Supreme Court of Canada
Commission des droits de la personne v. Attorney General of Canada, [1982] 1 S.C.R. 215
Date: 1982-02-09

Commission des droits de la personne *Appellant;*

and

Attorney General of Canada and Claude Vermette *Respondents;*

and

Bertrand Roy, Robert Senay and Hélène Mailhot *Mis en cause;*

and

The Attorney General of Quebec *Intervener.*

File No.: 15207.

1981: October 28; 1982: February 9.

Present: Laskin C.J. and Martland, Dickson, Beetz, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Administrative law — Investigation by the Commission des droits de la personne — Crown privilege not to disclose documents — Objection by affidavit — Objection dismissed by Commission — Whether Commission a court within the meaning of s. 41 (2) of the Federal Court Act —Whether affidavit meets requirements of s. 41(2) — Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 41 —Charter of human rights and freedoms, 1975 (Que.), c. 6, ss. 6, 7, 9, 10, 11, 12.

Constitutional law—Crown privilege not to disclose documents—Privilege pleaded in the interest of national security—Whether s. 41 (2) of Federal Court Act void because of the Canadian Bill of Rights—Whether ultra vires Parliament or constitutionally inapplicable to a provincial tribunal—British North America Act, 1867, s. 92(14)—Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 41—Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1(b).

The Commission, which investigated the dismissal of two employees following an unfavourable report by the R.C.M.P., challenged a decision of the Court of Appeal for Quebec authorizing a writ of evocation to issue against its decision ordering respondent Vermette, a member of the R.C.M.P., to appear and produce any document relating to the matter, despite the filing by the Solicitor General of Canada of an affidavit stating that

[Page 216]

disclosure of the information contained in the R.C.M.P. files could be injurious to the national security.

Held: The appeal should be dismissed.

The Commission is a court within the meaning of s. 41(2) of the *Federal Court Act.* The word "court" in this section is applicable not only to the provincial courts, but to any official invested with the powers of a court for the production of documents. The affidavit itself meets the requirements set forth by s. 41(2).

Section 41(2) is concerned with a valid federal objective, namely the Crown privilege not to disclose documents the production or communication of which would be injurious to the areas listed in the subsection, including national security. The risk that the Executive will apply it with malice or arbitrarily does not justify an adverse ruling on constitutionality, because it is important not to confuse the statute adopted by Parliament with the action of the Executive performed in accordance with that statute. In the case at bar the applicability of s. 41(2) to a decision of the federal Executive to refuse production of documents cannot be questioned. Not even s. 1(*b*) of the *Canadian Bill of Rights* is a bar, because s. 41(2) contains no unlawful distinction that is incompatible with the principles stated in that paragraph.

Attorney General of Quebec and Keable v. Attorney General of Canada et al. [1979] 1 S.C.R. 218; *Conway v. Rimmer,* [1968] A.C. 910; *Duncan v. Cammell Laird & Co.,* [1942] A.C. 624; Gagnon *v. Commission des Valeurs Mobilières du Québec et al.,* [1965] S.C.R. 73; *Prata v. Minister of Manpower and Immigration,* [1976] 1 S.C.R. 376; *R. v. Burnshine,* [1975] 1 S.C.R. 693; *Her Majesty in right of the Province of Alberta v. Canadian Transport Commission,* [1978] 1 S.C.R. 61; *Curr v. The Queen,* [1972] S.C.R. 889, referred to.

APPEAL from a judgment of the Court of Appeal of Quebec, [1978] C.A. 67, affirming a judgment of *the* Superior Court, [1977] C.S. 47, allowing an application for a writ of evocation. Appeal dismissed.

Gérald Tremblay and Madeleine Caron, for the appellant.

Gaspard Côté, Q.C., for the respondents.

Jean K. Samson and Odette Laverdière, for the intervener.

[Page 217]

English version of the judgment of the Court delivered by

CHOUINARD J.—This appeal raises the question of Crown privilege pleaded in the interest of national security, by means of an affidavit from the Solicitor General of Canada in which the latter objects to the production of certain files and the disclosure of their contents by respondent Claude Vermette, a member of the R.C.M.P.

By its decision of March 22, 1978, [1978] C.A. 67, the Court of Appeal for Quebec affirmed a judgment of the Superior Court dated March 22, 1977, [1977] C.S. 47, which allowed respondents' application and authorized a writ of evocation to be issued against appellant, the Commission des droits de la personne, and the three mis en cause in their capacity as employees of the Commission.

The facts are summarized as follows by Mayrand J.A., who gave the majority opinion of the Court of Appeal [at pp. 68-69]:

> [TRANSLATION] TWO girls, Sylvie Roche and Cathy Curtin, were hired for the Olympic Games held in Montreal in 1976. The first was a switchboard operator for the Comité organisateur des Jeux olympiques (COJO), and the second was a waitress for the Services alimentaires Berkely, a COJO concessionaire. The two girls alleged that they had been dismissed from their jobs on discriminatory grounds contrary to the rights conferred on them by the *Charter of human rights and freedoms* (S.Q. 1975, c. 6, ss. 10-19).
>
> At the request of the *Ligue des droits de l'homme* [human rights league], the Commission undertook an investigation of the matter and appointed the three mis en cause, who were members of its staff, to conduct the investigation. The latter revealed that Sylvie Roche and Cathy Curtin had been dismissed following an unfavourable report by the R.C.M.P. It should be noted that the Comité principal de sécurité publique [principal committee of public safety] of the Olympic Games had requested the R.C.M.P. to provide it with all available information on persons requesting employment with or already employed by COJO.
>
> Proceeding with their investigation, the mis en cause called respondent Claude Vermette as a witness on November 22, 1976. They wished him to provide the reasons or the information which led the R.C.M.P. to

[Page 218]

> make an unfavourable report on Sylvie Roche and Cathy Curtin. Counsel for the federal Department of Justice objected to the witness Vermette being required to provide such information and to produce the files requested. The Solicitor General of Canada then entered in the record a sworn statement (Exhibit R-1, "affidavit") dated December 2, 1976, in which he stated that disclosure of the information contained in the R.C.M.P.'s files could adversely affect national security, and he was therefore opposed to the files on Sylvie Roche and Cathy Curtin being produced before the Commission, and their contents being disclosed by a member of the R.C.M.P.
>
> The mis en cause rendered their decision on February 9, 1977 (Exhibit R-2): they held that the exhibits filed and the arguments put forward as the basis of the objection to testimony by members of the R.C.M.P. were dismissed. This decision

was based on the conclusion that s. 41(2) of the *Federal Court Act* (R.S.C. 1970, 2nd Supp., c. 10) was not applicable in the circumstances for the following two reasons: the Commission is not a tribunal but an administrative agency and this section, if its effect is to prevent the Commission from obtaining from the R.C.M.P. the information requested, conflicts with s. 2(*e*) of the *Canadian Bill of Rights* (R.S.C. 1970, Appendix III). The mis en cause then summoned Inspector Vermette of the R.C.M.P. to appear before them on February 21, 1977, ordering him by *subpoena duces tecum* to bring all files and information relating to Sylvie Roche (Exhibit R-3).

It is this decision of February 9, 1977 and the *subpoena duces tecum* which respondents challenged by way of evocation.

The questions presented to this Court, as stated by appellant in its submission, are the following:

[TRANSLATION]

1. Does subs. 2 of s. 41 of the Federal Court Act, R.S.C. 1970, 2nd Supp., c. 10, apply to appellant? Is the latter covered by the words “UN TRIBUNAL” used in the French version of the subsection and the words “ANY COURT” in its English version?

2. If the answer to the first question is in the affirmative, then a second question arises: does the affidavit filed by the Minister (J.R. p. 18) pursuant to subs. 2 of s. 41 of the Federal Court Act comply with the requirements of the law in such a matter?

3. If the answer to the first two questions is in the affirmative, then the questions arise which the

[Page 219]

Supreme Court of Canada authorized the appellant to raise, in accordance with an order pursuant to Rule 17 of this Court:

“A. Is Par. 2 of Section 41 of the Federal Court Act ultra vires the Parliament of Canada or constitutionally inapplicable to a Provincial Tribunal, in whole or in part?

B. Is Par. 2 of Section 41 of the Federal Court Act inoperable by reason of the Canadian Bill of Rights (R.S.C. 1970, appendix III), in whole or in part?”

Before examining these questions in order, it should be pointed out that the decisions of the Court of Appeal and the Superior Court were rendered before the decision of this Court, on October 31, 1978, in *Attorney General of Quebec and Keable v. Attorney General of Canada et al.,* [1979] 1 S.C.R. 218.

It should also be noted that the questions presented to this Court differ in several respects from those which the Court of Appeal and the Superior Court were asked to answer. In the Superior Court and the Court of Appeal, appellant argued that it did not constitute a court within the meaning of art. 846 *C.C.P.,* and that accordingly it was not subject to the superintending and reforming power of the Superior Court. This argument, which was rejected by both the Court of Appeal and the Superior Court, was not repeated in this Court. Additionally, appellant in this Court put forward for the first time the arguments challenging the constitutionality of s. 41(2) of the *Federal Court Act,* which will be discussed below. Finally, in the Court of Appeal, appellant asked that s. 41(2) be held void, as being incompatible with s. 2(*e*) of the *Canadian Bill of Rights;* in this Court appellant relied on s. 1(*b*) of the *Bill of Rights.*

THE COMMISSION DES DROITS DE LA PERSONNE IS A COURT WITHIN THE MEANING OF SUBS. 2 OF S. 41 OF THE FEDERAL COURT ACT

Section 41 of the *Federal Court Act* reads:

> **41.** (1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be with-
>
> *[Page 220]*
>
> held from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.
>
> (2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.

The meaning of the word "court" in this section was disposed of in *Keable,* cited above.

It suffices to cite the following passage from the reasons of Pigeon J., at p. 247, giving the unanimous opinion of the Court on this matter:

> Although this enactment is in the *Federal Court Act,* the wording makes it clearly applicable to “any court”. This makes it applicable not only to the provincial courts which are, in the main, courts of general jurisdiction, federal and provincial, but also to any official invested with the powers of a court for the production of documents. I would in this respect make the same reasoning as for the availability of evocation: whenever the Commissioner claims to exercise such powers he is subject to the provisions applicable to a court in respect of those powers.

Like the Keable Commission, what is relied on here by the Commission des droits de la personne is the powers of a court to compel documents to be produced.

Under s. 80 of the *Charter of human rights and freedoms*:

> **80.** The members and the personnel of the commission, and the person designated in conformity with section 75, have, for the purposes of an investigation, the powers and immunity of commissioners appointed under the Public Inquiry Commission Act (Revised Statutes, 1964, chapter 11).

Under s. 6 of the latter Act, commissioners are authorized to proceed “as they may think best fitted to discover the truth”.

[Page 221]

Section 7 gives them “all the powers of a judge of the Superior Court in term”.

Section 9 empowers them to summon witnesses and compel the latter to answer questions on oath and to file documents.

Sections 10, 11 and 12 specify the penalties which a witness may incur if he fails to appear or refuses to answer or to file documents.

It follows that, like the Keable Commission, appellant in exercising powers regarding the production of documents constitutes a court within the meaning of s. 41 of the *Federal Court Act.*

AFFIDAVIT BY THE SOLICITOR GENERAL

Appellant submitted that the affidavit of the Solicitor General does not meet the requirements of subs. 2 of s. 41.

Deschênes C.J. of the Superior Court observed in this regard [at p. 66]:

> [TRANSLATION] However, it is also necessary for the objection of the Minister to disclosure of the information requested to be couched in terms corresponding to the requirements of the Act. In the case at bar, the point was not seriously disputed by the Commission and, on reading the affidavit of the Honourable Francis Fox (R-1), the Court is persuaded that this meets the requirements set forth in s. 41(2).

I am in agreement with the manner in which the Court of Appeal, by the reasons of Mayrand J.A., disposes of this argument [at p. 74]:

> [TRANSLATION] In its oral argument, appellant raised one final point: that the sworn statement of the Solicitor General of Canada is insufficient and not in accordance with s. 41(2).

Paragraph 8 of that statement reads as follows:

> For all these reasons, *I am of the opinion* that the information contained in the files of the Security Branch of the R.C.M.P., which may be requested by the Commission des droits de la personne, in the case of Cathy Curtin and Sylvie Roche, belongs to a class of information *the disclosure of which would be injurious to national security.* (Emphasis added.)

I would agree that this statement could have been written in a more direct and positive manner. The fact

[Page 222]

remains that the statement of the Minister as to possible harm, whether or not preceded by the words “I certify that”, still expresses his personal opinion. As regards the use of the conditional, this is explained by the fact that the disclosure had not yet occurred and might not occur.

I also take into account the fact that other paragraphs of the same statement are more clearly positive and express the Minister’s certainty: “I know and do in fact believe that…”. Finally, the objection of respondent was not dismissed by the mis en cause on the

ground that the statement was insufficient, and an excessive formalism should not be allowed to impede or retard the solution of the real issue.

THE CONSTITUTIONALITY OF SUBS. 2 OF S. 41 OF THE FEDERAL COURT ACT

As noted above, this argument in its present form was raised in this Court for the first time. It is the subject of the first question determined by the order made pursuant to Rule 17 of the Court.

This point was therefore not considered by either the Court of Appeal or the Superior Court.

In the Superior Court, appellant had asked that s. 41(2) be declared *ultra vires* the Parliament, but on the ground that it violated the separation of the executive and judicial powers. The Chief Justice said the following [at pp. 57-58]:

> [TRANSLATION] Finally, the Commission made one last argument: s. 41(2) is so contrary to the principles of justice generally recognized in this country that the Court should declare it *ultra vires* the Parliament, or at the very least, void.
>
> The second part of this proposition must be rejected forthwith: s. 41(2) exists and the Commission could show no legal basis on which the Court could declare it void.
>
> Is it however *ultra vires*?
>
> It is certainly not unconstitutional in the sense that, by adopting it, Parliament trenched on an area of exclusive provincial jurisdiction: the cases which it covers fall within federal jurisdiction.
>
> However, the commission maintained that s. 41(2) approves a principle which is repugnant to our system of government and which violates the separation of the executive and judicial powers. It is this aspect of the matter which must be considered.
>
> In a sense, the question is not new: it concerns the “Crown privilege” which we have inherited from Eng-

[Page 223]

> lish public law, and which has, then and now, been the subject of sometimes heated debate. Two opposing arguments have been made.

> When the higher interest of public administration and the higher interest of the administration of justice are opposed, one must give way before the other: who—the executive or the judiciary—shall decide?

Then, after reviewing the evolution of this privilege in England, Australia, New Zealand, the United States, Canada (before 1970), Quebec and Canada (after 1970), the Chief Justice concluded as follows [at p. 66]:

> [TRANSLATION] As between the two options open to it, between the two arguments each of which has at times held sway, Parliament decided to select, in matters of national security among others, the theory that the Crown enjoys an absolute immunity from the courts. It reposed its complete confidence in the Ministers of the Crown and it divested the courts of all discretion. As Mahoney J. put it (*Landreville v. R.,* (1977) 70 D.L.R. (3d) 122, 124 and 125), Parliament preferred an interested executive to an impartial judiciary.
>
> Respondent Commission is free to regret this development and complain of it; but it does not follow that Parliament exceeded its jurisdiction or that its legislation is invalid, and the Commission cannot expect to obtain a legislative amendment from the Superior Court.
>
> The Court therefore cannot allow the Commission's objection or declare s. 41 (2) ultra vires the Parliament.

In this Court, appellant argued instead that s. 41(2) is without the jurisdiction of Parliament because it trenches on an area exclusively reserved to the provinces, the administration of justice.

> This argument is incorrect.

As counsel for the respondents observed, the fundamental purpose of s. 41 is not the administration of justice. He stated:

> [TRANSLATION] The aim of Parliament in enacting s. 41 cannot be in doubt. The purpose of subs. (1) is to prevent judicial disclosure of certain documents on the ground of public interest, while leaving the court in question complete discretion to decide whether in the circumstances the ministerial objection should be upheld or rejected, having regard to the equal public interest in

[Page 224]

> the proper administration of justice. The purpose of subs. (2) of this section is to prevent, this time absolutely, judicial disclosure of any document the disclosure of which could be injurious to any of the matters mentioned. In either case, the

documents in question must be documents originating with or in the possession of the Government of Canada.

I conclude my discussion of this point by adopting the *dictum* of the trial judge, cited above:

> [TRANSLATION] However, is it [s. 41(2)] *ultra vires*?
>
> It is certainly not unconstitutional, in the sense that by adopting it Parliament trenched on an area of exclusive provincial jurisdiction: the cases which it covers are within federal jurisdiction.

The Attorney General of Quebec, intervening on this question only, submitted a completely different proposition. Section 41(2), he said, [TRANSLATION] "is ultra vires to the extent that it seeks to forbid review by the competent courts of the constitutional legality of a decision by the federal executive to refuse to produce documents".

He referred to common law privilege and, citing *inter alia* Lord Reid, to the two conflicting aspects of the public interest, that of public administration and that of the administration of justice.

Lord Reid described this conflict in *Conway v. Rimmer,* [1968] A.C. 910, which held that the privilege is of a relative nature, contrary to the earlier case of *Duncan v. Cammell Laird & Co.,* [1942] A.C. 624, which held it to be absolute. Lord Reid wrote, at p. 940:

> It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the document in question would put the interest of the state in jeopardy. But there are many other cases where the

[Page 225]

> possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved. I do not believe that Lord

> Simon really meant that the smallest probability of injury to the public service must always outweigh the gravest frustration of the administration of justice.

Crown privilege is part of our public law: the intervener acknowledged this and stated in his submission:

> [TRANSLATION] This rule of the common law was introduced into Canada as part of Crown prerogative and as such is now a part of our public law. The rule therefore applies both to the Crown in right of Canada and to the Crown in right of a province, both of which may rely on it.

He then cited Laskin C.J., speaking for the majority, in *Her Majesty in right of the Province of Alberta v. Canadian Transport Commission,* [1978] 1 S.C.R. 61, at p. 76.

> Second, the common law rule as part of what I may call Crown law is an historic principle that was part of the law of this country from its beginning; and it remained part of our law under the federal structure brought into force in 1867, both for the advantage of the Crown in right of Canada and of the Crown in right of a Province.

In 1970 the federal Parliament sought to codify this common law privilege. It did so by making the privilege a relative one under subs. (1) of s. 41, but an absolute one under subs. (2) in the five cases *mentioned* therein, including national security.

In the Court of Appeal, Mayrand J.A. stated it as follows [at pp. 73-74]:

> [TRANSLATION] TWO theories were in conflict: first, that according to which the executive power has an absolute right to object to any evidence which it regards as injurious to national security, and second, that which regards the executive as having only a relative privilege to object to such evidence, leaving the task of deciding whether such objection is justified up to the courts.
>
> I do not feel it is useful to analyse the differing opinions expressed on this matter, both by the courts and by commentators, since s. 41 of the *Federal Court Act* clearly settles the matter. The first paragraph states the general rule: if the Minister objects to evidence on the grounds of public interest, without more, his privi-

[Page 226]

> lege is only relative; the Court then takes over the problem, and it "may examine the document and order its production …". The second paragraph gives the Minister an absolute privilege in the five cases stated, including that of national security. The Court ceases to have any discretionary authority to allow or refuse production: "discovery and production shall be refused without any examination of

the document" by it. The Court must, so to speak, homologate the Minister's statement, once it is shown to be in accordance with s. 41(2)[25].

> The wording of s. 41 is thus sufficiently clear to preclude the judicial and academic controversies mentioned by appellant in its submission. It is true that by relying solely on the decision of the Minister, the legislator takes the risk of an abuse of power that lies beyond judicial review. However, it is not for the Court to discuss the reasonable or excessive nature of this legislation; its function is to apply it, because the rule of parliamentary supremacy is peremptory and the manner in which Parliament has exercised its authority does not appear to me to be contrary to the principles stated in the *British North America Act, 1867.*

(25) Wilfrid Nadeau Inc. v. R., (1977) 1 F.C. 541, 550 and Landreville v. The Queen, (1977) 70 D.L.R. (3d) 122, 124, Mahoney J. of the Federal Court.

The intervener does not dispute Parliament's power to legislate on this privilege. Indeed, the provincial legislatures may do likewise. This has been the case in Quebec, which by art. 308 *C.C.P.,* in effect since 1966, made it relative in nature. In Quebec until then, for the last hundred years, as Deschênes C.J. noted, [TRANSLATION] "the theory of absolute immunity had been sanctioned by law and precedent", at least until this Court in 1965 raised a doubt as to the absolute nature of the privilege under art. 332 *C.C.P.,* then in effect, without however overturning it. (See *Gagnon v. Commission des Valeurs Mobilières du Québec et al.,* [1965] S.C.R. 73.)

However, the intervener contends, [TRANSLATION] "Although in Canada Crown law exists both for the advantage of the Crown in right of Canada and of the Crown in right of a province, the common law rules developed in a unitary system cannot be applied as such in the Canadian federal system, where executive powers are dis-

[Page 227]

tributed in accordance with the division of legislative authority made in the B.N.A. Act".

He later adds:

> [TRANSLATION] When it legislates concerning the relative privilege not to disclose documents, therefore, the federal Parliament is constitutionally limited to the objective of safeguarding the "federal public interest", which in that case is the sum of the areas within its legislative authority. Similarly, the provinces may legislate with regard to this privilege within the limits of the "provincial public interest", that is all areas within provincial authority. Either level can only prohibit the production of a document if that prohibition is directly related to its own public

> interest. Otherwise, the constitutional division of executive authority would be frustrated: the provincial executive might administer the federal public interest or vice versa.

The intervener concluded:

> [TRANSLATION] By means of the privative clause, the federal Parliament thus confers on the federal government a power to decide itself, with finality, whether the production of documents is or is not within the federal public interest. In deciding this question, the federal government at the same time decides as to the constitutional legality of its action. It may thus exceed the limits of federal jurisdiction without any court being able to condemn such an action.
>
> This is why the Attorney General of Quebec argues that in the case at bar the privative clause of s. 41(2) cannot deprive the courts of their power to monitor the constitutional legality of the decision of the federal executive to refuse production of documents. The privative clause of s. 41(2) is therefore invalid to the extent that it seeks to prohibit any review of constitutional legality by the competent courts.

If I understand correctly (but I shall return to this point below) what the intervener is referring to is what, in the passage cited above, Mayrand J.A. referred to as [TRANSLATION] "the risk of an abuse of power that lies beyond judicial review".

However, this risk does not result from the federal nature of the Canadian constitution. It is a risk inherent in absolute privilege, and will occur just as readily in a unitary state. It will also occur with respect to provincial legislation, as was the case in Quebec under art. 332 *C.C.P.* until it was replaced by art. 308 in 1966.

[Page 228]

Once Parliament and the provincial legislatures are admitted to have the power to legislate on this matter in their respective fields (and the power cannot be denied), the risk exists. However, the risk that the Executive will apply legislation that has been validly adopted by Parliament with malice or even arbitrarily does not have the effect of divesting Parliament of its power to legislate. It is important not to confuse the statute adopted by Parliament with the action of the Executive performed in accordance with that statute.

Once it is admitted that Parliament and the provincial legislatures have the power to legislate, it necessarily follows that they can make the privilege absolute. In my view, saying that Parliament and the legislatures cannot make the privilege absolute amounts to a

denial of parliamentary supremacy, and to denying Parliament and the legislatures their sovereign power to legislate in their respective fields of jurisdiction.

The existence of this risk “of an abuse of power” does not in my opinion justify an adverse ruling on the constitutionality of s. 41 (2).

However, the intervener really goes further in arguing for the unconstitutionality of the section [TRANSLATION] “to the extent that it seeks to prohibit review by the competent courts of the constitutionality of the decision of the federal executive to refuse production of documents”.

It is the constitutional legality of the decision or action of the Executive that is at issue, rather than the constitutionality of the legislative enactment itself. The risk is then not the general risk of abuse of power described above but, so to speak, the characterized risk where the abuse of power consists in exceeding the federal field of jurisdiction and trenching on a provincial field of jurisdiction, or consists perhaps in concealing such a trenching from the courts, without the latter being able to intervene.

In my opinion, this raises the applicability of the legislative enactment in a given case, not the constitutionality of the provision itself.

It is perhaps conceivable that a case could arise of an abuse which I have called characterized, in

[Page 229]

which the courts would be justified in considering whether s. 41(2) is inapplicable. It is not necessary to decide the point, for the case at bar is clearly not such a case. It is apparent from rereading the affidavit that it relies on the federal public interest. Nothing contained in the record and no allegation even suggests that it might be otherwise.

I conclude that s. 41(2) is constitutional. I also conclude that to the extent that the proposition put forward by the intervener also covers the applicability of the section to a [TRANSLATION] “decision of the federal executive to refuse production of documents”, this is not a case, if any exist, where its applicability can be questioned.

SECTION 41(2) OF THE FEDERAL COURT ACT AND THE CANADIAN BILL OF RIGHTS

As I mentioned, appellant argued in the Court of Appeal that s. 41(2) was void because it is in conflict with s. 2(*e*) of the *Canadian Bill of Rights,* in that it deprives the employees in question of the right to an impartial hearing of their case, in accordance with the principles of fundamental justice, for the definition of their rights and obligations. This argument was rejected by the Court of Appeal.

In this Court, appellant is now relying on s. 1(*b*) of the *Canadian Bill of Rights:*

> **1.** It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> . . .
>
> (*b*) the right of the individual to equality before the law and the protection of the law;

As counsel for the respondents pointed out, s. 41(2) is of universal application. It does not apply to any particular group as against all other citizens, and it contains no unlawful distinction that is incompatible with the principles stated in s. 1 (*b*) of the Bill of Rights.

Section 41(2) is concerned with a valid federal objective (*Prata v. Minister of Manpower and Immigration,* [1976] 1 S.C.R. 376; *R. v. Burn-*

[Page 230]

shine, [1975] 1 S.C.R. 693), namely the Crown privilege not to disclose documents the production or communication of which would be injurious to the areas listed, including national security.

Section 41(2) does of course create in favour of the Crown, the guardian of the nation's higher interests, a regime which differs from that applicable to individuals. It does not necessarily follow that it infringes on the right of the individual to equality before the law.

As Laskin J., as he then was, observed in *Curr v. The Queen,* [1972] S.C.R. 889, at p. 899:

… compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act.*

For these reasons, I would dismiss the appeal, with costs.

Appeal dismissed with costs.

Solicitor for the appellant: Raymond Lachapelle, Montreal.

Solicitor for the respondents: Gaspard Côté, Montreal.

Solicitors for the intervener: Jean K. Samson and Odette Laverdière, Quebec