragraph 16(1)(*c*) is the correct one as the opening paragraph speaks of investigations in the plural. The use of the plural investigations underlines the fact that the injury may be to the investigative process and not only to a particular investigation. The respondent further argues that as a matter of statutory construction paragraph 16(1)(*c*) must be wider than the enumerated subparagraphs. The respondent also claims that subparagraphs (i) and (iii) which refer to investigations in the

singular should not be determinative and should instead be seen as illustrations of the principle laid down in paragraph 16(1)(*c*). They should not be read as limiting paragraph 16(1)(*c*).

The respondent also argues that conduct should be regarded as a process and not an action because if it is regarded as an action, disclosing information cannot injure the conduct of an investigation that has already been completed. Subparagraphs (i), (ii) and (iii) also point to the conclusion that conduct is not necessarily active but can be a process. Although an investigation has been completed, disclosing the existence or nature of a particular investigation or, revealing the identity of a confidential source of information could injure the process of investigations. The example given is through a chilling effect on informants or other sources of information. Indeed, the argument of the respondent in this case is that it cannot disclose the Post-Accident Review Report because to do so would harm the way it does future post-accident reviews. The Trial Judge accepted these arguments.

Analysis

This appeal is important because how this Court decides to interpret the scope of the paragraph 16(1)(*c*) exemption will obviously impact on what the government can refuse to disclose under this subsection of the Act. It is also important because the decision of this Court may affect how the other exemptions in the Act are construed. Indeed, this appeal raises questions that go much beyond this Court's interpretation of the scope of paragraph 16(1)(*c*)"it raises questions that go to the meaning and interpretation of the entire Act. In particular, it raises the issue of how important a role subsection 2(1) of the Act should play in future decisions of this Court that examine and interpret the exceptions to disclosure contained in the Act.

[A.]Le présent appel est important parce que la façon dont la Cour décide d'interpréter la portée de l'exception prévue à l'alinéa 16(1)*c*) aura manifestement des répercussions sur les renseignements que le gouvernement peut refuser de divulguer en vertu de cette disposition législative. De plus, le présent appel est important parce que la décision de la Cour peut avoir une incidence sur la façon dont d'autres exceptions prévues par la Loi sont interprétées. De fait, le présent appel soulève des questions qui vont bien au-delà de l'interprétation que donne la Cour de la portée de l'alinéa 16(1)*c*); il soulève des questions qui touchent à la signification et à l'interprétation de la Loi tout entière. En particulier, il soulève la question de l'importance du rôle que devrait jouer le paragraphe 2(1) de la Loi dans des décisions ultérieures de la Cour qui examinent et interprètent les exceptions au droit à la communication prévues par la Loi.

Because this section has been the subject of so little review, and because the issue of the interplay between subsection 2(1) and the exemption provisions in the Act deserves greater attention than it has received in the past, I will comment generally on the role subsection 2(1) plays in interpreting the rest of the Act. Before doing so, however, I will first set out the relevant provisions of the *Access to Information Act.*

Relevant Provisions

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

. . .

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

(*a*) a Canadian citizen, or

(*b*) a permanent resident within the meaning of the *Immigration Act*,

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

. . .

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

. . .

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

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

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

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

. . .

(4) For the purposes of paragraphs 1(*b*) and (*c*) "investigation" means an investigation that

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

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

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

The Role of the Purpose Clause in Interpreting the Exemption Provisions contained in the Act.

As set out above, Parliament has deemed it fit to include in this Act a clause setting out the purpose of the Act. In my opinion, this is significant and should not be ignored. As M. Murray Rankin points out, "[e]ven hortatory preambles are increasingly rare; it is significant, therefore, that a purpose clause of this sort is contained in the body of the statute itself."[2] Both this Court and the Trial Division have commented on the significance of subsection 2(1) of the Act. Indeed, any examination of this section must begin with the judgment of Jerome A.C.J. in *Maislin Industries Limited v. Minister for Industry, Trade and Commerce*.[3] In that case, Jerome A.C.J. commented on the principles underlying the Act. He stated:

There was no disagreement that the burden of proof rests upon the applicant Maislin. It should be emphasized however, that since the basic principle of these statutes is to codify the right of

public access to Government information two things follow: first, that such public access ought not to be frustrated by the courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure; second, the burden of persuasion must rest upon the party resisting disclosure whether, as in this case, it is the private corporation or citizen, or in other circumstances, the Government. It is appropriate to quote subsection 2(1).[4]

He repeated the need to have regard to subsection 2(1) of the Act in *Information Commissioner (Canada) v. Canada (Minister of Employment and Immigration)*[5] where he stated: "To repeat, the purpose of the *Access to Information Act* is to codify the right of access to information held by the government. It is not to codify the government's 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."

In *Communauté urbaine de Montréal (Société de transport) v. Canada (Minister of Environment)*[6] Mr. Justice Dubé wrote that, "[t]he existence of such a clause is worth emphasizing since it is quite rare and therefore significant." Mr. Justice Rothstein in *Canada (Information Commissioner) v. Canada (Prime Minister)*[7] has also stated that, "When Parliament has been 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."[8]

This Court has also had a chance to comment on the significance of subsection 2(1) of the Act. In *Rubin v. Canada (Canada Mortgage and Housing Corp.)*[9] Heald J.A. (with whom Urie J.A and Stone J.A. concurred) examined the exemption contained in paragraph 21(1)(*b*) of the Act, and stated in his reasons for judgment:

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

Later on in his judgment, Heald J.A. stated that, "[t]he general rule is disclosure, the exception is exemption and the onus of proving the entitlement to the benefit of the exception rests upon those who claim it."[10]

In *Rubin v. Canada (Clerk of the Privy Council)*[11] this Court also affirmed the significance of subsection 2(1) of the Act. The Supreme Court of Canada has also highlighted the importance of the underlying purpose of the Act in construing its provisions. In *Dagg v. Canada (Minister of Finance)*,[12] Justice La Forest made the following remarks:[13]

Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the *Access to Information Act* recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.

In my opinion, therefore, all exemptions must be interpreted in light of this clause. That is, all exemptions to access must be limited and specific. This means that where there are two interpretations open to the Court, it must, given Parliament's stated intention, choose the one that infringes on the public's right to access the least. It is only in this way that the purpose of the Act can be achieved. It follows that an interpretation of an exemption that allows the government to withhold information from public scrutiny weakens the stated purpose of the Act.

It is important to emphasize that this does not mean that the Court is to redraft the exemptions found in the Act in order to create more narrow exemptions. A court must always work within the language it has been given. If the meaning is plain, it is not for this Court, or any other court, to alter it. Where, however, there is ambiguity within a section, that is, it is open to two interpretations (as paragraph 16(1)(*c*) is here), then this Court must, given the presence of section 2, choose the interpretation that infringes on the public's stated right to access to information contained in section 4 of the Act the least.

The Appropriate Scope of paragraph 16(1)(*c*)

Having read the reasons of the Trial Judge, it is with the greatest respect that I find myself unable to agree with his decision. In my opinion, where the Trial Judge went wrong in his interpretation of paragraph 16(1)(*c*) was when he failed to consider the stated purpose of the Act as set out in subsection 2(1) when defining the ambit of paragraph 16(1)(*c*). Indeed, to allow his judgment to stand, would protect from public review most non-regulatory investigations"past, present and future"on the nebulous ground that to disclose this information might have a chilling effect on future investigations. Given that the purpose of the Act is to broaden the public's access to government information, this cannot have been Parliament's intent. Indeed, in my opinion, had Parliament wished to create such a broad exemption that would protect from public scrutiny all future post-accident safety reviews it would have done so in a manner similar to that found under section 24 of the Act.[14]

A second reason for holding that the Trial Judge erred, is that his broad interpretation of paragraph 16(1)(*c*) effectively makes other provisions of the Act redundant. For example, paragraph 16(1)(*a*) might not be necessary as everything listed in that section could now be protected under section 16(1)(*c*).[15] By interpreting paragraph 16(1)(*c*) as a process, everything done during an investigation would be incorporated by this section. This means that information gathered during an investigation (as is specified in paragraph 16(1)(*a*)) would fall under paragraph 16(1)(*c*). This makes the 20-year time limit set out in paragraph 16(1)(*a*) meaningless as there is no corresponding time limit found in paragraph 16(1)(*c*). As long as the information can reasonably be expected to impact on some future investigation, it would remain protected.

Similarly, the third party information exemption found in section 20 would also not be necessary if the information in question was obtained in the course of an investigation as it would also be protected under paragraph 16(1)(*c*).[16] Indeed, the respondent seeks to expand section 20 by way of paragraph 16(1)(*c*) as well as circumvent the test for confidentiality, as its central argument is that the information it obtained during its Post-Accident Review should not be disclosed as it is of a confidential nature. If this information is disclosed, it may affect future investigations because individuals will not be quite as forthcoming or will not participate in future Post-Accident Safety Reviews.

It is not surprising that the respondent now attempts to rely on paragraph 16(1)(*c*) given the test that must be met for confidentiality. In *Noël v. Great Lakes Pilotage Authority Ltd.*[17] Dubé J. stated that the test for protecting a record as confidential is the test adopted by the Supreme Court of Canada in *Slavutych v. Baker et al.*[18]

"(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which, in the opinion of the community ought to be sedulously *fostered*.

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation."[19]

As this is an onerous test to meet, paragraph 16(1)(*c*) becomes an attractive, alternative exemption.

A third reason for rejecting the Trial Judge's interpretation of paragraph 16(1)(*c*) is that it is at odds with the principles of statutory construction, specifically, the modern interpretation rule. Indeed, this rule confirms the approach I suggested at the outset of my reasons"that where there is more than one plausible interpretation of a section the one that accords best with the purpose of the Act (which in this case is that exemptions are to be limited and specified) should be chosen. As is stated in, *Driedger on the Construction of Statutes* :[20]

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

This Court has adopted this as the correct method of statutory construction to be adopted when interpreting subsection 2(1) of the *Access to Information Act*. MacGuigan J.A. in *Canada Packers Inc. v. Canada (Minister of Agriculture)*[21] stated:

The words-in-total-context approach to statutory interpretation which this Court has followed in *Lor-Wes Contracting Ltd v. The Queen* . . . requires that we view the statutory language in these paragraphs in their total context, which must here mean particularly in the light of the purpose of the Act as set out in section 2. Subsection 2(1) provides a clear statement that the Act should be interpreted in the light of the principle that government information should be available to the public and that exceptions to the public's right of access should be "limited and specific". With such a mandate, I believe one must interpret the exceptions to access in paragraphs (*c*) and (*d*) to require a reasonable expectation of <u>probable</u> harm.

I find further support that paragraph 16(1)(*c*) refers to a specific, ongoing investigation in the French version of the phrase "conduct of lawful investigations" used in paragraph 16(1)(*c*). As Canadian jurisprudence has consistently affirmed, both versions of a bilingual statute have equal authority and authenticity in construing the meaning of a given provision.[22] When the word "conduct" is used in other sections of the Act, such as sections 14 and 15, the French text employs the word "*conduite*", which means direction or management in English. However, instead of using the French "*conduite*" in paragraph 16(1)(*c*), Parliament chose instead to employ the phrase "*déroulement d'enquêtes licites*" to correspond to the English "conduct of lawful investigations". This phrase translates into English as the "development, progress or unfolding" of lawful investigations. In my view, the word "*déroulement*" has a temporal nuance or quality which the word "*conduite*" does not have. It suggests that paragraph 16(1)(*c*) is concerned with the unfolding of a particular, ongoing investigation, rather than the unfolding of a general investigative process.

Similarly, when other sections of the Act speak to the future they use the future tense. For example, paragraphs 14(*b*), 15(1)(*g*) and section 22 all use the words "to be."[23] It follows that if Parliament had wanted paragraph 16(1)(*c*) to refer to the future, that is, that the harm contemplated could be harm to future investigations, then it would have specified so by using the future tense.

Thus, in my opinion, paragraph 16(1)(*c*) should be interpreted in the following manner: the word conduct refers to something specific about the development or progress of a particular investigation. It does not refer to the general investigative process. The use of investigations in the plural simply means that more than one investigation concerning the same event may be undertaken and may possibly be affected by the disclosure of information. As for future investigations, it is possible that information may affect an investigation that has not yet been undertaken but is about to be undertaken. An example of this is if a criminal investigation was also going to be undertaken as a result of an accident but had not yet officially begun. It cannot, however, refer to future investigations generally, such as all future post-accident safety reviews. To apply to the future, the exemption must be limited, specific and known. It cannot apply to all safety reviews. It can, however, have an impact on a particular safety review investigation, but to be able to do this, that investigation must have been undertaken or be about to be undertaken. Thus, one cannot refuse to disclose information under paragraph 16 (1)(*c*) on the basis that to disclose would have a chilling effect on future investigations.

Having said this, I am also of the view that the appellant is incorrect in arguing that all past information is excluded from protection under this section. I believe it is quite possible, and in line with this section, to protect past information that will have an effect on an investigation currently underway. However, again, the investigation to be affected must be specified, limited to that one investigation and it must be in progress or about to be undertaken. I would also like to point out that I agree with the respondent when he states that the examples specified in subparagraphs (i), (ii) and (iii) do not limit the general nature of the words in paragraph 16(1) (*c*). However, they are illustrative of the types of information or situations that may be protected under section 16(1)(*c*). I would also note that there is strong support for this view in the case law, most significantly the decisions in *Dagg v. Canada (Minister of Finance)* and *Schwartz v. Canada*.[24] In *Dagg,* the Supreme Court of Canada examined the scope of section 3 of the *Privacy Act*, [R.S.C., 1985, c. P-21] which includes opening words similar to those in paragraph 16(1)(*c*) of the *Access to Information Act.* The Court maintained (at page 436) that the phrase "including, without restricting the generality of the foregoing" reveals that:

. . . the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition.

This principle of interpretation does not alter my view, however, that paragraph 16(1)(*c*), when read in light of the Act's purpose, is intended to apply to information the disclosure of which will have an impact on specific investigations which are ongoing or about to be undertaken. In this regard, it is noteworthy that none of the enumerated examples in subparagraph, (i), (ii) or (iii) refers to a broad investigative process. Instead, they focus on a specific aspect of a single investigation. I also agree with the respondent and the Trial Judge that the Post-Accident Review is an investigation as defined by subsection 16(4) of the Act.

In reaching my conclusion with regards to the correct interpretation of paragraph 16(1)(*c*), I am not unaware of the important role safety review reports play in the overall framework of ensuring safety for the public in the aeronautics industry. However, if, as the respondent suggests, there is a negative impact on the willingness of individuals to participate in these reviews due to public disclosure, then there is nothing to preclude Parliament from changing the *Aeronautics Act* to provide for wide-scale confidentiality protection, or, from adding these reviews to the section 24 category of broad exemptions in the *Access to Information Act.* It is also open to the Minister to protect certain aspects of the report under other exemptions in this Act. Indeed, the respondent decided not to pursue a section 20 confidentiality claim. I will not comment on this, except to say that this avenue is open to the respondent for future investigations.

Having stated the important role that post-accident safety reviews play in the overall safety of the aeronautics industry, I think it is also important not to underestimate the public's interest in disclosure and the positive impact disclosure may have on the regulation of the aeronautics industry. It should not be forgotten that in passing this Act, Parliament has specified the important role public scrutiny of government information plays in a democratic system. Indeed, as Justice La Forest recently affirmed in *Dagg*, "The overarching purpose of access to information legislation . . . is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry."[25] (Although La Forest J. was writing in dissent, the majority of the Supreme Court explicitly agreed with this approach to interpreting the Act.) As for the fear that there may be a chilling effect, I take comfort in the remarks of Mr. Justice Dubin. Although dealing with a different context (witness statements in accident reports and whether privilege should attach), Mr. Justice Dubin addressed the "chilling effect" argument in his *Report of the Commission of Inquiry on Aviation Safety* . I feel his comments with regards to this argument are relevant and should be emphasized here. In his report, Mr. Justice Dubin stated:

The main ground advanced by those asserting that a privilege should be attached to all statements obtained by the investigators in the course of their investigations is that witnesses would refuse to provide information to accident investigators if these statements could become admissible in legal proceedings. Those who advanced this position opined that this would happen. These opinions were equally matched with the opinions of others that no such result would flow. It has not been the experience of the National Transportation Safety Board in the

United States, where witnesses' statements enjoy no privilege that their sources of information have dried up. Conversely, there is a danger that witnesses who are assured that their information will not be challenged, nor come under public scrutiny may take liberties with the facts. This may impair public confidence in the reliability of accident reports.

. . .

In my opinion no satisfactory arguments have been advanced which would warrant any rule of absolute privilege to be attached to witnesses' statements.[26]

I am therefore of the view that, in order to respect the purpose of the Act and not to render it a legislative instrument without teeth, the interpretation of paragraph 16(1)(*c*) advanced in these reasons must prevail. This is because my interpretation provides for a more limited and specific exemption which respects the purpose of the Act more than the broad blanket exemption accepted by the Trial Judge.

I would therefore allow the appeal on the grounds that the Trial Judge made an error in law that warrants interference by this Court when he found that paragraph 16(1)(*c*) contemplates a process rather than a particular investigation and can affect past, present as well as future investigations.

Given my reasons on the interpretation of paragraph 16(1)(*c*), I find it unnecessary to deal with the second issue concerning the evidentiary and threshold requirements necessary to prove reasonable expectation of probable harm under paragraph 16(1)(*c*).

As for the third issue, of whether or not to consider the public interest as an independent step under the test for reasonable expectation of probable injury, my opening remarks on the importance of respecting the purpose of the Act as set out in subsection 2(1) illuminate this point. It is therefore not necessary to comment on whether this is an independent step in the process of determining whether there is a reasonable expectation of probable injury. Suffice it to say that I am in general agreement with the method adopted by the Trial Judge.

I would allow the appeal with costs, set aside the judgment of the Trial Division and order Transport Canada to produce the August 1991 Nationair Post-Accident Safety Review Report in full to the appellant.

Stone J.A.: I agree.

Linden J.A.: I. agree.

[1] [1993] 2 F.C. 391 (T.D.) revd on other grounds [1994] 2 F.C. 707 (C.A.) on a different point. Rothstein J. stated at pp. 404-405: "I do not read paragraph 16(1)(*c*) to be a procedural provision that justifies confidentiality in respect of the investigative process of the Information Commissioner. To interpret paragraph 16(1)(*c*) as an all-encompassing procedural exemption justifying confidentiality in all cases where representations are sought would, to all intents and purposes, render much of section 35 redundant."

[2] Murray Rankin, "Case Comment: *Maislin Indust. Ltd. v. Min. of Industry, Trade and Commerce*" (1985), 8 *Admin. L.R.* 314, at p. 317.

[3] [1984] 1 F.C. 939 (T.D.).

[4] *Id.*, at pp. 942-943.

[5] [1986] 3 F.C. 63 (T.D.), at p. 69.

[6] [1987] 1 F.C. 610 (T.D.), at p. 613.

[7] [1993] 1 F.C. 427 (T.D.).

[8] *Id.*, at p. 441.

[9] [1989] 1 F.C. 265 (C.A.), at p. 274.

[10] *Id.*, at p. 276.

[11] [1994] 2 F.C. 707 (C.A.), at pp. 711-712.

[12] [1997] 2 S.C.R. 403.

[13] *Id.*, at pp. 433-434.

[14] S. 24(1) sets out that "The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II." Schedule II lists a series of Acts and provisions to which the *Access to Information Act* does not apply.

[15] S. 16(1) states:

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

(*a*) information obtained or prepared by any government institution, or party of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

(i) the detection, prevention or suppression of crime,

(ii) the enforcement of any law of Canada or a province, or

(iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act,*

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

As this section is clearly dealing with what can be labelled "sensitive investigations", it would be illogical to have this exemption subject to a 20 year time period but not to have s. 16(1)(*c*), which deals with less sensitive investigations, free from such a time period. Thus, Parliament could not have intended that s. 16(1)(*c*) be interpreted as a process that contemplates the future.

[16] S. 20(1) states:

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.

[17] [1988] 2 F.C. 77 (T.D.), at p. 86.

[18] [1976] 1 S.C.R. 254, at p. 260.

[19] This test was also applied by MacKay J. in *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (F.C.T.D.), at p. 270.

[20] 3rd ed. by Ruth Sullivan (Toronto: Butterworths, 1994), at p. 131.

[21] [1989] 1 F.C. 47 (C.A.), at p. 60.

[22] See for example *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

[23] S. 14 lists the federal-provincial affairs exemption. Paragraph (*b*) states: "on strategy or tactics adopted or to be adopted by the Government of Canada relating to the conduct of federal-provincial affairs."

S. 15 contains the international affairs and defence exemption. Paragraph (1)(*g*) states: "on the positions adopted or to be adopted by the Government of Canada, governments of foreign states or international organizations of states for the purpose of present or future international negotiations."

Finally, s. 22 falls under the "Operations of Government" section and sets out that, "The head of a government institution may refuse to disclose any record requested under this Act that contains information relating to testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted if the disclosure would prejudice the use or results of particular tests or audits." [Emphasis added.]

[24] [1996] 1 S.C.R. 254, at p. 290.

[25] *Supra*, at pp. 432-433.

[26] *Report of the Commission of Inquiry on Aviation Safety*, Vol. I, Ottawa: Supply and Services Canada, 1981 (Commissioner: Charles L. Dubin), at pp. 239-240.