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AUDITOR GENERAL LOSES BATTLE AGAINST FEDERAL CABINET

David Schneiderman

Auditor General v. Minister of Energy, Mines and Resources

The tension between public accountability and political secrecy has not slackened as result of a recent Supreme Court of Canada decision denying the Auditor General of Canada access to confidential federal Cabinet documents. For close to seven years, Auditor General Kenneth Dye has been seeking access to material considered by Cabinet regarding the \$1.7 million purchase of Petrofina by Petro-Canada in 1981. In the absence of specific authority in the legislation to compel the production of confidential Cabinet documents, the Supreme Court of Canada would not consider Mr. Dye's request.

The Auditor General is charged with the responsibility of auditing the government's finances. He is also responsible for determining whether "money had been expended with due regard to economy or efficiency". In order to determine whether sufficient regard was paid to economy and efficiency in the purchase of Petrofina, the Auditor General wished to review the material that the Trudeau Cabinet had relied upon in authorizing Petrofina's purchase by Petro-Canada. These requests were mostly denied by Petro-Canada and successive Federal Governments, both Liberal and Conservative.

To accede to this request, the Government argued, would be to ignore the principle that Cabinet deliberations remain confidential. The principle operates so as to make Cabinet speak in one collective voice, through the Government of the day. Moreover, argued the Government, the Auditor General had no business second-guessing political decisions that had been duly authorized by Parliament, namely the appropriation of public funds to Petro-Canada in order to purchase Petrofina.

In the face of these denials, the Auditor General commenced litigation in the Federal Court, arguing that the Cabinet was obliged by law to disclose the documents. The Auditor General Act, he argued, required compliance, even by Cabinet, with a request for the production of documents.

The Government, in response, filed a certificate under the Canada Evidence Act certifying that the documents sought were confidential Cabinet documents. The intended effect of the certificate was to preclude the Court from considering whether the documents were, in fact, confidential Cabinet documents and whether, in fact, any harm to Cabinet would flow from their disclosure to the Auditor General.

Chief Justice Jerome of the Federal Court, Trial Division, agreed with the Auditor General's arguments and ordered disclosure, notwithstanding the filing of the Canada Evidence Act certificate. This decision was reversed on appeal to the Federal Court of Appeal. Mr. Justice Heald, one of the Federal Court of Appeal judges in the majority, held that the effect of the lower court's order would be to "allow the Auditor General to audit the political process". On further appeal to the Supreme Court of Canada, the appeal was dismissed. In the Supreme Court's view, the statutory authority to inspect and audit Parliament's books did not entitle the Auditor General to enforce that authority in the courts.

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**(Auditor General
continued)**

Chief Justice Dickson, writing for the Supreme Court of Canada, stated that accepting the Auditor General's interpretation of his statutory duty "would result in a *de facto* shift in the constitutional balance of powers in the expenditure auditing process". In the absence of express language in the law commanding the disclosure of Cabinet documents, the Court would not, on its own, enlarge the Auditor General's mandate.

Chief Justice Dickson acknowledged that the courts have greatly expanded powers as a result of the Charter. But in those areas that remain untouched by the Charter, as in this case, it is the Parliament and the Legislatures, and not the Courts, who have the constitutional authority to redraw statutory boundaries.

The Auditor General's remedy, in the face of the refusal by Cabinet to disclose the documents, was to report the refusal to Parliament, thereby leaving the issue to be resolved politically. This remedy, in the opinion of the Supreme Court, was an "adequate alternative". However, the Court would not concede that, in reality, the Auditor General would be reporting back to a Parliament controlled by an executive that has continually refused to disclose the documents in question. According to the Chief Justice:

That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes on the scope of Parliament's auditing function is not ... constitutionally cognizable by the judiciary. The grundnorm with which the courts must work in this context is that of the sovereignty of Parliament.

In the Court's view, this remedy should not be underestimated. The Auditor General's complaint that the Government has withheld crucial information about an acquisition of immense proportions will likely be brought to the public's attention and may "affect the public's assessment of the government's performance." In this way, Parliamentary supremacy is maintained and the democratic process is strengthened. However, in this way, the public will not get to know whether the price paid for Petrofina was fair value. In the judgment of the Supreme Court of Canada, the remedy lies with the politicians and not with the courts.

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