

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20090527

Dockets: A-378-08

A-379-08

A-380-08

Citation: 2009 FCA 175

**CORAM: RICHARD C.J.
SEXTON J.A.
SHARLOW J.A.**

BETWEEN: **A-378-08**
THE INFORMATION COMMISSIONER OF CANADA

and

THE MINISTER OF NATIONAL DEFENCE

Appellant

Respondent

BETWEEN: **A-379-08**
THE INFORMATION COMMISSIONER OF CANADA

and

THE PRIME MINISTER OF CANADA

Appellant

Respondent

BETWEEN: **A-380-08**
THE INFORMATION COMMISSIONER OF CANADA

and

THE MINISTER OF TRANSPORT CANADA

Appellant

Respondent

Heard at Ottawa, Ontario, on May 27, 2009.
Judgment delivered from the Bench at Ottawa, Ontario, on May 27, 2009.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Ottawa, Ontario, on May 27, 2009)

SHARLOW J.A.

[1] These are three appeals by the Information Commissioner of Canada of a judgment of Justice Kelen (2008 FC 766) dismissing the applications for judicial review of the refusal of the Prime Minister of Canada, the Minister of National Defence, and the Minister of Transport to follow the Information Commissioner's recommendation to release certain records to a person who requested them under the *Access to Information Act*, R.S.C. 1985, c. A-1.

[2] The first question raised in these appeals relates to the meaning of the phrase "government institution" as defined in section 3 of the *Access to Information Act*. That phrase by definition includes the Privy Council Office, the Department of National Defence, and the Department of Transport. The question is whether those government institutions include the office of the member of the Privy Council who presides over them, namely, the Prime Minister's office, the office of the Minister of National Defence, and the office of the Minister of Transport, respectively.

[3] A second question arises if the answer to the first question is no. The second question is, in what circumstances is a record that is physically located in the office of the Prime Minister or a Minister nevertheless under the control of the government institution over which he or she presides?

[4] In the decisions under appeal, Justice Kelen concluded that the answer to the first question is no. Specifically, he found that the Prime Minister's office is not part of the Privy Council Office, the office of the Minister of National Defence is not part of the Department of National Defence, and the office of the Minister of Transport is not part of the Department of Transport.

[5] These conclusions reflect Justice Kelen's interpretation of the relevant provisions of the *Access to Information Act*, which are analyzed in detail in his reasons. Despite the able submissions of counsel for the Information Commissioner, we are not persuaded that Justice Kelen erred in law in reaching this conclusion.

[6] We acknowledge the force of the legal arguments made by the Information Commissioner, particularly the argument that the head of a government institution is, as a matter of common sense and in accordance with the ordinary meaning of words, a part of that government institution.

[7] However, it appears to us that the *Access to Information Act* was drafted on the basis of a well understood convention that the Prime Minister's office is an institution of government that is separate from the Privy Council Office, and that the offices of Ministers are institutions of government that are separate from the departments over which the Ministers preside. In our view,

that understanding of the structure of the government forms an important part of the factual context in which the *Access to Information Act* was drafted and should be interpreted. It also explains Justice Kelen's reliance on the expert evidence to which he referred when engaged in the exercise of statutory interpretation.

[8] As to the second question, Justice Kelen's reasons contain a lengthy analysis of the relevant jurisprudence, which led him to conclude that in this case, the question of control of any of the documents within the physical control of the Prime Minister or a Minister should be determined by asking, first, whether the contents of the document relate to a departmental matter and second, whether the relevant government institution could reasonably expect to obtain a copy of the document upon request. The document would be under the control of the government institution if, but only if, the answer to both questions is yes.

[9] We agree with Justice Kelen that these two questions were adequate to determine whether the records in this case were under the control of a government institution. Again, we acknowledge the force of the argument of the Information Commissioner that the second question proposed by Justice Kelen invited a speculative response, because no official of the government institution asked for copies of the records in issue. However, in our view it was open to Justice Kelen to answer those questions by drawing reasonable inferences from the evidence before him, as he did.

[10] For these reasons, each of these three appeals will be dismissed with costs. The cross-appeal in A-379-08 will be determined with the appeal in A-413-08. A copy of these reasons will be placed in each of the Court Files A-378-08, A-379-08 and A-380-08.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-378-08

STYLE OF CAUSE: The Information Commissioner of
Canada v. The Minister of National
Defence

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: May 27, 2009

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SHARLOW J.A.)

DELIVERED FROM THE BENCH BY: SHARLOW J.A.

APPEARANCES:

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Marlys Edwardh
Adriel Weaver

Christopher Rupar FOR THE RESPONDENT
Mandy E. Moore

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