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# EXCLUSIONS AND EXEMPTIONS: STUDY ON SECTION 68.1 OF THE *ACCESS TO INFORMATION ACT* AND THE RESULTING COURT ACTIONS CONCERNING THE CANADIAN BROADCASTING CORPORATION

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## BACKGROUND

On September 20, 2011, the House of Commons Standing Committee on Access to Information, Privacy and Ethics (the Committee) adopted the following motion:

That the Committee calls witnesses to hear testimony regarding the access to information dispute and the resulting court actions concerning CBC.

Between October and November 2011, the Committee heard testimony from various witnesses including the Information Commissioner of Canada, the President and Chief Executive Officer of the CBC, the President and Chief Executive Officer of Quebecor Media Inc., the Chairman of the Canadian Radio-television and Telecommunications Commission (CRTC), and academics on the issue of the CBC's access to information practices, as well as on the exclusion for journalistic, creative or programming activities found in section 68.1 of the *Access to Information Act*.

As well, on November 2, 2011, the Committee adopted the following motion:

That, in order for the Committee to determine and assess exclusions, the Committee orders the production of the following documents pursuant to Standing Order 108(1):

1. From the CBC: The redacted and un-redacted documents provided by the CBC for the access to information requests made by the Canadian Taxpayers Federation:

- If the CBC was in any way financially compensating prominent members of the lobby/advocacy group "Friends of the Canadian Broadcasting."
- The financing of any programs or films concerning the Quebec Nordiques team
- The number of employees falling within various income categories

2. From the CBC: The redacted and un-redacted responses provided by the CBC to the requests made by Quebecor Media Inc. and referred to by Pierre Karl Péladeau at the meeting of Thursday, October 20, 2011, specifically:

- First the request about the CBC fleet of vehicles.
- Second request concerns CBC/Radio-Canada's 75th anniversary celebration planning budget.
- That these documents be provided to the Committee without delay; and, that the Committee deal with the produced documents *in camera*.

On November 14, 2011, the CBC submitted documents to the Committee, some of which were submitted under seal, in response to the order to produce documents dated November 2.

On November 23, 2011, the Federal Court of Appeal issued its decision in [Canadian Broadcasting Corporation v. Canada \(Information Commissioner\)](#) (2011 FCA 326), upholding the finding of the Federal Court that the Information Commissioner has the authority under section 68.1 of the *Access to Information Act* to order the CBC to disclose records, including records that, in the opinion of the CBC, relate to its journalistic, creative or programming activities, in order to determine whether those records fall under the exception and consequently, whether they are subject to the exclusion.<sup>1</sup>

On November 24, 2011, the Committee agreed that the Clerk of the Committee return the sealed envelope included in the package ordered by the Committee on November 2, 2011 to CBC-Radio-Canada; and that the remaining documents be considered at an *in camera* meeting of the Committee.

### **APPLICATION OF THE *ACCESS TO INFORMATION ACT* TO THE CBC**

The *Federal Accountability Act* (FAA) was enacted in 2006, and amended the *Access to Information Act* (ATIA) to make it applicable to over 60 federal institutions, including several Crown corporations such as the CBC, Canada Post and Via Rail. That amendment came into force on September 1, 2007. The FAA also created an exclusion in section 68.1 of the ATIA that applies specifically to certain information held by the CBC. That provision reads as follows:

This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that relates to its general administration.<sup>2</sup>

In its first report on the administration of the ATIA,<sup>3</sup> the CBC stated that it had received 547 access to information requests for the period of September 2007 to March 2008. The report further states that most of the requests were submitted in the first three months.

For the 2007–2008 fiscal year, the requests came from the following sources:

- Media: 6% (33 requests)
- Academia: 0%

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1 See paragraph 23 of the FCA decision, and paragraph 37 of the FC decision.

2 *Access to Information Act* (R.S.C., 1985, c. A-1), <http://laws-lois.justice.gc.ca/eng/acts/A-1/>

3 CBC, Report on the Administration of the *Access to Information Act* for the Fiscal Years 2007–2008 and 2008–2009, p. 4, <http://www.cbc.radio-canada.ca/ati/pdf/ATIP.PDF>.

- Business: 88.7% (485 requests)
- Organization: 0%
- Public: 5.3% (29 requests)

During that fiscal year, the CBC responded to 224 requests, carrying forward 323 into the next fiscal year. This created a significant backlog of requests.

For the 2008–2009 fiscal year,<sup>4</sup> the volume of requests declined significantly, to 221 access to information requests, from the following sources:

- Media: 25% (56 requests)
- Academia: 1% (2 requests)
- Business: 43% (96 requests)
- Organization: 2% (4 requests)
- Public: 29% (63 requests)

During that fiscal year, the CBC reduced its backlog and carried forward 108 requests to the next fiscal year.<sup>5</sup>

For the 2009–2010 fiscal year,<sup>6</sup> the volume of requests remained at the same level as in 2008–2009. The CBC received 247 access to information requests from the following sources:

- Media: 25.9% (64 requests)
- Academia: 0%
- Business: 43.3% (107 requests)
- Organization: 2.9% (7 requests)
- Public: 27.9% (69 requests)

During that fiscal year, the CBC processed 315 requests and carried forward 40 to the current fiscal year.

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4 Ibid.

5 CBC, Report on the Administration of the *Access to Information Act* for the Fiscal Year 2009–2010, p. 5, <http://cbc.radio-canada.ca/ati/pdf/ATIP1.PDF>.

6 Ibid.

Finally, for the 2010–2011 fiscal year,<sup>7</sup> the volume of new requests jumped to 327, the second highest number of requests received by the CBC since it became subject to the Act in 2007. These requests came from the following sources:

- Media: 10% (33 requests)
- Academia: 2% (7 requests)
- Business: 60% (195 requests)
- Organization: 1% (4 requests)
- Public: 27% (88 requests)

During the 2010–2011 fiscal year, the CBC processed 349 requests (including the backlog from the previous fiscal year), leaving a backlog of 18 requests (down from 40 the previous year).

As well, during the 2010–2011 fiscal year, the CBC developed an Internet site where records released in answer to five categories of Access to Information (ATI) requests are posted for review by the public. This site is accessible here: <http://www.cbc.radio-canada.ca/docs/disclosure/information.shtml>

#### **A. CBC Guidelines for the Interpretation of Section 68.1 of the Access to Information Act**

The CBC Guidelines Committee has drafted “Guidelines for the Interpretation of Section 68.1 of the *Access to Information Act*,” accessible on the “Transparency and Accountability” section of the CBC website.<sup>8</sup>

According to the Guidelines:

In analyzing whether or not to disclose information, one must consider the overall context rather than fencing it in by approaching analysis on a case-by-case basis. When in doubt regarding application of the Act’s Section 68.1 exclusion, CBC/Radio-Canada will give preference to disclosure, based on the above-mentioned principle.<sup>9</sup>

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7 CBC, Report on the Administration of the *Access to Information Act* for the Fiscal Year 2010–2011, p. 3, <http://www.cbc.radio-canada.ca/ati/pdf/ATI-2010-2011.PDF>.

8 The Guidelines (undated) can be accessed here: [http://www.cbc.radio-canada.ca/docs/disclosure/pdf/Lignes-directrices-article-68.1\\_EN.pdf](http://www.cbc.radio-canada.ca/docs/disclosure/pdf/Lignes-directrices-article-68.1_EN.pdf).

9 Guidelines at p. 6.

As well, the CBC posted a “Legal opinion on the scope of the Guidelines for interpreting Section 68.1 of the *Access to Information Act*” prepared by Université de Montréal law professor Pierre Trudel next to the Guidelines on its website.<sup>10</sup>

During her appearance before the Committee on October 25, 2011, Information Commissioner Suzanne Legault expressed some concern about the Guidelines, and indicated that she would be discussing the Guidelines with CBC officials:

I'm also very concerned with the guidelines for the interpretation of section 68.1 recently published by the CBC. The guidelines state that an access to information request may be refused on its face by the person with the delegated authority if this person concludes that the requested information is excluded from the application of the act by virtue of section 68.1 on the sole basis of the wording of the actual access to information request. In my view, individuals with delegated authority to make decisions as to whether or not information falls within the exclusion found in section 68.1 must review the responsive records to make a valid decision under the act, including appropriate severances, as required under the act, to maximize disclosure.

It is therefore encouraging that the most recent statistics indicate that the CBC's performance is gradually improving. However, if the reason for improved response time to requests is that the CBC is not receiving and processing records in accordance with the act, as the recently published guidelines suggest, then the decrease in response time may not reflect an improvement in performance.

That said, my office has not yet had the opportunity to discuss the guidelines with CBC officials. I plan to do so shortly. Actually, it was while preparing my presentation for the committee that I learned about those guidelines, which are obviously a major source of concern for me. We will also follow up on the performance of the CBC in the next fiscal year, as part of our report cards process.<sup>11</sup>

## **CANADIAN BROADCASTING CORPORATION V. CANADA (INFORMATION COMMISSIONER)**

### **A. The September 24, 2010 Federal Court Decision<sup>12</sup>**

As noted above, the CBC has been subject to the *Access to Information Act* since September 2007, when the legislation was amended. Subsequently, between December 2007 and June 2009, the CBC received a number of access to information requests. Several of those requests were refused on the ground that they were considered to be excluded from the Act under section 68.1, which provides that:

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10 Pierre Trudel, “Legal opinion on the scope of the Guidelines for interpreting Section 68.1 of the *Access to Information Act*,” French original dated August 25, 2011, English translation completed September 14, 2011, [http://www.cbc.radio-canada.ca/docs/disclosure/pdf/0119\\_001.pdf](http://www.cbc.radio-canada.ca/docs/disclosure/pdf/0119_001.pdf).

11 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Session, 41st Parliament, October 25, 2011, 0850 (Ms. Suzanne Legault), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5194388&Language=E&Mode=1&Parl=41&Ses=1>.

12 *Canadian Broadcasting Corporation v. Canada (Information Commissioner)*, 2010 FC 954, <http://decisions.fct-cf.gc.ca/en/2010/2010fc954/2010fc954.html>.

68.1 This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that relates to its general administration.

The Information Commissioner received 16 complaints from individuals whose access requests were refused by the CBC. The Commissioner initiated an investigation to deal with the complaints. In the course of her investigation, the Commissioner asked the CBC to disclose a number of records to her.

The CBC refused the Commissioner's request on the grounds that the information contained in the records subject to the 16 access requests under investigation were excluded from the Act because, under section 68.1, the records relate to CBC's journalistic, creative or programming activities.

The Information Commissioner stated that, on the contrary, section 68.1 allows her to examine the records in order to determine whether she may exercise the authority provided by the Act in respect of information relating to the general administration of the CBC.

On September 15, 2009, the Commissioner ordered the CBC to disclose to her copies of the records in respect of which the 16 access requests were made. In turn, the CBC brought an application for judicial review before the Federal Court seeking a declaration that the Commissioner does not have authority to order disclosure of records excluded under section 68.1 of the Act.

On September 24, 2010, the Honourable Mr. Justice Boivin of the Federal Court issued his decision.

## **1. Exceptions, Exclusions, and the Commissioner's Powers**

Section 36 of the Act sets out the Commissioner's powers in carrying out investigations. Subsection 36(1) assigns certain powers to the Commissioner, including the power to examine records or to have records disclosed to her. Subsection 36(2) gives the Commissioner access to any record that is under the control of a government institution. Subsection 36(2) reads as follows:

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

As noted in paragraph 21 of the Federal Court decision, "Counsel for the CBC pointed out, however, that subsection 36(2) includes an important caveat, in that the Commissioner has access to any record 'to which this Act applies'. Because section 68.1 defines the records to which the Act does not apply, the CBC contends that the Commissioner does not have authority to compel the CBC to disclose records to her to which the Act does not apply."



Section 68.1 is indeed situated under the heading “Exclusions” in the Act. However, as noted by Justice Boivin at paragraph 27 of his decision, “Section 68.1, as worded, contains a double negative, that is, an exception to the exclusion.” He continues (at paras. 27 through 29) that the double negative found in 68.1 might shed light on the role of the Commissioner:

That exception to the exclusion, which refers to information that relates to the general administration of the CBC, may shed light with respect to the authority of the Commissioner. How can the Commissioner determine whether information relates to the general administration of the CBC, and thus falls under the exception set out in section 68.1, if she does not have authority to review all the records in question, including records relating to the journalistic, creative or programming activities of the CBC?

The Court notes the CBC’s argument that when Parliament created parallel schemes for exceptions (sections 13 to 26 of the Act) and exclusions (sections 68 to 69.1 of the Act), it surely did not intend that the two schemes be subject to the same rules.

However, the Court must observe that the wording of sections 68.1 and 68.2, which were both part of the amendment to the Act, contains an exception to the exclusion. Accordingly, the Court is of the opinion that while section 68.1 is included under the “exclusions” heading in the Act, the wording of that section cannot exempt it from independent review by the Commissioner. When we read section 68.1, we see that the Commissioner must have authority to determine, objectively and independently, whether the records fall under the exception and whether or not they may be properly excluded (see *Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 25 (CanLII), 2001 FCA 25, [2001] FCJ No 282, at para. 21). The consequence, otherwise, would be to exempt the CBC from the Act, and this would be contrary not only to the object of the Act (section 2) but also to its spirit, since the CBC has been subject to the Act since 2007.

## **2. The Federal Court Finding**

Given his interpretation of section 68.1 of the Act, Justice Boivin dismissed CBC’s application for judicial review, concluding the following at paragraph 37 of his decision:

In light of the foregoing, and having regard to the scheme of the Act and the provisions of the Act when read as a whole, the Court finds that the Commissioner has authority under section 68.1 to order the CBC to disclose records, including records that, in the opinion of the CBC, relate to its journalistic, creative or programming activities, in order to determine whether those records fall under the exception and consequently whether they are subject to the exclusion.

### **B. The November 23, 2011 Federal Court of Appeal Decision<sup>13</sup>**

The CBC appealed the Federal Court’s decision in which Justice Boivin dismissed the CBC’s application for judicial review. In a decision rendered November 23, 2011, the

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13 *Canadian Broadcasting Corporation v. Canada (Information Commissioner)*, 2011 FCA 326, <http://decisions.fca-caf.gc.ca/en/2011/2011fca326/2011fca326.html>.

Federal Court of Appeal dismissed the appeal, holding that the Federal Court judge correctly interpreted section 68.1 of the Act.

As at trial, the issue in the appeal was whether the Commissioner has the power to order the production of records containing information related to journalistic, creative or programming activities within the meaning of section 68.1 of the Act. The Commissioner posited that the answer to this question is yes, while CBC submitted that the CBC itself should determine whether information relates to its journalistic, creative or programming activities, and that it is not up to the Commissioner to review the records on which the CBC bases its decisions (see paragraph 40 of the appeal decision).

As part of her submissions, the Information Commissioner further posited that she has access to all excluded records (unless a certificate is issued under the *Canada Evidence Act*),<sup>14</sup> and that her power to compel the production of records is not limited to the records to which the Act applies (see paragraph 39 of the appeal decision). The Federal Court of Appeal rejected this more expansive interpretation of the Commissioner's powers (see paragraphs 49-54 of the appeal decision).

Rather, the Federal Court of Appeal noted that "if the Commissioner has the power to order the CBC to produce the records at issue in the case at bar, it is because section 68.1, by its wording so provides, as was found by the Federal Court Judge" (at paragraph 55 of the appeal decision).

Indeed, the Federal Court of Appeal found Justice Boivin's reasoning compelling:

[61] The Federal Court judge's reasoning is hard to challenge. The exclusion is subject to an exception. This exception is generic and is capable of reducing the scope of the exclusions. The existence of the exception invites the Commissioner to exercise her power of examination. Absent a contrary demonstration, a record that is under the control of a government institution and that can reveal information that is not excluded from the application of the Act is a record to which the Act applies.

Finally, at paragraph 69 of its decision, the Federal Court of Appeal recognized that section 68.1 is not "a model of clarity." Referring back to comments made by the former Information Commissioner before committees of the House of Commons and the Senate when section 68.1 was first being considered whereby the then-Commissioner expressed concern about the proposed provision, the Federal Court of Appeal observed:

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14 Section 69.1(1) of the *Access to Information Act* (R.S.C., 1985, c. A-1) provides that: "Where a certificate under section 38.13 of the *Canada Evidence Act* prohibiting the disclosure of information contained in a record is issued before a complaint is filed under this Act in respect of a request for access to that information, this Act does not apply to that information."

S. 38.13(1) of the *Canada Evidence Act* (R.S.C., 1985, c. C-5) provides: "The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament."

[69] It is easy to see why the Commissioner might have had this concern. As pointed out by the Federal Court judge, section 68.1 is not a model of clarity. A provision that appears under a part of the Act entitled “exclusions” and which provides for an exception capable of overlapping with the excluded information is a recipe for controversy. The Commissioner’s opinion undoubtedly demonstrates that section 68.1 is open to various readings, but, in such a case, it is the courts’ role to determine the reading that best reflects Parliament’s intention.

In a letter to the Committee dated November 25, 2011, Mr. Hubert L. Lacroix, President and CEO of the CBC, indicated that the CBC would not be seeking to appeal the Federal Court of Appeal’s decision, noting that “the decision addresses most of our concerns with respect to the protection of journalistic materials from outside review.” He further added:

We believe that the Court of Appeal has cleared up much of the confusion surrounding the interpretation of 68.1 with respect to the Commissioner’s powers of review and the safeguards which Parliament has established in law to ensure our independence as a public broadcaster. We will be sitting down with the Commissioner’s office shortly to implement the Court’s decision.

## **WITNESS RECOMMENDATIONS REGARDING AMENDING SECTION 68.1 OF THE *ACCESS TO INFORMATION ACT***

A number of witnesses who testified before the Committee proposed recommendations (in various levels of detail) with regard to whether and how to amend section 68.1 of the *Access to Information Act*. The recommendations proposed fall under four main categories: 1. Let the courts decide how the provision should be interpreted; 2. Clarify the awkward wording in 68.1 to stipulate whether aspects of the Act do not apply to the CBC, or to set out an exception for the CBC while allowing the Information Commissioner to review the CBC’s decisions; 3. Change the exclusion in 68.1 into an exemption, which would enable the Information Commissioner to review decisions to exempt; and, 4. Consider whether the Information Commissioner or the CRTC Commissioner should review the CBC’s decisions made pursuant to section 68.1 of the Act.

### **A. Let the Courts Decide How 68.1 Should be Interpreted**

In response to a question regarding how to improve section 68.1, Col. Michel Drapeau replied that the Committee should wait until the Federal Court of Appeal rules on the interpretation of 68.1:

I think we will need to wait for the Federal Court of Appeal, which has now reserved judgment on the hearing of October 18, to arrive precisely at a decision, if not on what journalism means then what the powers of the Information Commissioner are in response to a complaint. I’m looking forward to that.

I would suggest very strongly that we all wait until the Federal Court of Appeal, which has a considerable amount of experience in interpreting the access act, does so.<sup>15</sup>

In letting the court make its determination, witness Karen Wirsig of the Canadian Media Guild underscored the importance of maintaining an arm's-length relationship between Parliament, the Government, and the CBC:

On the first question, as we said, perhaps the wording of the legislation could be clearer. But I think the very important question that's probably being decided at court relates to the arm's-length relationship between CBC and Parliament, the government. That is something that makes the CBC different from virtually any other department, agency, or institution of the federal government. It's that arm's-length relationship, which is why I think the section 68.1 exclusion exists, right? It is the same thing that is written in the Broadcasting Act – it's the same language, even – to preserve the independence of the public broadcaster precisely so that it can't simply be a state broadcaster.

I guess the question is whether the Information Commissioner is seen as an arm of the state who would be checking up after CBC's private information. I think that is the question for the court. That, I think, is the arm's-length relationship we always have to keep in mind, and it's a specific question for CBC.<sup>16</sup>

Ms. Wirsig's colleague, Marc-Philippe Laurin, indicated, in response to a question regarding the Information Commissioner's abilities under section 68.1, that as the issue is before the courts, they should be able to decide:

Currently, the question in front of the courts is that the CBC is asking ... and they've made that decision. It's up to the CBC to explain why they want to go there. When it comes to sensitive information, because of the nature of the public broadcaster and the competitive market it finds itself in, the question is who should have access to it.

I understand your question. You're saying that the commissioner should have access to it. Right now, it's in front of the courts. I'll leave it there. I'll let the courts decide whether or not that's accurate.<sup>17</sup>

Finally, in accordance with the ultimate finding of the Federal Court of Appeal, Ian Morrison, of Friends of Canadian Broadcasting, posited that the Information Commissioner should be able to review decisions made by the CBC to exclude records under 68.1:

I'm not an expert. I believe that Parliament – it doesn't matter if I believe it or not – is sovereign, and if an act of Parliament is crafted, with whatever flaws are in it, it still has to be obeyed. Of course, there's a role for the courts in interpreting that, but our default is to trust the servant of Parliament, the Information Commissioner, that the CBC should be

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15 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Session, 41st Parliament, October 20, 2011, 0920 (Col. Michel Drapeau, Professor, Faculty of Law, University of Ottawa).

16 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Session, 41st Parliament, October 27, 2011, 0940 (Ms. Karen Wirsig, Canadian Media Guild).

17 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Session, 41st Parliament, October 27, 2011, 0950 (Mr. Marc-Philippe Laurin, Canadian Media Guild).

required to allow the Information Commissioner to look at material in confidence. Then the dispute should happen based on the decision of the Information Commissioner.<sup>18</sup>

## **B. Clarify the Wording in Section 68.1**

In his testimony, CRTC Chairman Konrad W. von Finckenstein noted that section 68.1 had been “poorly drafted” and that Parliament has the capacity to determine whether and how best to amend it:

Unfortunately, the section in dispute here has been drafted in such a way that you have a double exemption. The act does not apply, except it does apply, and that’s given rise to the dispute in the interpretation. It’s really a question of which approach you want to do. We have some areas where we clearly say that access to information does not apply, and then the commissioner can say ... and there are others where it’s the other way around, and there’s exemption, but you have to justify it.

It’s your choice to decide which way you want to go.<sup>19</sup>

He later reiterated:

The problem is in the awkward drafting. These are not my words. Judge Boivin himself said it’s very awkwardly drafted, and that’s why you have the problem you do. Either it doesn’t apply or it applies. That’s one system. The other is to create an exemption, and when it’s an exemption, the commissioner will have the power each time to see whether the exemption has been properly exercised or not.<sup>20</sup>

In response to a question as to whether the Information Commissioner should have authority to review materials excluded under 68.1, Mr. von Finckenstein replied:

If that’s your wish to do it that way, that’s fine. You, as the legislature, makes [sic] a value judgment. If you say, yes, that you feel more comfortable with that, then you do it. If you say that you are prepared to rely on the judgment of the broadcasters to decide what is journalistic, that it’s something that’s so sacred it shouldn’t be touched, then you say it doesn’t apply to anything that is beyond ...<sup>21</sup>

He then added:

... Should the exercise of this discretion be subject to review by the commissioner or not? It was a funny way of drafting things; I’ve rarely seen something that says it doesn’t apply except it does. It’s a strange way of drafting things.<sup>22</sup>

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18 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Session, 41st Parliament, October 27, 2011, 0945 (Mr. Ian Morrison, Friends of Canadian Broadcasting).

19 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Session, 41st Parliament, October 18, 2011, 0925 (Mr. Konrad W. von Finckenstein, Chairman, Canadian Radio-television and Telecommunications Commission).

20 *Ibid.* at 0930.

21 *Ibid.*

22 *Ibid.* at 0935

Mr. von Finckenstein affirmed the Information Commissioner's role to ensure accountability under the *Access to Information Act*.

No, that is always for the commissioner of access to information. This is really her bailiwick.<sup>23</sup>

In response to a question, Mr. von Finckenstein explained his understanding of section 68.1:

Regarding CBC, section 68.1 of the act states the following: "This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities ...." That's clear. In such cases, the act does not apply.

[...]

There would be no issue if the sentence ended there. However, there is another exception. It says: "... other than information that relates to its general administration." That means that the act does not apply to journalistic activities, but it does apply to information that relates to its administration.

The issue for the information commissioner is how to check that. Requested journalistic information is not related to administration. However, to make sure of that, she must check the information. The people at CBC say that the act does not apply and that it is up to them to make a decision, which must be accepted. They made the decision and asked that it be accepted, saying that we don't have that kind of jurisdiction. Since the matter involves journalistic information, the act does not apply.

As I was saying, that's a way to proceed I have never seen before. It is very complicated. It's easier to stipulate that the act does not apply to CBC, or to set out an exception for CBC, while allowing the information commissioner to check. That's really what the issue is. There are two possibilities. There is a case before the courts, and there is now an appeal of the decision.<sup>24</sup>

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23 Ibid.

24 Ibid.

### **C. Change the exclusion in 68.1 into an exemption**

When the Information Commissioner appeared before the Committee on October 25, 2011, she circulated a document titled, "International Benchmarking and Possible Change to the *Access to Information Act* in relation to records under the control of the Canadian Broadcasting Corporation".<sup>25</sup> A copy of this document is attached as an appendix.

In the document, the Office of the Information Commissioner proposes redrafting section 68.1 of the *Access to Information Act* to provide for a discretionary, injury-based exemption along the following lines:

The head of the Canadian Broadcasting Corporation may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to prejudice the journalistic, creative, or programming independence of the Corporation.

The document also provides a comparison to legislation in the United Kingdom, Australia and Ireland, all countries with public broadcasters that are subject to Freedom of Information (FOI) legislation to a limited extent, and where journalistic and programming aspects of their work are not subject to disclosure.

During her testimony, Information Commissioner Suzanne Legault elaborated on the material contained in the document that she had circulated:

In a nutshell, the situation in the jurisdictions reviewed is that public broadcasters are subject to the freedom of information legislation; programming and journalistic records are covered by way of exclusions to their respective legislation; the oversight bodies have the power to review the records to determine the application of the exclusion; and they can order disclosure. In the U.K., the ability of the information commissioner to actually review the records was pursuant to a court decision as well.

I've also included possible changes to our own act, because as Information Commissioner—and as previous information commissioners have also advocated—I believe that exceptions to the application of the act should be limited and specific, and such exceptions should be injury-based. The wording of exceptions should be clear and objective, which is consistent with the existing provisions of the act.

Injury-based exemptions require that the public institution establish a reasonable expectation of harm, and support that claim with specific evidence. A discretionary exemption ensures that the public interest in obtaining access to the requested information will be considered by the head of a public institution, even where the information otherwise qualifies for exemption.

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25 Office of the Information Commissioner of Canada, "[International Benchmarking and Possible Change to the Access to Information Act in relation to records under the control of the Canadian Broadcasting Corporation](#)", October 25, 2011.

Madam Chair, I believe these suggested changes would be consistent with the purposes underlying the *Access to Information Act* and would protect the CBC's journalistic and programming independence.<sup>26</sup>

In response to a question about whether there would continue to be court cases should 68.1 be amended, the Information Commissioner explained:

I think there will be court cases on these provisions. That has been the experience in the U.K. The language that I proposed in the handout I gave you is an injury-based, discretionary exemption. I've kept to the language of the *Broadcasting Act*, so that we mirror what exists. The difference between what we have in the current legislation under 68.1 versus the *Broadcasting Act* is that the *Broadcasting Act* deals with creative programming and journalistic independence, whereas our act deals with any activities related to these three concepts. That's a lot more broad in concept, it seems to me, than what the *Broadcasting Act* states and what these provisions should be capturing. We should be dealing with protecting the journalistic independence of the CBC.<sup>27</sup>

She then explained the rationale for amending 68.1 to provide an exemption rather than an exclusion:

The other countries I've mentioned all have exclusions. That's why I think, when the *Federal Accountability Act* came into effect, section 68.1 was drafted as an exclusion. I don't know. In French, I wasn't 'dans le secret des dieux', or in the know, as they say.

I wasn't behind the scenes with the government when this was drafted, but it seems as though it followed an international model. Although I like the international models most of the time, in this case, I don't see the necessity for an exclusionary provision. I think an injury-based exemption would be sufficient. It actually allows the institution to say, "Well, this information is covered by this exemption, and if it is disclosed it will lead to the following harm, i.e., it will lead to the disclosure of journalistic sources that must be protected." But it also allows for, in some instances, a public interest analysis, which says, "Well, yes, there is a harm, but is the public interest in disclosure greater than the harm?" That's the analysis you go through when you have an injury-based discretionary exemption. That's what I think would be appropriate in this case. But internationally I would be the outlier, certainly, in terms of the models that exist right now.<sup>28</sup>

Following the Information Commissioner's recommendation to turn the 68.1 exclusion into an injury-based exemption, Université de Montréal Professor Pierre Trudel (appearing as individual), posited that an injury-based exemption would insufficiently protect the CBC's interests as a public broadcaster:

Actually, from the moment it was decided that the CBC is part of the broadcasting system, it became important to ask whether we were willing to force all broadcasting companies to subject themselves to the *Access to Information Act*. If that isn't the case, we will have to go back to the exclusion.

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26 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Session, 41st Parliament, October 25, 2011, 0850-0855 (Ms. Suzanne Legault, Information Commissioner, Office of the Information Commissioner of Canada).

27 *Ibid.* at 0905.

28 *Ibid.* at 0910.



That's why we chose an exclusion. It protects the freedom of the press, journalistic freedom. Forcing a media organization, each time a request is made, to prove that there is harm that could cause a document to be disclosed very seriously affects its independence and flexibility to do investigative journalism, develop programs, be active in programming rights and the advertising market. That's why there's an exclusion.

That's why I think an exception, an injury-based exception, isn't an adequate way of ensuring that the public broadcaster is operating in a way that respects the constitutional freedom of expression, and that also properly protects both private broadcasters and the public broadcaster. I also have a lot of doubts about the constitutional validity of a proposal that would force the CBC to prove every single time a person requests a document that it will cause some harm. This would be the same as asking a newspaper or television station to consistently prove that its editorial freedom is being affected.

But we're talking here about an environment to produce a creative activity, programs and news. If a broadcasting agency like the CBC is required to take action to continuously defend itself against access to information requests, I'm not at all certain that it will still have the ability to ensure its own editorial freedom, which is recognized among broadcasters.<sup>29</sup>

#### **D. Designate the CRTC as the Appropriate Review Body for Decisions Made Under Section 68.1 of the Act**

During his appearance, Professor Pierre Trudel (who had prepared the legal opinion on the CBC's Guidelines for the interpretation of section 68.1, as noted above) suggested that the CRTC Commissioner, and not the Information Commissioner, should review decisions made by the CBC regarding the application of section 68.1:

The scope of the exclusion set out in section 68.1 must be interpreted in the overall context of legislation concerning broadcasting undertakings, which ensures that they enjoy independence in journalistic, creative and programming matters. But in the case of the CBC, management of the national broadcaster must be transparent to Canadian taxpayers since it is publicly funded. It was decided that an exclusion would be used, which is in keeping with international practice in such matters. Consequently, the *Access to Information Act* does not apply to information under the control of the CBC that relates to its journalistic, creative or programming activities.

...

When it comes to public policy options, it is important to keep in mind that section 3(2) of the *Broadcasting Act* stipulates the following:

... that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

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<sup>29</sup> House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Session, 41st Parliament, October 25, 2011, 1035 (Mr. Pierre Trudel, Professor, Public Law Research Centre, Université de Montréal, as an Individual).

To be specific, that authority is the CRTC. The importance of keeping regulations simple and easy to enforce is key, and that goes for all broadcasting undertakings. Making the CBC answer to a number of authorities complicates the accountability requirements that the public broadcaster must meet.

In that regard, it is not clear that the information commissioner is the best authority to oversee the CBC's decisions as to whether a record falls under the exclusion set out in the *Access to Information Act* or not.

The CRTC is the authority specializing in broadcasting matters and is most certainly in the best position to determine — in compliance with the editorial freedom requirements to which all broadcasters are subject — whether a requested record is related to journalistic, creative or programming activities.

The CRTC is indeed in a position to view the Canadian broadcasting system as a whole and the CBC as a part of that whole. For instance, the commission certainly has the necessary expertise to determine whether the disclosure of a record belonging to a broadcaster could jeopardize the broadcaster's journalistic, creative or programming activities, given the competitive nature of the environment.

In closing, Madam Chair, members of the committee, section 68.1 of the *Access to Information Act* theoretically excludes information relating to the CBC's journalistic, creative and programming activities from the access to information regime for public documents. The provision seeks to ensure that the CBC is in a position similar to that of other broadcasting undertakings while guaranteeing that it is accountable for the way it spends public funds. As a result, the only documents that can be accessed pursuant to the act relate to the general administration of the CBC and do not disclose information relating to the CBC's journalistic, programming or creative activities.<sup>30</sup>

He later provided an example of how the CRTC would be better than the Information Commissioner suited to determine an issue:

The main reason is that the CBC is an integral part of the system, meaning the Canadian broadcasting system, within which competition was wanted between the public broadcaster — the CBC — and the private entities. The CRTC was given the mandate under the *Broadcasting Act* to ensure that this system functions properly.

The example of the Olympic Games is an interesting one. It's important to know that the Canadian broadcasters, the CBC like the others, were competing for the broadcasting rights for these Olympic Games. When determining whether a broadcaster is required to disclose certain information, we need to ask whether it is appropriate to place a company that is part of the broadcasting system in a situation where it could see its competitive position jeopardized by its obligation to disclose information that the others, private companies for example, are not required to disclose. The CRTC would therefore be in a better position to determine whether, out of the public interest, it is appropriate for broadcasting companies, public or private, to disclose some of their information to the public. But the CRTC must make sure that they do not reveal information that must remain undisclosed,<sup>31</sup> so that competition within the Canadian broadcasting system functions properly.

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30 Ibid. at 1005.

31 Ibid. at 1020.

He added:

I think there is a real challenge when a judge or independent person is identified to determine the validity of the refusal of an organization like the CBC that relies on the exclusion in section 68.1.

Given how the Canadian broadcasting system is structured, with public and private entities, I'm not sure the Information Commissioner, whose mandate is to promote the best access to information and documents held by public organizations, has the overall perspective to properly examine the file and ensure that this type of disclosure does not jeopardize the conditions of competition that must prevail to ensure that the Canadian broadcasting system functions properly.<sup>32</sup>

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32 Ibid. at 1025.



## RECOMMENDATION OF THE COMMITTEE

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Given that a number of witnesses who testified before the Committee proposed amending section 68.1 of the *Access to Information Act*, for example:

- In his testimony, Mr. von Finckenstein (former Chair of the CRTC) noted that section 68.1 had been difficult to implement and that Parliament has the capacity to determine whether and how best to amend it.
- Mr. Ian Morrison, Friends of Canadian Broadcasting, posited that the Information Commissioner should be able to review decisions made by the CBC to exclude records under section 68.1.
- Ms. Suzanne Legault, Information Commissioner, Office of the Information Commissioner of Canada, proposed redrafting section 68.1 of the *Access to Information Act* to provide for a discretionary, injury-based exemption. In relation to her proposal, the Commissioner circulated a document comparing similar legislation in the United Kingdom, Australia and Ireland, all countries with public broadcasters that are subject to Freedom of Information (FOI) legislation to a limited extent, and where journalistic and programming aspects of their work are not subject to disclosure.
- In its decision rendered 23 November 2011, the Federal Court of Appeal recognized that section 68.1 is not “a model of clarity” in dismissing the appeal of the CBC regarding the application of section 68.1 of the Act and upholding the Federal Court’s interpretation of section 68.1 of the Act.

The Committee calls on the Government to amend section 68.1 of the *Access to Information Act* in accordance with the expert testimony heard during the study. In doing so, the Government should consider international models as presented by the Information Commissioner.



### **International Benchmarking and Possible Change to the *Access to Information Act* in relation to records under the control of the Canadian Broadcasting Corporation**

(2011-10-25)

Exceptions to the right of access should be limited and specific, they should be discretionary and injury-based. The wording of exemptions should be clear and objective in nature.

An injury-based exemption requires that a government institution must establish a reasonable expectation of harm and support that expectation with specific evidence.

A discretionary exemption ensures that the public interest in obtaining access to the requested information will be considered by the head of a government institution even where the information would otherwise qualify for exemption.

Thus, instead of an exclusion, the OIC proposes a discretionary, injury-based exemption along the following lines:

The head of the Canadian Broadcasting Corporation may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to prejudice the journalistic, creative or programming independence of the Corporation.

## Appendix A

### International Background

In the United Kingdom, Australia and Ireland, public broadcasters are subject to Freedom of Information (FOI) legislation to a limited extent, and journalistic and programming aspects of their work are not subject to disclosure. The exclusion of journalistic and programming aspects of the broadcasters' work is achieved in different ways in each jurisdiction.

*The following table provides a comparison of these three international jurisdictions.*

### Coverage of Broadcasting Corporations under Freedom of Information Legislation

Countries Relevant legislation	Canada Access to Information Act	Australia Freedom of Information Act 1982	Ireland Freedom of Information Acts 1997 and 2003	United Kingdom Freedom of Information Act 2000
Are broadcasting corporations covered by FOI legislation?	Yes  (Canadian Broadcasting Corporation)	Yes  (Australian Broadcasting Corporation)	Yes  (Radio Telefís Éireann, RTE Commercial Enterprises Limited, RTE Music Limited, Seirbhísí Theilifís Na Gaeilge Teoranta and DTT Network Company)	Yes  (British Broadcasting Corporation, Channel Four Television Corporation and Sianel Pedwar Cymru)
How is journalistic and programming information protected?	Exclusion  For: information that relates to journalistic, creative or programming activities	Exclusion  For: program material and datacasting content	Exclusion  For: information gathered for journalistic or programming content purposes.	Exclusion  For: journalism, art or literature



<b>Countries</b> <i>Relevant legislation</i>	<b>Canada</b> <i>Access to Information Act</i>	<b>Australia</b> <i>Freedom of Information Act 1982</i>	<b>Ireland</b> <i>Freedom of Information Acts 1997 and 2003</i>	<b>United Kingdom</b> <i>Freedom of Information Act 2000</i>
Is there an exception to the exclusion?	Yes: exception for information related to general administration		The Regulation specifies that the Act applies to the functions of management, administration, finance, commercial, communications and making of contracts of or for service.	
What powers does the Commissioner have to require disclosure of the information to a requester?	None: Recommendations making powers only	Full: Order making powers	Full: Order making powers	Full: Order making powers
Does the Commissioner have the power to compel production of responsive records related to the journalism etc. in the course of an investigation?	Issue is currently under reserve before the Federal Court of Appeal	Yes	Yes	Yes  (House of Lords decision, <i>Sugar v. BBC</i> )

[Appendix B provides the specific language of the statutory provisions in Canada, Australia, Ireland and the United Kingdom]

**Appendix B**  
**Relevant legislation**

**CANADA**

***Access to Information Act, R.S.C. 1985, c. A-1***

**Section 3 definitions**

3. In this Act,

“government institution” means

(a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and

(b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act;

**Section 36**

**36.** (1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power

(a) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;

(b) to administer oaths;

(c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;

(d) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;

(e) to converse in private with any person in any premises entered pursuant to paragraph (d) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and

(f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (d) containing any matter relevant to the investigation.

Access to records

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

### **Section 68.1**

68.1 This Act does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that relates to its general administration.

## **AUSTRALIA**

### ***Freedom of Information Act 1982, Act No. 3 of 1982 as amended***

#### **Section 7**

7(2) The persons, bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of this Act in relation to the documents referred to in that Schedule in relation to them.

#### **Schedule 2, Part II, Division I**

Australian Broadcasting Corporation in relation to its program material and its datacasting content.

#### **Section 55K**

Decision on IC review—decision of Information Commissioner

(1) After undertaking an IC review, the Information Commissioner must make a decision in writing:

(a) affirming the IC reviewable decision; or

(b) varying the IC reviewable decision; or

(c) setting aside the IC reviewable decision and making a decision in substitution for that decision.

#### **Section 55R**

Division 8—Information gathering powers

55R Information gathering powers—obliging production of information and documents

Scope

(1) This section applies if the Information Commissioner has reason to believe that a person has information, or a document, relevant to an IC review.

(2) This section applies subject to sections 55T (exempt documents generally) and 55U (particular exempt documents).

Notice to produce

(3) The Information Commissioner may, by written notice, require a person to, for the purposes of an IC review:

(a) give the Information Commissioner information of a kind specified by the notice; or

(b) produce to the Information Commissioner a document specified by the notice.

(4) The notice must:

(a) be in writing; and

(b) specify the place at which the person must comply with the notice; and

(c) state that the person must comply with the notice:

(i) within a specified period that is not less than 14 days after the day on which the person is given the notice; or

(ii) at a specified time that is not less than 14 days after the time at which the person is given the notice.

Offence for failure to comply

(5) A person commits an offence if:

(a) the person is subject to a requirement specified in a notice under subsection (3); and

(b) the person engages in conduct; and

(c) the person's conduct breaches the requirement.

## IRELAND

### ***Regulations Prescribing Public Bodies, Freedom of Information Act, 1997 (Prescribed Bodies)(No.2) Regulations, 2000***

S.I. 115/2000

1. These Regulations may be cited as the Freedom of Information Act, 1997 (Prescribed Bodies)(No.2) Regulations, 2000.

2. (1) Subject to paragraphs (2) and (3) of this Regulation, the bodies, organizations and groups specified in Schedule 1 to these regulations shall stand prescribed for the purposes of paragraph 1(5) of the First Schedule to the Freedom of Information Act, 1997 (No.13 of 1997)

(2) Subject to paragraph (3) of this Regulation, the Freedom of Information Act, 1997, shall apply to a body, organisation or group prescribed by paragraph (1) of this Regulation

only as respects the functions of the body, organisation or group which are specified in Schedule (2).

(3) For the purposes of these Regulations the functions specified in Schedule 2 to these regulations shall be deemed not to include any of the matters specified in Schedule 3 to these regulations.

#### SCHEDULE 1

1. Radio Telefis Éireann
2. RTE Commercial Enterprises Limited
3. RTE Music Limited
4. Seirbhísí Theilifís Na Gaeilge Teoranta
5. DTT Network Company

#### SCHEDULE 2

1. Management
2. Administration
3. Finance
4. Commercial
5. Communications
6. Making of contracts of or for service with any person, company or other body.

#### SCHEDULE 3

1. The gathering and recording, in any form of news, information, data, opinions, on or off the record quotes or views from any person or body or source, for journalistic or programme content purposes, whether or not a programme -

(a) is produced on the basis of such information, or

(b) is broadcast.

2. The identification of any potential or actual source of information or material for the purpose of programme origination, whether or not such programme is produced or broadcast and without prejudice to the generality of the foregoing, shall include the consideration of programme proposal submissions from internal and external sources.

3. The editing and storing of any material recorded by any means, whether written, aural, visual or otherwise, for the purpose of programme origination, whether or not such programme is produced or broadcast.

4. The process of making editorial decisions concerning programme or programme schedule content which, without prejudice to the generality of the foregoing, shall include preliminary programme proposal reviews, programme planning and final pre-transmission editorial decisions.

5. The process of post transmission internal review and analysis of any programme or schedule of programmes broadcast.

***Freedom of Information Acts 1997 and 2003 , No. 13/1997***

**Section 34**

(2) Subject to the provisions of this Act, the Commissioner may, on application to him or her in that behalf, in writing or in such other form as may be determined, by a relevant person—

(a) review a decision to which this section applies, and

(b) following the review, may, as he or she considers appropriate—

(i) affirm or vary the decision, or

(ii) annul the decision and, if appropriate, make such decision in relation to the matter concerned as he or she considers proper, in accordance with this Act.

**Section 37**

37.—(1) The Commissioner may, for the purposes of a review under section 34 or an investigation under section 36—

(a) require any person who, in the opinion of the Commissioner, is in possession of information, or has a record in his or her power or control, that, in the opinion of the Commissioner, is relevant to the purposes aforesaid to furnish to the Commissioner any such information or record that is in his or her possession or, as the case may be, power or control and, where appropriate, require the person to attend before him or her for that purpose, and

(b) examine and take copies in any form of, or of extracts from any record that, in the opinion of the Commissioner, is relevant to the review or investigation and for those purposes take possession of any such record, remove it from the premises and retain it in his or her possession for a reasonable period.

(2) The Commissioner may for the purposes of such a review or investigation as aforesaid enter any premises occupied by a public body and there—

(a) require any person found on the premises to furnish him or her with such information in the possession of the person as he or she may reasonably require for the purposes aforesaid and to make available to him or her any record in his or her power or control that, in the opinion of the Commissioner, is relevant to those purposes, and

(b) examine and take copies of, or of extracts from, any record made available to him or her as aforesaid or found on the premises.

(3) Subject to subsection (4), no enactment or rule of law prohibiting or restricting the disclosure or communication of information shall preclude a person from furnishing to the Commissioner any such information or record, as aforesaid.

(4) A person to whom a requirement is addressed under this section shall be entitled to the same immunities and privileges as a witness in a court.

(5) The Commissioner may, if he or she thinks fit, pay to any person who, for the purposes of a review under section 34, or an investigation under section 36, attends

before the Commissioner or furnishes information or a record or other thing to him or her—

(a) sums in respect of travelling and subsistence expenses properly incurred by the person, and

(b) allowances by way of compensation for loss of his or her time, of such amount as may be determined by the Minister.

(6) Subject to the provisions of this Act, the procedure for conducting a review under section 34 or an investigation under section 36 shall be such as the Commissioner considers appropriate in all the circumstances of the case and, without prejudice to the foregoing, shall be as informal as is consistent with the due performance of the functions of the Commissioner.

(7) A person who fails or refuses to comply with a requirement under this section or who hinders or obstructs the Commissioner in the performance of his or her functions under this section shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 6 months or both.

(8) This section does not apply to a record in respect of which a certificate under section 25 is in force.

## UNITED KINGDOM

### ***Freedom of Information Act 2000 (2000, c. 36)***

#### **Section 3**

3(1) In this Act “public authority” means—

(a) subject to section 4(4), any body which, any other person who, or the holder of any office which—

(i) is listed in Schedule 1, or (...)

#### **SCHEDULE 1**

Public authorities

Part VI

(...)

The British Broadcasting Corporation, in respect of information held for purposes other than those of journalism, art or literature.

#### **Section 50**

**50** Application for decision by Commissioner.

....

(3) Where the Commissioner has received an application under this section, he shall either —

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a “decision notice”) on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority—

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b) has failed to comply with any of the requirements of sections 11 and 17, the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

(5) A decision notice must contain particulars of the right of appeal conferred by section 57.

(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.

(7) This section has effect subject to section 53.

## **Section 51**

**51** Information notices.

(1) If the Commissioner—

(a) has received an application under section 50, or

(b) reasonably requires any information—

(i) for the purpose of determining whether a public authority has complied or is complying with any of the requirements of Part I, or

(ii) for the purpose of determining whether the practice of a public authority in relation to the exercise of its functions under this Act conforms with that proposed in the codes of practice under sections 45 and 46, he may serve the authority with a notice (in this Act referred to as “an information notice”) requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.



## APPENDIX B LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
<b>As an individual</b> Howard Bernstein	2011/10/06	7
<b>I Love CBC - Peterborough</b> Kady Denton	2011/10/06	
<b>Canadian Radio-television and Telecommunications Commission</b> Christianne Laizner, General Counsel Telecommunications	2011/10/18	8
Graham Sheppard, Senior Annual Returns Auditor	2011/10/18	
<b>Canadian Radio-television and Telecommunications Commission</b> Konrad W. von Finckenstein, Chairman	2011/10/18	
<b>Canadian Taxpayers Federation</b> Gregory Thomas, Federal and Ontario Director	2011/10/18	
<b>As an individual</b> Joshua Juneau	2011/10/20	9
<b>Quebecor Media Inc.</b> Pierre Karl Péladeau, President and Chief Executive Officer	2011/10/20	
J. Serge Sasseville, Vice-President Corporate and Institutional Affairs	2011/10/20	
<b>Sun Media Corporation</b> Luc Lavoie, Head of Development Sun News and Parliamentary Bureau	2011/10/20	
<b>University of Ottawa</b> Michel W. Drapeau, Professor Faculty of Law	2011/10/20	
<b>As an individual</b> Marc-François Bernier, Professor Research Chair in communication of the Canadian Francophonie, specializing in journalism ethics (CREJ), University of Ottawa	2011/10/25	10
Pierre Trudel, Professor Public Law Research Centre, Université de Montréal	2011/10/25	

## APPENDIX A LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
<b>Office of the Information Commissioner of Canada</b>	2011/10/25	10
Suzanne Legault, Information Commissioner		
Emily McCarthy, General Counsel and Acting Assistant Information Commissioner	2011/10/25	
<b>Canadian Media Guild</b>	2011/10/27	11
Marc-Philippe Laurin, President CBC Branch		
Karen Wirsig, Communications Coordinator	2011/10/27	
<b>Friends of Canadian Broadcasting</b>	2011/10/27	
Ian Morrison, Spokesperson		
<b>Canadian Broadcasting Corporation</b>	2011/11/24	13
Maryse Bertrand, Vice-President Real Estate, Legal Services and General Counsel		
Hubert T. Lacroix, President and Chief Executive Officer	2011/11/24	

## **APPENDIX C LIST OF BRIEFS**

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### **Organizations and individuals**

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**Bernier, Marc-François**

**Canadian Media Guild**

**Friends of Canadian Broadcasting**

**Trudel, Pierre**



## REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the Government table a comprehensive response to this report; however, notwithstanding the deadline of 120 days stipulated in Standing Order 109, the Committee request that the comprehensive response to this report be tabled within 60 days of the presentation of the report to the House.

A copy of the relevant Minutes of Proceedings ([Meetings Nos. 7, 8, 9, 10, 11, 13 and 25](#)) is tabled.

Respectfully submitted,

Jean Crowder, M.P.

Chair



## DISSENTING REPORT ON THE STANDING COMMITTEE ON ACCESS TO INFORMATION, PRIVACY AND ETHICS' STUDY OF COURT ACTIONS BETWEEN THE INFORMATION COMMISSIONER AND THE CANADIAN BROADCASTING CORPORATION (CBC)

The issue of the compliance of various ministries and Crown Corporations with the federal Access to Information Act is certainly within the purview of the Standing Committee on Access to Information, Privacy and Ethics (ETHI). However, in the case of the Conservative-led study into the Canadian Broadcasting Corporation's federal Court hearing on compliance under Section 68.1 of the Act, it is clear the work of our Committee was compromised.

The Conservative majority on the Committee was seen to interfere in issues before the Federal Court of Appeal, thereby breaching longstanding Parliamentary-legal conventions. Further, the Conservative majority on the Committee used the hearings to suggest changes to Article 68.1 of the Access to Information Act, the enabling clause in question in the court case.

It is disturbing that this proposed revision of Article 68.1 has not included due consideration of the language of the Broadcasting Act, which makes clear the "freedom of expression [and] the journalistic, creative [and] programming independence enjoyed by the Corporation in the pursuit of its objects and in the exercise of its powers."<sup>1</sup> Thus the majority report risks even further muddying the waters of this debate.

Further, we are deeply concerned by the dubious procedures launched by the Committee as part of this study, including the Government's passage of a motion to requisition the un-redacted documents at the heart of the court case with a view to their inspection by ETHI Members. This motion overstepped the proper function of a Committee of the House of Commons.

Our concern for this procedure has been reinforced by a legal opinion from Mr. R. R. Walsh, then-Parliamentary Law Clerk and Legal Counsel, and serves to underscore the political nature of the study which was undertaken in parallel to an independent court's treatment of the issue. While we recognize that Committees may compel production of whatever documents and witnesses a Committee deems necessary, it is out of respect for the independence of the judicial branch that Parliament observes the *sub judice* convention:

It is accepted practice that, in the interests of justice and fair play, certain restrictions should be placed on the freedom of Members of Parliament to make reference in the course of debate to matters awaiting judicial decisions, and that such matters should not be the subject of motions or questions in the House.<sup>2</sup>

Mr. Walsh, for his part, supported this point of view:

A House Committee should not, in my view, take on the role of a court - or even appear to take on the role of a court - by addressing whether particular actions taken by a party

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<sup>1</sup> The Broadcasting Act (S.C. 1991, c. 11), Art. 52.1.

<sup>2</sup> O'Brien and Bosc. House of Commons Procedures and Practices, pp. 99-100.

are permissible under the Act. To do so is to encroach upon - or to appear to encroach upon - the constitutional function of the courts.

Such an encroachment would offend the separation of powers between the judicial and legislative functions and possibly call into question the validity of ETHI's proceedings.

Mr. Walsh cited a further precedent in Mr. Justice Binnie's 2005 *Vaid* ruling:

It is a wise principle that the courts and Parliament strive to respect each other's role in the conduct of public affairs. Parliament, for its part, refrains from commenting on matters before the courts under the *sub judice* rule. The courts, for their part, are careful not to interfere with the workings of Parliament.<sup>3</sup>

as well as in *Canada (Minister of citizenship and Immigration) v. Tobias* (1997), where the Court commented that the *sub judice* convention is essential to respect the courts' role in administering the law.

Moreover, the matter of the separation of powers between the courts and Parliament was considered by the Chair of the Standing Committee on Justice and Human Rights on March 11, 2008, who ruled a similar motion out of order in light of the *sub judice* convention. A June 7, 2005 ruling by Speaker Milliken regarding a matter before the Ethics Commissioner substantiates this point of view. We are concerned that this Committee has attempted to directly interfere in a matter which was, at the time, before the Federal Court of Appeal and that the Committee risked overstepping the limits set by the Constitution and constitutional convention.

Mr. Walsh warned Parliamentarians of hazards that may lead a breach of the separation of powers. The Canadian Bar Association has also expressed its opinion, stating that "Members of Parliament must respect this important legal principle. The Committee would be well advised to await the outcome of the judicial proceedings before continuing its deliberations."

We agree with the Canadian Bar Association, as well as the conclusion of Mr. Walsh, that "respect for the Constitutional framework of our Parliamentary system of government is part of the rule of law which is the over-riding legal principle that makes a democratic system of Government such as ours workable and credible."

Mr. Walsh further noted in his opinion that had the Committee viewed the un-redacted documents (provided to them by the CBC in a sealed envelope), and should the CBC documents requisitioned by the committee ever be made public, "ETHI (or some members of ETHI) might be accused of causing this loss of confidentiality and of causing the legal process under the Act to be rendered pointless."

Had the Federal Court of Appeal delayed its judgment for several weeks, ETHI risked flouting the *sub judice* convention by viewing the documents so ordered by the Committee for review.

Throughout this study, the Opposition has been very concerned with the manner in which the Government sought to disregard Mr. Walsh's legal opinion regarding this

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<sup>3</sup> Canada (House of Commons) v. Vaid, [2005] 1 S.C.R. 667, 2005 SCC 30, paragraph 20.  
<http://scc.lexum.org/en/2005/2005scc30/2005scc30.pdf>



study. If anything, Parliament should consider giving greater strength to the *sub judice* convention in order to prevent such an occurrence from arising in the future.

Through Mr. Del Mastro's motion, the Government demanded that the Canadian Broadcasting Corporation submit un-redacted documents to the Committee that were at the time the subject of a dispute before the Federal Court of Appeal. Many legal opinions and precedents denounce this attempt to supplant the independence of the judicial branch.

Our political system is based on a separation of the legislative and judicial powers. The work of Committees of the House should not circumvent the judicial process in order to put a parallel process in place. Had the Federal Court of Appeal not rendered its decision when it had, this situation risked the creation of a dangerous precedent.

The CBC has made it clear that they are "satisfied" with the ruling and did not appeal the decision<sup>4</sup>. An important aspect of the Federal Court of Appeal's ruling was its support for the CBC's right not to disclose journalistic sources for review to the Information Commissioner:

No such conflict can arise between a refusal based on what is best described as the "journalist-source privilege" (*Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592) and the exception provided for in section 68.1. The identity of journalistic sources cannot clash with the exception relating to general administration, regardless of the scope attributed to this exception. In these circumstances, the only conclusion possible if one gives effect to the Federal Court judge's reasoning is that the exclusion for journalistic sources, like the exclusions provided in sections 69 and 69.1, is absolute. It follows that in the event that a request seeking the disclosure of journalistic sources was made, a record – or the part thereof – revealing this type of information would be exempt from the Commissioner's power of examination.<sup>5</sup>

At present, the CBC has provided the Information Commissioner with the documents in question, and their status as exempted documents pursuant to Article 68.1 is currently under review. The Committee should not attempt to interfere in the work of an independent Officer of Parliament. We trust that the Information Commissioner's decision will be the right one, and that it will have been made at arm's length from ETHI.

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<sup>4</sup> CBC 'satisfied' with Federal Court of Appeal ruling. *CBC News*. 25 Nov 2011. <http://www.cbc.ca/news/politics/story/2011/11/25/pol-cbc-ethics-decision.html>

<sup>5</sup> Canadian Broadcasting Corporation v. Canada (Information Commissioner), Docket A-391-10, paragraph 74. <http://decisions.fca-caf.gc.ca/en/2011/2011fca326/2011fca326.html>

