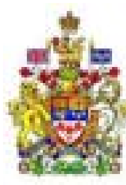
Federal Court of Appeal



Cour d'appel fédérale

Date: 20110922

Docket: A-266-10

Citation: 2011 FCA 263

CORAM: **NADON J.A.**
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

JACQUES NAULT

Appellant

and

THE MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA

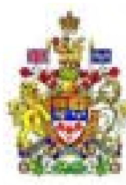
Respondent

Heard at Montréal, Quebec, on September 6, 2011.

Judgment delivered at Ottawa, Ontario, on September 22, 2011.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NADON J.A.
TRUDEL J.A.

Federal Court of Appeal  Cour d'appel fédérale

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REASONS FOR JUDGMENT

MAINVILLE J.A.

Overview

[1] The thorny question raised in this appeal is whether the prior employment history of an employee of a government institution is covered by the exception provided at paragraph (*j*) of the definition of "personal information" found in section 3 of the *Privacy Act*, R.S.C., 1985, c. P-21.

[2] Mr. Nault, whose candidacy for certain positions in the federal public service was unsuccessful, is requesting, under the *Access to Information Act*, R.S.C., 1985, c. A-1, the

disclosure of the documents (curriculum vitae, letters, proof of education) submitted by each of the 61 candidates hired following the recruitment competitions in which he himself participated.

[3] According to Mr. Nault, the requested information must be disclosed to him as the disclosure of this type of information allows Canadian citizens to satisfy themselves that the hiring criteria for the federal public service positions in question were respected, thereby holding the Canadian State to account for its actions and decisions. Although the requested information concerns the history of individuals prior to their being hired in the federal public service, Mr. Nault submits that the information relates to the positions and functions of the public service employees in question since this information makes it possible to establish whether there is a correlation between the requirements advertised for the positions and the qualifications of the successful candidates. According to Mr. Nault, the information is therefore sufficiently related to the positions in question to be caught by the exception provided at paragraph (*j*) of the definition of "personal information" found in section 3 of the *Privacy Act* (paragraph 3(*j*)).

[4] Mr. Nault explains that his access request does not concern all diplomas obtained by the candidates selected for the positions or their entire employment history; rather, he is seeking information that will facilitate the correlation with the eligibility requirements advertised for the positions. The competition notices for the positions in question required an undergraduate degree with an appropriate specialization or eligibility for a recognized professional accounting designation, experience in the field of financial administration and knowledge of accounting principles and practices and of financial administration.

[5] The head of the concerned department refused to disclose to Mr. Nault the information relating to the education and employment history of the targeted candidates, except for their employment history within federal government institutions. In the opinion of the head of the department, this information was covered by paragraph (*b*) of the definition of "personal information" found in section 3 of the *Privacy Act* and could therefore not be disclosed under subsection 19(1) of the *Access to Information Act*.

[6] Mr. Nault's subsequent complaint to the Information Commissioner was rejected. Mr. Nault's application for judicial review under section 41 of the *Access to Information Act*, was also dismissed by Justice Gauthier of the Federal Court on the ground that the information in question was indeed "personal information" within the meaning of section 3 of the *Privacy Act*.

[7] The only issue in this appeal is whether the requested information is caught by the exception provided at paragraph 3(*j*) of the *Privacy Act*, which sets out that personal information within the meaning of that statute does not include information about an individual who is or was an officer or employee of a government institution and that relates to the position or functions of the individual.

[8] For the reasons that follow, it is my view that the requested information is not caught by this exception and that it is rather "personal information" within the meaning of paragraph (*b*) of the definition of "personal information" found in section 3 of the *Privacy Act*. Consequently, the head of a government institution must refuse to disclose such information under subsection 19(1)

of the *Access to Information Act*. I would therefore dismiss this appeal; however, in light of subsection 52(2) of the *Access to Information Act*, I would ask the parties to file additional submissions concerning costs.

Statutory context

[9] As stated by the Supreme Court of Canada on several occasions, "[a]ccess to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance" (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at paragraph 1; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 ("*National Defence*"), at paragraph 15). These principles arise out of subsection 2(1) of the *Access to Information Act*:

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

[10] The right to access any record under the control of a government institution is clearly provided for in subsection 4(1) of the *Access to Information Act*, but this right must be exercised "[s]ubject to this Act". One of the significant exceptions to this access right concerns personal information as defined in section 3 of the *Privacy Act*. Indeed, section 19 of the *Access to Information Act* provides as follows:

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.	**19.** (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.
(2) The head of a government institution may disclose any record requested under this Act that contains personal information if	(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :
(*a*) the individual to whom it relates consents to the disclosure;	*a*) l'individu qu'ils concernent y consent;
(*b*) the information is publicly available; or	*b*) le public y a accès;
(*c*) the disclosure is in accordance with section 8 of the *Privacy Act*.	c) la communication est conforme à l'article 8 de la *Loi sur la protection des renseignements personnels*.

I note straightaway that subsection 19(2) of the *Access to Information Act* and section 8 of the *Privacy Act* are not at issue in this appeal.

[11] Section 2 of the *Privacy Act* states that the purpose of that statute is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information. For the purposes of that statute, section 3 sets out that all information about an identifiable individual is “personal information”. This is a very broad definition that is nonetheless delimited by the various examples provided at paragraphs (*a*) to (*i*) of the definition. Undoubtedly, however, information relating to the education and employment history of an identifiable individual is “personal information” given that it is specifically referred to at paragraph (*b*) of the definition:

3. In this Act,	**3.** Les définitions qui suivent s’appliquent à la présente loi.
. . .	[…]
“personal information” means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,	« renseignements personnels » Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :
(*a*) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,	*a*) les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;
(*b*) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,	*b*) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;

(*c*) any identifying number, symbol or other particular assigned to the individual,

(*d*) the address, fingerprints or blood type of the individual,

(*e*) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

(*f*) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

(*g*) the views or opinions of another individual about the individual,

(*h*) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (*e*), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(*i*) the name of the individual where it appears with other

c) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;

d) son adresse, ses empreintes digitales ou son groupe sanguin;

e) ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

f) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;

g) les idées ou opinions d'autrui sur lui;

h) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa *e*), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;

i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le

personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,	concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;
. . .	[…]
[Emphasis added]	[Non souligné dans l'original]

[12] However, paragraphs (*j*) and (*m*) of the definition of "personal information" found in section 3 of the *Privacy Act* provide some exceptions to the definition, including personal information about an individual who is or was an officer or employee of a government institution and that relates to the position or functions of the individual:

. . .	[…]
but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include	toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant :
(*j*) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,	*j*) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :
(i) the fact that the individual is or was an officer or employee of the government institution,	(i) le fait même qu'il est ou a été employé par l'institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(*k*) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(*l*) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and

(*m*) information about an individual who has been dead for more than twenty years;

(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,

(iii) la classification, l'éventail des salaires et les attributions de son poste,

(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,

(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

k) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées au cours de la prestation;

l) des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;

m) un individu décédé depuis plus de vingt ans.

[13] The principles underlying the *Access to Information Act* and the *Privacy Act* may seem contradictory at first glance, but the two statutes must nonetheless be interpreted in relation to one another. The approach to interpreting the two statues was set out as follows in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 ("*Dagg*"), at paragraphs 1 and 45 to 57: (a) Parliament has not given access to information priority over privacy right; (b) the two statutes have equal status; and (c) the courts must have regard to the purposes of both statutes in considering whether information contained in a government record constitutes "personal information".

[14] The Supreme Court of Canada has more recently dealt with the interpretation of these two statutes in *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441 ("*Heinz*"), at paragraphs 2 and 22 to 31, where Justice Deschamps reiterated that a careful balance between the two statutes had to be struck, while emphasizing that specific attention must be given to privacy rights given the "quasi-constitutional" character of privacy in light of the role it plays in the preservation of a free and democratic society. Justice Deschamps wrote as follows at paragraph 31 of *Heinz*:

> It is apparent from the scheme and legislative histories of the *Access Act* and the *Privacy Act* that the combined purpose of the two statutes is to strike a careful balance between privacy rights and the right of access to information. However, within this balanced scheme, the Acts afford greater protection to personal information. By imposing stringent restrictions on the disclosure of personal information, Parliament clearly intended that no violation of this aspect of the right to privacy should occur. For this reason, since the legislative scheme offers a right of review pursuant to s. 44, courts should not resort to artifices to prevent efficient protection of personal information.

<u>Federal Court decision</u>

[15] Relying on the Supreme Court of Canada's decision in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 ("*Royal Mounted Police*"), Justice Gauthier identified correctness as the standard of review applicable to the decision of the head of a government institution who refuses to disclose information under section 3 of the *Privacy Act* and subsection 19(1) of the *Access to Information Act*.

[16] Relying on both *Dagg* and *Royal Mounted Police*, the judge then determined that the information Mr. Nault was seeking was "personal information" within the meaning of paragraph (*b*) of the definition of this expression at section 3 of the *Privacy Act*, given that it expressly includes information relating to education and that "employment history" had to be interpreted broadly to include the list of positions previously held by an individual, his or her places of employment and the tasks performed.

[17] Justice Gauthier also found that the purpose of the exception at paragraph 3(*j*) of the *Privacy Act* was to ensure that the State and its agents are held accountable. According to the judge, the requested information did not relate to an action taken by the successful candidates as part of their functions as State agents. She added that the requested information does not become public information simply by virtue of the fact that it was analyzed or examined by another federal public servant in order to decide which of the candidates would be hired for the positions

in question. She also noted that Parliament did not use the expression “employment history” at paragraph 3(*j*), while using it expressly at paragraph (*b*) of the definition in question.

[18] Lastly, regarding costs, Justice Gauthier recognized the novelty of the issue raised by Mr. Nault’s application for review and the particular circumstances of the case, concluding that each party should bear its own costs.

<u>Standard of review</u>

[19] The standard of review applicable to the decision of the head of a government institution who refuses to disclose documents containing personal information under section 3 of the *Privacy Act* and subsection 19(1) of the *Access to Information Act* is correctness. The interpretation of paragraph 3(*j*) of the *Privacy Act* is also reviewable on the standard of correctness: *Royal Mounted Police* at paragraphs 14 to 19; *National Defence* at paragraph 22.

[20] A Federal Court decision made as a result of a review of such issues may, in turn, be reviewed on appeal in accordance with the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraphs 8 to 9, and 31 to 36: *National Defence*, at paragraph 23.

[21] In this case, Justice Gauthier properly identified the applicable standard of review. The question in this appeal, therefore, is whether she correctly interpreted the definition of “personal information” found in section 3 of the *Privacy Act*.

<u>Analysis</u>

[22] There is little doubt that the information asked for by Mr. Nault (curriculum vitae, letters, proof of education) is of a personal nature. Indeed, the information relates to the education and employment history of the candidates in question and is specifically contemplated by paragraph (*b*) of the definition of "personal information" found in section 3 of the *Privacy Act*. As pointed out by Justice Gonthier at paragraph 25 of *Royal Mounted Police*, "[t]he ordinary meaning of 'employment history' includes not only the list of positions previously held, places of employment, tasks performed and so on, but also, for example, any personal evaluations an employee might have received during his career. Such a broad definition is also consistent with the meaning generally given to that expression in the workplace."

[23] In *Royal Mounted Police*, Justice Gonthier concluded at paragraph 39 that the list of the RCMP members' historical postings, their status and dates; the list of ranks, and the dates they achieved those ranks; and their years of service were all elements that relate to the general characteristics associated with the position or functions of an RCMP member that are caught by the exception set out in paragraph 3(*j*) of the *Privacy Act*. This information is relevant to understanding the functions members of the RCMP perform without revealing anything about their competence or divulging any personal opinion they might have given outside the course of employment. Justice Gonthier however noted the following at paragraph 34 of *Royal Mounted Police*:

> . . . Section 3(*j*) applies only to an "individual who is or was an officer or employee of a government institution", and only for the purposes of ss. 7, 8 and 26 and s. 19 of the *Access Act*. In contrast, s. 3(*b*) is of general application. Parliament has therefore chosen to give less protection to the privacy of federal employees when the information

> requested relates to their position or functions. It follows that if a federal institution has in its possession the employment history of an individual who has never worked for the federal government, that information remains confidential, whereas federal employees will see the information relating to their position and functions released. Section 3(*b*) therefore has a wider scope, as it applies to every "identifiable individual", and not just individuals who are or were officers or employees of a government institution.

[24] Consequently, a person's employment history in a government institution is covered by the exception set out at paragraph 3(*j*) of the *Privacy Act*. However, the employment history of an individual who has never worked for a government institution is not covered by this exception. Therefore, the employment history of an individual who applied unsuccessfully for a position in a government institution is "personal information" the disclosure of which must be denied.

[25] As I noted above, the thorny question raised in this appeal, and which Justice Gonthier did not answer in *Royal Mounted Police*, is whether the employment history of an employee of a federal government institution prior to his or her being hired by that government institution is covered by the exception set out at paragraph 3(*j*). In other words, as expressed by Justice Gonthier at paragraph 38 of *Royal Mounted Police*, is this information sufficiently related to the position or functions held by an employee of a government institution to make it possible to conclude that the exception applies?

[26] In my opinion, one must distinguish, as Justice Gauthier did, between information relating to the requirements and qualifications for holding a position in a government institution

and information relating to the education and employment history of the candidate who fills the position.

[27] The requirements and qualifications for a position are indeed determined by the government institution, and their disclosure to the public meets the objectives of federal access to information legislation, namely, to increase transparency in government, contribute to an informed public and enhance an open and democratic society. However, past education and employment acquired prior to hiring by a government institution are an individual's personal assets which have been obtained without the involvement of the government institution that subsequently hires that individual. This is the type of information that the *Privacy Act* seeks to protect.

[28] In this respect, the list of examples provided at subparagraphs (i) to (v) of paragraph 3(*j*) of the *Privacy Act*, albeit not necessarily exhaustive (*Royal Mounted Police*, at paragraph 29), nonetheless properly illustrates that the information contemplated by the exception must relate to a position with a government institution rather than to activities at an educational institution or with another employer.

[29] The following are thus notably contemplated by the exception: the fact of being or having been an officer or employee of a government institution; the title, business address and business telephone number in a government institution; the classification, salary range and responsibilities of the position held in a government institution; the names of the individual on a document

prepared by the individual in the course of employment with a government institution; and the personal opinions or views of the individual given in the course of employment with a government institution. In contrast, information related to an individual's activities outside his employment with a government institution are not covered by the exception, whether these activities were pursued before, during or after the concerned individual was employed by a government institution.

[30] As Justice Gonthier further pointed out at paragraph 35 of *Royal Mounted Police*:

> Further, only information relating to the position or functions of the concerned federal employee or falling within one of the examples given is excluded from the definition of "personal information". A considerable amount of information that qualifies as "employment history" remains inaccessible, such as the evaluations and performance reviews of a federal employee, and notes taken during an interview. Indeed, those evaluations are not information about an officer or employee of a government institution that relates to the position or functions of the individual, but are linked instead to the competence of the employee to fulfil his task. . . .

[31] Information concerning achievements at an educational institution or positions held prior to hiring by a government institution do not relate to a position or functions with a government institution, but rather concern a position or functions with another employer or activities at an educational institution.

[32] According to Mr. Nault, the requested information must nonetheless be disclosed to him so that the Canadian public can satisfy itself that the hiring criteria for the federal public service positions in question were respected. This argument is specious. One could as easily argue that

the Canadian public must be able to satisfy itself that the incumbents of positions in the federal public service are competent. The courts have, however, decided that the evaluations of the employees of a government institution are "personal information" which are not contemplated by the exception set out at paragraph 3(*j*) of the *Privacy Act*: *Dagg*, at paragraph 94; *Royal Mounted Police*, at paragraph 35; *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551.

[33] In interpreting the *Access to Information Act* and the *Privacy Act*, one must focus on the statutory provisions at issue while at the same time considering simultaneously the purposes of the two statutes. In doing so, I conclude that information relating to the incumbent of a position in a government institution and concerning his education and employment history prior to being hired by a government institution is information that Parliament seeks to protect under the *Privacy Act*.

Costs

[34] Justice Gauthier recognized the novelty of the issue raised by the application for review filed by Mr. Nault and the particular circumstances of this application, concluding that each party had to bear its own costs. However, subsection 53(2) of the *Access to Information Act* provides that in cases where the Court is of the opinion that an application for review has raised an important new principle, costs must be awarded to the applicant even if the applicant has not been successful in the result:

53. (2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an

53. (2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe

important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.	important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

[35] As pointed out by this Court in *Statham v. Canadian Broadcasting Corp.*, 2010 FCA 315, 409 N.R. 350, 326 D.L.R. (4th) 228, at paragraph 71, subsection 53(2) of the *Access to Information Act* is a reflection of Parliament's intent that important issues concerning this statute be brought before the courts, and that a litigant who raises such issues is not to be deprived of an award of costs solely because he or she was unsuccessful. The provision ensures that litigants who raise important new questions in the context of applications for review under the statute are not penalized.

[36] The provisions of subsection 53(2) do not appear to have been raised before Justice Gauthier, nor were they raised before this Court. Although the mandatory nature of subsection 53(2) seems clear, I would nonetheless request that the parties file submissions on costs within 15 days of the judgment.

Conclusions

[37] For the foregoing reasons, I would dismiss the appeal, and I would request that the parties file written submissions with the Court on costs within 15 days of the judgment dismissing the appeal.

"Robert M. Mainville"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Johanne Trudel J.A."

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-266-10

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE JOHANNE GAUTHIER DATED JUNE 9, 2010, DOCKET NO. T-474-09)

STYLE OF CAUSE:	Jacques Nault v. Minister of Public Works and Government Services Canada
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 6, 2011
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	NADON J.A. TRUDEL J.A.
DATED:	September 22, 2011

APPEARANCES:

Jacques Nault	THE APPELLANT, REPRESENTING HIMSELF
Caroline Laverdière	FOR THE RESPONDENT

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Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT