Federal Court of Appeal  Cour d'appel fédérale

Date: 20240115

Docket: A-74-21

Citation: 2024 FCA 11

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
LEBLANC J.A.
GOYETTE J.A.

BETWEEN:

RÉGIS BENIEY

Appellant/Cross-Respondent

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent/Cross-Appellant

Heard at Ottawa, Ontario, on October 12, 2023.

Judgment delivered at Ottawa, Ontario, on January 15, 2024.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: BOIVIN J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

[1] The Court is called upon to review a judgment of the Associate Chief Justice of the Federal Court (the Federal Court) dated February 19, 2021 that is the subject of an appeal and a cross-appeal. That judgment (the Judgment), cited as 2021 FC 164, allowed the application for review filed by the appellant/cross-respondent (the Appellant) under subsection 41(1) of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the Act) against the Canada Border Services

Agency's (the Agency) refusal to disclose to him all the information that he had asked for in the access to information request that he had filed with the Agency.

[2] This refusal was based essentially on subsection 19(1) of the Act, which requires the head of the government institution that is the subject of an access to information request to "refuse to disclose any record requested under this Part that contains personal information." The information so removed under subsection 19(1) in the case at hand consists of images of travellers and Agency officers captured by surveillance cameras installed by the Agency at one of the ports of entry of the Canada–United States border where the Appellant was working. Only the images of the officers are at issue here.

[3] The Appellant, who is representing himself before this Court, is appealing from the Judgment, even though it seems to be in his favour. In fact, he argues that the Federal Court did not dispose of all the arguments that he raised before it and that, as a result, it failed to order the Agency to disclose all the information that he had asked for in his access to information request, and not just a portion of it, as it did. The respondent/cross-appellant (the Respondent) criticizes the Federal Court of having incorrectly limited the scope of the exemption provided for under section 19 of the Act. The Respondent also criticizes the Federal Court for the approach that it adopted to resolve this issue.

[4] For the reasons that follow, I consider that the main appeal must fail. As for the cross-appeal, I propose that it be allowed.

I. Background

[5] On July 3, 2017, the Appellant was involved in an incident with one of his superiors at the end of his work shift. At the time, he was working at the Queenston Bridge border crossing in southern Ontario. Following this incident, the Agency began an internal investigation and the Appellant filed a grievance.

[6] On July 31, 2017, the Appellant, in parallel with this investigation and grievance, filed an access to information request with the Agency. This request (No. A-2017-12202) reads as follows:

> [TRANSLATION]
>
> Location: Queenston Bridge Traveller Section bus counters area at 14154 Niagara Parkway, Niagara-on-the-Lake, ON, L0S 1J0. I request the following documents: All of the reports written by employees and managers present at the primary bus counters, including the allegations made by ... on 2017-07-03 between 11 p.m. and midnight. I request ALL of the reports written by all of the officers who had to write something in relation to this matter. I request that all true copies of the surveillance video recordings made between 11:30 p.m. and 12:06 a.m. that day in the bus counters area be disclosed to me. In particular those showing me interacting with Superintendent ..., Superintendent ... and all interactions between us between 11:45 p.m. and 12:06 a.m. I also ask to be given recordings from all of the surveillance cameras located on the ground floor between 11:30 p.m. and 12:06 a.m. I want to see the comings and goings of employees leaving and arriving on site during this period.

[7] The Agency responded to the request on February 21, 2018 by disclosing to the Appellant the written reports that he had requested, as well as a total of seven (7) video recordings, some redacted, others not. Dissatisfied with the response, the Appellant filed a

complaint with the Information Commissioner of Canada. His complaint was mainly that not all the requested video recordings were disclosed to him and that those that were disclosed had been deliberately altered during the editing process and were almost impossible to watch because they were in increased playback speed mode.

[8] On December 14, 2018, the Commissioner dismissed the complaint but stated that she had already asked the Agency to rework the video recordings sent on February 21, 2018 in order to correct the technical problem that the Appellant had noted. The Agency complied on October 19, 2018, when it sent the Appellant a corrected version of the video recordings in question. The Commissioner further noted that not all the video recordings that may have existed on the day and at the hours covered by the request were sent to the Appellant because some were erased in accordance with the Agency's security recordings retention policy, which provides for a 30-day retention period. Only video recordings considered necessary for the internal investigation undertaken following the July 3, 2017 incident were retained. These are the seven (7) video recordings sent to the Appellant. The Commissioner also noted in this regard that the cuts that the Agency had made to some of these video recordings were consistent with the [TRANSLATION] "clear framework" governing the right to privacy in the context of the use of surveillance cameras in the workplace.

[9] Following receipt of the Information Commissioner's report, the Appellant applied to the Court for a review under subsection 41(1) of the Act. In this application, the Appellant, who was then represented by counsel, asked the Federal Court to:

[TRANSLATION]

(a) declare that the Agency cannot rely on subsection 19(1) of the [Act] to refuse to disclose certain recordings of Agency employees, insofar as these recordings contain information required by paragraph 3(j) of the *Privacy Act*, RSC 1985, c P-21; and thereby

(b) set aside the decisions dated February 21, 2018 and October 19, 2018; and

(c) order the Minister of Public Safety and Emergency Preparedness ... to fully respond to Access to Information Request A-2017-12202;

(d) with costs.

(Notice of Application, Appeal Book amended at p. 817)

II. Judgment

[10] On February 19, 2021, the Federal Court allowed the Appellant's action, stating that it was of the view [TRANSLATION] "that the videotapes to which [the Appellant] is seeking access are not covered by section 19(1) of the [Act], and that they must be made available to him" (Judgment at para. 42).

[11] Recognizing that images of an employee of a government institution that identify them are, barring exceptions, "personal information" as defined in the *Privacy Act*, R.S.C. 1985, c. P-21 (the PA), the Federal Court, relying on two Supreme Court of Canada decisions, namely, *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, 148 D.L.R. (4th) 385 (*Dagg*) and *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, 224 D.L.R. (4th) 1 (*Canada (RCMP)*), found that the images taken in this case under subsection 19(1) of the Act fall under the exception to the

definition of “personal information” set out in paragraph 3(j) of the PA as information relating to the position and duties of the officers concerned.

[12] In its view, if, as the Supreme Court decided in *Dagg*, the records of federal employees’ presence at the workplace—in this case, Department of Finance employees—fall under the exception in paragraph 3(j) of the PA as information regarding the nature of a particular position, it is difficult “to see how the image of a border services officer, taken while in uniform and on duty for his or her employer, could be excluded from the scope of paragraph 3(j) of the Privacy Act.” (Judgment at para. 34). To read this exception as the Agency does, the Court states, would unduly limit the general scope of its introductory provision.

[13] Having concluded that the images taken in this case should have been disclosed to the Appellant, the Federal Court was of the opinion that it was not necessary, in this context, to decide the debate surrounding the Agency’s application of section 25 of the Act. This statutory provision imposes on federal institutions, where they are of the view that, given the nature of the information contained in a document covered by an access to information request, disclosure of this information may be refused, the obligation to nonetheless disclose the parts of the document that do not have the information in question when it “can reasonably be severed from any part.”

III. Issue and Standard of Review

[14] In my view, this application raises the following questions:

(a) Did the Federal Court fail to decide on all the issues raised in the Appellant's action before it and to thereby grant the Appellant the remedy he sought, an order requiring the Agency to disclose to him all the information covered by his access to information request?

(b) If not, did the Federal Court err in justifying the Court's intervention in finding that the use of the exception under subsection 19(1) of the Act was not justified in this case?

(c) If so, is there a need to decide on the Agency's application of section 25 of the Act and, if so, was the Agency's application consistent with the requirements of this provision?

[15] If there was at some point a debate in this Court on the standard of review applicable to the appeal of a decision by the Federal Court under section 41 of the Act, that debate ended in June 2019 with the addition of section 44.1 to the Act, which states that applications under section 41 must be "heard and determined as a new proceeding."

[16] The addition of this provision now ensures that the standard of review for appeals of section 41 decisions is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235

(*Housen*), not the one set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, applicable to appeals of Federal Court decisions in matters of judicial review (*Canada (Health) v. Elanco Canada Limited*, 2021 FCA 191, 337 A.C.W.S. (3d) 153 at para. 32 (*Elanco*)).

[17] It is well established that the standard of review set out in *Housen* requires that the Court review questions of law before it on the correctness standard and that it intervene on questions of fact or mixed fact and law only if it finds that there is a palpable and overriding error (*Housen* at paras. 26-28; *Elanco* at para. 33).

IV. Analysis

A. *The main appeal*

[18] I reiterate that the Appellant contends that the Federal Court failed to address all the issues raised in his application to it, an application that, as stated by the Appellant, it had to decide as a new case, which in his view required it to decide on the entirety of his access to information request and to order, if successful, full disclosure of the information that he had requested from the Agency.

[19] Apart from the fact that some might argue that this type of recrimination is more of a ground for an application for reconsideration under rule 397(1)(b) of the *Federal Courts Rules*, SOR/98-106, this argument, in any event, does not hold up to scrutiny for two reasons. First, a

reading of the Notice of Application and the Memorandum of Fact and Law filed by the Appellant with the Federal Court clearly shows that the Appellant ultimately focused his appeal on the use made of section 19 of the Act in relation to four (4) of the seven (7) videotapes that were sent to him in response to his access to information request, namely, those identified at paragraph 28 of the said Memorandum and at paragraph 16 of the Judgment:

(a) Traffic_Bus_Passenger_Pil_2017-07-14-1714;

(b) Traffic_Bus_Passenger_Secondary_1_2017-07-14_1700;

(c) Traffic_Bus_Passenger_Secondary_2_2017-07-14_1707;

(d) Traffic_Corr_Outside_1131_2017-07-18_1426.

[20] This is how the Appellant worded and circumscribed his application to the Federal Court, and the Federal Court cannot be criticized for any omission in relation to what it had to decide. The Appellant emphasizes the conclusion of his Notice of Application that requires that the Respondent be ordered to [TRANSLATION] “fully” respond to his access to information request (Notice of Application, Appeal Book amended at p. 46). However, this generic conclusion cannot be dissociated from the rest of the Notice of Application and how the Appellant stated his position in his memorandum. In other words, it cannot be regarded as a catch-all authorizing this Court to consider arguments not raised before the Federal Court. Moreover, I note that there is no evidence on the record that the case was approached differently by counsel for the Appellant at the Federal Court hearing.

[21] As the Respondent rightly points out, this Court will generally not deal with an issue that was not raised in the trial court (*Oleynik v. Canada (Attorney General)*, 2020 FCA 5, 441 D.L.R. (4th) 744 at para. 72). However, there is no justification in this case for any departure from this rule.

[22] That brings me to my second point. Before this Court, the Appellant, who now represents himself, has repeatedly attempted to broaden the debate by asking, in addition, for leave to present new evidence on appeal in such a way as to allow this Court to answer [TRANSLATION] "all the questions presented and which the Federal Court could not answer because of [the Respondent's] subterfuges". To have these "subterfuges" punished, the Appellant even filed a motion for contempt of court against the Respondent's main affiant.

[23] All these applications failed. The Court must therefore decide this appeal in light of the record as constituted before it. However, this record does not allow the Appellant to expand the scope of the debate as he would like to, or to address issues that were not raised before the Federal Court.

[24] Therefore, I find the main appeal to be devoid of any merit. Therefore, I would dismiss it.

B. *Cross-appeal*

[25] The cross-appeal involves the second issue in dispute, which is whether the Federal Court erred in concluding that information that the Agency refuses to disclose does not fall under the

exception in subsection 19(1) of the Act on the grounds that they would themselves be subject to one of the exceptions to the concept of “personal information”, as defined by the PA.

[26] This issue questions the scope of subsection 19(1) of the Act and, in turn, that of the definition of “personal information” in the PA and to which the Act refers.

[27] Turning first to the question of statutory interpretation, how the Federal Court deals with it must be reviewed on the correctness standard (*Housen* at para. 8) and the question itself, analyzed using the modern method of statutory interpretation, which requires that the text of the provisions at issue be considered “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 at para. 21, citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983 at p. 87; *Bayer Cropscience LP v. Canada (Attorney General)*, 2018 FCA 77, 155 C.P.R. (4th) 99 at para. 67, citing *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at para. 23).

[28] At the same time, we will have to see where the interpretation adopted by the Federal Court stands in relation to this exercise. This interpretation, which, I would remind you, essentially relies on the Federal Court’s reading of *Dagg* and *Canada (RCMP)*, can be summarized as follows:

(a) The Act, which promotes transparency in government operations, and the PA are complementary statutes; they must be interpreted harmoniously and neither has precedence over the other;

(b) Although the opening words of the definition of “personal information” in the Privacy Act is very broad, it is subject to exceptions that, while they should not limit the scope of the definition, apply, in particular, to the context of subsection 19(1) of the Act;

(c) There is no doubt that in the absence of these exceptions, and in particular with respect to information relating to the position or duties of an officer or employee, current or former, of a government institution, the information at issue in this case—the images of the Appellant’s colleagues appearing in the videotapes at issue—is personal information protected by subsection 19(1) of the Act;

(d) However, this exception under paragraph 3(j) of the PA is applicable to the information at issue because it is difficult to imagine that the image of a border services officer, captured while they are in uniform and on duty, does not, as with their records of attendance at the workplace, constitute information on the nature of the duties of their position, and it can be said in this regard that there is almost a correspondence between the officer’s presence at the workplace and the performance of their duties;

(e) The Agency’s proposed interpretation, which relies on analogies with some of the examples of personal information found in the definition of this concept in

section 3 of the PA, limits the general scope of the exception at issue, a "circular" approach, rejected in *Canada (RCMP)*.

[29] It is useful, at this stage, to reproduce the relevant portions of the text of the provisions at issue, the entire text being reproduced in the Appendix to these Reasons:

***Access to Information Act*, R.S.C. 1985, c. A-1**	***Loi sur l'accès à l'information*, L.R.C. 1985, c. A -1**
Definitions	**Définitions**
[…]	[…]
personal information has the same meaning as in section 3 of the *Privacy Act*; (*renseignements personnels*)	***renseignements personnels*** S'entend au sens de l'article 3 de la *Loi sur la protection des renseignements personnels*. (*personal information*)
[…]	[…]
Personal information	**Renseignements personnels**
19 (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Part that contains personal information.	**19 (1)** Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements personnels.
***Privacy Act*, R.S.C. 1985, c. P-21**	***Loi sur la protection des renseignements personnels*, L.R.C. 1985, c. P-21**
Definitions	**Définitions**
[…]	[…]
personal information means information about an identifiable individual that is recorded in any	***renseignements personnels*** Les renseignements, quels que soient leur

form including, without restricting the generality of the foregoing,

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

(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,

(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,

forme et leur support, concernant un individu identifiable, notamment :

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) 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) 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) 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

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) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

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,

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

(iii) the classification, salary range and responsibilities of the position held by the individual,	**(iii)** la classification, l'éventail des salaires et les attributions de son poste,
(iv) the name of the individual on a document prepared by the individual in the course of employment, and	**(iv)** son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,
(v) the personal opinions or views of the individual given in the course of employment,	**(v)** les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

[30] As noted in the Judgment, the Supreme Court's case law already provides information on the overall context, spirit, and purpose of the two statutes in question, as well as the meaning and scope of subsection 19(1) of the Act in particular. The Federal Court correctly summarized the main features of this subsection, particularly when it highlights the undeniably broad scope of the definition of "personal information" and the fact that exceptions to this definition should not limit its scope, at least, I would add, beyond what is necessary.

[31] However, a careful reading of this case law reveals another important dimension of the relationship between the Act and the PA, a dimension that is not reflected in the Judgment, which may explain the scope the Federal Court gave to the exception under paragraph 3(j) of the PA and, for this reason, to the mandatory exception under subsection 19(1) of the Act.

[32] Although they are complementary, as correctly noted by the Federal Court, and they must be "read together," as the Supreme Court noted in *Cie H.J. Heinz of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441 (*Heinz*), which also questioned the scope of subsection 19(1) of the Act (*Heinz* at paras. 2, 12; see also *Dagg* at para. 1), it is accepted that

the Act and the PA, read together, "afford greater protection to personal information" (*Heinz* at paras. 29–31; see also: *Dagg* at para. 48, La Forest J., dissenting in the result). This means that the personal information exception should not be given a "cramped interpretation" by giving access pre-eminence over privacy (*Heinz* at para. 61, citing *Dagg* at para. 51, La Forest J., dissenting in the result).

[33] It is important to note that the existing regime under the Act and the PA is intended to reconcile two competing legislative policies: access to information and privacy (*Dagg* at para. 45, La Forest J., dissenting in the result; see also *Dagg* at para. 1 and *Canada (RCMP)* at para. 21, concurring with La Forest J., dissenting in the result, on how to approach the interpretation of the Act and the PA). This regime, which attempts to establish and maintain a "delicate balance" between these two principles, nevertheless "consistently" promotes, to the extent it provides for, privacy (*Heinz* at para. 1, 24). The rights provided for in both Acts therefore do not have equal value at all times, and when it comes to an individual's personal information, the right to privacy outweighs the right to access information, except to the extent provided for by law (*Heinz* at para. 26).

[34] This nuance, I would remind you, does not seem to be one of the foundations on which the Federal Court's reasoning was built. At any rate, it is not mentioned. As just noted, this regime clearly prioritizes privacy over access rights. To this end, it requires a calibrated approach by the courts to promote the "efficient protection" of this information, which must, among other things, encourage the courts to "resort to artifices" to prevent this protection (*Heinz* at para. 31).

[35] Therefore, it is not sufficient to underscore the importance of privacy under this regime, to mention the undeniably broad nature of the definition of “personal information”; it is also necessary to express the analysis based on the prevalence of that protection over access rights. This also goes for the statement that neither of the two statutes at issue takes precedence over the other since, because of this prevalence, access rights are not, at all times, equal to privacy.

[36] Having outlined the principles governing the interaction between the Act and the PA, the relationship between subsection 19(1) of the Act and the exception to the definition of “personal information” under paragraph 3(j) of the PA should now be addressed.

[37] While it is true that federal public servants, because of the presence of this exception, are given less privacy when the information requested relates to their position or functions (*Canada (RCMP)* at para. 34), they are not without any protection.

[38] To determine this level of protection, it is necessary to consider whether the information to which access is sought “is directly related to the general characteristics associated with the position or functions held by an employee” and keep in mind that it consists “of the kind of information disclosed in a job description,” which includes “conditions associated with a particular position, including such information as qualifications, duties, responsibilities, hours of work and salary range” (*Canada (RCMP)* at para. 38, citing *Dagg* at para. 95, La Forest J., dissenting in the result).

[39] Although the scope is “general” and the list of examples it contains is not exhaustive, paragraph 3(j) of the PA does have “a specified scope, as the information must be related to the position or functions” and “should apply only when the information requested is sufficiently related to the general characteristics associated with the position or functions ...” (*Canada (RCMP)* at para. 38).

[40] The exception to paragraph 3(j) of the PA is therefore limited by relatively specific guidelines; for example, information that relates to an employee’s skill and characteristics, as well as “opinions expressed about the training, personality, [and] experience” of that employee, are not subject to this exception (*Canada (RCMP)* at para. 38). In *Dagg*, while the majority judges found that the information contained in a record of attendance at the workplace fell within this exception, they did point out that it was “information generic to the position itself” (*Dagg* at para. 12).

[41] The same is true of the salary range attaching to an employee’s position, which falls under the exception of paragraph 3(j) of the PA, but not the employee’s salary, information that relates to the individual employee (*Dagg* at para. 13), although it is intimately linked to the individual’s employment.

[42] Here, there is considerable tension between the “two competing legislative policies” since, as correctly stated by the Federal Court, if it were not for the exception under paragraph 3(j) of the PA, the information at issue would be unequivocally classified as “personal

information" as defined in the PA. We need only read the definition of this concept, reproduced at paragraph 29 of these reasons, to be convinced of this.

[43] The problem in the case at hand is that the Federal Court has attempted to reconcile these two principles by equating [TRANSLATION] "the information contained in a video tape captured on the arrival and departure of an employee," which it has also recognized, as I have just mentioned, as otherwise being personal information within the meaning of the PA, with the information "contained in the employee's sign-in logs." In its view, citing *Dagg*, in both cases, although this information may "not disclose anything about the nature of the responsibilities of the position," it does provide "a general indication of the extent of those responsibilities" (Judgment at para. 35, citing *Dagg* at para. 9). The Appellant echoes the Judgment, nothing more.

[44] With all due respect, this congruence is problematic as it ignores all the employee-specific information that can be revealed by images captured at the workplace. In other words, unlike the records of attendance at the workplace, which only provides generic information on the employee's position and the duties associated with that position, the images captured at the workplace reveal, in principle, much more about the employee himself and the "characteristics" that are specific to him, even though he is wearing a uniform.

[45] In fact, as required by the analysis grid applicable to the exception in paragraph 3(j) of the PA, which, incidentally, is not mentioned in the Judgment, one must ask how the employee's physical or personal features that may be revealed by the images captured by surveillance

cameras installed at the workplace, such as skin colour, facial features, stature, disability, membership in a religious group or other group, body language, and even visible mannerisms, are directly related to the general characteristics of this employee's position or duties and reveal information of the same type as that found in a work description.

[46] In all humility, I do not see any relationship between the two, even though the images were captured at the workplace because, beyond being able to see the employee [TRANSLATION] "in action" these images are likely to reveal information that is specific to the employee and that is more related to the way in which he performs his duties and, ultimately, his skill, and the way in which he shows his personality, identity or beliefs at the workplace, which is not covered by this exception.

[47] In this regard, as we have seen, protection under the PA continues to be provided to federal employees (*Canada (RCMP)* at para. 38) and having to wear a uniform makes no difference. Pushed to its limit, this feature—wearing a uniform—would create two categories of public servants under the regime established by the Act and the PA: those who wear the uniform, who are deprived of the protection of subsection 19(1) of the Act, and those who do not wear it and who therefore continue to receive that protection. That cannot have been Parliament's intention.

[48] In short, the Federal Court, in the name of transparency in government operations, prioritized access rights over privacy. In doing so, it has given too broad a scope to the exception in paragraph 3(j) of the PA, thereby reducing the scope of the exception under subsection 19(1)

of the Act. In my view, this result is, as we have seen, inconsistent with the applicable law and is therefore the result of an error justifying the Court's intervention. In other words, the right to privacy had to be prioritized as there was no sufficient link between all the personal characteristics that could be revealed by the images of the officers and the general characteristics of their positions or duties.

[49] At the hearing, counsel for the Respondent clarified that the Agency had erred in disclosing the image of the officers appearing on the videotapes in which the Appellant can also be seen. In her view, the image of all the officers appearing in the videotapes at issue should have been taken regardless of whether the Appellant was seen in them.

[50] I agree because there is nothing in the Act or the PA that justifies such a distinction. In other words, all officers appearing on the videotapes were entitled to the same protection under subsection 19(1) of the Act. For this reason, the exception under paragraph 3(j) had to be applied to them in the same way, regardless of the purpose or nature of the Appellant's access to information request (*Canada (RCMP)* at para. 32).

[51] Finally, the Respondent criticizes the Federal Court for having incorrectly approached the analysis that an application under section 41 of the Act required of it. The Respondent essentially argues that the Federal Court had to conduct its own analysis, not focus it on the Agency's decision and what motivated it.

[52] In view of my conclusion on the scope of the exception under paragraph 3(j) of the PA and consequently the exception under subsection 19(1) of the Act, it is necessary in my opinion to address in detail the second part of the cross-appeal. Suffice it to say that if some of its passages, such as the wording of the issue in dispute relating to the interpretation of subsection 19(1) of the Act (Judgment at para. 17A), may be confusing in this regard, the Judgment, read as a whole, suggests that the Federal Court made its own analysis of the issue it had to decide, regardless of the Agency's position, even though it criticized the Agency at times.

[53] Having concluded that the Agency could rightfully rely on subsection 19(1) of the Act to refuse to disclose the images of the officers appearing on the videotapes provided to the Appellant, issues relating to section 25 of the Act must be addressed.

C. *Section 25 of the Act*

[54] Section 25 of the Act requires the head of a government institution to disclose those portions of the document subject to an access to information request that do not contain exempted information in respect of which they are authorized to refuse disclosure, provided that those portions can reasonably be severed (*Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23, 342 D.L.R. (4th) 257 at para. 229 (*Merck*)).

[55] In the case at hand, the evidence on the record, contrary to what the Appellant states, reveals that this (mandatory) exercise was done (*Merck* at para. 236). In fact, the documents at issue (the videotapes at issue) were provided to the Appellant after the information that the

Agency considered to be personal information protected under subsection 19(1) of the Act was severed, although it was an erroneous exception. Therefore, there is no doubt that the Agency dealt with the Appellant's access to information request, bearing in mind the duty imposed on it by section 25 of the Act.

[56] The issue to be resolved, therefore, is whether the Agency has fulfilled this duty in accordance with the requirements of section 25. As noted above, the Federal Court did not consider it necessary to decide this issue as it was of the view that the videotapes at issue were to be fully disclosed to the Appellant, except for the images of the travelling public.

[57] In these circumstances, I must first decide whether this determination should be left to the Federal Court, in which case the record should be returned to it, or whether it is preferable for this Court to decide the matter instead of the Federal Court, as permitted by subparagraph 52(b)(i) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which allows the Court, when it is seized with an appeal of a Federal Court decision, to "give the judgment and award the process or other proceedings that the Federal Court should have given or awarded."

[58] At the outset, it is important to note that, to date, this power has been exercised sparingly, as it is not normally up to this Court to act as a trial court. This reluctance arises "not only from the greater experience and expertise of the Federal Court in fact-finding, but also from the logistical and other complications associated with fact-finding by a three-judge panel" (*Sandhu Singh Hamdard Trust v. Navsun Holdings Ltd*, 2019 FCA 295, 169 C.P.R. (4th) 325 at para. 59; see also: *Canada (National Revenue) v. Hydro Québec*, 2023 FCA 171 at paras. 27–29).

[59] However, the Respondent urges us to exercise this power. He considers that it is in the interests of justice to do so because (i) the evidence necessary to determine the compliance of the severances made in the case at hand with the requirements of section 25 is already on the record, (ii) this power, in its judicialized form, has been ongoing since 2019 and creates uncertainty within the federal system as to how to deal with access to information requests relating to the image of employees, and (iii) the full resolution of this appeal would meet the objectives of quick, efficient, and economical resolution that should guide making applications to the Federal Court.

[60] It will soon be seven (7) years since the Appellant filed his access to Information request and, as the Respondent points out, all the evidence necessary for what this Court would have to decide in lieu of the Federal Court is on the record. Moreover, this evidence is not controversial, meaning that this Court is in as good a position as the Federal Court would be in deciding this matter. In addition, this cross-appeal raises an important issue, and it is, in my view, in the interests of justice that the Court use the power vested in it under subparagraph 52(b)(i) of the *Federal Courts Act* to resolve this issue without further delay.

[61] The Court must therefore determine whether the Agency correctly applied section 25 (*Merck* at para. 232) and must do so, as provided for in new section 44.1 of the Act, as if it were seized with a “new proceeding.” To this end, it owes no deference to the Agency.

[62] The issue here is whether, among the video images that are severed from disclosure, there is information that should have been disclosed by the Agency. Under section 25 of the Act, such

disclosure is required if it is “reasonable” for the relevant government institution. This will be the case (i) if the information at issue, once disclosed, has a semantic meaning, making the disclosure “meaningful” and (ii) if “the effort of redaction by the government institution is justified” by the benefits of severing and disclosing this information (*Merck* at para. 237). In other words, the cost-benefit analysis will justify disclosure of this information if the severance effort required is reasonably proportionate to the quality of access it would provide (*Merck* at para. 237, citing *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, [1989] 1 F.C. 143, 51 D.L.R. (4th) 306).

[63] In the case at hand, this test should be applied to video images, not documents, as was the case in *Merck*, and it must be done without losing sight “of the purpose of s. 25. It aims to facilitate access to the most information reasonably possible while giving effect to the limited and specific exemptions set out in the Act” (*Merck* at para. 238, citing *Ontario (Security and Public Security)*, 2010 SCC 23, [2010] 1 S.C.R. 815 at para. 67).

[64] Regarding three (3) of the four (4) video tapes at issue, the severances are significant and target members of the travelling public present on the scene who were captured by the surveillance cameras, as well as officers present when the Appellant does not appear on the images. With respect to the meaningfulness of what could be disclosed, it must be asked whether what would be a disparate set of video images of physical locations (parts of walls, ceilings, hallways, offices, etc.) or, at the limit, images purged of the physical or personal traits of the officers concerned, such as skin colour, facial features, stature, disability, membership in a religious group or other group, body language, and visible mannerisms.

[65] In terms of the costs and benefits of carrying out such an extraction of otherwise disclosable information, the evidence shows that unlike documents, this type of exercise, when it comes to video images, poses particular challenges as each second of video recording contains about sixty images. The Respondent therefore argues that isolating, for example, the identifiable personal content of each image is a colossal challenge.

[66] I agree here with the words of the Federal Court in *Attaran v. Canada (National Defence)*, 2011 FC 664, 391 F.T.R. 70 (*Attaran*) "the application of s. 25 of the [Act] in the context of the removal of personal information from a photograph [...] should err on the side of protecting the subject's privacy interests" (*Attaran* at para. 29) (emphasis in original). This statement is equally important, in my view, when it comes to applying section 25 of the Act to personal identifiers appearing in video images.

[67] Without saying that in all circumstances, this type of extraction, when it comes to video images, is not meaningful and is not reasonably proportionate to the quality of the resulting access, I am of the view, in light of the case before the Court, that this is the case here and that, therefore, section 25 has been correctly applied to the Appellant's access to information request and was in accordance with its purpose. This purpose, I would remind you, is to facilitate access to the greatest extent possible while giving effect to the exceptions under the Act, including those relating to privacy, which is mandatory and supersedes access rights.

[68] While the severances carried out in this case may seem significant, quantitatively, note that under subsection 19(2) of the Act, disclosure of personal information is required where

(i) the individual to whom it relates consents to the disclosure; (ii) the information is publicly available; or (iii) the disclosure is in accordance with section 8 of the PA, which lists a number of situations where disclosure of such information is permitted. However, the application of subsection 19(2) of the Act to the circumstances of this case is outside the scope of this appeal.

V. Conclusion

[69] For all these reasons, I would dismiss the main appeal, with costs, and allow the cross-appeal. I would set aside the Judgment and make the decision that the Federal Court should have made, I would reject the Appellant's application under section 41 of the Act and do so with costs in favour of the Respondent both before this Court and before the Federal Court.

"René LeBlanc"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Nathalie Goyette J.A."

APPENDIX

Access to Information Act, **R.S.C. 1985, c. A-1**	***Loi sur l'accès à l'information*, L.R.C. 1985, c. A -1**
Definitions	**Définitions**
[…]	[…]
personal information has the same meaning as in section 3 of the *Privacy Act*; (*renseignements personnels*)	***renseignements personnels*** S'entend au sens de l'article 3 de la *Loi sur la protection des renseignements personnels*. (*personal information*)
[…]	[…]
Personal information	**Renseignements personnels**
19 (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Part that contains personal information.	**19 (1)** Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant des renseignements personnels.
Where disclosure authorized	**Cas où la divulgation est autorisée**
(2) The head of a government institution may disclose any record requested under this Part 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*.

***Privacy Act*, R.S.C. 1985, c. P-21**	***Loi sur la protection des renseignements personnels*, L.R.C. 1985, c. P-21**
Definitions	**Définitions**
[…]	[…]
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,	**c)** tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;
(d) the address, fingerprints or blood type of the individual,	**d)** son adresse, ses empreintes digitales ou son groupe sanguin;
(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,	**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) correspondence sent to a government institution by the	**f)** toute correspondance de nature, implicitement ou

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,

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) the views or opinions of another individual about the individual,

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

(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

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) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

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

j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :

functions of the individual including,

(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,

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

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

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

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

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

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

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

(j.1) the fact that an individual is or was a ministerial adviser or a member of a ministerial staff, as those terms are defined in subsection 2(1) of the *Conflict of Interest Act*, as well as the individual's name and title,

j.1) un conseiller ministériel, au sens du paragraphe 2(1) de la *Loi sur les conflits d'intérêts*, actuel ou ancien, ou un membre, actuel ou ancien, du personnel ministériel, au sens de ce paragraphe, en ce qui a trait au fait même qu'il soit ou ait été tel et à ses nom et titre;

(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,

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) 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

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

m) un individu décédé depuis plus de vingt ans. (*personal information*)

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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APPEARANCES:

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