Federal Court of Appeal | Cour d'appel fédérale

Date: 20170622

Docket: A-414-15

Citation: 2017 FCA 133

CORAM: **STRATAS J.A.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

JAMES PAUL IN HIS CAPACITY AS PRESIDENT OF DEFENCE CONSTRUCTION CANADA (1951) LIMITED A.K.A. DEFENCE CONSTRUCTION CANADA; THE SAID DEFENCE CONSTRUCTION CANADA (1951) LIMITED A.K.A. DEFENCE CONSTRUCTION CANADA; AND THE ATTORNEY GENERAL OF CANADA

Appellants

and

UCANU MANUFACTURING CORP.

Respondent

and

THE INFORMATION COMMISSIONER OF CANADA

Intervener

Heard at Ottawa, Ontario, on November 1, 2016.

Judgment delivered at Ottawa, Ontario, on June 22, 2017.

REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	RENNIE J.A.
DISSENTING REASONS BY:	BOIVIN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The appellants appeal from the judgment dated August 24, 2015 of the Federal Court (*per* Southcott J.): 2015 FC 1001. The Federal Court held that certain records sought by the

respondent, Ucanu Manufacturing, under the *Access to Information Act*, R.S.C. 1985, c. A-1 should be disclosed.

[2] For those unfamiliar with the Act, some brief background may assist. Under the Act, a person can file an information request against a government institution. The government institution holding the information responds. It can assert mandatory and optional exemptions to disclosure. The person requesting the information can complain about the assertion of the exemptions to the Information Commissioner. In turn, the Information Commissioner can investigate and report on whether exemptions apply. After that, an appeal may be made to the Federal Court to determine the issue.

[3] In this case, Ucanu Manufacturing submitted its information request. It sought records related to a contract awarded to a joint venture for the construction of a maintenance hangar on the Trenton air force base.

[4] The government institution holding the records, the appellant Defence Construction Canada, produced many records in response. But it refused to disclose certain others. It relied upon two exemptions, subsection 19(1) of the Act (personal information) and paragraph 20(1)(*b*) of the Act (third-party's confidential commercial information).

[5] Ucanu Manufacturing complained to the Information Commissioner. The Information Commissioner investigated Ucanu Manufacturing's complaint. During the investigation, Defence Construction Canada disclosed some further records, but not all of them.

[6] The Information Commissioner concluded her investigation. She issued her report. She found that the undisclosed records were properly exempt from disclosure. Ucanu Manufacturing applied to the Federal Court for review of the matter, seeking disclosure of the records.

[7] One part of the Federal Court's decision is before us. Another is not.

[8] In the part not before us, the Federal Court agreed with the Information Commissioner's finding concerning the exemption in subsection 19(1) of the Act but came to a different conclusion regarding the exemption in paragraph 20(1)(*b*) of the Act. As a result, the Federal Court ordered that the records—portions of the Joint Venture Agreement and a cover letter to Defence Construction Canada enclosing the Joint Venture Agreement—be disclosed. In this Court, the appellants do not challenge the Federal Court's findings on these matters.

[9] The part before us concerns what happened in a late stage in this matter, when it arrived at the Federal Court. Defence Construction Canada asserted for the first time a new mandatory exemption from disclosure found in section 30 of the *Defence Production Act*, R.S.C. 1985, c. D-1, an exemption that applies due to section 24 of the *Access to Information Act* and Schedule II to the Act.

[10] Section 30 provides as follows:

30. No information with respect to an individual business that has been obtained under or by virtue of this Act shall be disclosed without the consent	**30.** Les renseignements recueillis sur une entreprise dans le cadre de la présente loi ne peuvent être communiqués sans le consentement

of the person carrying on that business, except	de l'exploitant de l'entreprise, sauf :
(*a*) to a government department, or any person authorized by a government department, requiring the information for the purpose of the discharge of the functions of that department; or	*a*) à un ministère, ou à une personne autorisée par un ministère, qui en a besoin pour l'accomplissement de ses fonctions;
(*b*) for the purposes of any prosecution for an offence under this Act or, with the consent of the Minister, for the purposes of any civil suit or other proceeding at law.	*b*) aux fins de toute poursuite pour infraction à la présente loi ou, avec le consentement du ministre, de toute affaire civile ou autre procédure judiciaire.

[11] In this case, when the government institution, Defence Construction Canada, responded to Ucanu Manufacturing's information request, it did not assert the mandatory exemption under section 30 of the *Defence Production Act*. Nor did it assert the mandatory exemption during the Information Commissioner's investigation. Only after the matter arrived in the Federal Court did it assert it.

[12] Defence Construction Canada asked the Federal Court for an opportunity to file "further materials including supplementary submissions" (at para. 15). I take "further materials" to mean that Defence Construction Canada sought to file evidence in support of its claim to the mandatory exemption. The respondent opposed, noting that "the statutory exemption now raised by [Defence Construction Canada] had not been previously relied on by [it] in this matter including in [its] initial response" to the information request (at para. 15). The Federal Court refused Defence Construction Canada's request, only giving it an opportunity to file "submissions" after the hearing, if necessary.

[13] Defence Construction Canada asked the Federal Court to consider that it "carries out a mandate pursuant to the [Defence Production Act] and that the information at issue … can be characterized as having been obtained by [it] under or by virtue of that statute" (at para. 77). However, the Federal Court held that it was too late for Defence Construction Canada to assert the mandatory exemption. Thus, the Federal Court refused to consider arguments on the "substantive issue of the application of that exemption" (at para. 88). Nor could it. It had not given Defence Construction Canada the opportunity to file evidence on this issue. In the end, the Federal Court allowed Ucanu Manufacturing's application and ordered the records to be released.

[14] In this Court, the appellants, including Defence Construction Canada, ask that the Federal Court's judgment be overturned and all of the records be withheld from disclosure because of the mandatory exemption.

[15] For the reasons set out below, I would allow the appeal.

A. The submissions of the parties

[16] In this Court, the appellants submit that a mandatory exemption, such as the one here, can be asserted at any time. The appellants also submit that on the evidentiary record before us the mandatory exemption in section 30 of the *Defence Production Act* applies.

[17] The Information Commissioner supports the result reached by the Federal Court. She submits that there must be restrictions on the ability of a government institution to assert a mandatory exemption at a late stage, well after its response to an information request. Among other things, the Information Commissioner submits that late assertion of exemptions bypasses important rights and protections under the Act such as the Commissioner's power to investigate and to report.

B. The issues

[18] The parties raise two issues before us:

(1) *The fact-based issue*. If section 30 of the *Defence Production Act* can be raised at a late stage, does it apply on the facts of this case?

(2) *The jurisprudential issue.* Can section 30 of the *Defence Production Act* be raised at a late stage? Put another way, in *Access to Information Act* proceedings, is it ever too late to assert a mandatory exemption?

C. Analysis

(1) The fact-based issue

[19] The Federal Court found that it was too late for the appellants to assert the mandatory exemption. It did not examine the fact-based issue—whether the mandatory exemption applies on the facts of this case.

[20] Key to the Federal Court's conclusion that it was too late for the appellants to assert the mandatory exemption is its earlier ruling that it would not allow Defence Construction Canada an adjournment to file evidence on the point. Here is the relevant portion of the reasons (at para. 16):

> By Order dated July 9, 2015, being guided by the Notice to the Profession issued by Chief Justice Crampton dated May 8, 2013, I denied the request for an adjournment, on the basis that the request did not raise exceptional and unforeseen circumstances, including those that are outside the control of a party or its counsel. However, my Order advised that I would hear counsel at the hearing, including on the possibility of supplementary written submissions following the hearing, on the following two issues that I concluded were raised by their correspondence with the Court:
>
> A. whether the respondent should be permitted to rely on the additional statutory exemption at this stage in the proceeding; and
>
> B. if so, the effect of such exemption on the merits of this application.

[21] I construe this as saying that Defence Construction Canada could not file evidence to support the mandatory exemption and to justify its late assertion because the request to do so was too late.

[22] There is a certain circularity here. In effect, the fact that the mandatory exemption was asserted late meant that a request to file evidence could only be made late and that lateness was used to prevent consideration of whether the exemption could be asserted late. In my view, the Federal Court's conclusion was preordained by its refusal to grant Defence Construction Canada's late request for an adjournment. Put another way, the Federal Court's denial of the adjournment in effect decided the substantive issue—whether the mandatory exemption could be asserted late—without the benefit of evidence before it. Defence Construction Canada was denied the opportunity to explain why the mandatory exemption ought to be considered despite its lateness because it was late. This intimately relates to the issues raised in the notice of application before the Federal Court, its ability to deal with the issue of the mandatory exemption, and the notice of appeal that raises the mandatory exemption before us.

[23] In these particular circumstances, the late nature of the assertion of the exemption and the need to file evidence in support of it could not be, by itself, a sufficient ground to refuse the adjournment so that the issue of lateness could be considered. In these particular circumstances, the Federal Court was bound to allow Defence Construction Canada an opportunity to adduce evidence supporting its late assertion of the mandatory exemption. That evidence might have shed light on why the exemption was being asserted late and why it should be allowed to be asserted late. It might also have identified and explained the rationale underlying some of the confidentiality interests at stake. With that evidence before it, the Federal Court could have considered the mandatory exemption and the jurisprudential issue and the fact-based issue associated with it. Without the evidence before it, the Federal Court could not embark upon a

proper consideration of this issue. Yet, it dealt with the issue. In my view, this was an error in principle permitting this Court to intervene.

[24] Thus, for this reason alone, I would allow the appeal and set aside the Federal Court's judgment. It should redetermine on the basis of a full evidentiary record whether Defence Construction Canada can assert a mandatory exemption at a late stage and, if so, whether the mandatory exemption is made out on the facts of this case.

[25] I have read my colleague's dissenting reasons. Among other things, he suggests that the issue of the adjournment is not before us because the appellant did not challenge it in the notice of appeal. As I have explained above, the issue is part and parcel of the merits of the appeal and cannot be separated from it. In effect, the issue is before us by necessary implication.

[26] Further, my colleague states that after the Federal Court refused the adjournment to permit the appellant to file evidence, "the Federal Court expressly ordered that it would hear counsel on the issue of the late-claimed exemption, including the possibility of filing supplementary written submissions in this regard following the hearing." He also notes that in the hearing before the Federal Court the parties agreed no further written submissions were necessary. But the Federal Court gave the parties only the right to file legal submissions, not evidence. As I have explained above, the Federal Court's refusal to grant Defence Construction Canada's late request for an adjournment to allow the appellant to adduce further evidence preordained the conclusion on the merits of the mandatory exemption and further legal submissions would not have sufficed.

[27] Finally, my colleague raises the standard of review. I agree with his articulation of it. However, as I have said above, there is an error of principle permitting this Court to intervene.

(2) The jurisprudential issue

[28] Should this Court give guidance on the jurisprudential issue in this case? All parties urge us to settle it. Both provided helpful submissions on it.

[29] In particular, the Information Commissioner proposes the following analytical framework for this Court to consider when deciding whether a government institution can assert a mandatory exemption at a late stage:

> 1. Could the government institution have reasonably raised the mandatory exemption sooner, for example:
>
> (a) in the notice of the requester under s. 10(1) of the [*Access to Information Act*] where access was initially refused;
>
> (b) at any time during the Information Commissioner's investigation;
>
> (c) at the earliest possible occasion in the court proceedings.
>
> 2. What is the underlying interest that the mandatory exemption seeks to protect and what are the consequences of disclosing the records at issue?
>
> 3. What is the prejudice to the requester and their access rights if the new exemption is considered at that stage of the proceedings?
>
> 4. Will allowing new issues to be raised at that stage of the proceedings unduly delay the hearing of the application and consequently, access to information for the requester?
>
> 5. Is it in the interests of justice to allow the exemption to be raised?

[30] Helpfully, the Information Commissioner also suggests a detailed procedure by which a government institution could assert a mandatory exemption at a late stage and still be fair to all concerned.

[31] The jurisprudential issue has been the subject of a few decisions. These decisions touch on small aspects of the issue or speak in *obiter*. None of them deal with it comprehensively and definitively. The point remains completely open in this Court. It is a complex one, with compelling considerations on either side.

[32] On one side is the importance of the investigatory stage that takes place after a complaint has been made. This has been said to be a "cornerstone of the access to information system": *Canada (Information Commissioner) v. Canada (Minister of National Defence)* (1999), 240 N.R. 244, 166 F.T.R. 277 (C.A.). The completion of the investigatory stage under the Act is a condition precedent to any later review by the Federal Court of a government institution's decision to refuse access to records requested under the Act: *Whitty v. Canada (Attorney General)*, 2014 FCA 30, 460 N.R. 372 at paras. 8-9; *Statham v. Canadian Broadcasting Corporation*, 2010 FCA 315, 326 D.L.R. (4th) 228 at para. 55. Issues that go to subject-matter jurisdiction cannot be ignored: *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at paras. 8-10. Allowing a government institution to assert a ground for exemption for the first time when the matter is before the Federal Court bypasses these protections: *Davidson v. Canada (Solicitor General)*, [1989] 2 F.C. 341 at pp. 347-348 (C.A.); *Geophysical Service Inc. v. Canada*, 2003 FCT 507, 26 C.P.R. (4th) 190. Thus, according to the Information Commissioner, there must be limits on raising mandatory exemptions at a late stage.

[33] On the other side is the mandatory nature of the exemptions themselves. Some mandatory exemptions relate to very important matters such as national security. Indeed, it would be strange if the inadvertent or negligent handling of an information request had the effect of foreclosing recourse to a mandatory exemption and allowing a highly injurious document to be released. This was in the mind of the Federal Court when it commented, in *obiter*, that it was "an open question whether the failure on the part of the head of a government institution to properly identify the grounds for refusal of disclosure could ultimately compel disclosure that is contrary to the national interest": *Davidson v. Canada (Solicitor General)*, [1987] 3 F.C. 15 (T.D.).

[34] In only one case did this Court suggest that a mandatory exemption could be asserted late: *Canada (Information Commissioner) v. Canada (Minister of the Environment)*, 2003 FCA 68, 224 D.L.R. (4th) 498. However, it did so on the ground that the government institution believed that the documents were outside of the purview of the Act and so it was natural that it would not consider the issue of mandatory exemptions. The case contains no other explanation as to why the mandatory exemption could be asserted late.

[35] The Federal Court noted much of the above jurisprudence (at paras. 79-88). It observed correctly that the jurisprudential issue has never been settled by this Court: see, *e.g.*, *Davidson*, above and *Rubin v. Canada (Minister of Health)*, 2003 FCA 37, 23 C.P.R. (4th) 312, both of which explicitly declined to deal with it. The Federal Court did cite some earlier decisions from the Federal Court, not binding on us, that held that it was too late to assert the mandatory exemption. So it concluded, only on the basis of these Federal Court cases, that it was too late to assert the mandatory exemption in this case (at para. 88).

[36] But the earlier Federal Court cases relied upon by the Federal Court do not examine the jurisprudential issue in a fulsome way. In these cases, there is no comprehensive analysis of the compelling considerations on either side, some of which are set out above. The cases do not conduct a full examination of the text of the Act, construed in light of its context and purpose. This is not meant as criticism: courts are often limited by the restricted or inadequate nature of the submissions they receive.

[37] Should this Court comprehensively settle this jurisprudential issue in this case? This sort of question sparks debates in and around judges' chambers more than counsel might think.

[38] Most judges are rather flexible in their answers to this question. But for illustrative purposes, there are two discernable schools of thought. One says that courts should only deal with issues that are necessary for the disposition of the case. The other says that where possible, courts should resolve jurisprudential points to provide clarity and reduce litigation. Once in a while, along this age-old fault line, a case comes along—like this one—that causes a quake.

[39] Like many such debates, the best answer is "it all depends." I had occasion to comment on this in *Steel v. Canada (Attorney General)*, 2011 FCA 153, [2011] 1 F.C.R. 143 at paras. 65-66 and 68:

> …A minimal approach to judicial decision-making usually has great merit. Under this approach, sometimes called "judicial minimalism," we fashion solutions that are practical, routine, and uncontroversial and apply them to the cases before us, avoiding broad, unnecessary pronouncements. Sometimes, in search of solutions, we might consider a modest reform to our judge-made law. But we reform it only

> if necessary and appropriate, only as little as necessary, and always subject to Parliament's laws which bind us.
>
> When we discard judicial minimalism and, instead, gratuitously pronounce sweeping legal principles, we expose ourselves to the charge that we are law-making – a task beyond our remit, unelected as we are. Also, without the real-life facts that inform our pronouncements, temper our judgment, and keep us accountable, we are more likely to be wrong, more likely to cause disorder, and more likely to injure.
>
> …
>
> But too great a devotion to judicial minimalism sometimes can impose too great a cost. Pressing issues can linger and fester, and litigants may suffer for that.

[40] More on this can be said. On the one hand, developing the jurisprudence in a minimal way merely for the sake of minimalism may be counterproductive, inefficient, and contrary to the new litigation culture advocated by the Supreme Court: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. Developing the jurisprudence beyond the needs of a particular case might bring order to an area badly in need of it and might save wasteful, unnecessary litigation in the future. Additionally, in some contexts an important jurisprudential issue does not arise very often as a practical matter, giving rise to a concern that the issue is evasive of review. For example, in this case, the Information Commissioner cannot raise the jurisprudential issue very often because of resource limitations. Finally, there are cases like this, where counsel have been of great assistance and have done their best to empower us to decide it.

[41] But, on the other hand, some jurisprudential issues do not admit of an easy solution: judicial economy and the desire to solve it properly favour leaving it for another day. Sometimes, the settlement of the jurisprudential issue has high-stakes ramifications: its final resolution will affect vital interests and, if the determination is wrong, these interests may be disrupted and

injured. Sometimes certain issues by their nature are best served by courts seeing case after case before the doctrine is definitively settled; as both Justices Oliver Wendell Holmes and Benjamin Cardozo both recognized, the common law works inductively, with general rules best developed from particular cases: Frederic R. Kellogg, "Law, Morals, and Justice Holmes," 69 Judicature 214 (1986); Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at pages 22–23. Finally, it is true that the high-stakes implications and the uncertainty surrounding a jurisprudential issue can be dispelled by the thoughtful writings of the legal academy; but until there are some, the high-stakes ramifications and uncertainty reign.

[42] Weighing these considerations, I consider it unwise for us at this stage in the development of this jurisprudence to express a definitive, binding-for-all-time view on the jurisprudential issue in this case. Nor would it be wise, without working out the principles fully, simply to adopt the Federal Court's brief and rather automatic adoption in this case of earlier Federal Court cases—none of which have comprehensively examined the jurisprudential issue.

[43] The jurisprudential issue before us is a high-stakes one, fraught with ramifications of a far-reaching and hazardous kind. Mandatory exemptions come in all different shapes and sizes under different statutes with different purposes with different statutory wording. Crafting a legal test that works is a tricky thing. If we get it wrong, we might allow the disclosure of sensitive and harmful material that should be kept confidential in the public interest, thereby damaging the proper conduct of government. Or we might keep secret important material that the public should see, thereby inhibiting the sort of public comment that lies at the core of the guarantee of

freedom of expression in section 2(b) of the *Charter of Rights* and section 1(d) of the *Canadian Bill of Rights*, S.C. 1960, c. 44.

[44] As I shall explain below, there are certain questions associated with the Information Commissioner's test that require further study, full submissions and the benefit of Federal Court rulings. Sometime in the future, armed with those submissions, we may be able to resolve this jurisprudential issue once and for all.

[45] In *Rubin* and *Davidson*, above, this Court did not need to settle definitively the jurisprudential issue and so it did not do so. In the years since these cases have been decided, nothing has changed jurisprudentially or otherwise to give us the certainty or confidence needed to decide the jurisprudential issue. To decide it now would be a step too far.

[46] I know that some, for the best of motives, might be tempted to nibble a bit at the jurisprudential issue by making a one-off ruling that avoids a discussion of legal principle. For example, some might rule that "on the facts" or "in these circumstances"—without defining the facts or the circumstances—it was too late for the mandatory exemption to be asserted. Or they might rule that the late assertion of the mandatory exemption is "unfair." Or they might just announce a ruling with no supporting analysis. These approaches are troubling.

[47] First, courts are supposed to reach decisions based on legal principle and doctrine. If legal principle and doctrine are not offered in support of a decision, there probably isn't any.

[48] Related to this is the deciding of matters merely "on the basis of all the facts" or "fairness." This is to rely on concepts that are "empty vessel[s] to be filled with whatever meaning we might wish from time to time": *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, *per* McIntyre J. Such decisions, emanating from personal preferences rather than legal principle and doctrine, are legitimately open to attack based on the constitutional principle of the rule of law.

[49] Finally and more practically, such a decision would be a precedent binding future panels of this Court. The precedent might be no more than "sometimes it will be too late to assert mandatory exemptions." But that may be misleading and may wrongly influence later cases. Mandatory exemptions come in all different shapes and sizes under different statutes with different purposes with different statutory wording. After the jurisprudential issue is comprehensively settled, it may turn out that under all statutory regimes mandatory exemptions can be asserted at a late stage. Or perhaps mandatory exemptions can never be asserted at a late stage. Or perhaps only some, but only in certain defined circumstances. Until the jurisprudential issue is comprehensively settled, it is folly to nibble at it through one-off rulings.

[50] In this case, we do not know what the appellant's interest in confidentiality is because the appellant was not permitted to adduce evidence in support of the mandatory exemption. If the evidence showed that the interest in confidentiality in this case is massive and that disclosure would harm Canada, would we still say that it is too late for the mandatory exemption to be asserted? To find "on the facts" or because of "fairness" that the mandatory exemption was

asserted too late in this case is to take a blind stab in the dark in a high-stakes, uncertain area of law.

[51] Lastly, the list of government departments and institutions in Schedule II to the Act is long and the range of confidentiality interests recognized by Parliament is wide. The jurisprudential issue affects those interests and institutions and perhaps many other government institutions as well. To resolve the jurisprudential issue, the Court will need to be acquainted with all of those interests and institutions. As well, if it happens in a future case that the Attorney General is not present but should be, the Court may give the Attorney General notice of the case and invite her to appear: see Rule 110(b) of the *Federal Courts Rules*, SOR/98-106.

[52] For all these reasons, I refrain from determining the jurisprudential issue in this case. I do not comment on the Federal Court's reasoning and conclusions on it.

[53] Nor do I comment on the Information Commissioner's proposed analytical framework (at paragraph 29, above) except to offer a few words by way of assistance for future cases both in the Federal Court and in this Court.

[54] It seems that unless mandatory exemptions can always be asserted at a late stage, the sort of multi-factor approach that the Information Commissioner has proposed is methodologically sound: the various considerations, complex and conflicting, can only be captured by such an approach. The controversy—on which I shall refrain from commenting—comes in the content of the factors. Are the factors sufficiently grounded in the text, context and purpose of the *Access to*

Information Act? Do the factors sufficiently take into account the text, context and purpose of the legislation under which the mandatory exemption arises? What if there is a conflict between the two? Are there any factors beyond those that the Information Commissioner has identified in this case? How should the Court go about weighing and balancing the factors?

[55] Other related questions may arise. Is there a distinction to be made between the listed exemptions under the Act (some discretionary, some mandatory) and the statutory prohibitions in section 24 listed in Schedule II of the Act? To what extent does the purpose set out in subsection 2(1) apply in cases where the statutory prohibitions in section 24 listed in Schedule II of the Act apply? If it does apply, how should it apply? If a party is not entitled to access *Defence Production Act* documents that are covered by section 30 of that Act, can a substantive right to access those documents be created by a procedural defect such as delay?

[56] Another question is whether a court, confronted with a mandatory exemption asserted late should adjourn and remit the matter to the Information Commissioner for investigation.

[57] With more guidance on this—perhaps from the Federal Court's redetermination of this matter, other Federal Court decisions, considered academic commentaries and the submissions of counsel including the Attorney General—this Court may consider itself one day to be empowered to settle the jurisprudential issue. But that day is not today.

D. Proposed disposition

[58] Therefore, for the foregoing reasons, I would allow the appeal and set aside the judgment of the Federal Court. I would remit the matter to the Federal Court to receive evidence from the parties concerning the exemption under section 30 of the *Defence Production Act*, including why it was asserted late, and to redetermine the matter.

[59] The appellants are successful in this appeal. Normally costs, here and below, would follow the event. However, the only issue on appeal concerns the appellants' late assertion of the mandatory exemption under the *Defence Production Act*. Had they asserted the mandatory exemption in a timely way, this appeal might never have been necessary. Accordingly, I would not make any order as to the costs on appeal. In its redetermination, the Federal Court may consider the issue of costs for the original hearing before it and in the redetermination.

[60] The Court wishes to thank counsel for their excellent submissions.

"David Stratas"

J.A.

"I agree
Donald J. Rennie J.A."

BOIVIN J.A. (Dissenting Reasons)

[61] I have had the benefit of reading the reasons drafted by my colleague Stratas J.A. With respect, I am unable to agree with him that the appeal should be allowed.

[62] From the outset, I consider it fundamental to recall the manner in which the case proceeded before the Federal Court. As part of the proceedings leading to the judicial review hearing, the Federal Court refused to grant Defence Construction Canada's request for an adjournment five (5) days prior to the commencement of the hearing (the Order). My colleague concludes that "the late nature of the assertion of the exemption and the need to file evidence in support of it could not be, by itself, a sufficient ground to refuse the adjournment so that the issue of lateness could be considered". I disagree.

[63] The Order denying the adjournment was issued as a separate decision prior to the decision under appeal: the Federal Court released the Order on July 9, 2015 and the decision under appeal was rendered approximately six (6) weeks later on August 24, 2015. Yet, the Order was not appealed by Defence Construction Canada as it could have pursuant to paragraph 27(1)(*c*) of the *Federal Courts Act*, R.S.C., 1985, c. F-7. Nor did Defence Construction Canada make a motion before this Court requesting a retroactive extension of time to appeal the Order and have the matter consolidated or heard together with the appeal on the merits of the judicial review application. Moreover, nowhere in the notice of appeal, in the memoranda of fact and law or, in oral argument before our Court was the Order challenged. On this basis alone, I cannot agree that our Court ought to intervene and in effect overrule the Order.

[64] Even assuming that it was open to our Court to decide this appeal for purposes of overturning the Order, I am unable to find a reviewable factual or legal error. It is not open to an appellate court to intervene in a judge's discretionary decision unless it identifies an error of law, a palpable and overriding error of fact (see e.g. *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2016] F.C.J. No. 943 at paras. 68-69 (QL)). Therefore even if the Order were in play, I see no basis to disturb the Federal Court's discretionary decision to deny Defence Construction Canada's request for an adjournment.

[65] Just as significant, in my view, is that to overturn the Order in the present case overlooks the circumstances in which it was made. My colleague construes the Order as saying that "Defence Construction Canada could not file evidence to support the mandatory exemption and to justify its late assertion because the request to do so was too late". Respectfully, this does not give sufficient consideration to the fact that, as part of the Order, the Federal Court expressly ordered that it would hear counsel on the issue of the late-claimed exemption, including the possibility of filing supplementary written submissions in this regard following the hearing.

[66] Indeed, the parties did argue the issue at the hearing before the Federal Court and in fact confirmed at that hearing that the issue "had been sufficiently canvassed, such that no further written submissions were necessary" (Federal Court's decision at para 17).

[67] Thus, all were in agreement that the Federal Court was provided with what it needed for purposes to adjudicate upon the issue of the late-claimed exemption. In the circumstance, I cannot agree that it would be appropriate to, in effect, overrule the Order by remanding the

matter to the Federal Court for redetermination. In my respectful view, it was open to the Federal Court, and indeed appropriate in the circumstances given the parties' agreement in that regard, to rule upon the jurisprudential issue in the way it did based on the Record before it.

[68] Our Court is now seized of an appeal of the Federal Court's decision and it is accordingly our duty to address it.

[69] The narrow question that was squarely put before our Court by Defence Construction Canada and the Information Commissioner, the Intervener, is the following: did the Federal Court commit a legal error in holding that the Defence Construction Canada could not late-claim a mandatory exemption under subsection 24(1) of the *Access to Information Act*, R.S.C., 1985, c. A-1?

[70] In this appeal, the standard of review is correctness given that the issue, by definition, never arose before the administrative decision-maker (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Canada (Office of the Information Commissioner) v. Canada (National Defence*), 2015 FCA 56, [2015] F.C.J. No. 244 (QL); *Blank v. Canada (Justice)*, 2016 FCA 189, [2016] F.C.J. No. 694 (QL)).

[71] As part of its decision on the judicial review application, the Federal Court correctly rejected the contention that a government institution such as Defence Construction Canada may late-claim a mandatory exemption under subsection 24(1) of the *Access to Information Act*. In dealing with the issue and reaching this conclusion (paragraphs 77-88), the Federal Court

thoroughly considered the jurisprudence regarding exemptions. It did so first by pointing to this Court's decision in *Davidson v. Canada (Solicitor General),* [1989] 2 F.C. 341, [1989] F.C.J. No. 105 (F.C.A.) (QL) [*Davidson FCA*]. In *Davidson FCA*, this Court held, in the context of the *Privacy Act*, R.S.C., 1985, c. P-21, that discretionary exemptions cannot be late-claimed. The Federal Court noted at paragraph 82 of its decision that the reasoning in *Davidson FCA* has since been applied to mandatory exemptions under the *Access to Information Act* (*Rubin v. Canada (Minister of Health),* [2001] F.C.J. No. 1298, 210 F.T.R. 84 at paras. 55-60 (aff'd 2003 FCA 37, [2003] F.C.J. No. 103) (QL); *Geophysical Service Inc. v. Canada-Newfoundland Offshore Petroleum Board,* [2003] F.C.J. No. 665, 26 C.P.R. (4th) 190 at paras. 40-41 (QL)).

[72] The Federal Court also disagreed with Defence Construction Canada's reliance upon *Canada (Information Commissioner of Canada) v. Canada (Minister of National Defence),* [1999] F.C.J. No. 522, 240 N.R. 244 (F.C.A.) (QL), a case dealing with discretionary exemptions in which this Court referred to *Davidson FCA*. Defence Construction Canada attempted to draw an inference from the Information Commissioner's choice in that case to abstain from taking a position on whether mandatory exemptions may be late-claimed, which the Federal Court rejected. Finally, the Federal Court addressed this Court's decision in *Canada (Environment) v. Canada (Information Commissioner),* 2003 FCA 68, [2003] F.C.J. No. 197 (QL) [*Canada Environment*]. In that case, our Court allowed a government institution to raise exemptions after the Information Commissioner's investigation concluded. The Federal Court distinguished *Canada Environment* on the basis that the government institution at issue in that case had taken the initial position that the requested documents were wholly outside the *Access to Information Act*'s scope, making it unnecessary to claim specific exemptions. Our Court observed that the

circumstances in *Canada Environment* were exceptional. The Federal Court in the present case further observed that the reasons in *Canada Environment* are limited to that specific case.

[73] Hence, the consensus that emerges from the jurisprudence is that a government institution cannot late-claim an exemption, including a mandatory one, if that exemption was not put before the Information Commissioner during the investigation. That is so in order to safeguard the requester's quasi-constitutional right of access and the first level of independent review of the Information Commissioner (*Canadian Broadcasting Corporation v. Canada (Information Commissioner)*, 2010 FC 954, [2010] F.C.J. No. 1167 at para. 33 (aff'd 2011 FCA 326, [2011] F.C.J. No. 1600 (QL) [*Canadian Broadcasting*]). In my view, the Federal Court properly highlighted the concern that permitting a government institution to late-claim exemptions would deny requestors the benefit of the mechanism vested in the Information Commissioner's mandate (Federal Court's decision at para. 80). That concern was specifically expressed by our Court in *Davidson FCA* at paragraph 14:

> It is no doubt true, as the appellant argued, that a Federal Court trial judge, on a review of a refusal of access by an institution head which, as here, is upheld by the Commissioner, has adequate powers of review over the decision of the institution head, though it must be said that a judge sitting in Court lacks the investigative staff and flexibility of the Commissioner. More important, if new grounds of exemption were allowed to be introduced before the judge after the completion of the Commissioner's investigation into wholly other grounds, as is the issue in the case at bar, the complainant would be denied entirely the benefit of the Commissioner's procedures. He would thus be cut down from two levels of protection to one. …
>
> [Emphasis added.]

[74] I further observe that when one considers the *Access to Information Act*'s objective and the overall scheme, and giving effect to the Information Commissioner's role and mandate

confirmed by Parliament, the general principle that mandatory exemptions cannot be late-claimed is sound (*Canadian Broadcasting*).

[75] It is true that the general principle whereby exemptions under the *Access to Information Act* cannot be late-claimed could admit exceptions in certain limited circumstances such as those raised in *Canada Environment* or, in *obiter*, in *Davidson v. Canada (Solicitor General)*, [1987] 3 F.C.R. 15, 41 DLR (4th) 533 (FC) at paragraph 7; *Davidson FCA* at paragraph 11. For instance, national security concerns may very well be an interest that could fall within an exception. However, if a party was of the view that an exception was warranted, the burden to justify reliance on an exemption provision for the first time before the Federal Court – *i.e.* post-investigation by the Information Commissioner would be on the party claiming the exception to the general principle. In the present case, such circumstances are non-existent. Defence Construction Canada has not pointed to an interest it sought to protect before the Federal Court or before our Court.

[76] Given my conclusion with respect to section 24 of the *Access to Information Act*, it is unnecessary to address the subsidiary issue of whether section 30 of the *Defence Production Act*, R.S.C., 1985, c. D-1 applies to the facts of this case.

[77] For these reasons, I would dismiss the appeal, without costs as none were requested.

"Richard Boivin"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-414-15
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE SOUTHCOTT DATED AUGUST 24, 2015, DOCKET NO. T-694-14	
STYLE OF CAUSE:	JAMES PAUL IN HIS CAPACITY AS PRESIDENT OF DEFENCE CONSTRUCTION CANADA (1951) LIMITED A.K.A. DEFENCE CONSTRUCTION CANADA; THE SAID DEFENCE CONSTRUCTION CANADA (1951) LIMITED A.K.A. DEFENCE CONSTRUCTION CANADA; AND THE ATTORNEY GENERAL OF CANADA v. UCANU MANUFACTURING CORP. AND THE INFORMATION COMMISSIONER OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 1, 2016
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	RENNIE J.A.
DISSENTING REASONS BY:	BOIVIN J.A.
DATED:	JUNE 22, 2017

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