ENGLANDER V. TELUS: PROTECTION OF PRIVACY IN THE PRIVATE SECTOR GOES TO THE FEDERAL COURT OF APPEAL

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I. INTRODUCTION: PRIVACY GALORE

These days, is there a topic more significant and provocative than the protection of privacy in the private sector? The importance of this topic has been highlighted since the Canadian Parliament adopted the *Personal Information Protection and Electronic Documents Act*[1] which came into full force on 1 January 2004 and which is scheduled for review in 2006.[2] Although it seems that everywhere we turn, the word "privacy" and its companion *PIPEDA* are at centre stage, many say that this attention is unwarranted and a knee-jerk reaction to the information age where one can run but cannot hide. Like it or not, we are subject to the prying eyes of cameras in public places, the tracking and trailing of Internet activities, the selling of address lists and other such listings, and the synthesizing by marketers of frightful amounts of personal information that, when pulled together, reveals a lot about our personal life, our ancestry, our relationships, our interests and our spending habits.

These concerns of potential attacks against an individual's privacy have been developing for quite awhile now, particularly following the introduction of automation and instant global communications in government, commerce, transportation, entertainment and publishing. *PIPEDA* and its various provincial equivalents are a legislative attempt to regulate the fall-out from this e-information revolution. Faced with new legislation, it is not surprising that the Canadian business and legal communities are actively seeking answers and guidance concerning how the principles and concepts established by the federal and provincial legislatures should be applied, particularly in the private sector.

The *PIPEDA* jurisprudence is still in the embryonic stages, as there have been very few cases that have reached the Federal Court and even fewer that have reached the Federal Court of Appeal. As a result, there is very little guidance coming from the courts for businesses. In November 2004, the Federal Court of Appeal issued its decision in *Englander v. TELUS Communications Inc.*[3] which is bound to have a significant impact on the interpretation and application of the *PIPEDA*.

In this article, I will first review the factual and legal contexts which led to the case being heard before the Federal Court of Appeal of Canada. Second, I will review both the decisions

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1 S.C. 2000, c. 5 [*PIPEDA*].

2 *PIPEDA* came into effect in three stages: (1) 1 January 2001 "Federally-regulated private sector and out-of-province exchange of personal information"; (2) 1 January 2002 "Health Information"; and (3) 1 January 2004 "Commercial use of personal information within individual provinces," online: Office of the Privacy Commissioner of Canada <www.privcom.gc.ca/legislation/02_06_02a_e.asp>. Pursuant to s. 29 of the *PIPEDA*, Part I must be reviewed by the committee of the House of Commons.

3 (2004), [2005] 2 F.C. 572, 2004 FCA 387 [*Englander* FCA].

made by the Federal Court of Canada and the Federal Court of Appeal. Finally, I will discuss some issues arising from this case which may be of interest for the upcoming revision of the *PIPEDA* in 2006.

II. BACKGROUND

A. FACTS AND PRIVACY COMMISSIONER DECISION

Mathew Englander is a non-practicing lawyer residing in Vancouver, B.C. and a customer of TELUS Communications Inc. for local residential telephone service.[4] TELUS is a federal corporation that provides telecommunications services in British Columbia and Alberta.[5] As a result, TELUS' business is regulated by the Canadian Radio-Television and Telecommunications Commission (CRTC).[6]

Englander had subscribed to TELUS' Non-Published Number Service (NPNS) for his residential phone number since February 2000.[7] During the four preceding years, Englander's phone number was listed. When he changed to NPNS, he did not change his phone number, an option that was open to him. As a result, his listing information was still available in outdated directories.[8]

TELUS is required by the CRTC to publish in a directory the names, addresses and telephone numbers of those customers who have not subscribed to NPNS, and is also required to make this information available to alternate directory publishers.[9]

The *Regulations Specifying Publicly Available Information*[10] stipulate that "personal information consisting of the name, address and telephone number of a subscriber that appears in a telephone directory that is available to the public, where the subscriber can refuse to have the personal information appear in the directory,"[11] is publicly available information.

By letter dated 1 January 2001,[12] Englander filed a complaint against TELUS with the Privacy Commissioner of Canada, pursuant to s. 11(1) of the *PIPEDA*, so that an investigation could be conducted and a report prepared.[13] As the Court of Appeal noted,

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4 *Englander v. Telus Communications Inc.* (2003), [2004] 235 F.T.R. 1, 2003 FCT 705 at para. 2 [*Englander* FCTD cited to F.T.R.]; see also online: Mathew Englander <www.mathew-englander.ca>.

5 *Ibid.* at para. 3.

6 *Ibid.* at para. 4.

7 *Ibid.* at paras. 11-12. In accordance with the CRTC's Telecom Order 98-109, TELUS charges $2.00 for the NPNS in addition to a one-time $9.50 set-up fee.

8 *Ibid.* at para. 14.

9 *Ibid.* at para. 15; *Englander* FCA, *supra* note 3 at paras. 23-24.

10 S.O.R./2001-7.

11 *Ibid.*, s. 1(a).

12 The *PIPEDA* came into force in three stages (see *supra* note 2). Pursuant to ss. 30 and 72 of the *PIPEDA*, TELUS became subject to the *PIPEDA* as of 1 January 2001; pursuant to s. 30(1), TELUS, operating a "federal work," is still subject to the *PIPEDA* even though B.C. and Alberta have enacted similar legislation.

13 *Englander* FCTD, *supra* note 4 at para. 18.

Englander was never personally aggrieved by TELUS' actions.[14] Nonetheless, the Commissioner accepted the complaint and conducted an investigation.

On 14 August 2001, the Privacy Commissioner issued his report and concluded that TELUS' practices did not violate the *PIPEDA*.[15] The Privacy Commissioner wrote:

> Customers are verbally asked how they would like their personal information to appear in TELUS' White Pages directory. *It is implied that telephone numbers are published in publicly available telephone directories*, and if a customer chooses not to have a non-published telephone number they indirectly consent to having their telephone number published in publicly available directories. I am satisfied that TELUS obtains valid consent from its customers to publish their telephone number in publicly available White Pages at the time telephone service is initiated.[16]

B. THE FEDERAL COURT DECISION

Englander applied for a hearing by the Court. In his decision, the applications judge opened by noting that the application was made under s. 14 of the *PIPEDA* and, as such, the hearing was not an appeal of the Commissioner's report,[17] nor was it an application for judicial review in an administrative law sense.[18]

The applications judge then proceeded to exercise his discretion *de novo*.[19] While noting that the Commissioner is granted no statutory authority to impose his conclusions or recommendations, the Court also recognized that the Commissioner, as a statutorily created administrator with specialized expertise, is entitled to some deference with respect to decisions which are clearly within his jurisdiction.[20]

In his decision, the applications judge identified two issues:

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14 *Englander* FCA, *supra* note 3 at para. 90.

15 *Englander* FCTD, *supra* note 4 at para. 20.

16 As quoted in *ibid.* [emphasis in original].

17 *Ibid.* at para. 35. In accordance with s. 12, the Commissioner may conduct an investigation, and for that purpose, the *Act* grants him/her wide powers such as the ability to summon and enforce the appearance of persons. The Commissioner may also attempt to resolve complaints by means of dispute resolution mechanisms such as mediation and conciliation. Pursuant to s. 13, at the end of the investigation, the Commissioner prepares a report that contains his/her findings and recommendations. Section 13(2) provides for situations where a report is not required.

18 *Ibid.* Division 2 of the *PIPEDA* provides for a "Hearing by the Court." Accordingly, pursuant to s. 14(1), a complainant may, after receiving the Commissioner's report, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report, *and* that is referred to in cl. 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 or 4.8 of Sch. 1, in cl. 4.3, 4.5 or 4.9 of that Schedule as modified or clarified by Division 1, in ss. 5(3), 8(6), (7) or in s. 10. The application must be made within 45 days after the report is sent. Section 16 provides that the Court may, in addition to any other remedies it may give, order an organization to correct its practices in order to comply with ss. 5-10.

19 *Englander* FCTD, *ibid.* at para. 36.

20 *Ibid.* at para. 39. Having said that, it is unclear from the Court's conclusion what role, if any, the Commissioner's report played in the Court's analysis.

1. Does TELUS have valid consent under the *PIPEDA* to publish its customers' personal information in TELUS directories?[21]

On the first issue, the Court wrote:

> I believe that once a TELUS representative has asked a new subscriber how he or she would like his or her *listing information* to appear in the telephone directory, it is open to that subscriber to enquire on the options available to him or her. If the privacy of such information is fundamental or simply desired by a subscriber, it is his or her responsibility to educate him or herself, either by asking the representative or through the various tools which have been put at the public's disposal by TELUS.
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> Therefore, it is my conclusion that TELUS has valid consent under the *PIPEDA* to publish its customers' personal information in TELUS directories.[22]

2. Does the *PIPEDA* restrict TELUS from charging a fee for the provision of NPNS?[23]

On the second issue, the Court concluded:

> After a careful and thorough reading of the *PIPEDA*, I find that there is no express nor implied restriction on TELUS from charging a reasonable fee for the provision of NPNS.[24]

C. THE FEDERAL COURT OF APPEAL DECISION

Of the eight issues identified by the Court of Appeal, I have retained five which I think are important with regard to the proper application of the *PIPEDA*:

1. What rules should guide the interpretation of a self-regulatory code transformed into a statute?
2. What is the deference owed to the report on a complaint prepared by the Privacy Commissioner of Canada under s. 11 of the *PIPEDA*?
3. What is the requisite standing to apply to the Federal Court for a hearing under s. 14 of the *PIPEDA*?
4. What type of consent is required by the *Act* for the listing of first-time customers' personal information in telephone directories?
5. Can fees be charged to customers who ask that their telephone numbers remain confidential?

I will now focus on each of these five issues.

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21 *Ibid.* at para. 33.
22 *Ibid.* at paras. 52-53 [emphasis in original].
23 *Ibid.* at para. 33.
24 *Ibid.* at para. 67.

1. INTERPRETATION

In *obiter*, the Federal Court of Appeal warned that the principles and rules of interpretation developed in the context of the *Privacy Act*[25] may not apply to Part 1 and Schedule 1 of the *PIPEDA*.[26] The Court referred to the *PIPEDA*'s Part I purpose clause:

> [T]o establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.[27]

The Court commented that within the purpose clause of the *PIPEDA*, there are two competing interests: an individual's right to privacy and the commercial need for access to personal information.[28] Given the need for balance, there is therefore an express recognition that the right of privacy is not absolute.[29] This contrasts with the *Privacy Act*, whose main purpose is simply the protection of privacy.

From the four principles of the *PIPEDA* that were in play in the proceedings (4.2 (identifying purposes), 4.3 (consent), 4.4 (limiting collection) and 4.5 (limiting use, disclosure and retention)), the Court found that Schedule 1 is not as focused on the *prevention* of collection, use and disclosure of personal information (as these are almost taken for granted) as much as on the *purposes* for which the information is collected, used or disclosed in the first place.[30] According to the Court, once these purposes are identified and once informed consent is expressly or implicitly obtained, an individual's personal information can be collected, used or disclosed.[31]

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25 R.S.C. 1985, c. P-21.

26 *Englander* FCA, *supra* note 3 at para. 36. As the Court mentioned, the first part of the *PIPEDA* is complemented by Sch. 1, and by virtue of s. 5(1) of the *Act*, and subject to other sections of the *Act*, every organization is bound to comply with the obligations set out in Sch. 1. Division 1 of Part 1 provides for the protection of personal information. Division 2 (Remedies) of the *PIPEDA* provides for the filing of complaints. More specifically, pursuant to s. 11(1), an individual may file with the Commissioner a written complaint against an organization for contravening a provision of Division 1 – "Protection of Personal Information" (ss. 5-10) – or for not following a recommendation set out in Sch. 1. Schedule 1 is essentially only a "cut-and-paste" of the CSA Standard. When developing private sector privacy legislation, Parliament had decided to regulate the protection of privacy based on the success of the CSA Standard, a voluntary code. At the time, it was the opinion of the Canadian government (particularly the leading department, the Department of Industry) that the principles based on the CSA Standard would help ensure compatibility with other regimes that had also legislated to a higher standard than the Guidelines, such as the province of Quebec. See Task Force on Electronic Commerce, *The Protection of Personal Information: Building Canada's Information Economy and Society* (Ottawa: Industry Canada, 1998); Michel W. Drapeau & Marc-Aurèle Racicot, *Federal Access to Information and Protection of Privacy Legislation Annotated 2004*, vol. 2 (Toronto: Thomson-Carswell, 2004) at 13-150, 13-153.

27 *PIPEDA*, *supra* note 1, s. 3.

28 *Englander* FCA, *supra* note 3 at para. 38.

29 *Ibid.*

30 *Ibid.* at para. 42.

31 *Ibid.*

The Court noted that there is also a need to strike a balance between two competing interests because, even though Part 1 and Schedule 1 of the *Act* purport to protect the right of privacy, simultaneously they purport to facilitate the collection, use and disclosure of personal information by the private sector.[32] Therefore, flexibility, common sense and pragmatism must guide the Court, particularly when one takes into account that Schedule 1 is not *per se* the product of legislative drafting but is a *de facto* copy of a voluntary code developed by laypersons for the guidance of industry.[33]

2. DEGREE OF DEFERENCE OWED TO COMMISSIONER'S REPORT

The Federal Court of Appeal held that deference should not be extended to the Commissioner's report. The Court saw significant similarity between an application "for a remedy" under s. 77(1) of the *Official Languages Act*[34] and an application "for a hearing" under s. 14(1) of the *PIPEDA*. Consequently, the Court applied its findings in *Canadian Food Inspection Agency v. Forum des maires de la Péninsule acadienne*,[35] concluding that the hearing under s. 14(1) of the *PIPEDA* is a proceeding *de novo* akin to an action, and the report of the Commissioner, if put in evidence, may be challenged or contradicted like any other document adduced in evidence.[36] The Court added that showing deference to the Commissioner's Report would provide an advantage to the Commissioner when he/she is acting as a party (s. 15 of the *PIPEDA*), thus potentially compromising the fairness of the hearing.[37]

3. STANDING

Before the Court, Englander conceded that he had no personal interest in the consent issue, to the extent that he did not allege that his own privacy interests were infringed by TELUS' action. TELUS argued that the appellant lacked the common law interest to address the Court on the consent issue.

The Court of Appeal concluded that

> in situations where the Commissioner has prepared a report, and where his decision to do so has not been challenged, the individual who has filed the complaint becomes a complainant for the purposes of an application to the Court pursuant to section 14 of the Act as soon as the report is sent to that individual, whether or not his own personal information is at stake.[38]

The Court of Appeal, based on its analysis of ss. 11 and 14 of the *PIPEDA*, decided that Englander had standing to bring the question before the Court. For reasons that will be addressed below, the officials charged with the upcoming review of the *PIPEDA* may consider limiting the complaint mechanism under s. 11 and the review mechanism under s.

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32 *Ibid.* at para. 46.
33 *Ibid.*
34 R.S.C. 1985 (4th Supp.), c. 31.
35 [2004] 4 F.C. 276, 2004 FCA 263 [*Canadian Food Inspection Agency*].
36 *Englander* FCA, *supra* note 3 at paras. 47-48.
37 *Ibid.* at para. 48.
38 *Ibid.* at para. 51.

14 to "any interested individual." It is always perilous to decide a theoretical question that may have a great impact on the way business is conducted without a proper factual basis.[39] That is more the purview of Parliament than the courts.

4. CONSENT

The Court found that "in the circumstances ... proper consent was not, and could not have been given, by TELUS *first-time customers* with respect to the use by TELUS of the personal information in its Internet directory assistance service, in its directory file service and basic listing interchange file service and its CD-ROM service."[40]

The Court held that

> these services were not identified at the time of enrolment and there is no evidence that they were so connected with the primary purposes of telephone directories that a new customer would reasonably consider them as appropriate. There is no evidence that TELUS made any "effort," let alone a "reasonable" one, within the meaning of clause 4.3.2, to ensure that its first-time customers are advised of the secondary purposes at the time of collection.[41]

The Court found that the applications judge therefore committed a reviewable error by not making a specific finding with respect to these services.[42]

The Court concluded:

> First-time customers have the right to know before their personal information becomes "publicly available" within the meaning of section 7 of the Act, with all the consequences that might flow from such publicity, that they can exercise their right to privacy and choose not to be listed. This, it seems to me, is a fair compromise between one's right to privacy and the industry's needs.[43]

5. FEE FOR NPNS

On this particular issue, I note that although Englander protested against the fee charged by TELUS for NPNS, there is no evidence that he ever filed a complaint before the CRTC. It seems that Englander chose to challenge new legislation the day it was introduced, when his argument was clearly to alter the two-dollar fee set through tariffs approved by the CRTC. There are mechanisms within the CRTC to address this issue, but Englander chose to use the provisions of the *PIPEDA* instead.[44]

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39 In an interesting interview conducted by Terry McQuay (President of Nymity), Drew McArthur (Vice President Corporate Affairs and Privacy Officer, TELUS) describes the impact this decision will have on the telecommunications industry; online: Nymity Inc. <www.nymity.com/privaviews/2005/mcarthur.asp>.

40 *Englander* FCA, *supra* note 3 at para. 65 [emphasis added].

41 *Ibid.*

42 *Ibid.* The Federal Court noted that "[t]he only information that is provided through these services is information that is publicly available and specified as such by regulations to the *PIPEDA*" (*Englander* FCTD, *supra* note 4 at para. 16).

43 *Englander* FCA, *ibid.* at para. 67.

44 *Englander* FCTD, *supra* note 4 at para. 19.

The Court of Appeal noted that a rate that does not exceed two-dollars per month for residential subscribers was approved by the CRTC. The Court added that no one had argued that this was not a "just and reasonable rate" within the meaning of s. 27 of the *Telecommunications Act*.[45] The Court of Appeal added that it would have in any event declined to hear this argument because this issue is within the exclusive domain of the CRTC.[46]

6. DISPOSITION

The Court of Appeal allowed the appeal in part, setting aside the decision of the Federal Court and holding that the complaint filed by the applicant against TELUS was well founded in part. The Court of Appeal found that TELUS had infringed s. 5 of the *PIPEDA* by not informing its first-time customers at the time of their enrolment of the primary and secondary purposes for which their personal information was collected and in not informing them at that time of the availability of the NPNS.[47]

Finally, as the Court of Appeal was not dealing with a complainant who was personally aggrieved, the Court was only prepared to order a remedy which did not comprise the payment of money and which would be future-oriented. Accordingly, the Court ordered that TELUS comply with the obligations found in s. 5 of the *PIPEDA*.[48] The Court gave TELUS four weeks from the date of the order[49] to serve and file representations with respect to the manner and the timetable of its implementation of the remedy. The Court gave the appellant two weeks to reply.

On 9 February 2005, based on the parties' representations, the Court issued its judgment in which it noted that TELUS has undertaken to change its business practices in order to comply with its obligation under the *Act*.

III. ANALYSIS AND DISCUSSION

In the interest of promoting a healthy discussion surrounding the imminent revision of the *PIPEDA*, in the penultimate part of this case comment I will visit some questions which surface after a cursory review of the decision. These questions could be addressed in the upcoming review of the *PIPEDA*. In light of the Court of Appeal's decision, I will cover the following points: a) the *PIPEDA*'s purpose; b) role of the Privacy Commissioner; c) standing of a complainant; and d) remedy under the *Act*.

A. PURPOSE AND INTERPRETATION OF THE *PIPEDA*

Candidly, I believe that like other ground-breaking legislation, the pith and substance of the *PIPEDA* was meant to deal with real and pressing issues. Also, I simply fail to see how an individual's phone number, which has already been in the public domain for more than

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45 S.C. 1993, c. 38.
46 *Englander* FCA, *supra* note 3 at para. 85.
47 *Ibid.* at paras. 88-89.
48 *Ibid.* at para. 90.
49 17 November 2004.

four years, should merit judicial protection or attention and thus consume scarce judicial resources at no less than two levels. As the Federal Court of Appeal so aptly noted, there is an express recognition embedded in the language of the *Act*, particularly by the use of the words "reasonable purpose," "appropriate" and "in the circumstances," that the "right of privacy" in the private sector is not absolute.[50]

As stated in its purpose clause, the *PIPEDA* establishes rules to govern the collection, use and disclosure of personal information in a manner that recognizes the privacy rights of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances. It recognizes the importance of having a balance between the right to privacy and the needed flow of information in our society. As held by Blais J.,[51] I believe that it could have been said that since Englander was not a first-time customer and he had already consented to having his personal information, name and phone number made publicly available in one phone book directory, it was open to TELUS to collect and use that information for other directories (for example, Internet directory assistance service) without Englander's consent pursuant to ss. 7(1)(d) and 7(2)(c.1) of the *PIPEDA* and s. 1 of the *Regulations*.[52] This reasoning could also apply to a first-time customer, since when a person consents to having his/her personal information, name and phone number made public available in one directory, that information is publicly available, and under the law any organization may collect or use it without the knowledge or consent of the individual.

On this point, the review task force's recommendation might be that the purpose clause state that the *PIPEDA* is there to facilitate commerce and should be interpreted in a pragmatic manner, as exemplified by the approach taken by Blais J.[53]

B. ROLE OF THE COMMISSIONER AND ROLE OF THE COURT

The Court of Appeal's ruling concerning the weight that should be given to the Privacy Commissioner's Report is another issue on which the review task force may spend some time, primarily because in light of previous judgments under the *Access to Information Act*[54] and the *Privacy Act*,[55] it seems that the courts are not "fixed" on what the status of the Commissioners' reports should be. In the overview of case law regarding these two statutes (found in Schedule A), the courts have frequently asserted that the complainant must first have the benefit of the Commissioner's investigation before applying to the court for a hearing. It must be noted that a complainant cannot go to court pursuant to s. 14 of the *PIPEDA* unless there is a report made by the Privacy Commissioner. By including that particular requirement in the *Act*, Parliament wanted the complainant to benefit from the Commissioner's investigation and recommendations. Since a Commissioner's review of a complaint is a prerequisite to the Court's review, and given that the Commissioner possesses both broad expertise and experience in the investigation of alleged statutory breaches in this

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50 *Englander* FCA, *supra* note 3 at para. 38.
51 *Englander* FCTD, *supra* note 4 at paras. 50-54.
52 *Supra* note 10.
53 *Englander* FCTD, *supra* note 4 at para. 47.
54 R.S.C. 1985, c. A-1.
55 *Supra* note 25.

area, I am of the opinion that it would make sense for the court to give some deference or "special" attention to the report of the Commissioner. Although not binding, the report of the Commissioner is an expert conclusion about the evidence. I argue this not only for reasons of economy of judicial resources, but also as a way to reinforce the ombudsman role of the Commissioner in the front-line processing and investigation of complaints under the *Act*, which the Court has previously characterized as a "cornerstone" in the statutory schemes of the *Access to Information Act* and *Privacy Act*. These officers of Parliament and their respective staff are highly specialized and qualified to investigate and report on these particular matters and their authority should be recognized.

The applications judge, in the appreciation of the evidence before him, held that "the *PCC* is entitled to some deference with respect to decisions clearly within his jurisdiction";[56] however, the Court of Appeal was of the opinion that "[t]o show deference to the Commissioner's report would give a head start to the Commissioner when acting as a party and thus could compromise the fairness of the hearing."[57]

In *Canadian Food Inspection Agency*, dealing with a report of the Official Languages Commissioner, the Court of Appeal wrote:

> Moreover, the Commissioner's reports are admissible in evidence, but they are not binding on the judge and may be contradicted like any other evidence. The explanation is obvious. The Commissioner conducts her inquiry in secret and her conclusions may be based on facts that the parties concerned by the complaint will not necessarily have been able to verify. Furthermore, for reasons that I will soon give, the purpose of the court remedy is more limited than the purpose of the Commissioner's inquiry and it may be that the Commissioner takes into account some considerations that the judge may not consider.[58]

I agree with the Court that there is a significant similarity between an application "for a remedy" under s. 77(1) of the *Official Languages Act* and an application "for a hearing" under s. 14(1) of the *PIPEDA*.

I would opt for the approach adopted by Lemieux J. in *Eastmond v. Canadian Pacific Railway*, who decided to accord some deference to the Privacy Commissioner in the area of his expertise:

> A proceeding under s. 14 of PIPEDA is not a review of the Privacy Commissioner's report or his recommendation. It is a fresh application to this Court by a person who had made a complaint to the Privacy Commissioner under PIPEDA and who, in order to obtain a remedy under s. 16, bears the burden of demonstrating CP violated its PIPEDA obligations.
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[56] *Englander* FCTD, *supra* note 4 at para. 39.

[57] *Englander* FCA, *supra* note 3 at para. 48. Note that the Commissioner appeared briefly as a party before the applications judge at the beginning of the proceedings before being removed on his own motion.

[58] *Supra* note 35 at para. 21.

> I accord the Privacy Commissioner some deference in the area of his expertise which would include appropriate recognition to the factors he took into account in balancing the privacy interests of the applicant and CP's legitimate interest in protecting its employees and property.
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> However, I do not accord any deference on the Commissioner's findings of fact because I am satisfied the evidence before me is considerably different than that gathered by the Privacy Commissioner's investigation.[59]

In light of Lemieux J.'s decision, the upcoming revision of the *PIPEDA* is an opportunity to recognize clearly in the *Act* that the Commissioner's report should be given special consideration in regard of the factors he/she took into account in balancing the interests in question. By special consideration, I mean that the correctness standard should be applied to the Commissioner's conclusions. The Commissioner's recommendations are impregnated with facts which the Commissioner is in the best position to evaluate.[60] The conclusions should stand unless they are contradicted by the evidence before the court or are incorrect in law.

In its analysis of s. 14, the Court of Appeal commented in *obiter* that organizations, unlike individuals, are not granted a right to apply for a hearing under the *PIPEDA*.[61] I would say that this is consistent with the regime under the *Access to Information Act* and the *Privacy Act* where the review by the Federal Court is open only to the complainant and the Commissioner.[62] For example, a government institution which has made the decision to disclose or not to disclose a record cannot bring an application for judicial review under ss. 41 and 42 of the *Access to Information Act*. The Federal Court had already observed that in the context of these two statutes, the decision to disclose or not disclose the information is ultimately made by the government institution; the Commissioner's recommendations are not binding on the parties.[63] Since the Commissioner's recommendations are not binding, the right for complainants or the Commissioner to apply for a court review of the government institution's decision is a necessary safeguard of the purposes enshrined in those acts.

Likewise, under the *PIPEDA*, the Commissioner's recommendations are also not binding. It therefore stands to reason that the Commissioner and complainants require the right to apply for a court hearing on certain issues, just as is the case with both the *Access to Information Act* and *Privacy Act*. As well, since the Commissioner's recommendations are

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59 (2004), 254 F.T.R. 169, 2004 FC 852 at paras. 118-23.

60 *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 29 (cited in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 45).

61 *Englander* FCA, *supra* note 3 at para. 50. Additionally, it must be kept in mind that under the *Access to Information Act*, *supra* note 54, third parties have a limited right of review where their confidential commercial information is at stake. Under s. 44 of the *Access to Information Act*, a third party has but a limited right to file an application. Notices under ss. 28 and 29 must first be sent before a third party has the right to file a s. 44 application. The Court of Appeal in *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2005] 1 F.C. 281, 2004 FCA 171 decided otherwise (appeal heard and reserved by the Supreme Court of Canada, 7 November 2005).

62 *Access to Information Act*, *supra* note 54, ss. 41-42; *Privacy Act*, *supra* note 25, ss. 41-42.

63 See *e.g. Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245 (T.D.) at para. 12; *Gauthier v. Canada (Minister of Consumer & Corporate Affairs)* (1992), 58 F.T.R. 161 (T.D.).

not binding, there is no need to grant organizations the right to apply for a review of their own decisions or actions or of the Commissioner's non-binding recommendations.

C. STANDING: COMPLAINT FROM ANY INDIVIDUAL?

The *PIPEDA* is silent on the characteristics needed to be a qualified complainant. The French and English versions differ in wording. I argue that if it had been made clear in the *Act* that some sort of interest was required in order for a complaint to be filed, the issue of mootness would have arisen in the present case.

In *Borowski v. Canada (Attorney General)*,[64] the Supreme Court stated clearly that the doctrine of mootness is part of the general policy that a court should decline to decide cases involving hypothetical or abstract questions. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced, but also when the court is called upon to reach a decision. As a rule, the general policy is enforced in moot cases unless the court exercises its discretion to depart from it. Therefore, in exercising that discretion, the court normally considers whether there remains a live controversy, whether there is an adversarial relationship in court, the issue of judicial economy, and the possibility that in deciding the case the court might be viewed as intruding on the role of the legislative branch.[65]

Given the above, if the *PIPEDA* had been clear on the need to have some sort of interest in order to have standing to file a complaint, I cannot escape the conclusion that Englander's complaint would have been moot for the following reasons:

(i) the *PIPEDA* was not in force when TELUS obtained Englander's consent;
(ii) there was no damage, injury or prejudice caused to Englander, since the "personal information" was already in the public domain and thus had lost its "confidential" or "private" quality; and
(iii) Englander was not a first-time customer.

I shall elaborate on each of these reasons.

1. DATE OF THE COMPLAINT AND APPLICATION OF THE *PIPEDA*

As the Privacy Commissioner explained: "In its first stage [1 January 2001], the Act began applying to personal information (except personal health information) that is collected, used or disclosed in the course of commercial activities by federal works, undertakings and businesses."[66] The *PIPEDA* was adopted in 2000 and TELUS became subject to it on 1 January 2001 when Part 1 came into force.[67]

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64 [1989] 1 S.C.R. 342 [*Borowski*]; see also *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62 at paras. 16-22.

65 *Borowski*, *ibid.* at 353-65.

66 Office of the Privacy Commissioner of Canada, "A Guide for Businesses and Organizations," online: <www.privcom.gc.ca/information/guide_e.asp#002>.

67 *PIPEDA*, *supra* note 1, ss. 30, 72; S.I./2000-29.

In January 2001, a TELUS customer's personal information was protected because TELUS was an organization collecting and using information in the course of a commercial activity (s. 4(1)(a)) and in connection with the operation of a federal work (telecommunications) (s. 30(1)).[68]

The evidence revealed, however, that Englander contacted TELUS prior to 1 January 2001. At the time TELUS obtained Englander's consent, Part 1 of the *PIPEDA* was not in force. Therefore, TELUS could not have acted in contravention of the *PIPEDA* because there is no disposition in the *Act* making it retroactive. Absent such a statutory provision, we must fall back upon the well-recognized principle that a law or a legislative provision is not retroactive unless specifically mentioned.[69] At most, at the time that Englander's consent was given, TELUS had a moral duty to comply with the CSA Code (a voluntary code), a matter not enforceable by a Court order and fine.[70]

2. NO DAMAGE BECAUSE NO INTEREST

Englander had conceded that he was never personally aggrieved.[71] Also, there was no evidence filed before the Court to the effect that anybody was aggrieved by TELUS' procedures. Again a query arises: if there was no problem, why fix it?

The evidence raises an interesting question: who may file a complaint? Before the Court of Appeal, TELUS argued:

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68 Lyette Doré wrote that [translation] "the use of the expression 'commercial activity' is the result of a deliberate choice and has been pondered at length since it was important for the federal legislator to choose an expression which would not encroach upon the exclusive power conferred to the provinces, in accordance with s. 92(13) of the *Constitution Act of 1867*"(Lyette Doré, "La législation canadienne sur la protection des renseignements personnels dans le secteur privé" (2003) 188 Dév. récents dr. accès à l'info. 231 at 253). It is interesting to note that in December 2003, on the recommendation of Quebec's Minister of Justice, it was ordered that the Attorney-General of Quebec be given the mandate to challenge by reference to the Court of Appeal of Quebec the constitutional validity of Part 1 of the *PIPEDA*. In particular, it was ordered that the following question be submitted to the Court of Appeal for hearing and consideration: "Is Part 1 of PIPEDA *ultra vires* the legislative competence conferred on the Parliament of Canada by the *Constitution Act*, 1867?" (Décret du gouvernement du Québec, O.I.C. 1368-2003, G.O.Q. 2004.II.184 (question constitutionnelle: "La partie 1 de la Loi sur la protection des renseignements personnels et les documents électroniques, L.C. 2000, ch. 5, excède-t-elle la compétence législative que la Loi constitutionnelle de 1867 confère au Parlement du Canada?"); see also Karen A. Spector, "Concerning a Reference to the Court of Appeal of Quebec in Relation to the Personal Information Protection and Electronic Documents Act," online: Ontario Bar Association <www.oba.org/en/pri/may04/concerning.aspx>.

69 *Dikranian v. Quebec (Attorney General)* (2005), 260 D.L.R. (4th) 17, 2005 SCC 73 at paras. 32-36.

70 In a decision dated 24 September 2002, Quebec's Commission de l'accès à l'information found that the *PIPEDA* could not apply to a factual situation which took place before 1 January 2001 (*Boudreault v. Air Canada* (24 September 2002) File no. 000887 (Commission d'accès à l'information du Québec), online: Commission d'accès à l'information du Québec <www.cai.gouv.qc.ca/07_decisions_de_la_cai/01_pdf/2002/000887se.pdf>). In judicial review, the decision was quashed and on that particular point the Quebec Superior Court found that had it been present or absent, the *PIPEDA* would have had no application (*Air Canada c. Constant*, [2003] C.A.I. 710 (C.Q. Civ.).

71 *Englander* FCA, *supra* note 3 at para. 49.

> By reason of the words "tout intéressé" found in the French text of subsection 11(1), that an individual who has no personal interest may not file a complaint with the Commissioner and should be restricted to having a "whistle blowing" interest under section 27 of the Act.[72]

The Court of Appeal noted: "That may well be the case before the Commissioner and it may well be that the Commissioner could refuse to prepare a report where he finds that a complainant has no personal interest," but decided not to express any opinion on either matter.[73] Since the Court of Appeal did not express an opinion, this may be an opportunity for the review committee to clarify matters by proposing an amendment to the *PIPEDA* that would make it necessary for the complainant to have an express interest in the matter before filing a complaint. An individual would have to allege that he/she is directly affected by the organization's actions and that the information at issue relates to him/her.

In the English version, "any individual" may file a complaint, while in the French version, "tout intéressé" may file a complaint pursuant to s. 11 of the *PIPEDA*. These expressions are not defined in the *PIPEDA*, its Annex or *Regulations*.[74] Hence, the complainant, who could even be a company (legal person), need not be aggrieved by the action or lack of it to file a complaint with the Privacy Commissioner. In *Maheu v. IMS Health Canada*,[75] the Court subscribed to the view of the counsel for the applicant and counsel for the Privacy Commissioner regarding the interpretation of s. 11 of the *PIPEDA*. Counsel for the Privacy Commissioner stressed that under s. 11, an individual may file a complaint concerning an organization's information practices, regardless of whether that organization collects, uses or discloses personal information relating to that individual.[76] Counsel for the Privacy Commissioner also argued that there is nothing in ss. 11 and 14 requiring, as a pre-condition to a complaint or court review, a complainant's allegations relate to his or her own personal information; nor is there any reason to read such a limitation into the *Act*, emphasizing that if Parliament wished to restrict the right to file a complaint to those individuals that are directly affected by the allegations of breaches of the *Act*, it would have expressly set out such limitations, as it did under s. 18.1 of the *Federal Courts Act*.[77] That being said, it seems reasonable to require that applicants have a personal interest because it would limit people from bringing highly hypothetical questions or general public policy issues before the courts.

More precisely, Englander could have had no "interest" at stake because his personal information in question — his phone number — was already in the public domain. Englander's phone number was published in public phone directories for more than four years with his knowledge and implicit consent. The analysis of whether or not TELUS obtained proper consent must be done therefore within a full and proper contextual framework. Because of the way the *PIPEDA* is worded, the Court was allowed to theoretically decide and focus on the public interest of the litigant in standing for first-time

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72 *Ibid.* at para. 51.

73 *Ibid.*

74 Doré, *supra* note 68 at 266.

75 (2003), 226 F.T.R. 269, 2003 FCT 1 aff'd (2003), [2004] 246 F.T.R. 159, 2003 FCA 462.

76 *Ibid.* at para. 38.

77 *Ibid.* at para. 39. *Federal Courts Act*, R.S.C. 1985, c. F-7, prior to am. by *Courts Administration Service Act*, S.C. 2002, c. 8. Note that the relevant text of s. 18.1 remains the same in the current *Federal Courts Act*.

customers. The Court should have been in a position to first ask whether this particular customer consented in the past to having this information made public. Was the information in the public domain at a particular time prior to the consent being required? Clause 4.3 of Schedule 1 must guide the Court in this exercise. At 4.3.2, it is mentioned: "To make the consent meaningful, the purposes must be stated in such a manner that the individual can reasonably understand how the information will be used or disclosed." Clause 4.3.4 states that "[t]he form of the consent sought by the organization may vary, depending upon the circumstances and the type of information." In this case, the Court was dealing with a phone number which was publicly listed for four years. Clause 4.3.6 states that "[t]he way in which an organization seeks consent may vary, depending on the circumstances and the type of information collected." Clause 4.3.7 adds that "[i]ndividuals can give consent in many ways." I am of the opinion that the *PIPEDA* should be amended to make sure that the Court only considers the context in which the particular complaint is made in order not to impose too rigid a framework for organizations to function with individuals who have previously consented to having their personal information made public. This being said, I understand that according to 4.3.8 of Schedule 1 an individual may withdraw consent at any time. However, this is subject to legal or contractual restrictions. What has been made public, by definition, remains public for eternity.

When Englander first subscribed to TELUS services, he consented to having his phone number made public. When he decided to request an unlisted service, he could also have requested a different phone number. Englander's phone number was in the public domain for four years prior to the complaint.[78] Like a secret that is divulged, protected information is no longer exclusive or restricted to those having a requirement to know once it is made public; it is impossible to put the genie of privacy back in the bottle once it has been let out. Once privacy or confidentiality over one's personal or private information has been lost, it is never possible to restore it to its original pristine condition. To assume so would imply the purging of both public and private records and memories. For instance, many of TELUS' phone directories covering the period of 1996 to 1999 probably remain in existence in private residences, businesses or public libraries, and still contain Englander's phone number. With or without the advent or dictates of the *PIPEDA*, that phone number is assuredly in the public domain and no amount of judicial intervention can eradicate its traces.

All this is to say that the *PIPEDA* should be interpreted and applied in a pragmatic manner. I would add that I am of the opinion that the *PIPEDA* does not codify the "right to be left alone," nor was it adopted to replace common sense. Some issues brought to the attention of the Commissioner seem to come more from a certain discontent than a real and present danger to one's own right to privacy. Keeping in mind that our monetary resources are not infinite, one could ask if the Commissioner should not focus only on the issues that truly represent a real and present threat to one's privacy.

3. NOT FIRST-TIME CUSTOMER

There was evidence before the Court that Englander first contacted TELUS in 1996 to activate his phone service. At that time, Englander did not request to have his phone number

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[78] *Englander* FCTD, *supra* note 4 at para. 14.

unlisted. As a result, Englander's phone number was published in TELUS' phone directory from that point onwards. It was only later in 1999 that he requested to have his phone number unlisted. He did not ask to have a new phone number.[79] Hence, Englander was not a first-time customer.

D. INTERESTING REMEDY

I applaud the way the Federal Court of Appeal handled the solution of the case. Instead of imposing the remedy, it gave the parties a chance to make representations and to come up with their own well-thought-out solution.

In my opinion, this way of proceeding maintains the spirit of the *PIPEDA*. Parties should be aware of the problem and be involved in the solution. It is only if the organizations themselves understand the sensitive issue of protection of personal information and find ways to integrate this protection within their everyday dealings that long-term solutions will take hold.

IV. CONCLUSION

In a period when the federal courts never seem to have sufficient time to deal promptly with a growing caseload, *Englander v. TELUS* managed to be heard by both the Federal Court and the Court of Appeal within a reasonable period of time. Why was this case deemed to be so important? Was the protection against the use of a publicly available phone number for more than one directory created by an organization the reason why the *PIPEDA* was adopted?

I am of the opinion that the *PIPEDA* should be amended to prevent its use in cases where the interest of the complainant is non-existent or remote. If the *PIPEDA* requires that the complaint be filed by an "interested individual," such an appeal should have been dismissed for mootness. Parliament should recognize that the courts must be careful to not intervene in matters where the actual factual context is not problematic in light of the law. From a legal perspective, such proceedings should be left to the parties and the Privacy Commissioner; after all, most of these issues will arise between private parties as part of a contractual relationship. Parties should be encouraged, with the assistance of the Privacy Commissioner, to mediate and solve their imbroglio, particularly when there are no damages to the complainant. It must be highlighted that the Court of Appeal, in the present case and in the spirit of the *Act*, did well in allowing the parties to participate in the creation of the remedy. Courts generally should not deal with hypothetical factual contexts. Only where there is a serious and live issue, wherein the privacy of an individual is jeopardized or is at risk of being jeopardized if the situation is not remedied, should the Court become involved.

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[79] *Ibid.*

We should reflect on the impact of the Commissioner's recommendations as they pertain to our future and life within society.[80] The *PIPEDA* has the power to shape the society of tomorrow; therefore we need to carefully examine and understand the impact of giving "privacy" too wide a definition. The concept of privacy inherently implies that its counterpart includes social aspects. Privacy is about where to draw the boundaries in all aspects of life in society. After all, we do not want our society to become a collection of cocooned hermits unable and unwilling to exchange and interact in a civilized and trusting manner.

SCHEDULE A

Dussault v. Canada (Customs and Revenue Agency) (2003), 238 F.T.R. 280, 2003 FC 973 (T.D.) at para. 23.	[23] Finally, I have had regard to the report and recommendations of the Commissioner, as contemplated by Mr. Justice Evans, as he then was, in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245; 168 F.T.R. 49; 99 D.T.C. 5337 (T.D.), at paragraph 14 and by Mr. Justice Evans writing for the Court of Appeal in *3430901 Canada Inc.*, supra, at paragraph 42.
Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] 4 F.C. 245 (T.D.) at para. 14.	[14] However, while the Court is required to review the Minister's decisions on a standard of correctness it is certainly appropriate to have regard to the report and recommendations of the Information Commissioner. The Commissioner is independent of the Executive and reports directly to Parliament, and has acquired an expertise in the administration of the Act as a result of the experience gained in the investigation of complaints of refusals to disclose.

[80] For example, refer to the *PIPEDA* case summaries online: Office of the Privacy Comissioner of Canada <www.privcom.gc.ca/cf-dc/2005/index2-5_e.asp>:
(1) *PIPEDA* Case Summary #2 "Unsolicited e-mail from an Internet service provider" and *PIPEDA* Case Summary #297 "Unsolicited e-mail for marketing purposes": What is the "right to privacy"? To prevent someone from contacting a particular person, to prevent someone from using an address within the public domain to contact a particular person?
(2) *PIPEDA* Case Summary #308 "Opting-out of marketing inserts in account statements": What will happen if companies cannot send marketing material to its customers? Will this result in service fees going up? What kind of commercial environment are we heading for if everything will be initiated only by the customer?
(3) *PIPEDA* Case Summary #154 "Couple dismayed at receiving unsealed envelope from bank": What is the difference between an individual opening an unsealed envelope addressed to somebody else or someone opening a sealed envelope address to somebody else? Should this kind of "unintentional" error be brought to the attention of a public body at the public's expenses? Mail is also often misdirected (due to moving, human errors, *etc.*). Should this also be an issue of privacy?
(4) *PIPEDA* Case Summary #156 "Husband's name appears on wife's credit line statement": Again, should this kind of "unintentional" error be brought to the attention of a public body at the public's expense? It would be best for all parties to deal with this issue between themselves first before resorting to a privacy complaint.
(5) *PIPEDA* Case Summary #254 "Daughter racks up long-distance charges; mom blames phone company": Should all perceived issues of privacy which occur under one's roof be brought before a public body? Is it realistic to assume that the expectation towards one's privacy within a family unit should be lower?

Commissaire à l'information du Canada v. Canada (Ministre de la Défence Nationale). (1999), 240 N.R. 244 (F.C.A.) at para. 27.	The investigation the Commissioner must conduct is the cornerstone of the access to information system. It represents an informal method of resolving disputes.... The importance of this investigation is reinforced by the fact that it constitutes a condition precedent to the exercise of the power of review.
Canada (Attorney General) v. Information Commissioner (Can.), (2004), 255 F.T.R. 56, 2004 FC 431 (T.D.) at paras. 78-81 [*Canada* cited to F.T.R.].	[78] The regime or scheme prescribed by the *Act* with respect to access requests has been reviewed in some detail, commencing at para. 22 of these reasons. Features of particular relevance to the arguments of prematurity, lack of necessity and impropriety are the requirement that decisions on disclosure should be reviewed independently of government, the provision of a two-tiered independent review process wherein the Commissioner provides the first level of independent review, the statutory obligation on the part of the Commissioner to investigate all complaints made to him, and the obligation of the Commissioner to report to a complainant after the completion of the Commissioner's investigation. The investigation the Commissioner is required to conduct has been described as the "cornerstone" of the access to information scheme. See: *Information Commissaire à l'information du Canada v. Canada (Ministre de la Défense nationale)* (1999), 240 N.R. 244 (F.C.A.) at para. 27.
	[79] Parliament's view of the importance of the Commissioner's investigation and report is demonstrated in s. 41 of the *Act* which provides that a person who has been refused access and who wishes to challenge such refusal in court must first have complained to the Commissioner and, as a general rule, must wait for the Commissioner to report to the complainant as to the results of the Commissioner's investigation.
	[80] The importance of the Commissioner's investigation is further illustrated in *Davidson v. Canada (Solicitor General)*, [1989] 2 F.C. 341; 98 N.R. 126 (F.C.A.), where the Federal Court of Appeal held (under the parallel provisions of the *Privacy Act*) that a government institution can not invoke new discretionary exemptions after the Commissioner's investigation is complete because to do so would deprive the complainant of the benefit of the Commissioner's investigation. The Court of Appeal noted that while this Court has adequate powers of review, it lacks the investigative staff and the flexibility of the Commissioner.

	[81] The relevance of the statutory scheme and the importance of the Commissioner's investigation to the issue of prematurity is that while the court has the jurisdiction to grant the relief requested, to do so would circumvent Parliament's general intent that the court is to exercise its independent review after the Commissioner has completed his investigation and after the head of the affected government institution and the complainant have had the benefit of the Commissioner's investigation.
Davidson v. Canada (Solicitor General), [1989] 2 F.C. 341 (C.A.) at 348.	[I]f new grounds of exemption were allowed to be introduced before the judge after the completion of the Commissioner's investigation into wholly other grounds, ... the complainant would be denied entirely the benefit of the Commissioner's procedures. He would thus be cut down from two levels of protection to one.