Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

RESPONDENT/MOVING PARTY
MOTION RECORD

Gabor Lukacs

Halifax, Nova Scotia

lukacs@AirPassengerRights.ca

Odette Lalumière
Senior Counsel
Legal Services Branch
Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec K1A 0N9

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Fax: 819-953-9269

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Court File No.: A-218-14

FEDERAL COURT OF APPEAL

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NOTICE OF MOTION

TAKE NOTICE that counsel on behalf of the Respondent, Canadian Transportation Agency ("the Agency") hereby makes a motion to the Federal Court of Appeal in writing pursuant to Rule 369 of the *Federal Courts Rules*.

THE MOTION IS FOR an Order quashing the application for judicial review in the within matter pursuant to section 52(a) of the *Federal Courts Act*.

AND FURTHER TAKE NOTICE that the motion is brought on the grounds that:

1. Subparagraph 28(1)(k) of the *Federal Courts Act* provides that it has jurisdiction to hear application for judicial review made in respect of decisions of the Agency.

2. A "refusal" to disclose government information, containing personal information such as in the present case for example, is a "refusal" of the head of the institution. It is therefore not a decision of the Agency falling within the purview of section 28 of the Federal Courts Act.

3. The application for judicial review should have been filed with the Federal Court.

4. Any person who has been refused access to a record requested under the Access to Information Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Federal Court for a review of the matter within the time specified in the Access to Information Act.

5. There are three prerequisites that must be met before an access requestor may apply for Judicial Review:

   1) The applicant must have been refused access to a record

   2) The applicant must have complained to the Information Commissioner

   3) The applicant must have received an investigation report by the Information Commissioner.

6. The applicant could not apply for a judicial review because (1) the applicant's request was treated informally and there is therefore no "refusal"; (2) the applicant did not complain to the Information Commissioner before filing the within judicial review application; and (3) the applicant did not receive an investigation report by the Information Commissioner.

7. Even if the application for judicial review had been filed with the appropriate Court, it would have had no jurisdiction to entertain this application.

8. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be presented in support of this motion:

- Affidavit of Patrice Bellerose, sworn July 29, 2014;

- Written Representations of the Canadian Transportation Agency.

DATED at the City of Gatineau, in the Province of Quebec, this 31st day of July, 2014.

Odette Lalumière
Senior Counsel
Canadian Transportation Agency

TAB 2

Court File No. A-218-14

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

-and-

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF PATRICE BELLEROSE,
SWORN JULY 29, 2014

I, Patrice Bellerose, resident of the City of Gatineau, in the Province of Quebec, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Manager of Records Services and Access to Information and Privacy (ATIP) in the Records Services & ATIP Division of the Information Services Directorate in the Corporate Management Branch of the Canadian Transportation Agency (Agency) and, as such, have personal knowledge of the matters hereinafter deposed to.

2. On February 14, 2014, Gabor Lukacs ("the Applicant") sent an email to the Agency with the subject line "Request to view file no. M4120-3/13-05726 pursuant to s. 2(b) of the Charter". Attached hereto and marked as Exhibit "A" to my Affidavit is a copy of the e-mail received on February 14, 2014.

3. Although the Applicant referred to his request as a request under section 2(b) of the *Canadian Charter of Rights and Freedoms*, it was treated as an informal access request, in conformity with the Directive on the Administration of the Access to Information Act of the Treasury Board of Canada Secretariat. Attached hereto and marked as Exhibit "B" to my Affidavit is a copy of the Directive on the Administration of the Access to Information Act of the Treasury Board of Canada Secretariat.

4. On March 19, 2014, I sent an e-mail to the Applicant with copies of records in response to his "request to view file 4120-3/13-05726". Attached hereto and marked as Exhibit "C" to my Affidavit is a copy of the e-mail sent on March 19, 2014 (without the attachment).

5. On March 24, 2014, the Applicant sent an e-mail to the Agency asking that he be provided with unredacted "copies of all documents in File No. M4120-3/13-05726 with respect to which no confidentiality order was made by a Member of the Agency". Attached hereto and marked as Exhibit "D" to my Affidavit is a copy of the e-mail sent to the Agency on March 24, 2014.

6. On March 26, 2014, Mr. Geoffrey C. Hare, Chair and Chief Executive Officer the Agency, wrote to the Applicant to inform him that the Agency is a government institution listed in the schedule of the *Privacy Act* and that although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal

phone number, date of birth, financial details, social insurance number, driver's license number, or credit card or passport details, is not available for consultation. Attached hereto and marked as "Exhibit "E" to my Affidavit is a copy of the e-mail and letter sent to the Applicant on March 26, 2014.

7. This Affidavit is made at the request of counsel to the Canadian Transportation Agency in support of the Agency's Motion to quash the Application for judicial review in this matter and for no other or improper purpose.

DATED at the City of Gatineau, in the Province of Quebec, this 29th day of July, 2014

SWORN BEFORE ME at the City of Gatineau in the Province of Quebec, this 29th day of July, 2014.

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

Exhibit "A"

Ceci est la pièce A de l'affidavit
This is Exhibit referred to in the Affidavit

de Patrice Belterose
of

assermenté devant moi ce 30th jour de July 2014
sworn to before me this day of

Andray Renaud
Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

From lukacs@AirPassengerRights.ca Fri Feb 14 16:26:02 2014
Date: Fri, 14 Feb 2014 16:25:59 -0400 (AST)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: secretaire-secretary@otc-cta.gc.ca
Cc: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>, Odette Lalumiere <Odette.Lalumiere@otc-cta.gc.ca>
Subject: Request to view file no. M4120-3/13-05726 pursuant to s. 2(b) of the Charter

Dear Madam Secretary,

I would like to view the public documents in file no. M4120-3/13-05726.

Due the public interest in the case, in which a final decision has been released today, the present request is urgent.

Sincerely yours,
Dr. Gabor Lukacs

Exhibit "B"

Ceci est la pièce B de l'affidavit
This is Exhibit referred to in the Affidavit

de Patrice Bellerose
of

assermenté devant moi ce 29th jour de July 199 2014
sworn to before me this day of

Andray Renaud
Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

011

Directive on the Administration of the *Access to Information Act*

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1. Effective date

1.1 This directive takes effect on May 5, 2014.

1.2 It replaces the Directive on the Administration of the *Access to Information Act* dated January 16, 2012.

2. Application

2.1 This directive applies to government institutions as defined in section 3 of the *Access to Information Act* (Act), including parent Crown corporations and their wholly owned subsidiaries, if any.

2.2 This directive, with the exception of clause 7.13, is issued pursuant to paragraph 70(1)(c) of the Act. Clause 7.13 is issued pursuant to subsection 5(2) of the Act.

2.3 This directive does not apply to the Bank of Canada.

2.4 This directive does not apply to information that is excluded under the Act.

3. Context

3.1 The Act gives Canadian citizens, permanent residents within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* and any individual or corporation present in Canada the right of access to records under the control of a government institution, subject to limited and specific exceptions. The Act further provides that decisions on the non-disclosure of information can be reviewed independently of government.

3.2 The Act also specifies that it is intended to complement existing procedures for obtaining government information and is not to limit in any way the type of information that is normally available to the public, thereby denoting the importance of informal access.

3.3 The administration of the Act is the responsibility of the heads of government institutions. Heads (or their delegates) process requests for access to information in accordance with the provisions of the Act and the *Access to Information Regulations* (Regulations), which include the duty to assist applicants. The Act and the Regulations also spell out parameters relating to the transfer of access requests, the extension of time limits, the charging of fees, the grounds for exemptions and exclusions, the process for giving notice to third parties, and the language, format and method of access. This directive is intended to support heads (and their delegates) in the administration of the Act by providing specific direction for responding to requests under the Act and by establishing principles for assisting applicants.

3.4 This directive is to be read in conjunction with the Act, the Regulations and the *Policy on Access to Information*. Where there is ambiguity, the Act takes precedence over this directive.

4. Definitions

4.1 The definitions to be used in the interpretation of this directive are listed in Appendix A. Additional definitions are listed in Appendix A of the *Policy on Access to Information*.

5. Directive statement

5.1 Objective

5.1.1 To establish, across all government institutions, consistent practices and procedures for the processing of access to information requests, including requirements to make every reasonable effort to assist applicants without regard to their identity.

5.2 Expected results

5.2.1 Effective, well-coordinated and proactive administration of the Act in government institutions.

5.2.2 Complete, accurate and timely responses to requests made under the Act.

6. Requirements for Heads of government institutions

6.1 Principles for delegation under the Access to Information Act

6.1.1 Respecting the following principles when delegating any powers, duties or functions under the Act:

a. Heads can only designate officers and employees of their government institution in the delegation order. Consultants, members of a Minister's exempt staff, or employees of other government institutions or from the private sector cannot be named in the delegation order;
b. Powers, duties and functions are delegated to positions identified by title, not to individuals identified by name;
c. Persons with delegated authorities are to be well informed of their responsibilities;
d. Delegates cannot further delegate powers, duties and functions that have been delegated to them, although employees and consultants may perform tasks in support of delegates' responsibilities; and
e. The delegation order must be reviewed when the circumstances surrounding the delegations have changed. A delegation order remains in force until it is reviewed and revised by the head of the institution.

6.2 Access to information awareness

6.2.1 Ensuring that delegates receive training in the areas specified in Appendix B of this directive.

7. Requirements for Heads of government institutions or their delegates

7.1 Exercising Discretion

7.1.1 Exercising discretion in a fair, reasonable and impartial manner after completing the following steps:

a. Consideration of the purpose of the Act, which is to provide a right of access to information held in government records, subject to limited and specific exceptions;
b. Consideration of the relevant provisions of the Act, as well as applicable jurisprudence;

c. Necessary consultations, for the proper exercise of discretion and application of the exemption and exclusion provisions of the Act including consultations with other government institutions and third parties;
d. Review of the information contained in records; and
e. Consideration, in a fair and unbiased manner, of all relevant factors.

The above considerations apply to all provisions of the Act for which the head or the delegate exercises discretion.

7.2 Access to information awareness

7.2.1 Ensuring that employees of government institutions and officials who have functional responsibility for the administration of the Act receive training in the areas specified in Appendix B of this directive.

7.3 Admissibility of applicants

7.3.1 Ensuring that the requester has the right to make a request under the Act.

7.4 Duty to assist

Protection of applicant's identity

7.4.1 Limiting, on a need-to-know basis, the disclosure of information that could directly or indirectly lead to the identification of a requester, unless the requester consents to the disclosure.

Interpretation and clarification of access request

7.4.2 Adopting a broad interpretation of an access request, and promptly communicating with the requester when necessary to clarify the request.

Revised requests

7.4.3 When an access request has been clarified or its wording altered, documenting the wording of the revised request and the date of the revision in the tracking system.

Principles for assisting applicants

7.4.4 Implementing and communicating the principles for assisting requesters as listed in Appendix C of this directive.

Informal processing

7.4.5 Determining whether it is appropriate to process the request on an informal basis. If so, offering the requester the possibility of treating the request informally and explaining that only formal requests are subject to the provisions of the Act.

Contextual information

7.4.6 Providing, as appropriate, general information of a contextual nature in response to an access request to help the requester understand the record in cases where the record itself may provide misleading information and the access to information analyst has been informed by the office of primary interest that the information contained in the record may be misleading. Government institutions are not obligated to explain all records or complex information being disclosed when responding to an access request.

7.5 Collecting Fees

Fees

7.5.1 Ensuring that requesters are charged fees only for the activities and formats described in section 7 of the *Regulations*.

Waiver, reduction or refunds

7.5.2 Exercising discretion concerning the waiver, reduction or refund of fees while taking into account the applicable steps set out in subsection 7.1.1 of this directive.

Reduction of fees for producing records from a machine-readable record

7.5.3 Ensuring that reduced fees are applied when producing any record from a machine-readable record if the actual cost of producing the record is less than the fee prescribed in paragraph 7(3)(*a*) of the Regulations.

Estimates

7.5.4 Providing sufficient information in fee estimates to enable the requester to make an informed decision.

Refund of fees

7.5.5 Refunding the difference to the requester when the actual cost is less than the deposit paid.

Access to records

7.5.6 Providing access to records only when the requester has paid all the required fees.

7.6 Extension of time limits

Notice of extension

7.6.1 Assessing, without undue delay, all access requests received and, if an extension is needed for processing the request, notifying the requester of the extension within 30 days of the receipt of the request.

Length of extension

7.6.2 Ensuring that any extension taken is as short as possible and can be justified.

Notice of extension to Information Commissioner

7.6.3 Notifying the Information Commissioner of Canada if the extension is for more than 30 days, in accordance with subsection 9(2) of the Act.

7.7 Limiting and Reducing the Need for Inter-Institutional Consultations with Respect to Sections 15 and 16 of the Act

7.7.1 Limiting and reducing the need for inter-institutional consultations with respect to sections 15 and 16 of the Act to two circumstances: i) where the processing institution requires more information for the proper exercise of discretion to withhold; or ii) where the processing institution intends to disclose sensitive information.

Importance of consultations

7.7.2 Ensuring that consultation requests from other government institutions are given the same importance as access to information requests.

7.8 Exemptions

Application of exemptions

7.8.1 Invoking exemptions by properly considering the intent of the Act and relevant jurisprudence.

Citation of exemptions

7.8.2 Citing all exemptions invoked in relation to those on the records, unless doing so would reveal the exempted information or cause the injury upon which the exemption is based.

7.9 Obligation to process non-relevant information

7.9.1 Ensuring that non-relevant information contained in a record is severed only if an exemption applies or if consent is obtained from the requester. Lack of relevance is not a ground for exemption under the Act.

7.10 Notification of right to complain

7.10.1 Ensuring that requesters are notified of their right to complain to the Information Commissioner of Canada for all matters relating to requests and access to records under the Act.

7.11 Internal Processes

Tracking system

7.11.1 Establishing and maintaining an internal management system to keep track of the processing of access requests, consultation requests, complaints, and reviews by the courts.

Documentation

7.11.2 Documenting the processing of requests by placing on file all created and received paper and electronic documents that support decisions under the Act, including communications where recommendations are given or decisions are made.

Disclosure of records

7.11.3 Ensuring that any internal process relating to the disclosure of records under the Act does not delay the processing of the request.

7.12 Allegations of an obstruction of the right of access

7.12.1 Establishing internal procedures to address suspected obstructions of the right of access, which are defined in section 67.1 of the Act. The procedures should outline measures for:

a. Investigating any allegation of falsification, concealment, mutilation or improper destruction of records;
b. Reporting any suspected falsification, concealment, mutilation or improper destruction of records immediately to the head of the government institution; and
c. Reporting a suspected contravention to law enforcement agencies for investigation.

7.13 Posting Summaries of Completed Access to Information Act Requests

7.13.1 Posting, to the Government of Canada's mandated website, the summaries of completed access to information requests within 30 calendar days after the end of each month, as indicated in Appendix E.

8. Requirements for Employees of government institutions

8.1 Informal access

8.1.1 Recommending to the head or the delegate, when appropriate, that the requested information be disclosed informally.

8.2 Search of records

8.2.1 Making every reasonable effort to locate all records under the control of the government institution that are responsive to the request.

8.3 Estimates

8.3.1 Providing a realistic fee estimate and the rationale for it to the head or the delegate, when required.

8.4 Recommendations

8.4.1 Providing valid recommendations on the disclosure of the records requested, as well as contextual information, when appropriate.

8.5 Contracts and agreements

8.5.1 Ensuring, if involved in contracting activities, that contracts and agreements do not weaken the right of public access to information.

9. Monitoring and reporting requirements

9.1 The monitoring and reporting requirements of this directive are set out in subsection 6.3 of the *Policy on Access to Information*.

10. Consequences

10.1 The consequences of non-compliance with this directive are identified in section 7 of the *Policy on Access to Information*.

11. Roles and responsibilities of government institutions

11.1 The roles and responsibilities of government institutions with respect to this directive are identified in Section 8 of the *Policy on Access to Information*.

12. References

12.1 Relevant legislation and regulations:

- *Access to Information Act*
- *Access to Information Regulations*
- *Financial Administration Act*
- *Interpretation Act*
- *Library and Archives Canada Act*
- *Official Languages Act*
- *Privacy Act*
- *Privacy Regulations*
- *Public Servants Disclosure Protection Act*
- *User Fees Act*

12.2 Related policy instruments and publications:

- *Communications Policy of the Government of Canada*
- *Directive on Privacy Requests and Correction of Personal Information*
- *Policy on Access to Information*
- *Policy on Learning, Training and Development*
- *Policy on Privacy Protection*
- *Policy on Service Standards for External Fees*

13. Enquiries

Please direct enquiries about this directive to your institution's access to information and privacy (ATIP) coordinator. For interpretation of this directive, the ATIP coordinator is to contact:

Information and Privacy Policy Division
Chief Information Officer Branch
Treasury Board Secretariat
219 Laurier Avenue West
Ottawa ON K1A 0R5

E-mail: ippd-dpiprp@tbs-sct.gc.ca
Telephone: 613- 946-4945
Fax: 613-957-8020

Appendix A - Definitions

Access to information (ATI) training
All activities that serve to increase awareness about access to information, including formal training, research, discussion groups, conferences, access to information and privacy community meetings, shared learning among colleagues, on-the-job training, special projects, job shadowing, and communications activities that promote learning in the areas specified in Appendix B of this directive.

Class test
A test that objectively identifies the categories of information or documents to which certain exemption provisions of the Act can be applied. The following sections of the Act provide for exemptions that are based on a class test: 13(1), 16(1)(*a*), 16(1)(*b*), 16(3), 16.1, 16.2, 16.3, 16.4, 16.5, 18(*a*), 18.1, 19(1), 20(1)(*a*), 20(1)(*b*), 20(1)(*b.1*), 20.1, 20.2, 20.4, 21 (1), 22.1, 23, 24 and 26.

Discretionary exemption
An exemption provision of the *Act* that contains the phrase "may refuse to disclose." The following sections of the Act provide for exemptions that are discretionary: 14, 15(1), 16(1), 16(2), 16.3, 17, 18, 18.1, 21(1), 22, 22.1, 23 and 26.

Every reasonable effort
A level of effort that a fair and reasonable person would expect or would find acceptable.

Injury test
A test to determine the reasonable expectation of probable harm that must be met for certain exemption provisions of the Act to apply. The following sections of the Act provide for exemptions that are based on an injury test: 14, 15(1), 16(1)(*c*), 16(1)(*d*), 16(2), 17, 18 (*b*), 18(*c*), 18(*d*), 20(1)(*c*), 20(1)(*d*) and 22.

Mandatory exemption
An exemption provision of the Act that contains the phrase "shall refuse to disclose." The following sections of the Act provide for exemptions that are mandatory: 13(1), 16(3), 16.1, 16.2, 16.4, 16.5, 19(1), 20(1), 20.1, 20.2, 20.4 and 24.

Tracking system
Is an electronic or paper-based internal case management system used in ATIP offices to track access requests and document their processing.

Appendix B - Access to information awareness

Information for all employees

All employees of government institutions should receive training in the application of the Act. The training should cover the following:

- The purpose of the Act;
- The applicable definitions;
- Their responsibilities under the Act, including the principles for assisting applicants;
- Delegation, exemption decisions and the exercise of discretion;
- The requirement to provide complete, accurate and timely responses;
- The complaint process and reviews by the courts;
- Section 67.1 of the Act, which makes it an offence to obstruct the right of access and which provides for criminal sanctions;
- The requirements found in Treasury Board policy instruments relating to the responsibilities described above; and
- Specific institutional policies and processes relating to the administration of the Act, including policies on information management.

Information for practitioners in the field of Access to Information

All employees of government institutions who have functional responsibility for the administration of the Act and the Regulations should receive training that covers the items listed above and the following:

- The provisions concerning the extension of time limits, fees, exemptions and exclusions, the third-party notification process, and the language, format and method of access;
- Reporting requirements, including annual reports to Parliament; and
- Information on the activities and operations of standing committees relating to the Act.

Appendix C - Principles for assisting applicants

The following principles, which are aimed at assisting applicants, are to be communicated to applicants.

In processing your request under the *Act*, we will:

1. Process your request without regard to your identity.

2. Offer reasonable assistance throughout the request process.
3. Provide information on the Act, including information on the processing of your request and your right to complain to the Information Commissioner of Canada.
4. Inform you, as appropriate and without undue delay, when your request needs to be clarified.
5. Make every reasonable effort to locate and retrieve the requested records.
6. Apply limited and specific exemptions to the requested records.
7. Provide accurate and complete responses.
8. Provide timely access to the requested information.
9. Provide records in the format and official language requested, as appropriate.
10. Provide an appropriate location in the government institution where you can examine the requested information.

Appendix D - Classification of exemptions

The following table lists all exemptions under the Act and indicates whether they are based on a class test or an injury test and whether they are mandatory or discretionary.

Exemption	Mandatory	Discretionary	Class	Injury
Subsection 13(1)	yes	no	yes	no
Section 14	no	yes	no	yes
Subsection 15(1)	no	yes	no	yes
Paragraph 16(1)(*a*)	no	yes	yes	no
Paragraph 16(1)(*b*)	no	yes	yes	no
Paragraph 16(1)(*c*)	no	yes	no	yes
Paragraph 16(1)(*d*)	no	yes	no	yes
Subsection 16(2)	no	yes	no	yes
Subsection 16(3)	yes	no	yes	no
Section 16.1	yes	no	yes	no
Section 16.2	yes	no	yes	no
Section 16.3	no	yes	yes	no
Section 16.4	yes	no	yes	no
Section 16.5	yes	no	yes	no
Section 17	no	yes	no	yes
Paragraph 18(*a*)	no	yes	yes	no
Paragraph 18(*b*)	no	yes	no	yes
Paragraph 18(*c*)	no	yes	no	yes
Paragraph 18(*d*)	no	yes	no	yes
Section 18.1	no	yes	yes	no
Subsection 19(1)	yes	no	yes	no
Paragraph 20(1)(*a*)	yes	no	yes	no
Paragraph 20(1)(*b*)	yes	no	yes	no
Paragraph 20(1)(*b.1*)	yes	no	yes	no
Paragraph 20(1)(*c*)	yes	no	no	yes

Paragraph 20(1)(*d*)	yes	no	no	yes
Section 20.1	yes	no	yes	no
Section 20.2	yes	no	yes	no
Section 20.4	yes	no	yes	no
Section 21	no	yes	yes	no
Section 22	no	yes	no	yes
Section 22.1	no	yes	yes	no
Section 23	no	yes	yes	no
Section 24	yes	no	yes	no
Section 26	no	yes	yes	no

Appendix E - Criteria for posting summaries of completed access to information requests

To promote consistency among government institutions, the Information and Privacy Policy Division of the Treasury Board of Canada Secretariat has developed, in consultation with the access to information and privacy community, criteria for posting the summaries of completed access to information (ATI) requests on the Government of Canada's mandated website.

Mandatory Criteria

Institutions must meet the following criteria in relation to the posting of summaries:

1. Post summaries of completed Access to Information requests within 30 calendar days after the end of each month. When no ATI requests are completed in a given month, an update to this effect must still be made. Monthly updates assure website visitors that the information is current.
2. The entry for each summary must include the following:
    a. The **request number** assigned by the institution;
    b. A **summary** of the request that reflects the final text of the request after clarification was obtained from the applicant, where applicable. Summaries must not include personal information or any other information that would be exempted or excluded under the *Act*, or that could reveal a requester's identity;
    c. The **disposition** of the request (i.e., all disclosed; disclosed in part; all exempted; all excluded; or no records exist). Requests that were transferred, abandoned or treated informally are not to be included; and
    d. The **number of pages** released.
3. Provide the summaries simultaneously in both official languages with translations that must be accurate to meet the requirements of the *Official Languages Act*;
4. Do not include summaries of requests that are uniquely of interest to the applicant, that contain primarily personal information of the applicant (e.g., Citizenship and Immigration Canada immigration case files), or requests that could reveal a requester's identity.

Date Modified: 2014-05-27

Exhibit "C"

Ceci est la pièce C de affidavit
This is Exhibit referred to in the Affidavit

de Patrice Bellerose
of

assermenté devant moi ce 28th jour de July 2014
sworn to before me this day of

Andray Renaud
Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

From Patrice.Bellerose@otc-cta.gc.ca Wed Mar 19 13:59:48 2014
Date: Wed, 19 Mar 2014 12:58:42 -0400
From: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Cc: Cathy Murphy <Cathy.Murphy@otc-cta.gc.ca>, Odette Lalumiere <Odette.Lalumiere@otc
-cta.gc.ca>
Subject: Response to "Request to view file 4120-3/13-05726"

[The following text is in the "Windows-1252" character set.]
[Your display is set for the "ISO-8859-1" character set.]
[Some characters may be displayed incorrectly.]

Hello Mr. Lukacs,
Please find attached copies of records in response to your "request to
view file 4120-3/13-05726".
Thank you.

Patrice Bellerose
Gestionnaire principale | Senior Manager
Services d'information, des projets de services partagés et
coordinatrice de l'AIPRP | Information Services, Shared Services
Projects & ATIP Coordinator
Office des transports du Canada | Canadian Transportation Agency
Bureau 1718 | Office 1718
15 rue Eddy, Gatineau (QC) K1A 0N9 | 15 Eddy St., Gatineau, QC K1A
0N9
Téléphone | Telephone 819-994-2564
Télécopieur | Facsimile 819-997-6727
patrice.bellerose@otc-cta.gc.ca

[Part 2, Application/PDF (Name: "AI-2013-00081.PDF") 15 MB.]
[Unable to print this part.]

Exhibit "D"

Ceci est la pièce D de affidavit
This is Exhibit referred to in the Affidavit

de Patrice Bellcrose
of

assermenté devant moi ce 28th jour de July 2014
sworn to before me this day of

Andray Renaud
Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCAT
194392-8
BARREAU DU QUÉBEC

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

March 24, 2014

VIA EMAIL and FAX

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Dear Madam Secretary:

Re: Request pursuant to the open court principle and s. 2(b) of the *Charter* to view File No. M4120-3/13-05726
Heavily redacted documents received on March 19, 2014

I am writing to make a final request, prior to making an application for judicial review, that the Agency comply with its obligations under the open court principle and s. 2(b) of the *Canadian Charter of Rights and Freedoms*, to make documents that are part of the public record available for public viewing.

1. On February 14, 2014, I made a request to the Agency to "view the public documents in file no. M4120-3/13-05726" pursuant to s. 2(b) of the *Charter*.

2. In subsequent communications dated February 17, 21, and 24, 2014, I have reiterated that my request was based on s. 2(b) of the *Charter*.

3. On March 19, 2014, I received an email from Ms. Bellerose, the Senior Manager of the Information Services, Shared Services Projects & ATIP Coordinator of the Agency, stating that:

> Please find attached copies of records in response to your "request to view file 4120-3/13-05726".

Ms. Bellerose's email had a PDF file named "AI-2013-00081.PDF" attached, which contained heavily redacted copies of documents in File No. M4120-13/13-05726.

It is my position that providing redacted documents does not discharge the Agency's obligations under the open court principle, because the file contains no confidentiality order made by a Member of the Agency pursuant to Rules 23-25 of the *Canadian Transportation Agency General Rules*, S.O.R./2005-35.

My position is consistent with Rule 23(1) of the *Canadian Transportation Agency General Rules*:

> The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person filing the document makes a claim for its confidentiality in accordance with this section.

My position is also consistent with the Agency's Privacy Statement concerning the Agency's complaint process:

> In accordance with the values of the open court principle and pursuant to the Canadian Transportation Agency General Rules, all information filed with the Agency becomes part of the public record and may be made available for public viewing.

Finally, I refer to Decision No. 219-A-2009 of the Agency, concerning the motion of Leslie Tenenbaum for non-publication of his name and certain personal information, where the Agency analyzed in great detail its own obligations under the open court principle.

In light of the foregoing, I trust you agree with me that the documents in question were redacted without lawful authority or authorization to do so, and in breach of the Agency's obligations under the open court principle and s. 2(b) of the *Charter*.

Therefore, I am requesting that:

A. the present letter be brought to the attention of Mr. Geoffrey C. Hare, Chair and CEO of the Agency; and

B. the Agency provide me, within five (5) business days, with unredacted copies of all documents in File No. M4120-3-/13-05726 with respect to which no confidentiality order was made by a Member of the Agency.

Kindly please confirm the receipt of this letter.

Yours very truly

Dr. Gábor Lukács

Exhibit "E"

Ceci est la pièce E de affidavit
This is Exhibit referred to in the Affidavit

de Patrice Bellerose
of

assermenté devant moi ce 24th jour de July 20 14
sworn to before me this day of

Andray Renaud
Commissaire à l'assermentation
Commissioner for Oaths

BARREAU DU QUÉBEC 194392-8 ANDRAY RENAUD, AVOCAT

Odette Lalumiere

From: Cathy Murphy <Cathy.Murphy@otc-cta.gc.ca>
Sent: March-26-14 3:12 PM
To: Gabor Lukacs
Cc: Odette Lalumiere; Patrice Bellerose
Subject: Re: Final request before making an application for judicial review [Request pursuant to the open court principle and s. 2(b) of the Charter to view File No. 4120-3/13-05726]

Please find attached a pdf version of a letter from the Chair and Chief Executive Officer of the Agency.

Please confirm receipt.

Sincerely,

Cathy Murphy
Secretary of the Canadian Transportation Agency

Cathy Murphy
819-997-0099 | télécopieur/facsimile 819-953-5253 | ATS/TTY 800-669-5575
cathy.murphy@cta-otc.gc.ca
Secrétaire de l'Office des Transports du Canada/ Secretary of the Canadian Transportation Agency
15, rue Eddy, Hull QC K1A 0N9/
15 Eddy St., Hull QC K1A 0N9
Gouvernement du Canada | Government of Canada

>>> Gabor Lukacs <lukacs@AirPassengerRights.ca> 24/03/2014 4:27 PM >>>
Dear Madam Secretary:

Please refer to the attached correspondence.

Kindly please confirm its receipt.

Best wishes,
Dr. Gabor Lukacs

On Wed, 19 Mar 2014, Patrice Bellerose wrote:

> Hello Mr. Lukacs,
> Please find attached copies of records in response to your "request to
> view file 4120-3/13-05726".
> Thank you.
>
>
>
> Patrice Bellerose
> Gestionnaire principale | Senior Manager
> Services d'information, des projets de services partagés et
> coordinatrice de l'AIPRP | Information Services, Shared Services

> Projects & ATIP Coordinator
> Office des transports du Canada | Canadian Transportation Agency
> Bureau 1718 | Office 1718
> 15 rue Eddy, Gatineau (QC) K1A 0N9 | 15 Eddy St., Gatineau, QC K1A
> 0N9
> Téléphone | Telephone 819-994-2564
> Télécopieur | Facsimile 819-997-6727
> patrice.bellerose@otc-cta.gc.ca
>

Chair.pdf

>

Office
des transports
du Canada

Canadian
Transportation
Agency

Bureau du
Président

Office of the
Chairman

March 26, 2014

Mr. Gábor Lukács

Halifax, NS

lukacs@AirPassengerRights.ca

Mr. Lukács,

Re: Your letter of March 24, 2014 in regards to your request to view
File No. M4120-3/13-05726

The Canadian Transportation Agency (Agency) is a government institution which was included in the schedule to the *Privacy Act* (Act) in 1982. When Parliament adds a government institution to the schedule of the Act, either through legislation or regulation, it reflects a decision to subject the institution to the full application of the Act. For the Agency, that decision was maintained throughout successive legislation modifications.

The purpose of the Act is to protect the privacy of individuals with respect to personal information about themselves held by a government institution. Section 8 of the Act is clear that, except for specific exceptions found in that section, personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution. Also, in accordance with sections 10 and 11 of the Act, personal information under the control of a government institution such as the Agency must be accounted for in either personal information banks or classes of personal information. Because there are no provisions in the Act that grant to government institutions that are subject to the Act the discretion to not apply those provisions of the Act, personal information under the control of the Agency is not disclosed without the consent of the individual and are accounted for either in personal information banks or classes of personal information and consequently published in Info Source. This is all consistent with the directions of the Treasury Board of Canada Secretariat.

Although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social insurance number, driver's license number, or credit card or passport details, is not available for consultation.

The file you requested has such sensitive personal information and it has therefore been removed by the Agency as is required under the Act.

Sincerely,

Geoffrey C. Hare
Chair and Chief Executive Officer

TAB 3

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

Gabor Lukacs

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

WRITTEN REPRESENTATIONS
OF THE RESPONDENT
CANADIAN TRANSPORTATION AGENCY

INTRODUCTION

These are the written representations in support of the Notice of Motion of the Respondent, Canadian Transportation Agency (the Agency), for an Order quashing the Application for Judicial Review by the Applicant, Gabor Lukacs (Applicant) in the within matter.

PART I - STATEMENT OF FACTS

1. On February 14, 2014, the Applicant sent an email to the Agency with the subject line "Request to view file no. M4120-3/13-05726 pursuant to section 2(b) of the Charter".

Affidavit of Patrice Bellerose, sworn
July 29, 2014, Exhibit "A"

2. Although the Applicant referred to his request as a request under section 2(b) of the *Canadian Charter of Rights and Freedoms* (*Charter*), it was treated as an informal access request, in conformity with the Directive on the Administration of the Access to Information Act of the Treasury Board of Canada Secretariat.

Affidavit of Patrice Bellerose, sworn
July 29, 2014, Exhibit "B"

3. On March 19, 2014, Ms. Patrice Bellerose, Manager of Records Services and Access to Information and Privacy in the Records Services & ATIP Division of the Information Services Directorate in the Corporate Management Branch of the Agency sent an email to the Applicant with copies of records in response to his "request to view file 4120-3/13-05726", some of which were redacted.

Affidavit of Patrice Bellerose, sworn
July 29, 2014, Exhibit "C"

4. On March 24, 2014, the Applicant sent an e-mail to the Agency asking that he be provided with unredacted "copies of all documents in File No. M4120-3/13-05726 with

respect to which no confidentiality order was made by a Member of the Agency".

Affidavit of Patrice Bellerose, sworn
July 29, 2014, Exhibit "D"

5. On March 26, 2014, Mr. Geoffrey C. Hare, Chair and Chief Executive Officer of the Agency, wrote to the Applicant to inform him that the Agency is a government institution listed in the schedule of the *Privacy Act*, R.S.C. 1985, C.P -21 and that although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social insurance number, driver's license number, or credit card or passport details, is not available for consultation.

Affidavit of Patrice Bellerose, sworn
July 29, 2014, Exhibit "E"

6. On April 22, 2014, the Applicant served the Agency with the within Application for Judicial Review.

PART II – ISSUE

7. The issue is whether this Honourable Court should quash the within Application for Judicial Review on the basis that it is not within this Honorable Court's jurisdiction.

PART III – ARGUMENTS

Access to government records

8. The *Charter* does not guarantee access to all documents in government hands. The *Charter* guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.

> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* [2010] 1 S.C.R. 815, at para. 30

9. It is not possible to proclaim that section 2(b) of the *Charter* entails a general constitutional right of access to all information under the control of government.

> *Ontario (Attorney General) v. Fineberg*, 1994 CanLII 10563 (ON SC)

10. The fact that the Applicant qualified his request to the Agency as a "Request to view file no. M4120-3/13-05726 pursuant to s. 2(b) of the *Charter*" does not change the reality that the purpose of the Applicant's request was to have access to a government record.

Federal Court of Appeal vs. Federal Court

11. Subparagraph 28(1)(k) of the *Federal Courts Act,* provides that the Federal Court of Appeal has jurisdiction to hear applications for judicial review made in respect of decisions of the Agency.

> *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 28(1)(k)
> Appendix A

12. A "refusal" to disclose government information, containing personal information such as in the present case for example, is a "refusal" of the head of the institution. It is not a decision of the Agency falling within the purview of section 28 of the *Federal Courts Act*.

Access to Information Act, R.S.C. 1985, c. A-1, s. 28
Appendix A

13. The Agency respectfully submits that this Application for Judicial Review should have been filed with the Federal Court, as per section 41 of the *Access to Information Act*.

Access to Information Act, R.S.C. 1985, c. A-1, s.41
Appendix A

Available recourse when there is a refusal by a government institution

14. Any person who has been refused access to a record requested under the *Access to Information Act,* or a part thereof, may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Federal Court for a review of the matter within the time specified in the *Access to Information Act*.

Access to Information Act, R.S.C., 1985, c. A-1. s. 41
Appendix A

15. There are three prerequisites that must be met before an access requestor may apply to the Federal Court for Judicial Review:

1) The applicant must have been refused access to a record;

2) The applicant must have complained to the Information Commissioner; and

3) The applicant must have received an investigation report by the Information Commissioner.

Statham v. Canadian Broadcasting Corporation, 2010 FCA 315 (CanLII), at para. 64

16. The facts show that (1) the Applicant's request was treated informally and, as such, there was no "refusal"; (2) the Applicant did not complain to the Information Commissioner before filing the within judicial review application; and (3) the Applicant did not receive an investigation report by the Information Commissioner. Therefore, the Applicant does not meet the three prerequisites necessary before a judicial review application can be filed with the Federal Court.

Whitty v. Canada (Attorney General), 2013 FC595, at para. 21
Rubin v. Canada (Minister of Employment and Immigration), [1985] F.C.J. No. 903
Clancy v. Canada (Minister of Health), 2002 FCT 1331 (CanLII), at para. 10

17. For these reasons, the Agency respectfully submits that even if the Application for Judicial Review had been filed with the appropriate Court, it would have had no jurisdiction to entertain this application.

Costs

18. The Agency is not seeking costs and it is respectfully submitted that costs should not be awarded against the Agency as it is acting in good faith in preparing this motion to quash addressing the jurisdiction of this Honorable Court.

PART IV - ORDER SOUGHT

19. The Agency respectfully requests that the Application for Judicial Review in this matter be quashed pursuant to this Honorable Court's powers under paragraph 52(a) of the *Federal Courts Act.*

ALL OF WHICH IS RESPECTFULLY SUBMITTED. Dated at the City of Gatineau, in the Province of Quebec, this 31st day of July, 2014.

Odette Lalumière
Senior Counsel
Canadian Transportation Agency

PART V - LIST OF AUTHORITIES

Statutes and Regulations cited

Access to Information Act, R.S.C., 1985, c. A-1, section 19, section 41.

Federal Courts Act, R.S.C., 1985, c. F-7, section 28, section 28(1)(k), section 52(a)

Jurisprudence cited

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 S.C.R. 815

Ontario (Attorney General) v. Fineberg, 1994 CanLII 10563 (ON SC)

Statham v. Canadian Broadcasting Corporation, 2010 FCA 315 (CanLII)

Whitty v. Canada (Attorney General), 2013 FC595

Rubin v. Canada (Minister of Employment and Immigration), [1985] F.C.J. No. 903

Clancy v. Canada (Minister of Health), 2002 FCT 1331 (CanLII),

Appendix A

Access to Information Act, R.S.C., 1985, c. A-1, section 19

PERSONAL INFORMATION

Personal information

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

(*a*) the individual to whom it relates consents to the disclosure;

(*b*) the information is publicly available; or

(*c*) the disclosure is in accordance with section 8 of the *Privacy Act*.

1980-81-82-83, c. 111, Sch. I "19".

RENSEIGNEMENTS PERSONNELS

Renseignements personnels

19. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.

Cas où la divulgation est autorisée

(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :

a) l'individu qu'ils concernent y consent;

b) le public y a accès;

c) la communication est conforme à l'article 8 de la *Loi sur la protection des renseignements personnels*.

1980-81-82-83, ch. 111, ann. I « 19 ».

Access to Information Act, R.S.C., 1985, c. A-1, section 41

REVIEW BY THE FEDERAL COURT

Review by Federal Court

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

1980-81-82-83, c. 111, Sch. I "41".

RÉVISION PAR LA COUR FÉDÉRALE

Révision par la Cour fédérale

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

1980-81-82-83, ch. 111, ann. I « 41 ».

Federal Courts Act, R.S.C., 1985, c. F-7, section 28

Judicial review

28. (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

(*a*) the Board of Arbitration established by the *Canada Agricultural Products Act*;

(*b*) the Review Tribunal established by the *Canada Agricultural Products Act*;

(*b.1*) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*;

(*c*) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

(*d*) [Repealed, 2012, c. 19, s. 272]

(*e*) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

(*f*) the National Energy Board established by the *National Energy Board Act*;

(*g*) the Governor in Council, when the Governor in Council makes an order under subsection 54(1) of the *National Energy Board Act*;

(*g*) the Appeal Division of the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, unless the decision is made under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the *Canada Pension Plan*, section 27.1 of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;

Contrôle judiciaire

28. (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

a) le conseil d'arbitrage constitué par la *Loi sur les produits agricoles au Canada*;

b) la commission de révision constituée par cette loi;

b.1) le commissaire aux conflits d'intérêts et à l'éthique nommé en vertu de l'article 81 de la *Loi sur le Parlement du Canada*;

c) le Conseil de la radiodiffusion et des télécommunications canadiennes constitué par la *Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes*;

d) [Abrogé, 2012, ch. 19, art. 272]

e) le Tribunal canadien du commerce extérieur constitué par la *Loi sur le Tribunal canadien du commerce extérieur*;

f) l'Office national de l'énergie constitué par la *Loi sur l'Office national de l'énergie*;

g) le gouverneur en conseil, quand il prend un décret en vertu du paragraphe 54(1) de la *Loi sur l'Office national de l'énergie*;

g) la division d'appel du Tribunal de la sécurité sociale, constitué par l'article 44 de la *Loi sur le ministère de l'Emploi et du Développement social*, sauf dans le cas d'une décision qui est rendue au titre du paragraphe 57(2) ou de l'article 58 de cette loi ou qui vise soit un appel interjeté au titre du paragraphe 53(3) de cette loi, soit un appel concernant une décision relative au délai supplémentaire visée au paragraphe 52(2) de cette loi, à l'article 81 du *Régime de pensions du Canada*, à l'article 27.1 de la *Loi sur la sécurité de la vieillesse* ou à l'article 112 de la *Loi sur l'assurance-emploi*;

(*h*) the Canada Industrial Relations Board established by the *Canada Labour Code*;

(*i*) the Public Service Labour Relations Board established by the *Public Service Labour Relations Act*;

(*j*) the Copyright Board established by the *Copyright Act*;

(*k*) the Canadian Transportation Agency established by the *Canada Transportation Act*;

(*l*) [Repealed, 2002, c. 8, s. 35]

(*m*) [Repealed, 2012, c. 19, s. 272]

(*n*) the Competition Tribunal established by the *Competition Tribunal Act*;

(*o*) assessors appointed under the *Canada Deposit Insurance Corporation Act*;

(*p*) [Repealed, 2012, c. 19, s. 572]

(*q*) the Public Servants Disclosure Protection Tribunal established by the *Public Servants Disclosure Protection Act*; and

(*r*) the Specific Claims Tribunal established by the *Specific Claims Tribunal Act*.

h) le Conseil canadien des relations industrielles au sens du *Code canadien du travail*;

i) la Commission des relations de travail dans la fonction publique constituée par la *Loi sur les relations de travail dans la fonction publique*;

j) la Commission du droit d'auteur constituée par la *Loi sur le droit d'auteur*;

k) l'Office des transports du Canada constitué par la *Loi sur les transports au Canada*;

l) [Abrogé, 2002, ch. 8, art. 35]

m) [Abrogé, 2012, ch. 19, art. 272]

n) le Tribunal de la concurrence constitué par la *Loi sur le Tribunal de la concurrence*;

o) les évaluateurs nommés en application de la *Loi sur la Société d'assurance-dépôts du Canada*;

p) [Abrogé, 2012, ch. 19, art. 572]

q) le Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles constitué par la *Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles*;

r) le Tribunal des revendications particulières constitué par la *Loi sur le Tribunal des revendications particulières*.

Sections apply

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

Dispositions applicables

(2) Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

Federal Court deprived of jurisdiction

(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

Incompétence de la Cour fédérale

(3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

R.S., 1985, c. F-7, s. 28; R.S., 1985, c. 30 (2nd Supp.), s. 61; 1990, c. 8, s. 8; 1992, c. 26, s. 17, c. 33, s. 69, c. 49, s. 128; 1993, c. 34, s. 70; 1996, c. 10, s. 229, c. 23, s. 187; 1998, c. 26, s. 73; 1999, c. 31, s. 92(E); 2002, c. 8, s. 35; 2003, c. 22, ss. 167(E), 262; 2005, c. 46, s. 56.1; 2006, c. 9, ss. 6, 222; 2008, c. 22, s. 46; 2012, c. 19, ss. 110, 272, 572; 2013, c 40, s. 236.

L.R. (1985), ch. F-7, art. 28; L.R. (1985), ch. 30 (2e suppl.), art. 61; 1990, ch. 8, art. 8; 1992, ch. 26, art. 17, ch. 33, art. 69, ch. 49, art. 128; 1993, ch. 34, art. 70; 1996, ch. 10, art. 229, ch. 23, art. 187; 1998, ch. 26, art. 73; 1999, ch. 31, art. 92(A); 2002, ch. 8, art. 35; 2003, ch. 22, art. 167(A) et 262; 2005, ch. 46, art. 56.1; 2006, ch. 9, art. 6 et 222; 2008, ch. 22, art. 46; 2012, ch. 19, art. 110, 272 et 572; 2013, ch. 40, art. 236.

Federal Courts Act, R.S.C., 1985, c. F-7, section 52

JUDGMENTS OF FEDERAL COURT OF APPEAL

Powers of Federal Court of Appeal

52. The Federal Court of Appeal may

(*a*) quash proceedings in cases brought before it in which it has no jurisdiction or whenever those proceedings are not taken in good faith;

(*b*) in the case of an appeal from the Federal Court,

(i) dismiss the appeal or give the judgment and award the process or other proceedings that the Federal Court should have given or awarded,

(ii) in its discretion, order a new trial if the ends of justice seem to require it, or

(iii) make a declaration as to the conclusions that the Federal Court should have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in light of that declaration; and

(*c*) in the case of an appeal other than an appeal from the Federal Court,

(i) dismiss the appeal or give the decision that should have been given, or

(ii) in its discretion, refer the matter back for determination in accordance with such directions as it considers to be appropriate.

(*d*) [Repealed, 1990, c. 8, s. 17]

R.S., 1985, c. F-7, s. 52; 1990, c. 8, s. 17; 2002, c. 8, s. 50.

JUGEMENTS DE LA COUR D'APPEL FÉDÉRALE

Pouvoirs de la Cour d'appel fédérale

52. La Cour d'appel fédérale peut :

a) arrêter les procédures dans les causes qui ne sont pas de son ressort ou entachées de mauvaise foi;

b) dans le cas d'un appel d'une décision de la Cour fédérale :

(i) soit rejeter l'appel ou rendre le jugement que la Cour fédérale aurait dû rendre et prendre toutes mesures d'exécution ou autres que celle-ci aurait dû prendre,

(ii) soit, à son appréciation, ordonner un nouveau procès, si l'intérêt de la justice paraît l'exiger,

(iii) soit énoncer, dans une déclaration, les conclusions auxquelles la Cour fédérale aurait dû arriver sur les points qu'elle a tranchés et lui renvoyer l'affaire pour poursuite de l'instruction, à la lumière de cette déclaration, sur les points en suspens;

c) dans les autres cas d'appel :

(i) soit rejeter l'appel ou rendre la décision qui aurait dû être rendue,

(ii) soit, à son appréciation, renvoyer l'affaire pour jugement conformément aux instructions qu'elle estime appropriées.

d) [Abrogé, 1990, ch. 8, art. 17]

L.R. (1985), ch. F-7, art. 52; 1990, ch. 8, art. 17; 2002, ch. 8, art. 50.

TAB 4

045

Indexed as:

Ontario (Public Safety and Security) v. Criminal Lawyers' Association

Ministry of Public Safety and Security (Formerly Solicitor General) and Attorney General of Ontario Appellants;
v.
Criminal Lawyers' Association Respondent, and Attorney General of Canada, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Newfoundland and Labrador, Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario, Canadian Bar Association, Information Commissioner of Canada, Federation of Law Societies of Canada, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers' Association, Canadian Association of Journalists and British Columbia Civil Liberties Association Interveners

[2010] 1 S.C.R. 815

[2010] 1 R.C.S. 815
[2010] S.C.J. No. 23
[2010] A.C.S. no 23

2010 SCC 23

File No.: 32172.

Supreme Court of Canada

Heard: December 11, 2008;
Judgment: June 17, 2010.

Present: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.

(76 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Constitutional law — Charter of Rights — Freedom of expression — Access to information — Exemptions — Minister refusing to disclose records relating to murder case, claiming exemptions under s. 14 (law enforcement) and s. 19 (solicitor-client privilege) of Ontario Freedom of Information and Protection of Privacy Act — Whether [page816] s. 23 of Act violates guarantee of

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freedom of expression by failing to extend "public interest" balancing to exemptions found in ss. 14 and 19 — Canadian Charter of Rights and Freedoms, s. 2(b) — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 14, 19, 23.

Constitutional law — Charter of Rights — Freedom of expression — Scope — Access to government held information — Whether freedom of expression protects access to information — If so, in what circumstances — Canadian Charter of Rights and Freedoms, s. 2(b).

Access to information — Access to records — Exemptions — Minister refusing to disclose records relating to murder case, claiming exemptions under freedom of information legislation — Whether constitutional guarantee of freedom of expression protects access to information — If so, in what circumstances — Canadian Charter of Rights and Freedoms, s. 2(b) — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 14, 19, 23.

Summary:

The trial judge ordered a stay of proceedings in a murder trial, finding many instances of abusive conduct by state officials. The Ontario Provincial Police investigated and exonerated the police of misconduct without giving reasons for their finding. Concerned about the disparity between the findings at trial and the conclusion of the police investigation, the Criminal Lawyers' Association ("CLA") made a request under the Ontario *Freedom of Information and Protection of Privacy Act* ("*FIPPA*") to the responsible Minister for disclosure of records relating to the investigation. The records at issue were a lengthy police report and two documents containing legal advice. *FIPPA* exempts various categories of documents from disclosure, some of which may be disclosed pursuant to a discretionary ministerial decision, including law enforcement records under s. 14 and solicitor-client privileged records under s. 19. Some records in the ministerial discretion category, but not those under ss. 14 and 19, are subject to a further review to determine whether a compelling public interest in disclosure clearly outweighs the purpose of the exemption under s. 23 of *FIPPA*.

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The Minister refused to disclose any of the records without explanation, claiming exemptions under, among other provisions, ss. 14 and 19 of *FIPPA*. On review, the Assistant Information and Privacy Commissioner held, without inquiring into the Minister's exercise of discretion, that the impugned records qualified for exemption under a number of sections of the Act, including ss. 14 (2)(a) and 19. He noted that s. 23 did not apply to these two provisions of *FIPPA*, and accordingly, did not determine whether there was a compelling public interest at play. He also concluded that the omission of ss. 14 and 19 from the public interest override in s. 23 did not constitute a breach of the CLA's right to freedom of expression guaranteed under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The Divisional Court upheld the decision not to disclose the documents and agreed with the conclusion that the exclusion of ss. 14 and 19 from s. 23 did not violate s. 2(*b*) of the *Charter*. In a majority decision, the Court of Appeal allowed the CLA's appeal, concluding that the exemption scheme violated the *Charter*.

Held: The appeal should be allowed. The Assistant Commissioner's order confirming the constitutionality of s. 23 of *FIPPA* should be restored. The documents protected by s. 19 of *FIPPA* dealing with solicitor-client privilege should be exempted from disclosure. The claim under the law enforcement provision, s. 14 of *FIPPA*, should be returned to the Commissioner for reconsideration.

The real constitutional issue before the Court is whether the failure to extend the s. 23 public interest override to documents for which law enforcement or solicitor-client privilege are claimed violates the guarantee of freedom of expression in s. 2(*b*) of the *Charter*. Section 2(*b*) of the *Charter* guarantees freedom of expression, but it does not guarantee access to all documents in government hands. Determining whether s. 2(*b*) of the *Charter* protects such access is essentially

a question of how far s. 2(*b*) protection extends. It asks whether s. 2(*b*) is engaged at all and is best approached by building on the methodology set out in *Irwin Toy*.

To demonstrate that there is expressive content in accessing these documents, a claimant must establish [page818] that the denial of access effectively precludes meaningful public discussion on matters of public interest. If this necessity is established, a *prima facie* case for production is made out, but the claimant must go on to show that there are no countervailing considerations inconsistent with production. A claim for production may be defeated, for example, if the documents are protected by a privilege, as privileges are recognized as appropriate derogations from the scope of protection offered by s. 2(*b*) of the *Charter*. It may also be that a particular government function is incompatible with access to certain documents, and these documents may remain exempt from disclosure because it would impact the proper functioning of affected institutions. If the claim survives this second step, then the claimant establishes that s. 2(*b*) is engaged, and the only remaining question is whether the government action infringes that protection.

The legislature's decision not to make documents under ss. 14 and 19 subject to the s. 23 public interest override does not violate the right to free expression guaranteed by s. 2(*b*) of the *Charter*. The CLA has not demonstrated that meaningful public discussion of the handling of the investigation and prosecution of the murder cannot take place under the current legislative scheme. Even if the first step were met, the CLA would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions. Sections 14 and 19 are intended to protect documents from disclosure on these very grounds.

On the record before us, it is not established that the CLA could satisfy the requirements of the framework and, as a result, s. 2(*b*) is not engaged. In any event, the impact of the absence of a s. 23 public interest override in relation to documents under ss. 14 and 19 is so minimal that even if s. 2(*b*) were engaged it would not be breached. The ultimate answer to the CLA's claim is that the absence of a second-stage review, provided by the s. 23 override for documents within ss. 14 and 19, does not significantly impair any hypothetical right to access government documents given that those sections, properly interpreted, already incorporate considerations of the public interest. The CLA therefore would not meet the test because it could not show that the state has infringed its rights to freedom of expression.

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In reviewing the Minister's decision not to disclose the records, the Commissioner must determine whether the exemptions were properly claimed and, if so, whether the Minister's exercise of discretion was reasonable. In this case, the order pertaining to the claim under s. 14 of *FIPPA* should be returned to the Commissioner for reconsideration. The Commissioner upheld the Minister's decision without reviewing the Minister's exercise of discretion under ss. 14 and 19 of *FIPPA* because s. 23 did not apply to these sections. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought raise concerns which should have been investigated by the Commissioner. Had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

The Commissioner's decision on the s. 19 claim, however, should be upheld. It is difficult to see how these records could have been disclosed under the established rules on solicitor-client privilege and based on the facts and interests at stake.

Cases Cited

Applied: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; **referred to:** *R. v. Court* (1995), 23 O.R. (3d) 321; *R. v. Court* (1997), 36 O.R. (3d) 263; *Ontario (Ministry of Finance) v. Ontario (Inquiry Officer)* (1998), 5 Admin. L.R. (3d) 175, rev'd (1999), 13 Admin. L.R. (3d) 1; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763; *R. v. Campbell*, [1999] 1 S.C.R. 565; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; [page820] *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185; *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4) 447.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 7, 11(*b*), (*d*).

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 10, 14, 19, 23, 50 (1)(a).

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History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Juriansz, MacFarland and LaForme JJ.A.), 2007 ONCA 392, 86 O.R. (3d) 259, 224 O.A.C. 236, 280 D.L.R. (4) 193, 60 Admin. L.R. (4) 279, 220 C.C.C. (3d) 343, 58 C.P.R. (4) 298, 156 C.R.R. (2d) 1, [2007] O.J. No. 2038 (QL); 2007 CarswellOnt 3218, setting aside a decision of Blair R.S.J. and Gravely and Epstein JJ. (2004), 70 O.R. (3d) 332, [page821] 237 D.L.R. (4) 525, 184 O.A.C. 223, 13 Admin. L.R. (4) 26, 30 C.P.R. (4) 267, 116 C.R.R. (2d) 323, [2004] O.J. No. 1214 (QL), 2004 CarswellOnt 1172. Appeal allowed.

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The judgment of the Court was delivered by

McLACHLIN C.J. and ABELLA J.:—

1. Overview

1 Access to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance.

2 Both openness and confidentiality are protected by Ontario's freedom of information legislation, the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*" or the "Act"). The relationship between them under this scheme is at the heart of this

appeal. At issue is the balance struck by the Ontario legislature in exempting certain categories of documents from disclosure.

3 The Act exempts various categories of documents from disclosure. This case concerns records that *may* be disclosed pursuant to a discretionary ministerial decision. More particularly, this case concerns records prepared in the course of law enforcement investigations (s. 14) and records protected by solicitor-client privilege (s. 19). The Act provides that some records in the ministerial discretion category are subject to a further review to determine whether a compelling public interest in disclosure clearly outweighs the purpose of the exemption under s. 23 of *FIPPA*. The Act does not [page823] require this additional public interest review for solicitor-client records or law enforcement records.

4 The Criminal Lawyers' Association ("CLA") is an advocacy group representing members of the criminal defence bar in Ontario. It is seeking records in the hands of the Crown relating to a murder case which gave rise to judicial expressions of concern: two documents containing legal advice and a 318-page report looking into alleged police misconduct. The Minister refused to disclose either the report or related documents, stating that the exemptions in the Act for solicitor-client privilege and law enforcement privilege covered all the material. On review, the Assistant Information and Privacy Commissioner held, without inquiring into the Minister's exercise of discretion, that the impugned records qualified for exemption under a number of sections of the Act, including ss. 14(2)(a) and 19. He noted that s. 23 did not apply to these two provisions of the Act and, as such, he did not determine whether there was a compelling public interest at play here in the context of ss. 14 and 19.

5 Section 2(*b*) of the *Canadian Charter of Rights and Freedoms* guarantees freedom of expression, but it does not guarantee access to all documents in government hands. Access to documents in government hands is constitutionally protected only where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned.

6 The CLA argues that the Act's failure in s. 23 to include a public interest review for solicitor-client and law enforcement privileged documents [page824] violates freedom of expression in s. 2 (*b*) of the *Charter*. For the reasons that follow, we conclude that there is no such violation.

7 This said, it is not clear on the material before us that the Assistant Commissioner, in applying the Act, fully considered the scope of his discretion under s. 14, the law enforcement provision. We therefore remit this matter to the Commissioner for reconsideration to determine whether any or all of the report should be disclosed.

2. Background

8 This case arises out of the murder of Domenic Racco in 1983, for which four men (Anthony Musitano, Domenic Musitano, Guiseppe Avignone, and William Rankin) were originally charged. They pled guilty to lesser charges in 1985. In 1990, two other individuals, Graham Rodney Court and Peter Dennis Monaghan, were alleged to have been hired to kill Racco. Court and Monaghan were convicted after a jury trial in 1991.

9 In 1995, the Ontario Court of Appeal ordered a new trial for Monaghan on the basis, *inter alia*, of fresh evidence (*R. v. Court* (1995), 23 O.R. (3d) 321). It was evidence that had been lost before trial, but the police did not reveal its loss to the defence until two-and-a-half years after the trial. A new trial was also ordered, for both Monaghan and Court, based on inadequate jury instructions at trial.

10 Both men applied for a stay of proceedings in 1997 on the grounds of a breach of their *Charter* rights. Glithero J. concluded that their rights under ss. 7, 11(*b*) and 11(*d*) of the *Charter* had been violated to such a degree that the proceedings should be stayed, stating:

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> ... I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. That prejudice is completed. The improper cross-examinations and jury address would not be repeated at a new trial and the completed prejudice with respect to those issues would not therefore be perpetuated in a new trial. The effects or prejudice caused by the abusive conduct in systematic non-disclosure, deliberate revision of materials so as to exclude useful information to the defence, and the unexplained loss, or breach of the duty to preserve, of so much original evidence would be perpetuated through a future trial in that the defence cannot be put back into the position they would originally have been, and which in my view they were entitled to maintain throughout the trial process. That evidence is gone, either entirely or to the extent of severely diminishing the utility of the evidence, and the prejudice thereby occasioned has only been exaggerated by the passage of time since the 1991 trial and prior to the belated disclosure of this information in 1996. [Emphasis added.]
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> (*R. v. Court* (1997), 36 O.R. (3d) 263 (Gen. Div.), p. 300)

11 As a result of Glithero J.'s rebuke, the Ontario Provincial Police ("OPP") undertook an investigation into the conduct of the Halton Regional Police, the Hamilton-Wentworth Regional Police, and the Crown Attorney in the case. In a terse press release on April 3, 1998, the OPP exonerated the police on the grounds that there was "no evidence that the officers attempted to obstruct justice by destroying or withholding a vital piece of evidence" and "no evidence that information withheld from defence was done deliberately and with the intent to obstruct justice". Despite the clear public interest in knowing why the misconduct found by Glithero J. did not merit criminal charges, the OPP offered no explanation for its conclusions.

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12 Concerned about the disparity between the findings of Glithero J. and the conclusions reached by the OPP, the CLA made a request under *FIPPA* to the Minister of the Solicitor General and Correctional Services (later the Minister of Public Safety and Security and now the Minister of Community Safety and Correctional Services) for disclosure of records relating to the OPP investigation. The records at issue were a 318-page police report detailing the results of the OPP's investigation; a March 12, 1998 memorandum from a Crown Attorney to the Regional Director of Crown Operations containing legal advice with respect to the police report; and a March 24, 1998 letter from the Regional Director of Crown Operations to a police official also containing legal advice on the OPP investigation.

13 The Minister refused to disclose any of these records, claiming several exemptions under the Act, including: s. 14 (law enforcement), s. 19 (solicitor-client privilege), s. 20 (danger to health and safety), and s. 21 (personal privacy). He did not explain how or why each of these exemptions applied to the material in question and did not address the possibility of partial disclosure.

14 The CLA appealed the Minister's decision not to disclose the records to the Commissioner pursuant to s. 50(1)(a) of *FIPPA*.

15 The Minister's decision was reviewed by the Assistant Information and Privacy Commissioner, Tom Mitchinson. Reliance on the s. 20 exemption was withdrawn. On May 5, 2000, Mr. Mitchinson upheld the propriety of the Minister's decision not to disclose the records (IPC Order PO-1779). He found that the public interest in disclosure "clearly outweigh[ed]" the purpose of the exemption on the facts of this case, and would have applied the s. 23 override

with respect to the s. 21 personal privacy exemption; however, he upheld the Minister's [page827] refusal because the other claimed exemptions (ss. 14 and 19) are not included within the s. 23 override. He was also asked to consider whether the omission of ss. 14 and 19 from the public interest override constituted a breach of the CLA's *Charter* right to freedom of expression. He concluded that it did not.

16 At the Divisional Court, Blair R.S.J. upheld the decision not to disclose the documents and agreed with the conclusion that the *FIPPA* exemption scheme did not violate s. 2(*b*) of the *Charter*: (2004), 70 O.R. (3d) 332.

17 The appeal was allowed by the Court of Appeal: 2007 ONCA 392, 86 O.R. (3d) 259. LaForme J.A., for the majority, concluded that the exemption scheme in *FIPPA* violated the *Charter*. Juriansz J.A. dissented, concluding that there was no *Charter* violation, and questioned whether expression was genuinely at issue at all.

18 The Minister appealed the matter to this Court on the issue of the constitutionality of s. 23, given the exclusion of ss. 14 and 19 from its scope. Before this Court, and before the Court of Appeal for that matter, the CLA based its attack on the constitutionality of the statutory scheme and not on the Minister's exercise of discretion under either s. 14 or s. 19.

3. The Legislative Scheme

19 The Act provides for limited access to information in the government's hands. Section 10(1) provides for general rights of access to information, subject to a limited number of statutory exemptions:

> **10.**-(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
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> (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
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> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

20 The exemptions include Cabinet records (s. 12); advice to government (s. 13); law enforcement records (s. 14); records relating to relations with other governments (s. 15); defence records (s. 16); third-party information (s. 17); records related to Ontario's economic and other interests (s. 18); records to which solicitor-client privilege applies (s. 19); records whose disclosure might reasonably be expected to seriously threaten the safety or health of an individual (s. 20); personal information (s. 21); records putting species at risk (s. 21.1); and information already or soon to be publicly available (s. 22).

21 There is no discretion, and disclosure must be refused in the case of some categories of exemptions, including Cabinet records, records containing certain third-party information, and records containing personal information. Other categories of exemptions are discretionary. They include the exemptions at issue in this case: law enforcement records under s. 14 and solicitor-client privileged records under s. 19.

22 Section 14, dealing with law enforcement records, states:

> **14.**-(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
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> (a) interfere with a law enforcement matter;

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(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication;

(g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

(h) reveal a record which has been confiscated from a person by a peace officer in accordance with an Act or regulation;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime.

(2) A head may refuse to disclose a record,

(a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

(b) that is a law enforcement record where the disclosure would constitute an offence under an Act of Parliament;

(c) that is a law enforcement record where the disclosure could reasonably be expected to expose [page830] the author of the record or any person who has been quoted or paraphrased in the record to civil liability; or

(d) that contains information about the history, supervision or release of a person under the control or supervision of a correctional authority.

(3) A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) apply.

(4) Despite clause (2) (a), a head shall disclose a record that is a report prepared in the course of routine inspections by an agency where that agency is authorized to enforce and regulate compliance with a particular statute of Ontario.

(5) Subsections (1) and (2) do not apply to a record on the degree of success achieved in a law enforcement program including statistical analyses unless disclosure of such a record may prejudice, interfere with or adversely affect any of the matters referred to in those subsections.

Section 19 deals with solicitor-client privilege. At the material time, it stated:

> **19.** A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

23 The Minister asserting the exemption has the burden of demonstrating that it applies. Any decision made by a Minister is subject to review by the Commissioner. In reviewing ministerial decisions made pursuant to certain exemptions, the Commissioner considers the public interest pursuant to s. 23, the "public interest override":

> **23.** An exemption from disclosure of a record under sections 13 [advice to government], 15 [relations with other governments], 17 [third-party information], 18 [economic and other interests of Ontario], 20 [danger to safety or health], 21 [personal privacy] and 21.1 [species [page831] at risk] does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

24 The s. 23 public interest override does not apply to documents exempted from disclosure for law enforcement (s. 14) and solicitor-client privilege (s. 19). The main issue in this case, as it was argued before us, is whether this renders s. 23 unconstitutional.

25 When an exemption is invoked by the head of an institution (the Minister) under ss. 13, 15, 17, 18, 20, 21 and 21.1, the effect of s. 23 is to require the Commissioner to not only review whether the exemption was validly claimed, but whether the public interest in the disclosure of the record "clearly outweighs the purpose of the exemption" (*Ontario (Ministry of Finance) v. Ontario (Inquiry Officer)* (1998), 5 Admin. L.R. (3d) 175 (Ont. Div. Ct.), rev'd (1999), 13 Admin. L.R. (3d) 1 (C.A.)).

26 This public interest override was a late addition to the legislation. The Attorney General took the position that it would undermine the context of the Act:

> You are just saying to them, ignore the standards of the *Act* that the Legislature has set up and do what you please by looking at the public interest.

27 Nevertheless, a public interest provision was eventually introduced for some but not all categories of exemptions on the insistence of some of the members of the legislature. This was despite the fact that the Williams Commission Report on which the Act was based had not specifically recommended its adoption (Ontario, *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* (1980) (the "Williams Commission" Report); Speech by Tom Mitchinson, Assistant Commissioner, Ontario Information and Privacy Commissioner, *"Public [page832] Interest" and Ontario's Freedom of Information and Protection of Privacy Act*, February 16, 2001).

28 This review of the general statutory scheme brings us to the specific challenge before us. The CLA argued that s. 23 of *FIPPA* infringes s. 2(*b*) of the *Charter* by failing to extend the "public interest" balancing to the exemptions found in ss. 14 and 19 concerning law enforcement and solicitor-client privileged records.

4. Is the Legislation Constitutional?

29 It is essential to correctly frame the real constitutional issue before the Court. That issue is whether the failure to extend the s. 23 public interest override to documents for which law enforcement or solicitor-client privilege are claimed violates the guarantee of freedom of expression in s. 2(*b*) of the *Charter*.

(a) Access to Information Under Section 2(b) of the Charter

30 The first question to be addressed is whether s. 2(*b*) protects access to information and, if so, in what circumstances. For the reasons that follow, we conclude that s. 2(*b*) does not

guarantee access to all documents in government hands. Section 2(*b*) guarantees freedom of expression, not access to information. Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government.

31 Determining whether s. 2(*b*) of the *Charter* requires access to documents in government hands in a particular case is essentially a question of how far s. 2(*b*) protection extends. A question arises as to how the issue should be approached. The courts [page833] below were divided on whether the analysis should follow the model adopted in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. In their argument before this Court, some of the parties also placed reliance on *Dunmore* and on this Court's subsequent decision in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673. In our view, nothing would be gained by furthering this debate. Rather, it is our view that the question of access to government information is best approached by building on the methodology set in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 967-68, and in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141. The main question in this case is whether s. 2(*b*) is engaged at all. We conclude that the scope of the s. 2(*b*) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints. We further conclude, as discussed more fully below, that in this case these requirements are not satisfied. As a result, s. 2(*b*) is not engaged.

32 The *Irwin Toy* framework involves three inquiries: (1) Does the activity in question have expressive content, thereby bringing it within the reach of s. 2(*b*)? (2) Is there something in the method or location of that expression that would remove that protection? (3) If the activity is protected, does the state action infringe that protection, either in purpose or effect? These steps were developed in *Montréal (City)* (at para. 56) in the context of expressive activities, but the principles animating them equally apply to determining whether s. 2(*b*) requires the production of government documents.

33 This leads us to more detailed comments on the scope of s. 2(*b*) protection where the issue is access to documents in government hands. To [page834] demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a *prima facie* case for the production of the documents in question. But even if this *prima facie* case is established, the claim may be defeated by factors that remove s. 2(*b*) protection, e.g. if the documents sought are protected by privilege or if production of the documents would interfere with the proper functioning of the governmental institution in question. If the claim survives this second step, then the claimant establishes that s. 2(*b*) is engaged. The only remaining question is whether the government action infringes that protection.

34 The first inquiry into expressive content asks whether the demand for access to information furthers the purposes of s. 2(*b*). In the case of demands for government documents, the relevant s. 2(*b*) purpose is usually the furtherance of discussion on matters of public importance.

35 Not every demand for government information serves this purpose. Thus the jurisprudence holds that there is no general right of access to information. The position is well put in *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.), *per* Adams J.:

> By contrast, our political access makes government bureaucracy accountable to elected officials who, in turn, conduct their business in the context of public elections and legislatures and where the media, again, play a fundamental reporting role... . Against this tradition, it is not possible to proclaim that s. 2(*b*) entails a general constitutional right of access to all information under the control of government and this is particularly so in the context of an application relating to an active criminal investigation. [Emphasis added; p. 204.]

36 To show that access would further the purposes of s. 2(*b*), the claimant must establish that access is necessary for the meaningful exercise [page835] of free expression on matters of public

or political interest: see *Irwin Toy*, at pp. 976 and 1008; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. On this basis, the Court has recognized access to information under s. 2(*b*) in the judicial context: "members of the public have a right to information pertaining to public institutions and particularly the courts" (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1339). The "open courts" principle is "inextricably tied to the rights guaranteed by s. 2(*b*)" because it "permits the public to discuss and put forward opinions and criticisms of court practices and proceedings" (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23, *per* La Forest J.).

37 In sum, there is a *prima facie* case that s. 2(*b*) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded. As Louis D. Brandeis famously wrote in his 1913 article in *Harper's Weekly* entitled " What Publicity Can Do": "Sunlight is said to be the best of disinfectants ... ." Open government requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions.

38 If this necessity is established, a *prima facie* case for production is made out. However, the claimant must go on to show that the protection is not removed by countervailing considerations inconsistent with production.

39 Privileges are recognized as appropriate derogations from the scope of the protection offered by s. 2(*b*) of the *Charter*. The common law privileges, like solicitor-client privilege, generally represent [page836] situations where the public interest in confidentiality outweighs the interests served by disclosure. This is also the rationale behind common law privileges that have been cast in statutory form, like the privilege relating to confidences of the Queen's Privy Council under s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. Since the common law and statutes must conform to the *Charter*, assertions of particular categories of privilege are in principle open to constitutional challenge. However, in practice, the outlines of these privileges are likely to be well settled, providing predictability and certainty to what must be produced and what remains protected.

40 It may also be that a particular government function is incompatible with access to certain documents. For example, it might be argued that while the open court principle requires that court hearings and judgments be open and available for public scrutiny and comment, memos and notes leading to a judicial decision are not subject to public access. This would impair the proper functioning of the court by preventing full and frank deliberation and discussion at the pre-judgment stage. The principle of Cabinet confidence for internal government discussions offers another example. The historic function of a particular institution may assist in determining the bounds of institutional confidentiality, as discussed in *Montréal (City)*, at para. 22. In that case, this Court acknowledged that certain government functions and activities require privacy (para. 76). This applies to demands for access to information in government hands. Certain types of documents may remain exempt from disclosure because disclosure would impact the proper functioning of affected institutions.

[page837]

(b) *The Constitutionality of Section 23*

41 The CLA argues that the failure of the legislature to make the s. 23 public interest override applicable to the exemptions in ss. 14 and 19 denies it access to the documents it seeks and thus violates s. 2(*b*) of the *Charter*. The CLA argues that if the override were applicable, the CLA would be entitled to the records in question due to their public interest nature.

42 We first address the question of the extent to which the absence of a s. 23 public interest override impairs the ability to obtain documents protected by ss. 14 and 19 of the Act. Against this background, we ask whether s. 2(*b*) is engaged in the case at bar, and if so, whether it is breached.

(i) The Impact of the Absence of the Section 23 Public Interest Override in This Case

43 In our view, it is not established that the absence of a s. 23 review for public interest significantly impairs the CLA's access to documents it would otherwise have had. Law enforcement privilege and solicitor-client privilege already take public interest considerations into account and, moreover, confer a discretion to disclose the information on the Minister. For the reasons that follow, we conclude that the public interest override contained in s. 23 would add little to what is already provided for in ss. 14 and 19 of the Act.

44 We turn first to records prepared in the course of law enforcement, which are dealt with under s. 14 of the Act. As jurisprudence surrounding concepts such as informer privilege and prosecutorial discretion attests, there is a strong public interest in protecting documents related to law enforcement: *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389; *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.), at p. 769, cited in *R. v. Campbell*, [1999] 1 S.C.R. 565, [page838] at para. 33; *R. v. Power*, [1994] 1 S.C.R. 601, at p. 623, *per* L'Heureux-Dubé J.; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 64, *per* LeBel J.; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at para. 32; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 48, *per* Charron J. Section 14 of the Act reflects this. The legislature in s. 14(1) has in effect declared that disclosure of records described in subsets (a) to (l) would be so detrimental to the public interest that it presumptively cannot be countenanced.

45 However, by stipulating that "[a] head may refuse to disclose" a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head.

46 A discretion conferred by statute must be exercised consistently with the purposes underlying its grant: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 53, 56 and 65. It follows that to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure.

47 By way of example, we consider s. 14(1)(a) where a head "may refuse to disclose a record where the disclosure could reasonably be expected to ... interfere with a law enforcement matter". The main purpose of the exemption is clearly to protect the public interest in effective law enforcement. However, the need to consider other interests, public and private, is preserved by the word "may" which confers a discretion on the head to make the decision whether or not to disclose the information.

48 In making the decision, the first step the head must take is to determine whether disclosure [page839] could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

49 The public interest override in s. 23 would add little to this process. Section 23 simply provides that exemptions from disclosure do not apply "where a compelling public interest in the

disclosure of the record clearly outweighs the purpose of the exemption". But a proper interpretation of s. 14(1) requires that the head consider whether a compelling public interest in disclosure outweighs the purpose of the exemption, to prevent interference with law enforcement. If the head, acting judicially, were to find that such an interest exists, the head would exercise the discretion conferred by the word "may" and order disclosure of the document.

50 The same rationale applies to the other exemptions under s. 14(1) as well as to those under s. 14(2). Section 14(2)(a) is particularly relevant in the case at bar. It provides that a head "may refuse to disclose a record ... that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law". The main purpose of this section is to protect [page840] the public interest in getting full and frank disclosure in the course of investigating and reporting on matters involving the administration of justice; an expectation of confidentiality may further the goal of getting at the truth of what really happened. At the same time, the discretion conferred by the word "may" recognizes that there may be other interests, whether public or private, that outweigh this public interest in confidentiality. Again, an additional review under s. 23 would add little, if anything, to this process.

51 This interpretation is confirmed by the established practice for review of s. 14 claims which proceeds on the basis that, even in the absence of the s. 23 public interest override, the head has a wide discretion. The proper review of discretion under s. 14 has been explained as follows:

> The absence of section 14 from the list of exemptions that can be overridden under section 23 does not change the fact that the exemption is discretionary, and discretion should be exercised on a case-by-case basis. The LCBO's submission suggests that it would never be appropriate to disclose such records in the public interest, or in order to promote transparency and accountability, in the context of the exercise of discretion. I disagree, and in my view, such a position would be inconsistent with the requirement to exercise discretion based on the facts and circumstances of every case.
>
> (IPC Order PO-2508-I/September 27, 2006, at p. 6, *per* Senior Adjudicator John Higgins)

52 We therefore conclude that s. 14 already provides for adequate consideration of the public interest in the disclosure of the records. In reviewing a claim for an exemption under s. 14, the Commissioner, as discussed more fully below, focuses on the exercise of discretion under that [page841] section. A further consideration under s. 23 would add essentially another level of review.

53 The same analysis applies, perhaps even more strongly, to the exemption for documents protected by solicitor-client privilege. Section 19 of the Act provides that a head "may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation". The purpose of this exemption is clearly to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship: *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 836; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875; *Campbell*, at para. 49; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at paras. 35 and 41; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at paras. 36-37; *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809; *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574. The only exceptions recognized to the privilege are the narrowly guarded public safety and right to make full answer and defence exceptions: *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. Brown*, 2002 SCC 32, [2002] 2 S.C.R. 185.

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54 Given the near-absolute nature of solicitor-client privilege, it is difficult to see how the s. 23 public interest override could ever operate to require disclosure of a protected document. This is particularly so given that the use of the word "may" would permit and, if relevant, require the head to [page842] consider the overwhelming public interest in disclosure. Once again, the public interest override in s. 23 would add little to the decision-making process.

55 The conclusion that the s. 23 override in the case of the law enforcement and solicitor-client exemptions adds little more than a second level of review is consistent with the legislative history of the Act. The Williams Commission Report, on which the Act was based, did not recommend a public interest override, presumably not finding such an override necessary. The Minister who spoke to the legislation resisted suggestions for a public interest override. It was tacked on by amendment, but made applicable only to certain exemptions. These are generally exemptions of a political or personal nature - advice to government; third-party information; economic and other interests of Ontario; danger to health and safety; personal privacy; and species at risk. These exemptions reflect a legislative choice that is not at issue in this appeal. But by way of comparison, it may be possible to argue that the s. 23 public interest override might serve a purpose with respect to these issues, since they may not inherently raise the need to balance all conflicting interests, raising the risk that the public interest in disclosure might be overlooked. But that cannot be said of the law enforcement and solicitor-client exemptions.

56 We conclude that the CLA has failed to establish that the inapplicability of the s. 23 public interest override significantly impairs its ability to obtain the documents it seeks. Sections 14 and 19 already incorporate, by necessity, the public interest to the extent it may be applicable.

[page843]

(ii) Is the Section 23 Public Interest Override Constitutionally Required?

57 Having examined the impact of the legislature's decision not to make documents under ss. 14 and 19 subject to the s. 23 public interest override, we are in a position to address the ultimate question: Does this decision violate the right to free expression guaranteed by s. 2(*b*) of the *Charter*? To answer this question, we must return to our earlier discussion of when disclosure of documents in government hands may be constitutionally required under the *Irwin Toy* framework.

58 The first question is whether any access to documents that might result from applying the s. 23 public interest override in this case would enhance s. 2(*b*) expression. This is only established if the access is necessary to permit meaningful debate and discussion on a matter of public interest. If not, then s. 2(*b*) is not engaged.

59 In our view, the CLA has not demonstrated that meaningful public discussion of the handling of the investigation into the murder of Domenic Racco, and the prosecution of those suspected of that murder, cannot take place under the current legislative scheme. Much is known about those events. In granting the stay against the two accused, Glithero J. stated:

> ... I have found many instances of abusive conduct by state officials, involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial. [p. 300]

The record supporting these conclusions is already in the public domain. The further information sought relates to the internal investigation of the conduct of the Halton Regional Police, [page844] the Hamilton-Wentworth Regional Police and the Crown Attorney in this case. It may be that this report should have been produced under the terms of the Act, as discussed below. However, the CLA has not established that it is necessary for meaningful public discussion of the problems in the administration of justice relating to the Racco murder.

60 If necessity were established, the CLA, under the framework set out above (para. 33) would face the further challenge of demonstrating that access to ss. 14 and 19 documents, obtained through the s. 23 override, would not impinge on privileges or impair the proper functioning of relevant government institutions. As discussed, ss. 14 and 19 are intended to protect documents from disclosure on these very grounds. On the record before us, it is not established that the CLA could satisfy the requirements of the above framework.

61 It is unnecessary to pursue this inquiry further because, in any event, the impact of the absence of a s. 23 public interest override in relation to documents under ss. 14 and 19 is so minimal that even if s. 2(*b*) were engaged, it would not be breached. The ultimate answer to the CLA's claim is that the absence of the second-stage review, provided by the s. 23 override for documents within ss. 14 and 19, does not significantly impair any hypothetical right to access government documents, given that those sections, properly interpreted, already incorporate consideration of the public interest. The CLA would not meet the test because it could not show that the state has infringed its rights to freedom of expression.

5. Exercise of the Discretion Under the Act

62 Having decided that s. 23 of the Act itself is constitutional, our focus shifts now to determining [page845] whether the decisions of the Minister (the head) and the Commission complied with the statutory framework established by the Act.

(a) *The Decisions*

63 The Minister's decision not to disclose the records in question was conveyed to the CLA in a letter dated November 27, 1998, citing a number of statutory exemptions as the reason for the denial, including s. 21 (the personal privacy exemption), s. 19, and a number of subsections of s. 14. The letter provided no explanation for applying these exemptions; nor did it explain why no part of the records sought would be disclosed.

64 On review, the Assistant Commissioner recognized that the documents contained personal information about people involved in the case, including police officers, Crown counsel, witnesses, the victim, the accused and others. He concluded, however, that there was "a compelling public interest" in disclosure that "clearly outweigh[ed]" the interest in non-disclosure. Therefore, if only the s. 21 personal privacy exemption were at issue, he would have ordered disclosure pursuant to the s. 23 override.

65 The Assistant Commissioner also determined that the discretionary exemptions in ss. 14 and 19 could be applied to the records at issue. Because s. 23 does not apply to ss. 14 and 19, he upheld the Minister's decision not to disclose without reviewing the Minister's exercise of discretion under ss. 14 and 19 of the Act.

(b) *The Duty of the "Head" (or Minister)*

66 As discussed above, the "head" making a decision under ss. 14 and 19 of the Act has a [page846] discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.

67 The head must consider individual parts of the record, and disclose as much of the information as possible. Section 10(2) provides that where an exemption is claimed, "the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions".

(c) *The Duty of the Reviewing Commissioner*

68 The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

69 In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, [page847] I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis added; p. 11.]

70 Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).

71 The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).

72 In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.

73 The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in [page848] accordance with the review principles discussed above.

74 Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

75 We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:

> ... solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly

defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.]

(See also *Goodis*, at paras. 15-17, and *Blood Tribe*, at paras. 9-11.)

Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.

6. Conclusion

76 We would allow the appeal, set aside the decision of the Court of Appeal, and restore the Assistant Commissioner's Order confirming the [page849] constitutionality of s. 23 of *FIPPA*. The documents protected by s. 19 of *FIPPA* are exempted from disclosure. We would, however, order that the claim under s. 14 of the Act be returned to the Commissioner for reconsideration in light of these reasons. In accordance with the request of the parties, there will be no order for costs.

Appeal allowed.

Solicitors:

Solicitor for the appellants: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Heenan Blaikie, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Québec.

Solicitor for the intervener the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitor for the intervener Tom Mitchinson, Assistant Commissioner, Office of the Information and Privacy Commissioner of Ontario: Information and Privacy Commissioner of Ontario, Toronto.

[page850]

Solicitors for the intervener the Canadian Bar Association: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener the Information Commissioner of Canada: Information Commissioner of Canada, Ottawa.

Solicitors for the intervener the Federation of Law Societies of Canada: Borden Ladner Gervais, Ottawa.

Solicitors for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers' Association and the Canadian Association of Journalists: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Blake, Cassels & Graydon, Toronto.

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Action No. 621/93

Ontario Court (General Division), Divisional Court,

Hartt, Then and Adams JJ.

June 16, 1994*
*Released June 30, 1994.

Counsel:

Kim Twohig, Lori R. Sterling and Priscilla Platt, for applicant.

Christopher D. Bredt and Gerald Fahey, for respondent, Anita Fineberg, Inquiry Officer.

Paul B. Schabas and Andrew M. Diamond, for respondent, John Doe.

The judgment of the court was delivered orally by

1 ADAMS J.: — This is an application and cross-application for judicial review of Order P-534 of the respondent Anita Fineberg, Inquiry Officer (the "Officer") with the Office of the Information and Privacy Commissioner for Ontario. In Order P-534, the Inquiry Officer ordered the Ministry of the Attorney General (the "Ministry") to disclose to Kevin Donovan ("Donovan") of the Toronto Star certain information related to the funding of a law enforcement investigation, pursuant to the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31. The applicant and cross-applicant seek review of the order on quite different grounds.

2 The Ministry of the Attorney General seeks to have the entire order of Anita Fineberg, Inquiry Officer, quashed on the basis that she erred in finding that s. 14(1)(a), (b), (d) and (f) did not apply to the records in issue. The cross-applicant John Doe or, as is his proper name, Kevin Donovan, submits that the Inquiry Officer erred in finding s. 14(1)(b) did apply to portions of record 6 and in finding that much of the information and records 2, 4, 6 and 7 and all of records 1, 3, and 5 were not relevant to the cross-applicant's request. The cross-applicant also submits that ss. 52 and 55(1) of the Freedom of Information and Protection of Privacy Act violate s. 2(b) of the Canadian Charter of Rights and Freedoms and are not reasonable limits justifiable under s. 1. An improper delegation argument based on s. 56(2) was not pursued in argument.

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3 The interpretation of s. 14 of the Act lies at the heart of the specialized expertise of the Information and Privacy Commissioner and those who act on the Commissioner's behalf. As this court stated in John Doe v. Ontario (Information & Privacy Commissioner) (1993), 13 O.R. (3d) 767 at p. 783, 106 D.L.R. (4th) 140:

> The commission has issued over 500 orders in the five years since its creation, resulting in an expertise acquired on a daily basis in the management of government information.

4 Faced with the task of developing and applying the new statutory concept of unjustified invasion of privacy, one of the touchstones of its unique regulatory scheme, the commission is performing the same task begun years ago by labour tribunals in the development of then novel concepts, such as unfair labour practices. Central to its task, and at the heart of its specialized expertise, is the commissioner's interpretation and application of its statute and in particular, the sections under consideration, being ss. 21, 22 and 23, which regulate the core function of information management.

5 We therefore conclude the commissioner's decisions, already protected by the lack of any right of appeal, ought to be accorded a strong measure of curial deference even where the legislature has not insulated the tribunal by means of a privative clause.

6 Similarly, at p. 607 of Ontario (Solicitor General) v. Ontario (Assistant Information & Privacy Commissioner) (1993), 102 D.L.R. (4th) 602, this court again stated:

> The Commissioner has accumulated a great deal of experience and expertise in interpreting and applying the Act and the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56. Specifically, he has accumulated experience and expertise in balancing three competing interests: public access to information; individuals' right to protection of privacy in respect to personal information held by government; and the government's interest in confidentiality of government records. In this regard, the Commissioner has received over 1,500 appeals under the Act in the past three years, and over 800 appeals under the Municipal Freedom of Information and Protection of Privacy Act in the past two years. Further, the Commissioner has issued over 530 orders to date (432 under the Act and 105 orders under the municipal Act) and, accordingly, has developed a body of jurisprudence that guides it and functions as a precedent.
>
> We conclude that the proper test is curial deference to those decisions which lie within the Commissioner's area of expertise. Thus, a distinction can be made between decisions of the Commissioner relating to such matters as constitutional interpretation, to which no deference would be appropriate, and decisions interpreting the exemptions provided for by the Act which are squarely within his specialized area of expertise, to which curial deference is appropriate.

7 Accordingly, curial deference in reviewing the instant decision is appropriate. This court will not intervene where the Commissioner or Officer has accorded interpretations to the exemptions in s. 14(1) which they can reasonably bear.

8 At the outset of these proceedings, the Ministry sought to adduce an affidavit setting out the current status of the investigation. The affidavit described the occurrence of various trials, charges laid, and preliminary hearings, all arising out of the investigation. This information is a matter of public record. The cross-applicant's motion to quash the affidavits is therefore dismissed.

9 Section 14(1) permits a head to refuse to disclose a record where the disclosure:

> 14(1) . . . could reasonably be expected to,

(a) interfere with a law enforcement matter;

(b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

. . . . .

(d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

. . . . .

(f) deprive the person of the right to a fair trial or impartial adjudication;

10 Pursuant to s. 53 of the Act, the burden of proof that the requested information falls within the scope of s. 14(1)(a), (b), (d) or (f) resides with the Ministry.

11 The record reveals that the submissions made to the Officer by the head were of the most general sort, emphasizing that the project was funded pursuant to the rarely used and secretive funding mechanism of s. 9 of the Ministry of Treasury and Economics Act, R.S.O. 1990, c. M.37, and repeating the language of s. 14 of the Freedom of Information and Protection of Privacy Act. Clearly, sufficient information and reasoning has to be provided to the Officer in order that he or she may make an informed assessment of the reasonableness of the expectations required by s. 14. In this case, the Ministry proceeded before the Officer and this court as if the concerns detailed in s. 14 were self-evident from the record, or the request of such material during an active criminal investigation constituted a per se fulfilment of the relevant exemptions. These positions are inconsistent with the purpose and scheme of the statute.

12 It is our view that the findings by the Officer with respect to the application of s. 14(1)(a), (b), (d) and (f) were reasonable in light of the material before her, including the representations and the records themselves. The affidavit filed concerning the current status of the investigation does not alter this conclusion.

13 In this court, the Ministry's submissions centred on the concern that the financial information could reveal investigation techniques and procedures. This submission is not readily apparent from the information at issue. Moreover, this precise concern is an exemption specifically provided for by s. 14(1)(c) and this exemption was not relied on by the Ministry before the Officer. We emphasize that this case involved a request for financial information only and where there was very limited representations and evidence offered by the Ministry to the Officer, possibly in order to test its per se theory.

14 As well, we note the investigation has already attracted much publicity, making it difficult to understand the claims of potential harm or interference arising from disclosure of this information. In the circumstances, the Officer also reasonably concluded that the concern with respect to s. 14(1)(f) appeared quite unlikely. Finally, the Ministry's other concerns in relation to s. 14(1)(a), (b) and (d) were reasonably considered to be speculative given the financial nature of this particular information and in light of the representations made.

15 We note the exemptions are intended to be limited and specified, as indicated in the statute's purpose clause. In our view, the Officer's determinations reflect this statutory scheme. While the exemptions are to be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context, the result is not inconsistent with this required approach. In the circumstances of this case, it is not necessary for us to determine whether a "clear and direct linkage" test applied in one of the cases quoted by the Officer is reasonably related to the words of the statute. The reasonableness of the Officer's determination does not turn on the application of this test.

16 The request was "for information on funding by the Attorney General's Ministry of Project 80". The Officer determined that certain records were not relevant to the request. The cross-applicant submits that the Officer has no jurisdiction to determine relevancy and, alternatively, that the failure to seek representations from him, and from the Ministry we might add, before making such a determination, was contrary to s. 52(13).

17 In our opinion, the Officer must have the jurisdiction to consider the information and records at issue, in light of the wording of the request. Such jurisdiction necessarily entails a right to determine the scope of the request and the related relevance of the information at issue. However, s. 52(13) imposes a mandatory obligation on the Officer to provide the person making the request, and others as specified, with an opportunity to make representations. This was not done and it does not now lie in counsel's mouth to submit that Mr. Donovan, or the Ministry, could not have made meaningful representations. Section 52(13) contains no such qualification. In the result, this portion of the Officer's order is set aside and the matter is remitted back for a redetermination of the issue of relevancy and, potentially, for a consideration of whether any of the exemptions apply, all with the benefit of representations from the parties to the request proceedings.

18 This brings us to the cross-applicant's Charter submissions. It is his position that freedom of the press, provided by s. 2(b) of the Charter, entails a constitutional right of access to any and all information in the possession and under the control of government, subject to whatever limitations might be justified pursuant to s. 1 of the Charter. It is further submitted that the inquisitorial and secrecy provisions provided for by ss. 52 and 55(1) of the Act which, it is argued, precluded Mr. Donovan from making meaningful representations to the Officer, are excessive and not tailored to minimally impact the freedom of the press as defined by counsel. No judicial authority was cited in direct support of these submissions. Rather, they are based on the principle that a democratic government must be accountable to the people and information concerning its performance is essential to such accountability. In turn, the press is a fundamental vehicle for keeping the public informed. Effectively, the submission amounts to the claim of a general constitutional right to know: see Thomas I. Emerson, "Legal Foundations of the Right to Know" (1976), 1 Wash. U. L. Rev. 1; but see Houchins v. K.Q.E.D., 438 U.S. 1 (1978).

19 The Canadian legal authority to which we were referred essentially centres on freedom of the press in the context of our courts. Thus, cases such as Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, 45 C.R.R. 1, are distinguishable. They deal with the traditional emphasis which has been placed, in our justice system, upon an open court process. The tradition of open courts runs deep in Canadian society, as does the notion that the media are surrogates for the public. It is against this history that the Supreme Court of Canada has concluded that arguments in favour of the right of the press to report on the details of judicial proceedings are strong and that restrictions on that right clearly infringe s. 2(b). However, even this right has been confined to access to the court in contrast to information not revealed and tested in open court proceedings.

20 When it comes to government itself, other considerations may pertain. The information government has at its disposal, if looked at generally, potentially affects many interests, including privacy concerns of a constitutional dimension. The issue before us, therefore, is not just one of ensuring that government does its job effectively. Thus, the profound difficulty, represented by the statutory title "Freedom of Information and Protection of Privacy Act", in equating responsible or accountable government with transparent governance. Indeed, this may explain why there is no history of unfettered public access to all information controlled by government akin to our almost unqualified tradition of open courts.

21 By contrast, our political access makes government bureaucracy accountable to elected officials who, in turn, conduct their business in the context of public elections and legislatures and where the media, again, play a fundamental reporting role. Opposition parties ask questions of the government in the legislature and in committees. Opposition parties are also dedicated to

causing a critical public evaluation of the government's performance. Against this tradition, it is not possible to proclaim that s. 2(b) entails a general constitutional right of access to all information under the control of government and this is particularly so in the context of an application relating to an active criminal investigation.

22 This does not mean that governments are unaware of the growth of bureaucracy, the related assembly of vast amounts of information and the difficulties of obtaining information by relying exclusively on the political process as described. Indeed, several mechanisms have been enacted to enhance the disclosure of such information in response to public interest in this area while, at the same time, protecting the public interest in matters of privacy. The statute in question is one example and the Ombudsman is another. There are many others. The difficult accommodation of such profoundly conflicting interests is therefore evolving in a manner consistent with political tradition and discourages sweeping Charter pronouncements of the type requested by the cross-applicant. In this case, we need not consider whether positive government support in obtaining information, in contrast to government's opposition as in International Fund for Animal Welfare Inc. v. Canada (Minister of Fisheries & Oceans), [1989] 1 F.C. 335, 35 C.R.R. 359, 83 N.R. 303 (C.A.), could ever be constitutionally required.

23 Most of the representations of the parties concerning the Charter centred on the issue of breach. Accordingly, the court did not obtain the assistance it would have liked in regard to s. 1. However, for the sake of completeness, we wish to provide our view on the record before us.

24 Had there been established a s. 2(b) violation, we would have found, in these circumstances, the interests reflected in s. 14 constitute pressing and substantial objectives sufficient to support a Charter limitation. We would also have found, on the state of the record before us, that the institutional design of the statutory mechanisms together with the exemptions in question constitute (1) rational links between the means and the objectives, (2) minimum impairments on the right or freedom asserted, and (3) a proper balance between the effects of the limiting measures and the legislative objectives, recognizing that government need not be held to the ideal or perfect policy instrument.

25 In the result, the cross-applicant's Charter application is dismissed.

26 The Ministry's judicial review application is also dismissed.

27 The cross-applicant's judicial review application is allowed in part. The Officer's determination on relevancy, without first obtaining representations from the cross-applicant and the Ministry, is quashed. That matter is remitted for proper consideration of both relevancy and, potentially, the application of any exemption.

Application dismissed; cross-application allowed in part.

069

TAB 6

070

Statham v. Canadian Broadcasting Corporation, 2010 FCA 315 (CanLII)

Date: 2010-11-22 (Docket: A-458-09)
Citation: Statham v. Canadian Broadcasting Corporation, 2010 FCA 315 (CanLII), <http://canlii.ca/t/2dk9z> retrieved on 2014-07-28

Date: 20101122
Docket: A-458-09
Citation: 2010 FCA 315

CORAM: **DAWSON J.A.**
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

DAVID J. STATHAM

Appellant

and

PRESIDENT OF THE CANADIAN BROADCASTING CORPORATION

Respondent

and

THE INFORMATION COMMISSIONER OF CANADA

Intervener

Heard at Ottawa, Ontario, on September 15, 2010.
Judgment delivered at Ottawa, Ontario, on November 22, 2010.

REASONS FOR JUDGMENT BY: DAWSON
J.A.

CONCURRED IN BY: TRUDEL J.A.
MAINVILLE
J.A.

072

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The *Access to Information Act*, R.S.C. 1985, c. A-1 (Act) provides a right of timely access to information in records under the control of a government institution. The Act has been held to enshrine a quasi-constitutional right of access for the purpose of facilitating democracy. This appeal from a decision of the Federal Court, cited as 2009 FC 1028 (CanLII), 2009 FC 1028, 353 F.T.R. 102, raises important issues relating to the exercise of the powers of the Information Commissioner (Commissioner) during an investigation of a government institution's deemed refusal to disclose records. Also at issue is the availability of recourse to the Federal Court to review a government institution's deemed refusal to disclose records. Specifically, when the Commissioner receives a complaint, investigates an institution's deemed refusal to disclose records, secures an undertaking from the institution that the access request will be responded to by a specific date, and issues a final report to the access requester:

(a) Has the Commissioner granted a reasonable extension of time to the institution to respond to the access request so as to in effect "cure" the deemed refusal?

(b) Can the access requester apply to the Federal Court to judicially review the institution's deemed refusal to disclose records?

[2] For the following reasons I would answer no to the first question and yes to the second.

The Facts and Procedural History

[3] The facts are comprehensively set out in the reasons of the Federal Court. The following synopsis of the facts is sufficient for the purpose of this appeal. All sections of the Act referred to in these reasons are set out in the appendix to the reasons.

[4] On September 1, 2007, the Canadian Broadcasting Corporation (CBC) became subject to the provisions of the Act. Between September 1, 2007 and December 12, 2007, the appellant, Mr. Statham, submitted almost 400 access to information requests to the CBC.

[5] The CBC failed to respond to the appellant's requests within 30 days of their receipt as required by section 7 of the Act. As well, the CBC failed to notify the appellant that extensions of time to respond were being claimed pursuant to section 9 of the Act. In consequence, by operation of subsection 10(3) of the Act, the CBC was deemed to have refused to give access to Mr. Statham. For ease of reference, subsection 10(3) of the Act provides:

Where the head of a government institution fails to give access to a record requested under this Act or a part thereof within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.	Le défaut de communication totale ou partielle d'un document dans les délais prévus par la présente loi vaut décision de refus de communication.

[6] Thereafter, the appellant submitted approximately 389 complaints to the Commissioner, alleging that the CBC was deemed to have refused access to requested records. The Commissioner's office then began its investigation.

[7] The Commissioner did not investigate the deemed refusals as if there had been a final refusal to grant access based on exemptions or exclusions under the Act. To have proceeded in that manner would have required the Commissioner to compel production of records, seek representations from the CBC concerning disclosure, and consider the merits of any claimed exemptions or exclusions. Instead, the Commissioner was of the view that the CBC had been inundated and overwhelmed by the volume of access requests so that it would require a reasonable amount of time to respond to them. After discussions with the CBC and Mr. Statham, the Commissioner recommended that the CBC respond to all of the access requests by April 1, 2009. The CBC agreed to respond to all of the requests by that date (commitment date).

[8] On March 31, 2008, the then Commissioner made his report to the appellant, as required by subsection 37(2) of the Act. In material part, the report stated:

> "[...] the institution has not responded to your requests, thereby placing itself in a deemed-refusal situation pursuant to subsection 10(3) of the Act.
>
> Nonetheless, following our intervention, the institution has provided assurances to our office that, through its best efforts, it will respond to all of the requests itemized in the attached Annex on or before April 1, 2009. The target date is based on a number of factors, most notably the volume of requests and the lack of resources in the [access to information] office. We also received assurances from the CBC that it will provide you with the responses as they are completed over the coming months. Please note that we will regularly monitor the CBC's progress in this regard. I consider this to be a reasonable commitment on CBC's part to finalize the processing of all of your listed requests.
>
> While your complaints are valid, I conclude that they are resolved on the basis that CBC has undertaken to respond to each request on or before April 1, 2009. As each response is provided to you by the CBC, in the coming months, you do of course have the right under section 31 of the Act to complain to this office.
>
> In accordance with paragraph 30(1)(a) and subsection 37(5) of the Act, please be advised that having now received our report on the results of our investigation with respect to these deemed-refusals to disclose records requested under the Act, section 41 provides that you have the right to apply to the Federal Court for a review of the Canadian Broadcasting Corporation's deemed-refusal to deny you access to the records you requested. Such an application should name the President of the Canadian Broadcasting Corporation as respondent and it must be filed with the Court within 45 days of receiving this letter."
>
> [Emphasis added.]

[9] On May 20, 2008, Mr. Statham commenced an application for judicial review in the Federal Court pursuant to section 41 of the Act. One application was filed in respect of all of the access requests. The relief sought by Mr. Statham was:

1. An order requiring the CBC to disclose the requested documents by a deadline to be agreed by the parties or set by the Court.
2. Costs.
3. Such further orders as the Court might deem just or appropriate.

[10] Thereafter, the Commissioner sought leave to intervene in the application for judicial review in order to respond to allegations made by the appellant against the Commissioner's office and to make representations with respect to the interpretation and administration of the Act. In response to the Commissioner's motion the appellant agreed to withdraw his allegations against the Commissioner. The Commissioner was given leave to intervene in the application for the purpose of making written and oral submissions to the Court on the issues of the jurisdiction of

the Court and the appropriate remedy in the event the application was successful.

[11] Following the Commissioner's motion, the CBC brought a motion to strike the application on the ground it was bereft of any chance of success. At the same time the Commissioner moved for an order either setting aside the application or giving directions as to the conduct of the proceeding. Prothonotary Tabib found that Mr. Statham had improperly challenged in a single application several hundred refusals by the CBC. In exercising her discretion nonetheless to allow the application to proceed, the Prothonotary observed that:

> In the present instance, the Applicant has eventually made it very clear that the issues raised in relation to the requests for information concern only the belated and allegedly unreasonable extension of time imposed by the CBC to respond to the requests; furthermore, these issues arise only in relation to requests for information to which no response has been or is received prior to the hearing of the application on its merits. The Applicant also clearly specified that by "response" to a request for information, he means communication of the information, a refusal or a request for additional fees. In short, the Applicant concedes that for every request for which a response, of any kind, has been or may be received, up to the start of the hearing, the application is or will be moot and will be withdrawn. On that basis, this Court will not be called upon to determine the merits of any actual refusal by the CBC, a task which undoubtedly would have made it impossible to deal with such numerous and diverse requests for information in a single proceeding.
>
> [Emphasis added.]

[12] On this basis, the application was permitted to proceed. The appellant was ordered to pay the costs of both motions to the CBC and to the Commissioner.

[13] As of the commitment date, the CBC had not responded to 38 access requests. Responses to those access requests were delivered on May 29, 2009 - five days before the Federal Court heard the application for judicial review.

[14] Notwithstanding that at the time of the hearing the CBC had delivered responses to all of the access requests, Mr. Statham continued to prosecute the application, seeking a declaration that the CBC had acted unreasonably. This was not relief sought in Mr. Statham's amended notice of application. The only complaint Mr. Statham had made to the Commissioner was that the CBC was deemed to have refused to give access to the requested records.

The Decision of the Federal Court

[15] The Judge of the Federal Court who heard the application for judicial review dismissed the application for disclosure and declined to grant declaratory relief. He awarded costs in favour of the CBC and the Commissioner; those costs were to be assessed at the mid-range of column V of the table to Tariff B of the *Federal Courts Rules*.

[16] In coming to this decision the Judge identified three issues to be determined. They were

described by the Judge to be:

a) Is the application moot, in light of the fact that all [access] requests have been responded to by the CBC at the time of the hearing?

b) If the issue is found not to be moot, does the *Act* allow a deemed refusal to be cured by the Information Commissioner setting out a new time limit within which the notice required under sections 7 and 10 must be given? And does this Court have jurisdiction under section 41 of the *Act* to judicially review the determination of a delay for answering [access] requests approved by the [Commissioner] in the exercise of his power under the *Act*?

c) Was the conduct of either one of the parties throughout these proceedings unreasonable, outrageous, vexatious and reprehensible so as to justify costs on a solicitor-client basis?

The Judge then went on to consider each issue.

a. Mootness

[17] The Judge reviewed the order of Prothonotary Tabib, quoted in material part at paragraph 11 above. After a discussion of the relevant case law he concluded, at paragraph 30 of his reasons, that the application for judicial review was moot because "all the records requested by the applicant had been disclosed at the time of the hearing." This notwithstanding, the Judge viewed the application to raise important issues. For that reason he exercised his discretion to hear the application.

b. The concept of curing deemed refusals and the jurisdiction of the Federal Court

[18] The Judge began his discussion of these issues by acknowledging that, under subsection 10(3) of the Act, the CBC was deemed to have refused access to all of the records requested by the appellant. This deemed refusal placed Mr. Statham, the Commissioner and the CBC in the same position as if there had been an explicit refusal within the meaning of section 7 of the Act. It followed in the Judge's view that the appellant had the right to complain to the Commissioner under paragraph 30(1)(*a*) of the Act.

[19] The Judge found that once an institution is deemed to have refused access it cannot "unilaterally relieve itself of that deemed refusal and is proscribed from remedying it by simply granting itself a further time extension." He went on to state that this did not mean "that the deemed refusal cannot be cured. It is then for the Information Commissioner, having received a complaint from the person who has been refused access, to investigate the matter and to make a report."

[20] The Judge explained that following the investigation of the complaint, the Commissioner had the power to issue recommendations under subsection 37(1) of the Act. In the Judge's

view, expressed at paragraph 36 of his reasons, the power to issue recommendations:

> 36. [...] encompasses the right to set a time frame within which an institution has to respond to a request for documents and to follow up with the institution on the action plan undertaken by the institution to comply with that time frame. At that stage, the requirements found in s. 9 of the *Act* are no longer applicable, contrary to the applicant's submissions. It is for the Commissioner to assess the circumstances and to determine a reasonable extension of time to comply with its recommendations.

[21] The Judge then considered whether the Commissioner's actions affected Mr. Statham's right to apply to the Court under section 41 of the Act. At paragraphs 37 and 38 of his reasons he wrote:

> 37. Could the applicant come to the Court, within 45 days after he received the letter from the Commissioner reporting the results of his investigation of his complaints, to review the matter pursuant to section 41 of the *Act*? As previously mentioned, the relief sought by the applicant is twofold: first, he requested the CBC disclose those documents that had not yet been disclosed at the time of his amended application, and second, he asked that the CBC be found to have acted unreasonably in failing to respond to his access requests in accordance with the provisions of the *Act*.
>
> 38. As previously mentioned, the first relief has been overtaken by events. At the time of the hearing, the applicant had been provided with a response to all of his requests. Despite the ambiguity of his application, this is clearly what he was seeking; he made it clear before the Prothonotary that what he meant by a response was either the communication of the information or a refusal (total or partial) of the communication. As a result, the issue is not only moot but this Court has no jurisdiction to entertain the application since he has not been refused what he was seeking from the CBC.
>
> [Emphasis added.]

[22] During oral argument of this appeal, counsel for Mr. Statham agreed that the *ratio decidendi* of the Judge's decision is found in the last sentence of paragraph 38.

[23] The Judge then went on, in *obiter dicta*, to more fully explain the effect at law of the Commissioner's actions. At paragraphs 39 to 43 of his reasons, the Judge expressed his view that once the Commissioner and the CBC agreed that the CBC would respond to all of the access requests by the commitment date, no application could be brought by the appellant under section 41 of the Act. In the Judge's words:

> 39. But I would go even further. It seems to me the applicant could not apply to the Court while the CBC was still within the time frame set by the Commissioner. The Commissioner could have chosen to initiate his investigation, upon the complaint of the applicant, as if there had been a true refusal. Just as in the case of *Canada Information Commissioner* v. *Minister of National Defence, supra*, he chose instead to split his investigation and to try to get a response from the institution,

leaving for a second stage the examination of the merits of whatever response might be provided. As a result, the applicant could not apply to the Court until April 1, 2009, as it could not yet be said until the expiry of that delay period granted by the Commissioner that the CBC had refused access to the records.

40. Section 41 of the *Act* states that an applicant may apply to the Court if he or she has been refused access to a record and has complained to the Commissioner in respect of that refusal. It is clear from the context of the *Act* read as a whole and from the wording of that section that the Court was granted jurisdiction in cases where access to the record had been denied, in whole or in part. This is consistent with section 37 of the *Act*, focused as it is on the actual content of the response provided by a government institution and its conformity with the *Act*.

41. Of course, the Commissioner could have initiated his investigation as if there had been a true refusal, without giving the CBC any further delay to respond. In such a scenario, the applicant could have come to the Court and sought a review if the CBC had not complied with the findings and recommendations of the Commissioner. But this was not the course of action chosen by the Commissioner. Accordingly, it was premature to come to the Court before April 1, 2009. In other words, I do not think this Court has jurisdiction to judicially review the determination of a delay for answering ATI requests approved by the OIC in the exercise of its power under the *Act*.

42. While I have been unable to find any precedent dealing specifically with this issue, there have been cases where an applicant brought an application to the Court after a government institution, despite having sought a time extension, had failed to respond before the expiry of the extended deadline. In the first decision, the Court concluded that it had jurisdiction to entertain a judicial review even if the response was provided before the hearing: *Canada (Information Commissioner) v. Canada (Minister of External Affairs)*, reflex, [1990] 3 F.C. 514. This interpretation, however, was rejected in two subsequent decisions: see *X v. Canada (Minister of National Defence)*, reflex, (1990) 41 F.T.R.16 and *X v. Canada (Minister of National Defence)*, reflex, [1991] 1 F.C. 670 (F.C.T.D.). In that last decision, Justice Strayer explicitly endorsed the approach taken by Dubé, J. in the preceding case and wrote that "...unless there is a genuine and continuing refusal to disclose and thus an occasion for making an order for disclosure or its equivalent, no remedy can be granted by this Court".

43. I am therefore reinforced in my view that this Court does not have jurisdiction to entertain the application filed by the applicant. Even if the CBC was initially in a deemed refusal situation, it could not be said at the time of the hearing that the applicant had a genuine and continuing claim of refusal of access. Further, it is not much of a stretch to add that the applicant did not have a genuine and continuing claim of refusal of access either during the extension period given to the CBC to respond to his requests.

[Emphasis added.]

[24] The Judge went on to conclude that the Court lacked jurisdiction to make any declaration reprimanding the CBC for its behavior. The Judge adopted the remarks of the Court in *X v. Canada (Minister of National Defence)*, reflex, [1991] 1 F.C. 670 (T.D.) to the effect that sections 49 and 50 of the Act, which empower the Court to make appropriate orders, only apply where the Court finds a refusal to disclose a record. Refusal of access is a condition precedent to the granting of an order. Thus, orders issued under sections 49 or 50 must be pertinent to providing access or its equivalent where there is first a finding that access has been refused.

c. Costs

[25] The appellant sought costs on a solicitor-client basis on the ground that the CBC had been adversarial and defensive in dealing with his access requests. The Judge relied on Rule 400 of the *Federal Courts Rules*, which confers full discretion on the Court when awarding costs. The Judge decided that the CBC's behavior had not amounted to the type of reprehensible conduct that will ground an order for solicitor-client costs. Instead, the Judge found that it was Mr. Statham's behavior that had been objectionable. The Judge pointed to the Prothonotary's criticism of Mr. Statham's conduct in commencing one application which challenged many decisions of the CBC, his failure to properly amend his affidavit and amended application, and what the Judge characterized to be gratuitous allegations made by Mr. Statham against the Commissioner and, to a lesser extent, against the CBC.

[26] The Judge, relying on the factors outlined in Rule 400(3)(c), (g), (i) and (k), awarded costs against Mr. Statham under the highest column of the table to Tariff B of the *Federal Courts Rules*. The Judge did not refer to subsection 53(2) of the Act.

The Issues

[27] The parties and the intervener raise a number of issues. In my view, the issues to be decided may properly be framed as follows:

1. Did the Judge err in his primary finding that the application was moot because at the time of the hearing Mr. Statham had been provided with a response to all of his access requests?
2. What is the effect at law of a deemed refusal of access?
3. When the Commissioner receives a complaint alleging a deemed refusal of access, may the Commissioner limit her investigation to establishing a time frame in which the government institution is to respond to the access request?
4. If the Commissioner is entitled to so limit her investigation, did the Judge err by stating that it is for the Commissioner to assess the circumstances and determine what is a reasonable deadline for complying with the access request, thus in effect curing the deemed refusal?
5. Did the Judge err by stating that Mr. Statham could not apply to the Federal Court to judicially review the CBC's deemed refusal of access prior to the expiration of the

commitment date?

6. Did the Judge err by failing to grant the requested declaration?
7. Did the Judge err by awarding costs against Mr. Statham?

Consideration of the Issues

1. Did the Judge err in his primary finding that the application was moot because at the time of the hearing Mr. Statham had been provided with a response to all of his access requests?

[28] As explained above at paragraph 22, during oral argument of the appeal counsel for Mr. Statham agreed that the *ratio decidendi* of the decision of the Federal Court is that the application for judicial review was moot and the Court lacked jurisdiction because Mr. Statham had received responses from the CBC. It follows that the Judge's later statements about the effect of the Commissioner's agreement with the CBC concerning the commitment date and Mr. Statham's right of access to the Federal Court were *obiter dicta* because they were unnecessary for the Judge's decision on the determinative question.

[29] In that circumstance, it is important that this Court affirm that, as a matter of law, the Judge possessed complete discretion to dismiss the application for judicial review on the ground of mootness. See, for example, *Canada (Information Commissioner of Canada) v. Canada (Minister of National Defence)* (1999), 240 N.R. 244 (F.C.A.) (hereafter *Minister of National Defence*).

[30] Further, on the facts before the Judge I am satisfied that he committed no reviewable error in the exercise of that discretion. Mr. Statham had conceded before the Prothonotary that if every request for access was responded to the application would become moot and would be withdrawn. Given that Mr. Statham's complaint to the Commissioner only concerned the CBC's deemed refusal of access, and given the clarifications Mr. Statham gave to the Prothonotary, referred to in the quotation at paragraph 11 above, Mr. Statham's concession was correct in law. Once all of the access requests were responded to, the rights of the parties in relation to those responses could not be affected by any decision in the pending application for judicial review. With respect to the Judge's reference to the Court lacking "jurisdiction to entertain the application", there was no issue of jurisdiction in the sense the Court was forbidden from speaking on the issues before it. After the access requests were responded to the Court could still consider issues such as costs.

[31] Leaving aside the question of costs, the consequence of this is that I would dismiss the appeal on the ground that no error has been demonstrated with respect to the Judge's conclusion that the application for judicial review should be dismissed on the ground of mootness.

[32] That said, this Court heard full argument on the Judge's *obiter* statements and was advised that a number of cases are being held in abeyance pending a decision on this appeal. As well, the Court has heard another appeal from a decision of the Federal Court which followed the decision here under appeal. On that basis, I am satisfied that it is consistent with the principle of judicial economy to address the following issues.

2. What is the effect at law of a deemed refusal of access?

[33] The appellant argues that the Judge's analysis is premised on the idea that the Federal Court has jurisdiction under section 41 of the Act only with respect to a "true refusal" of access. A "true refusal" is said to arise when a government institution has responded to an access request by invoking one of the provisions of the Act that exempts or excepts a record from access. The appellant submits that this conclusion renders meaningless the deeming provision found in subsection 10(3) of the Act.

[34] I have not been persuaded that the Judge drew a distinction between deemed and actual refusals. At paragraph 34 of his reasons, the Judge wrote:

> 34. When an institution runs afoul of the timelines prescribed by the *Act*, subsection 10(3) deems the institution to have refused access to the requested documents with the result that the government institution, the complainant and the [Commissioner] are placed in the same position as if there had been an explicit refusal within the meaning of section 7 of the *Act*. By incorporating subsection 10(3) into the access regime, Parliament ensured that government institutions could not avoid access obligations by way of delay or non-response and provided a mechanism through which requesting parties are able to file a complaint and eventually seek review from the Court.
>
> [Underlining added.]

[35] In any event, I believe it is settled law that no distinction exists between a "true refusal" and a deemed refusal of access. As this Court wrote in *Minister of National Defence* at paragraph 19:

> 19. Under the terms of subsection 10(3) of the Act, where a government institution fails to give access to a record within the time limits set out in the Act, there is a deemed refusal to give access, with the result that the government institution, the complainant and the Commissioner are placed in the same position as if there had been a refusal within the meaning of section 7 and subsection 10(1) of the Act.

3. When the Commissioner receives a complaint alleging a deemed refusal of access, may the Commissioner limit her investigation to establishing a time frame in which the government institution is to respond to the access request?

[36] The Commissioner submits that this issue is essential to the determination of whether a commitment date effectively cures a deemed refusal with the consequence that a complainant's right to apply to the Federal Court under section 41 of the Act for review of the refusal is suspended.

[37] Neither party challenges the right of the Commissioner to so limit her investigation. The CBC points out that Prothonotary Tabib's order reflected the understanding of the parties that the

Federal Court would not be called upon to adjudicate upon the merits of the CBC's responses to the access requests. The Court could not consider the merits of the responses because the Commissioner had chosen not to investigate the merits of any refusal of access by the CBC.

[38] The Judge also accepted that the Commissioner was entitled to limit her investigation to requiring the CBC to respond to each access request so that Mr. Statham could then consider the merits of whatever response was provided. If not satisfied with any response, Mr. Statham could make a further complaint to the Commissioner, who would then consider the merits of any exemption or exclusion under the Act claimed by the CBC.

[39] In my view, the Judge was correct in his view that the Commissioner was entitled in her discretion to limit her investigation. Section 34 of the Act confers upon the Commissioner the power to "determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act." While this power is expressed to be "[s]ubject to this Act," there is nothing in the Act that suggests the Commissioner is required in every case to investigate and assess a government institution's claimed exemptions or exclusions before the Commissioner can report that in her view the government institution is deemed to have refused access. As the Commissioner points out, such a requirement would have significant resource implications for her office.

[40] Support for the view that the Commissioner may limit her investigation is found in the reasons of this Court in *Minister of National Defence*. There, the Commissioner had received a complaint with respect to a deemed refusal of access and proceeded to investigate the complaint in the same manner as in the present case. At paragraph 21 of its reasons, the Court wrote:

> 21. In the instant case, as soon as the institution failed to comply with the time limit, the Commissioner could have initiated his investigation as if there had been a true refusal. He does have powers to investigate including, at the beginning of an investigation, the power to compel the institution to explain the reasons for its refusal. The Commissioner, who is master of his procedure pursuant to section 34 of the Act, chose another approach. He hoped to persuade the institution to voluntarily give the notice required under sections 7 and 10. He tried to transform, as it were, what was then a deemed refusal into a true refusal. For all practical purposes, he split his investigation into two parts, initially trying to get an answer from the institution, so he could then consider the merits of whatever answer might be provided.
>
> [Emphasis added.]

[41] Implicit in this passage, and in the reasons of the Court in their entirety, is the affirmation of the right of the Commissioner to limit her investigation of a deemed refusal. The Commissioner may confine her investigation to recommending a time frame in which a government institution is to respond to the access request. Such an approach will result, at the end of the day, in the government institution giving the notice required under sections 7 and 10 of the Act. If at that time access is not provided, the institution's response will enable the access requester to consider whether to lodge a further complaint with the Commissioner.

4. If the Commissioner is entitled to so limit her investigation, did the Judge err by stating that it is for the Commissioner to assess the circumstances and determine what is a reasonable deadline for complying with the access request, thus in effect curing the deemed refusal?

[42] The appellant submits that the Judge erred in law by construing the Act to give the Commissioner power to "cure" deemed refusals by permitting a government institution to respond to an access request outside of the statutory time frame.

[43] The position of the Commissioner is that this "is not a power that the Commissioner had understood to have been granted" to her. Nor, in the Commissioner's view, "is this a power expressly or implicitly conferred" upon the Commissioner under the Act.

[44] The CBC argues that the appellant's interpretation of the Act does not acknowledge the right of the Commissioner to determine the procedure to be followed when investigating a complaint that there has been a deemed refusal of access. In its submission, it is the nature of the procedure followed by the Commissioner that will be determinative of whether a deemed refusal can be judicially reviewed.

[45] In my respectful view, the Judge erred in law when he interpreted the Act to empower the Commissioner to "cure" deemed refusals by establishing, with the agreement of the institution, a commitment date. The Judge's interpretation in effect allows the Commissioner, by agreeing to a commitment date, to transform the deemed refusal into a valid and binding extension of time for responding to the access request. I reach the conclusion that the Judge erred for the following reasons.

[46] First, contrary to the submission of the CBC, the discretion to determine the procedure to be followed in an investigation is a distinct and separate issue from the powers granted to the Commissioner when investigating a complaint. The Commissioner's powers are set out in section 36 of the Act. Neither section 36 nor any other provision of the Act confers power on the Commissioner to extend the time frames set out in the Act.

[47] Second, the role of the Commissioner is to make non-binding recommendations to the relevant government institution. The Commissioner has no authority to order the disclosure of any record. See, for example, *Minister of National Defence* at paragraph 27, *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 F.C. 245 at paragraph 12 (T.D.), and *Canada (Attorney General) v. Canada (Information Commissioner)*, 2004 FC 431 (CanLII), [2004] 4 F.C.R. 181 at paragraph 32 (T.D.) (rev'd on other grounds). It is inconsistent with the role and mandate of the Commissioner to clothe her with authority to grant to a government institution a binding extension of time for the purpose of responding to an access request.

[48] Finally, the Judge appears to have relied upon the decision of this Court in *Minister of National Defence* to conclude that Mr. Statham could not apply to the Court until after the expiration of the commitment date. In that case, the Court affirmed the decision of the Federal

Court that an application for judicial review of a deemed refusal of access was rendered moot because the institution had finally provided a response to the access request. To the extent the application for judicial review was directed towards the merits of the exemptions claimed in the response, the application was premature because the Commissioner had not investigated those claimed exemptions. This decision does not support the Judge's interpretation of the Act.

[49] To conclude on this point, the Act confers no authority on the Commissioner to "cure" a deemed refusal of access by granting any extension of time to a government institution to respond to an access request.

5. Did the Judge err by stating that Mr. Statham could not apply to the Federal Court to judicially review the CBC's deemed refusal of access prior to the expiration of the commitment date?

[50] As explained above at paragraph 23, the Judge found that Mr. Statham could not seek judicial review prior to the expiration of the commitment date. The Judge reached this conclusion notwithstanding that one year prior to the commitment date the then Commissioner had completed his investigation of the complaint and made his final report to Mr. Statham under subsection 37(2) of the Act. In that report, the Commissioner advised Mr. Statham that he could apply under section 41 of the Act to the Federal Court for a review of the CBC's deemed refusal to deny him access to the requested records.

[51] Mr. Statham asserts that the Judge's analysis is premised on the idea that the Federal Court only has jurisdiction under section 41 of the Act with respect to "true refusals" of access. Mr. Statham also argues that the Judge's conclusion that he had no right of access to the Federal Court is not supported by the language or purpose of the Act.

[52] The Commissioner submits that section 41 of the Act does not specify that the right of judicial review is confined to actual or true or continued refusals and the Judge's interpretation of the Act unnecessarily restricts the Federal Court's jurisdiction under the Act.

[53] The CBC asserts that section 41 of the Act confers on the Federal Court a limited power to entertain an application for judicial review were a person has been "refused" access to a record by an institution. The term "refused" is said to refer exclusively to an "actual" refusal. Reliance is placed upon the Judge's comment at paragraph 43 of his reasons that there was no "genuine and continuing" refusal of access "during the extension given to the CBC to respond." The CBC further says that the purpose of the deemed refusal provision in subsection 10(3) of the Act is simply to allow an access requester to file a complaint with the Commissioner when an institution fails to respond to an access request within the time frame prescribed by the Act.

[54] As explained at paragraph 34 above, I do not believe the Judge concluded that deemed refusals are insufficient to found an application under section 41 of the Act. Rather, what the Judge considered to be determinative was how the Commissioner decides to conduct her investigation. This is reflected at paragraph 41 of his reasons where the Judge stated that a

deemed refusal could be judicially reviewed where the Commissioner does not allow any further time for the institution to respond to the access request, but instead investigates "as if there had been a true refusal."

[55] That said, in my respectful view the Judge erred when he found that, as a matter of law, there was no right to judicially review the deemed refusal to provide access in the circumstances before the Court. Where there is a complaint of a deemed refusal to provide access, the complainant may apply for judicial review within 45 days of receiving the Commissioner's report made under subsection 37(2) of the Act. The relevance of the procedure chosen by the Commissioner is that in an application under section 41 of the Act the Court cannot rule upon the application of any exemption or exclusion claimed under the Act if the Commissioner has not investigated and reported upon the claim to the exemption or exclusion. I reach this conclusion for the following reasons.

[56] First, as is apparent from paragraph 41 of the Judge's reasons, the Judge's conclusion that Mr. Statham could not apply for judicial review was based upon his conclusion that the Commissioner had, by agreeing to the commitment date, in effect granted an extension of time to the CBC, thus "curing" its deemed refusal. As explained above, the Commissioner had no power to grant an extension of the time limits set out in the Act.

[57] Second, there is nothing in the wording of section 41 of the Act which limits the right of access to the Court to an actual refusal of access. For ease of reference, section 41 is reproduced here:

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow. [Emphasis added.]	41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation. [Non souligné dans l'original.]

[58] Subsection 10(3) of the Act provides that where the head of a government institution fails to give access to a requested record within the time limit set out in the Act, "the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access."

[59] The Act is to be interpreted in a purposive and liberal manner. See: *Canada Post Corp. v. Canada (Minister of Public Works)*, 1995 CanLII 3574 (FCA), [1995] 2 F.C. 110 at paragraph 33 (C.A.). The governing principle of statutory interpretation requires words of an Act to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[60] Applying those principles, the phrase "[a]ny person who has been refused access to a record requested" as used in section 41 of the Act includes any person who has not received access to a requested record within the time limits set out in the Act. To conclude otherwise would not give effect to the plain wording of subsection 10(3) of the Act.

[61] Third, the prior jurisprudence of this Court is to the effect that a deemed refusal to give access places a complainant in the same position as if there had been a refusal within the meaning of section 7 and subsection 10(1) of the Act. See: *Minister of National Defence* at paragraph 19.

[62] Consistent with this is the decision of the Federal Court in *X v. Canada (Minister of National Defence)*, reflex, [1991] 1 F.C. 670. At page 677 Justice Strayer, when describing the scheme of the Act, referred to "a right to seek judicial review in cases of actual or deemed refusal of access for the purpose of obtaining that access."

[63] Finally, I have considered the CBC's reliance upon the Judge's statement at paragraph 43 of his reasons that there was no "genuine and continuing claim of refusal of access either during the extension period given to the CBC." However, the commitment date did not cure the deemed refusal by extending the time in which the CBC could respond to the access request. At the time the application for judicial review was commenced, the CBC had not provided responses to all of the access requests. There was, therefore, a refusal of access to some of the records at the time the application was commenced.

[64] To conclude, section 41 of the Act contains three prerequisites that must be met before an access requester may apply to the Federal Court. They are:

1. The applicant must have been "refused access" to a requested record.
2. The applicant must have complained to the Commissioner about the refusal.
3. The applicant must have received a report of the Commissioner under subsection 37(2) of the Act.

[65] A person who is "refused access" to a record includes a person who has requested access where the head of the government institution is deemed under subsection 10(3) of the Act to have refused to give access.

6. Did the Judge err by failing to grant the requested declaration?

[66] As of the commitment date the CBC had not responded to 38 access requests. Those responses were delivered five days prior to the hearing in the Federal Court. At the hearing, Mr. Statham sought a declaration that the CBC had acted unreasonably. The Judge declined to grant declaratory relief on the ground that the Federal Court lacked jurisdiction.

[67] In my view, the Judge did not err in refusing declaratory relief. I reach this conclusion for a different reason than the Judge. In my view, the request for declaratory relief should have been refused because the reasonableness of the CBC's conduct was not directly in issue in this application. This is reflected by the following:

1. No complaint was made to the Commissioner concerning the reasonableness of the CBC's conduct.
2. Neither Mr. Statham's notice of application for judicial review nor his amended application sought declaratory relief.
3. Mr. Statham conceded before Prothonotary Tabib that the application would become moot in respect of all of the access requests the CBC responded to.
4. A single application for judicial review was filed in respect of hundreds of complaints to the Commissioner. As of November 21, 2008 there were 80 outstanding access requests. As of the commitment date only 38 access requests had not been responded to. Having regard to the number and diversity of the access requests and the different time frames in which each was responded to, it was inconsistent with a general request for declaratory relief to consolidate all of the complaints within a single application.

In these circumstances it would have been inappropriate to grant declaratory relief.

[68] As I have concluded that the reasonableness of the CBC's conduct was not directly and properly raised by Mr. Statham, it is unnecessary to consider whether the Federal Court could have granted declaratory relief.

7. Did the Judge err by awarding costs against Mr. Statham?

[69] The Judge awarded the costs of the proceeding against Mr. Statham and set those costs under the highest column of the table to Tariff B to the *Federal Courts Rules*. Mr. Statham submits that the cost award was inappropriate and improperly punitive. This is said to be particularly so because the prothonotary had previously made cost orders against Mr. Statham in respect of at least some of the same conduct relied upon by the Judge.

[70] It is not clear that the Judge's attention was drawn to section 53 of the Act. Section 53 provides:

53. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event	53. (1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.

unless the Court orders otherwise.

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result. [Emphasis added.]	(2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours. [Non souligné dans l'originale.]

[71] Subsection 53(2) is a reflection of Parliament's intent that important issues concerning the Act be brought before the courts, and that a litigant who raises such issues is not to be deprived of an award of costs solely because he or she was unsuccessful in the litigation. The provision is an effort to level the playing field for litigants who seek records from a government institution.

[72] In the present case, the Judge exercised his discretion to hear an application that was moot. He did so because he found that Mr. Statham had raised "issues that are of interest to other potential litigants and which have never been addressed by courts before." Having found important issues of principle were raised, it was an error of law to fail to consider the application of subsection 53(2) of the Act. Had the Judge done so, I am satisfied that the award of costs would have been different.

[73] As to what the award of costs should have been had the Judge considered subsection 53(2), the Judge was critical of Mr. Statham's conduct in the proceeding. This was a conclusion open to the Judge on the evidence and I have not been persuaded that the Judge made any palpable or overriding error in reaching this conclusion. Nothing in section 53 of the Act precludes the Court from considering the conduct of a party before the Court when exercising the discretion as to costs.

[74] Rule 407 of the *Federal Courts Rules* provides that unless otherwise ordered, costs are to be assessed in accordance with column III of the table to Tarriff B. Taking into consideration subsection 53(2) of the Act, Rule 407 and the Judge's concerns about Mr. Statham's conduct, I would award the costs of the Federal Court proceeding to Mr. Statham. Such costs should be assessed in accordance with the midpoint of column I of the table to Tariff B.

Conclusion

[75] For the reasons given I would dismiss the appeal except that, pronouncing the judgment that the Judge ought to have pronounced, I would vary the judgment appealed from so as to award the costs of the application in the Federal Court to Mr. Statham, such costs to be assessed in accordance with the midpoint of column I of the table to Tariff B.

[76] In this Court, Mr. Statham has failed to obtain the declaratory relief he sought. He has, however, raised important principles in relation to the Act that are of concern to other persons making access requests. Further, he successfully argued that the Judge had erred in his interpretation of the Act. For that reason, I would award him the costs of this appeal, to be assessed at the midpoint of column III of the table to Tariff B.

[77] The Commissioner is an intervener in this Court. Therefore, I would make no award of costs for or against the Commissioner.

"Eleanor R. Dawson"

J.A.

"I agree
Johanne Trudel J.A."

"I concur
Robert M. Mainville J.A."

APPENDIX

Sections 7, 9, 10, 30, 34, 36, 37, 41, 49, 50 and 53 of the *Access to Information Act* are as follows:

Notice where access requested	Notification
7. Where access to a record is requested under this Act, the head of the government institution to which the request is made shall, subject to sections 8, 9 and 11, within thirty days after the request is received, (*a*) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and (*b*) if access is to be given, give the person who made the request access to the record or part thereof.	7. Le responsable de l'institution fédérale à qui est faite une demande de communication de document est tenu, dans les trente jours suivant sa réception, sous réserve des articles 8, 9 et 11 : *a*) d'aviser par écrit la personne qui a fait la demande de ce qu'il sera donné ou non communication totale ou partielle du document; *b*) le cas échéant, de donner communication totale ou partielle du document.
[...]	. . .
Extension of time limits	Prorogation du délai
9. (1) The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Act for a reasonable period of time, having regard to the circumstances, if (*a*) the request is for a large number	9. (1) Le responsable d'une institution fédérale peut proroger le délai mentionné à l'article 7 ou au paragraphe 8(1) d'une période que justifient les circonstances dans les cas où : *a*) l'observation du délai entraverait

of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution,

(*b*) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or

(*c*) notice of the request is given pursuant to subsection 27(1)

by giving notice of the extension and, in the circumstances set out in paragraph (*a*) or (*b*), the length of the extension, to the person who made the request within thirty days after the request is received, which notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

de façon sérieuse le fonctionnement de l'institution en raison soit du grand nombre de documents demandés, soit de l'ampleur des recherches à effectuer pour donner suite à la demande;

b) les consultations nécessaires pour donner suite à la demande rendraient pratiquement impossible l'observation du délai;

c) avis de la demande a été donné en vertu du paragraphe 27(1).

Dans l'un ou l'autre des cas prévus aux alinéas *a*), *b*) et *c*), le responsable de l'institution fédérale envoie à la personne qui a fait la demande, dans les trente jours suivant sa réception, un avis de prorogation de délai, en lui faisant part de son droit de déposer une plainte à ce propos auprès du Commissaire à l'information; dans les cas prévus aux alinéas *a*) et *b*), il lui fait aussi part du nouveau délai.

Notice of extension to Information Commissioner

(2) Where the head of a government institution extends a time limit under subsection (1) for more than thirty days, the head of the institution shall give notice of the extension to the Information Commissioner at the same time as notice is given under subsection (1).

Avis au Commissaire à l'information

(2) Dans les cas où la prorogation de délai visée au paragraphe (1) dépasse trente jours, le responsable de l'institution fédérale en avise en même temps le Commissaire à l'information et la personne qui a fait la demande.

Where access is refused

10. (1) Where the head of a government institution refuses to

Refus de communication

give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(*a*)

(*a*) that the record does not exist, or

(*b*) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,
and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

10. (1) En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente loi, l'avis prévu à l'alinéa 7*a*) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l'information et, d'autre part :
a) soit le fait que le document n'existe pas;
b) soit la disposition précise de la présente loi sur laquelle se fonde le refus ou, s'il n'est pas fait état de l'existence du document, la disposition sur laquelle il pourrait vraisemblablement se fonder si le document existait.

Existence of a record not required to be disclosed

(2) The head of a government institution may but is not required to indicate under subsection (1) whether a record exists.

Dispense de divulgation de l'existence d'un document

(2) Le paragraphe (1) n'oblige pas le responsable de l'institution fédérale à faire état de l'existence du document demandé.

Deemed refusal to give access

(3) Where the head of a government institution fails to give access to a record requested under this Act or a part thereof within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.

Présomption de refus

(3) Le défaut de communication totale ou partielle d'un document dans les délais prévus par la présente loi vaut décision de refus de communication.

[...]

Receipt and investigation of complaints

30. (1) Subject to this Act, the Information Commissioner shall receive and investigate complaints

(*a*) from persons who have been refused access to a record requested under this Act or a part thereof;

(*b*) from persons who have been required to pay an amount under section 11 that they consider unreasonable;
(*c*) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;
(*d*) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;
(*d.1*) from persons who have not been given access to a record or a part thereof in an alternative format pursuant to a request made under subsection 12(3), or have not been given such access within a period of time that they consider appropriate;
(*e*) in respect of any publication or bulletin referred to in section 5; or
(*f*) in respect of any other matter

. . .

Réception des plaintes et enquêtes

30. (1) Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information reçoit les plaintes et fait enquête sur les plaintes :
a) déposées par des personnes qui se sont vu refuser la communication totale ou partielle d'un document qu'elles ont demandé en vertu de la présente loi;
b) déposées par des personnes qui considèrent comme excessif le montant réclamé en vertu de l'article 11;

c) déposées par des personnes qui ont demandé des documents dont les délais de communication ont été prorogés en vertu de l'article 9 et qui considèrent la prorogation comme abusive;
d) déposées par des personnes qui se sont vu refuser la traduction visée au paragraphe 12(2) ou qui considèrent contre-indiqué le délai de communication relatif à la traduction;

d.1) déposées par des personnes qui se sont vu refuser la communication des documents ou des parties en cause

relating to requesting or obtaining access to records under this Act.

Complaints submitted on behalf of complainants

(2) Nothing in this Act precludes the Information Commissioner from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorized by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorized.

Information Commissioner may initiate complaint

(3) Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Commissioner may initiate a complaint in respect thereof.

[...]

Regulation of procedure

34. Subject to this Act, the Information Commissioner may

sur un support de substitution au titre du paragraphe 12(3) ou qui considèrent comme contre-indiqué le délai de communication relatif au transfert;

e) portant sur le répertoire ou le bulletin visés à l'article 5;

f) portant sur toute autre question relative à la demande ou à l'obtention de documents en vertu de la présente loi.

Entremise de représentants

(2) Le Commissaire à l'information peut recevoir les plaintes visées au paragraphe (1) par l'intermédiaire d'un représentant du plaignant. Dans les autres articles de la présente loi, les dispositions qui concernent le plaignant concernent également son représentant.

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Plaintes émanant du Commissaire à l'information

(3) Le Commissaire à l'information peut lui-même prendre l'initiative d'une plainte s'il a des motifs raisonnables de croire qu'une enquête devrait être menée sur une question relative à la demande ou à l'obtention de documents en vertu de la présente loi.

determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act.

[...]

Powers of Information Commissioner in carrying out investigations

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36. (1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power
(*a*) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;
(*b*) to administer oaths;
(*c*) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;
(*d*) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the

. . .

Procédure

34. Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information peut établir la procédure à suivre dans l'exercice de ses pouvoirs et fonctions.

. . .

Pouvoirs du Commissaire à l'information pour la tenue des enquêtes

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36. (1) Le Commissaire à l'information a, pour l'instruction des plaintes déposées en vertu de la présente loi, le pouvoir :
a) d'assigner et de contraindre des témoins à comparaître devant lui, à déposer verbalement ou par écrit sous la foi du serment et à produire les pièces qu'il juge indispensables pour instruire et examiner à fond les plaintes dont il est saisi, de la même façon et dans la même mesure qu'une cour supérieure d'archives;

b) de faire prêter serment;
c) de recevoir des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu'il estime indiqué, indépendamment de leur admissibilité devant les tribunaux;

premises;

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

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

Access to records

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

Evidence in other proceedings

-

(3) Except in a prosecution of a person for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, in a prosecution for an offence under

d) de pénétrer dans les locaux occupés par une institution fédérale, à condition de satisfaire aux normes de sécurité établies par l'institution pour ces locaux;

e) de s'entretenir en privé avec toute personne se trouvant dans les locaux visés à l'alinéa *d*) et d'y mener, dans le cadre de la compétence que lui confère la présente loi, les enquêtes qu'il estime nécessaires;

f) d'examiner ou de se faire remettre des copies ou des extraits des livres ou autres documents contenant des éléments utiles à l'enquête et trouvés dans les locaux visés à l'alinéa *d*).

Accès aux documents

(2) Nonobstant toute autre loi fédérale et toute immunité reconnue par le droit de la preuve, le Commissaire à l'information a, pour les enquêtes qu'il mène en vertu de la présente loi, accès à tous les documents qui relèvent d'une institution fédérale et auxquels la présente loi s'applique; aucun de ces documents ne peut, pour quelque motif que ce soit, lui être refusé.

Inadmissibilité de la preuve dans d'autres procédures

(3) Sauf dans les cas de poursuites pour infraction à l'article 131 du *Code criminel* (parjure) se rapportant à une déclaration faite en vertu de la présente loi ou pour infraction à l'article 67, ou sauf

section 67, in a review before the Court under this Act or in an appeal from such proceedings, evidence given by a person in proceedings under this Act and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings.

dans les cas de recours en révision prévus par la présente loi devant la Cour ou les cas d'appel de la décision rendue par la Cour, les dépositions faites au cours de toute procédure prévue par la présente loi ou le fait de l'existence de telle procédure ne sont pas admissibles contre le déposant devant les tribunaux ni dans aucune autre procédure.

Witness fees

(4) Any person summoned to appear before the Information Commissioner pursuant to this section is entitled in the discretion of the Commissioner to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court.

Frais des témoins

(4) Les témoins assignés à comparaître devant le Commissaire à l'information en vertu du présent article peuvent recevoir, si le Commissaire le juge indiqué, les frais et indemnités accordés aux témoins assignés devant la Cour fédérale.

Return of documents, etc.

(5) Any document or thing produced pursuant to this section by any person or government institution shall be returned by the Information Commissioner within ten days after a request is made to the Commissioner by that person or government institution, but nothing in this subsection precludes the Commissioner from again requiring its production in accordance with this section.

Renvoi des documents, etc.

(5) Les personnes ou les institutions fédérales qui produisent des pièces demandées en vertu du présent article peuvent exiger du Commissaire à l'information qu'il leur renvoie ces pièces dans les dix jours suivant la requête qu'elles lui présentent à cette fin, mais rien n'empêche le Commissaire d'en réclamer une nouvelle production.

Findings and recommendations of Information Commissioner

Conclusions et recommandations du

Commissaire à l'information

37. (1) If, on investigating a complaint in respect of a record under this Act, the Information Commissioner finds that the complaint is well-founded, the Commissioner shall provide the head of the government institution that has control of the record with a report containing

(*a*) the findings of the investigation and any recommendations that the Commissioner considers appropriate; and

(*b*) where appropriate, a request that, within a time specified in the report, notice be given to the Commissioner of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.

37. (1) Dans les cas où il conclut au bien-fondé d'une plainte portant sur un document, le Commissaire à l'information adresse au responsable de l'institution fédérale de qui relève le document un rapport où :

a) il présente les conclusions de son enquête ainsi que les recommandations qu'il juge indiquées;

b) il demande, s'il le juge à propos, au responsable de lui donner avis, dans un délai déterminé, soit des mesures prises ou envisagées pour la mise en oeuvre de ses recommandations, soit des motifs invoqués pour ne pas y donner suite.

Report to complainant and third parties

(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant and any third party that was entitled under subsection 35(2) to make and that made representations to the Commissioner in respect of the complaint the results of the investigation, but where a notice has been requested under paragraph (1)(*b*) no report shall be made under this subsection until the expiration of the time within which the notice is to be

Compte rendu au plaignant

(2) Le Commissaire à l'information rend compte des conclusions de son enquête au plaignant et aux tiers qui pouvaient, en vertu du paragraphe 35(2), lui présenter des observations et qui les ont présentées; toutefois, dans les cas prévus à l'alinéa (1)*b*), le Commissaire à l'information ne peut faire son compte rendu qu'après l'expiration du délai imparti au responsable de l'institution fédérale.

given to the Commissioner.

Matter to be included in report to complainant

(3) Where a notice has been requested under paragraph (1)(*b*) but no such notice is received by the Commissioner within the time specified therefor or the action described in the notice is, in the opinion of the Commissioner, inadequate or inappropriate or will not be taken in a reasonable time, the Commissioner shall so advise the complainant in his report under subsection (2) and may include in the report such comments on the matter as he thinks fit.

Éléments à inclure dans le compte rendu

(3) Le Commissaire à l'information mentionne également dans son compte rendu au plaignant, s'il y a lieu, le fait que, dans les cas prévus à l'alinéa (1)*b*), il n'a pas reçu d'avis dans le délai imparti ou que les mesures indiquées dans l'avis sont, selon lui, insuffisantes, inadaptées ou non susceptibles d'être prises en temps utile. Il peut en outre y inclure tous commentaires qu'il estime utiles.

Access to be given

(4) Where, pursuant to a request under paragraph (1)(*b*), the head of a government institution gives notice to the Information Commissioner that access to a record or a part thereof will be given to a complainant, the head of the institution shall give the complainant access to the record or part thereof
(*a*) forthwith on giving the notice if no notice is given to a third party under paragraph 29(1)(*b*) in the matter; or
(*b*) forthwith on completion of twenty days after notice is given to a third party under paragraph 29(1)(*b*), if that notice is given, unless a review

Communication accordée

(4) Dans les cas où il fait suite à la demande formulée par le Commissaire à l'information en vertu de l'alinéa (1)*b*) en avisant le Commissaire qu'il donnera communication totale ou partielle d'un document, le responsable d'une institution fédérale est tenu de donner cette communication au plaignant :
a) immédiatement, dans les cas où il n'y a pas de tiers à qui donner l'avis prévu à l'alinéa 29(1)*b*);
b) dès l'expiration des vingt jours suivant l'avis prévu à l'alinéa 29(1)*b*), dans les autres cas, sauf si un recours

of the matter is requested under section 44.

Right of review

(5) Where, following the investigation of a complaint relating to a refusal to give access to a record requested under this Act or a part thereof, the head of a government institution does not give notice to the Information Commissioner that access to the record will be given, the Information Commissioner shall inform the complainant that the complainant has the right to apply to the Court for a review of the matter investigated.

[...]

Review by Federal Court

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

en révision a été exercé en vertu de l'article 44.

Recours en révision

(5) Dans les cas où, l'enquête terminée, le responsable de l'institution fédérale concernée n'avise pas le Commissaire à l'information que communication du document ou de la partie en cause sera donnée au plaignant, le Commissaire à l'information informe celui-ci de l'existence d'un droit de recours en révision devant la Cour.

. . .

Révision par la Cour fédérale

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

[...]

Order of Court where no authorization to refuse disclosure found

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Order of Court where reasonable grounds of injury not found

50. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(*c*) or (*d*) or 18(*d*), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof,

...

Ordonnance de la Cour dans les cas où le refus n'est pas autorisé

49. La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

Ordonnance de la Cour dans les cas où le préjudice n'est pas démontré

50. Dans les cas où le refus de communication totale ou partielle du document s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)*c*) ou *d*) ou 18*d*), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner communication totale ou partielle à la personne qui avait fait la demande; la Cour rend une autre ordonnance si

subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

[...]

Costs

53. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

Idem

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

elle l'estime indiqué.

. . .

Frais et dépens

53. (1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.

Idem

(2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-458-09
STYLE OF CAUSE:	DAVID J. STATHAM V. PRESIDENT OF THE CANADIAN BROADCASTING CORPORATION and INFORMATION COMMISSIONER OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 15, 2010
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	TRUDEL J.A. MAINVILLE J.A.
DATED:	November 22, 2010

APPEARANCES:

Ms. Sally A. Gomery Mr. Michel Drapeau	FOR THE APPELLANT
Mr. Christian Leblanc Mr. Marc-André Nadon	FOR THE RESPONDENT
Mr. Laurence Kearly Ms. Diane Therrien	FOR THE INTERVENER

SOLICITORS OF RECORD:

Ogilvy Renault LLP Ottawa, Ontario	FOR THE APPELLANT
Fasken Martineau DuMoulin LLP Montreal, Quebec	FOR THE RESPONDENT
Office of the Information Commissioner of Canada Ottawa, Ontario	FOR THE INTERVENER

TAB 7

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Whitty v Canada (Attorney General), 2013 FC 595 (CanLII)

Date: 2013-06-04 (Docket: T-1423-12)
Citation: Whitty v Canada (Attorney General), 2013 FC 595 (CanLII), <http://canlii.ca/t/fz53j> retrieved on 2014-07-28

Date: 20130604
Docket: T-1423-12
Citation: 2013 FC 595

Ottawa, Ontario, June 4, 2013
PRESENT: The Honourable Madam Justice Snider

BETWEEN:

PATRICK WHITTY

Applicant

and

THE ATTORNEY GENERAL OF CANADA AS REPRESENTED BY THE MINISTER OF THE ENVIRONMENT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Patrick Whitty, the Applicant, requested information from Environment Canada (EC) regarding himself and his three companies: RPR Environmental Inc.; 1049585 Ontario Inc., o/a RPR Environmental Services; and 876947 Ontario Ltd., o/a RPR Environmental. In this application for judicial review, Mr. Whitty states that he is seeking:

1. An order for EC to comply with its obligations under the *Access to Information Act*, RSC 1985, c A-1 [*ATIA* or the Act]; and
2. A writ of mandamus requiring EC to send the Applicant a complete copy of his personal information recorded on the National Enforcement Management Information System (NEMISIS) and a complete copy of a specific document the Applicant initially requested.

[2] The problem with this application is that Mr. Whitty has not met the statutory pre-conditions for bringing an application to this Court. Therefore, the judicial review must be dismissed.

[3] The history of Mr. Whitty's requests to EC for information and his complaints to the Office of the Information Commissioner (OIC) is lengthy. The more important steps in the process are described below.

The 2009 Request

[4] Sometime prior to November 2009, Mr. Whitty submitted his first request under the *ATIA*. He asked for documents relating to "alleged breaches of any applicable law" by himself and his companies in the possession or control of the Public Prosecution Service of Canada or EC.

[5] EC answered this request in November 2009. Some information was withheld by EC in accordance with certain enumerated sections of the *ATIA*. Of particular concern to Mr. Whitty, EC redacted the name of an individual referenced in an e-mail dated February 5, 2009 (the Specific Document). The Specific Document related to a personal profile in NEMISIS to which an investigator wished to add information.

The 2011 Request

[6] In a second request to EC (the 2011 Request), Mr. Whitty asked for an extensive list of material, including, but not limited to, an un-redacted copy of the Specific Document:

> This request is for documents of any kind relating or referring to myself . . . and my companies . . . that is contained in Environment Canada's National Enforcement Management Information System, also known as NEMISIS.
>
> Without limiting the generality of the word "documents", my request is intended to include all drafts and final copies of: records, letters,

> notes, investigator's notebooks, affidavits, briefs, complaints, reports, information used to obtain search warrants, e-mails (including deleted e-mails), faxes, directives and memoranda, and communications with legal counsel, whether in printed or computer-stored form, as well as audio and videotapes and photographs.
>
> I also request access to a specific document that was previously released to me as per your enclosed letter of November 20, 2009. This specific document . . . has an individual's name redacted. I have reason to believe that I am the individual that was named in this e-mail. If so, I request immediate release of this specific document to me, without redaction and without waiting for any other information to be compiled.

First Complaint to the OIC

[7] The statutory due date for EC's response to the 2011 Request was July 2, 2011. On June 30, 2011, EC issued a "notice of extension" advising that the department would require a 200-day extension (to January 18, 2012) to complete the request. On August 4, 2011, Mr. Whitty complained to the OIC about the time extension. This complaint was assigned File No. 3211-00503. In a response dated October 27, 2011 (the Extension Report), the OIC advised Mr. Whitty that the extension was "valid" and "reasonable".

Second Complaint to the OIC

[8] On March 20, 2012, Mr. Whitty complained to the OIC about the delay which had now extended well beyond the 200-day extension. The OIC assigned file number 3212-00017 to this complaint.

[9] On March 30, 2012, EC responded to Mr. Whitty's 2011 *ATIA* Request (the March 30 Response). Of particular concern to Mr. Whitty is the redaction in the Specific Document; EC had not, as requested by Mr. Whitty, removed the redaction of a name from this document.

[10] In a letter dated June 14, 2012 (the Delay Report), the OIC responded to the March 20, 2012 complaint. The OIC acknowledged that the late response had placed EC "in a state of deemed refusal pursuant to subsection 10(3) of the Act". However since EC responded on March 30, 2012, the OIC simply recorded the complaint "as well founded, resolved without having made recommendations to the head of the institution".

[11] On July 23, 2012, Mr. Whitty commenced this application for judicial review.

Third Complaint to the OIC

[12] Although the record is somewhat muddy, I accept that Mr. Whitty made a further complaint to the OIC in or around June 2012 (the Third Complaint). In this complaint Mr. Whitty apparently alleged that:

> Environment Canada has improperly applied exemptions, so as to unjustifiably deny access to records, or portions thereof, requested under the *Access to Information Act*.

[13] Of note, the Third Complaint marks the first instance when Mr. Whitty complained to the OIC regarding improper redactions by EC in its March 30 Response. The earlier complaints only addressed the issue of EC's delay. Further, it is also an important fact that Mr. Whitty's Third Complaint was not limited to the redactions in the Specific Document. In other words, Mr. Whitty's complaint extends to all 8000 pages of documents provided by the EC to him. Accordingly, to adequately respond to the complaint, the OIC must review each and every one of those 8000 pages.

[14] The OIC has begun – but not completed – an investigation of the Third Complaint. On June 20, 2012, the OIC sent a document to EC titled "Notice of Intention to Investigate and Summary of Complaint", pursuant to s. 32 of the *ATIA*. On June 21, 2012, EC forwarded in excess of 8,000 pages, including a working copy of the records gathered by EC in response to Mr. Whitty's request, outlining the particular exemptions claimed by EC. On July 26, 2012, EC was advised that the complaint had not yet been assigned to an investigator. A further update was requested by EC on November 21, 2012, but no response was received by the time the affidavit in the Respondent Record was sworn.

Analysis

[15] I believe that Mr. Whitty is somewhat confused as to what decision is reviewable before this Court. In fact, Mr. Whitty cannot seek review of any alleged "decision" by the OIC; the OIC can only provide non-binding recommendations (*Canadian Council of Christian Charities v Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 FC 245 at para 12, 168 FTR 49). What Mr. Whitty is really asking for is a decision of this Court to force the EC to disclose information to which he was entitled under the *ATIA*. On this basis, the relevant decision is the March 30 Response by EC.

[16] The problem for Mr. Whitty is that investigation by the OIC is necessary prior to the commencement of a judicial review application (*Statham v Canadian Broadcasting Corp*, 2009 FC 1028 (CanLII), 2009 FC 1028 at para 18, 2009 FC 1028 (CanLII), [2010] 4 FCR 216, aff'd 2010 FCA 315 (CanLII), 2010 FCA 315, [2012] 2 FCR 421). Section 41 of the *ATIA* sets out the conditions precedent for judicial review under the *ATIA*:

41. Any person who has been refused access to a record requested under this	41. La personne qui s'est vu refuser communication totale ou partielle d'un document

Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.	demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation

[17] The requirement for a complaint to the OIC is clearly stated in *Canada (Information Commissioner of Canada) v Canada (Minister of National Defence)* (1999), 240 NR 244 at para 27, [1999] FCJ No 522 (CA):

> The investigation the Commissioner must conduct is the cornerstone of the access to information system. It represents an informal method of resolving disputes in which the Commissioner is vested not with the power to make decisions, but instead with the power to make recommendations to the institution involved. The importance of this investigation is reinforced by the fact that it constitutes a condition precedent to the exercise of the power of review, as provided in ss. 41 and 42 of the Act. [Emphasis added.]

[18] Therefore, in this case, judicial review cannot be sought without a report outlining the investigation of OIC of the relevant subject matter.

[19] Obviously, Mr. Whitty cannot seek judicial review on the basis of the Extension Report since he is out of time.

[20] In his oral submissions, Mr. Whitty identified the June 14, 2012 report regarding the Delay Complaint as the basis for his judicial review application. However, the OIC's investigation of this complaint cannot satisfy the requirements for judicial review since it dealt with delay and not the redactions. The complaint made by Mr. Whitty was only that EC had breached the provisions of the *ATIA* by failing to respond to his request by the extended deadline. The OIC properly answered Mr. Whitty's complaint of delay. The OIC concluded that, because EC had responded to the request on March 30, 2012, nothing beyond an acknowledgment of the lengthy delay was required. The fact that Mr. Whitty did not receive

the documents that he wanted was not an issue raised with the OIC at this time. Mr. Whitty had only complained to the OIC about the delay and not about the redactions. In my view, the OIC addressed the issue before it in a complete and reasonable manner; however, this investigation cannot satisfy the conditions precedent to commence this application for judicial review.

[21] In sum, the only possible reviewable decision is the March 30 Response of EC. However, the problem for Mr. Whitty is that, in the absence of a report from the OIC detailing its investigation of the Third Complaint, the court is precluded from granting – or even considering – this application for judicial review.

[22] In the circumstances, the prerequisites for an application for judicial review have not been met and the application will be dismissed, with costs to the Respondent.

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JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. costs fixed in the amount of $500, inclusive of disbursements, are payable by the Applicant to the Respondent.

"Judith A. Snider"

Judge

TAB 8

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1423-12
STYLE OF CAUSE:	PATRICK WHITTY v THE ATTORNEY GENERAL OF CANADA AS REPRESENTED BY THE MINISTER OF THE ENVIRONMENT
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 28, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	SNIDER J.
DATED:	JUNE 4, 2013

APPEARANCES:

Patrick Whitty	FOR THE APPLICANT (ON HIS OWN BEHALF)
Jacqueline Dais-Visca	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Patrick Whitty St. Catherines, Ontario	FOR THE APPLICANT (ON HIS OWN BEHALF)
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT

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Indexed as:

Rubin v. Canada (Minister of Employment and Immigration)

IN THE MATTER OF Section 41 of the Access to Information Act AND IN THE MATTER OF an application by Ken Rubin concerning refusal of access to information in Employment and Immigration Canada (Machine Readable Lists), Environment Canada (copies of parts of Environment's Access Procedural Manual) and National Health and Welfare (Machine Readable Data Lists and Software Packages)
Between
Ken Rubin, Applicant, and
The Minister of Employment and Immigration Canada, the Minister of the Environment and the Minister of National Health and Welfare, Respondents

[1985] F.C.J. No. 903

[1985] A.C.F. no 903

Action No. T-194-85

Federal Court of Canada - Trial Division
Ottawa, Ontario

Jerome A.C.J.

Heard: June 20, 1985
Judgment: October 4, 1985

(3 pp.)

Access to information — Filing fee for application for access to information — Each department to interpret Regulations as best it can — Consistency in interpretation minimum requirement — Applications not accompanied by filing fee properly refused.

This was an application under the Access to Information Act. The applicant was engaged in a comprehensive project requiring a great deal of informtion from a number of government departments. A filing fee of $5 was required by statute to be paid with every application under the Act. The applicant refused to pay the filing fee to the respondent on the ground of what he consistent to be inconsistent enforcement of the filing fee regulation by different departments. The respondents refused him access to the information sought. The applicant sought an order of the Court.

HELD: The application was dismissed. The fee was authorized by statute. Each department must interpret the guidelines published by the Treasury Board as best it could. Accordingly, the respondents' submission, that applications which were not accompanied by the requisite filing fee were not applications within the meaning of the statute and, therefore, not the subject of a refusal which could be adjudicated upon by the Court, was basically sound. In any case, the departments must be consistent in the enforcement of the Regulations.

Ken Rubin, Applicant, on his own behalf.
B. McIsaac, for the Respondents.

JEROME A.C.J. (Reasons for Order):— This application under the Access to Information Act [S.C. 1980-81-82-83, c. 111.] came on for hearing before me at Ottawa, Ontario, on February 12, 1985, when it was adjourned to permit the parties to file written argument, then again on June 20, 1985, and on September 26, 1985. The issue is extremely narrow and arises from a dispute over the applicant's obligation to pay a $5.00 filing fee with each application.

This applicant is engaged in a very comprehensive project requiring a great deal of information from a number of Government departments. It is not necessary to review here in any detail the number of different applications under the statute that he has filed. I do not question his sincerity in becoming engaged in the project and I accept his statement that his refusal to pay the filing fee in the cases which he has brought forward in this application arises from what he considers to be inconsistent enforcement of the filing fee regulation by different departments. Nevertheless, it is acknowledged that the filing fee is authorized by statute in Section 11 of the Act and Section 7 of the Regulations:

> 11.(1) Subject to this section, a person who makes a request for access to a record under this Act may be required to pay
> (a) at the time the request is made, such application fee, not exceeding twenty-five dollars, as may be prescribed by regulation; and
> (b) before any copies are made, such fee as may be prescribed by regulation reflecting the cost of reproduction calculated in the manner prescribed by regulation.
>
> (2) The head of a government institution to which a request for access to a record is made under this Act may require, in addition to the fee payable under paragraph (1)(a), payment of an amount, calculated in the manner prescribed by regulation, for every hour in excess of five hours that is reasonably required to search for the record or prepare any part of it for disclosure, and may require that the payment be made before access to the record is given.
>
> (3) Where a record requested under this Act is produced as a result of the request from a machine readable record under the control of a government institution, the head of the institution may require payment of an amount calculated in the manner prescribed by regulation.
>
> (4) Where the head of a government institution requires payment of an amount under subsection (2) or (3) in respect of a request for a record, the head of the institution may require that a reasonable proportion of that amount be paid as a deposit before the search or production of the record is undertaken or the part of the record is prepared for disclosure.
>
> (5) Where the head of a government institution requires a person to pay an amount under this section, the head of the institution shall
> (a) give written notice to the person of the amount required; and
> (b) state in the notice that the person has a

> right to make a complaint to the Information Commissioner about the amount required.
>
> (6) The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section.
>
> Reg. 7.(1) Subject to subsection 11(6) of the Act, a person who makes a request for access to a record shall pay
> (a) an application fee of $5.00 at the time the request is made. . .

It is also acknowledged that, as would be expected, Treasury Board has published guidelines to assist each department in the interpretation of the Regulations and in the imposition of a filing fee. I indicated to Mr. Rubin during the course of the hearing that it was certainly to be expected as a minimum, that the departments would be consistent in the enforcement of these Regulations and in the interpretation of the bulletin, and I would certainly expect that every effort would be made to ensure a uniform and even policy in that regard throughout every department and for every applicant.

In the final analysis, however, the fee is authorized by statute and each department must interpret the guidelines as best they can. The Respondents' submission therefore that those of Mr. Rubin's applications which are not accompanied by the requisite $5.00 fee are not applications within the terms of the statute and therefore not the subject of a refusal which can be adjudicated upon by this Court, is basically sound and the application must therefore be dismissed. I don't think this is an appropriate case for costs against the Applicant.

JEROME A.C.J.

TAB 9

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Clancy v. Canada (Minister of Health), 2002 FCT 1331 (CanLII)

Date: 2002-12-31 (Docket: T-1224-02)
Citation: Clancy v. Canada (Minister of Health), 2002 FCT 1331 (CanLII), <http://canlii.ca/t/j1r> retrieved on 2014-07-30

Date:

20021231

Docket No.:

T-1224-02

Neutral Citation: 200 FCT

1331

Ottawa, Ontario, this 31st day of December, 2002

PRESENT: THE HONOURABLE MR. JUSTICE BLANCHARD

BETWEEN:

MARY CLANCY, APPLICANT CITIZEN

Applicant

- and -

THE MINISTER OF HEALTH

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion by the respondent Minister of Health for an order striking out the applicant's application for judicial review of the July 18, 2002 decision of the Information

Commissioner for Canada (ICC). The respondent also requests costs of the motion and in the alternative an extension of time in order to serve and file its affidavit should the within motion be dismissed.

Facts

[2] On September 29, 1996, the applicant made a request under the *Access to Information Act* to Health Canada (the Department) for all correspondence and reports pertaining to environmental safety concerning the 5th Floor of the Ralston Building, Hollis Street, Halifax.

[3] A second request was made on February 21, 1997. The applicant requested "...[a] list of all hazardous materials shipped to and from health protection branch laboratories during the periods of [her] employment. A list of all chemicals and chemical compounds used in the Health Protection branch laboratories during the periods of [her] employment". The applicant stated that she was employed at the Health Protection Branch in 1969 and 1988-89.

[4] The applicant received a response from the Information Access and Coordination Division ("IACD") of the department, dated March 6, 1997. The response indicated that the requested list of chemicals did not exist after such a long time (i.e. after more than 10 years) and thus the applicant's request could not be satisfied.

[5] The applicant sent further requests for information in 1997. She was informed by the ICC, by letter dated June 5, 1997, that the records she required did not exist because they are destroyed every six years according to law.

[6] The applicant filed further access to information requests during the period 2000-2002, again receiving negative responses from the IACD. According to the respondent, the applicant filed a complaint to the ICC on or about October 31, 2001.

[7] On June 18, 2002, the ICC sent a letter to the applicant concerning her complaint. In this letter, the Commissioner stated:

Based on interviews with several departmental officials, the investigation confirmed that HCan does not maintain records of the daily use of chemicals as requested by your access request. The Access to Information and Privacy (ATIP) staff took extra measures to ensure that every possible avenue was exhausted in searching for any responsive records. After a thorough review of the matter during the course of the investigation, it is my view that the department does not have records that could be considered responsive to your request. My investigator sought your representations in this matter on March 7, 2002, requesting that you reply by March 28, 2002. You sent no further representations.

[8] In response to this letter, the applicant brought an application for judicial review under s. 41 of the *Access to Information Act*, which provides as follows:

Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow. (My emphasis)

La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation. (Je souligne)

The applicant sought (i) judicial review of the decisions of the Minister of Health and "Health Canada Access to Information, Privacy Division"; (ii) a declaration or order that the Minister of Health, the Health Protection Branch Director and specified Health Protection Branch Lab Employees from 1988-89 "appear before the Judicial Review and provide the requested Access to Information Documentary Evidence and to answer questions" posed by the applicant; (iii) other and further relief necessary for the applicant to obtain access to information documents and answers concerning the chemical contamination of the Ralston Building.

Issue

[9] Where the applicant was not refused access to a record requested under the *Access to Information Act*, should the applicant's notice of application for judicial review be struck for lack of the Court's jurisdiction?

Analysis

[10] The Court has jurisdiction to dismiss a judicial review application in circumstances where there is no possibility of success or where the application is frivolous, vexatious, or abusive [*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, 1994 CanLII

3529 (FCA), [1995] 1 F.C. 588]. For applications made under the authority of s. 41 of the *Access to Information Act*, there is a requirement that the applicant be subject to a "refusal" of access. Without a "refusal" under the terms of that section, the Court has no jurisdiction to entertain the application [*Wheaton v. Canada Post Corp.* [2000] F.C.J. 1127 online: QL, at para. 7].

[11] In *Wheaton, supra*, the applicant made a series of requests under the *Privacy Act*, R.S.C. 1985, c. P-21, for documents in the possession of Canada Post. Section 41 of the *Privacy Act*, considered in *Wheaton, supra*, is similar to s. 41 of the *Access to Information Act*, therefore the *ratio* of *Wheaton* is applicable to the case at bar.

[12] In *Wheaton*, Canada Post produced what it said was all of the records in its possession relating to the request. Prothonotary Hargrave held that on the facts of the case there had been no "refusal of access", stating, at para. 16:

The case law is clear that in order to come within section 41 of the Privacy Act, which is the only grant of jurisdiction to the Court under that legislation, Mr. Wheaton must establish a refusal of access to personal information. Not only has Mr. Wheaton neglected to plead a refusal of access, but faced with sound evidence that he has been provided with all of the material which Canada Post has, he has not in anyway [sic] refuted that evidence. All of this constitutes exceptional and special circumstances for the Court can only hear Mr. Wheaton's application for judicial review if he brings himself within section 41of the Privacy Act, which he has failed to do for: as I have said, section 41 of the Privacy Act requires that there in fact be a refusal of access to personal information. A refusal of access is condition precedent to an application under this section. This application by Mr. Wheaton is one which is bereft of any possibility of success. The application for review is struck out (emphasis added)

[13] In *Blank v. Canada (Minister of the Environment)* [2000] F.C.J. No. 1620, online: QL, the applicant sought the disclosure of records that he felt were still undisclosed by Environment Canada. Muldoon J. stated that, when an applicant claims that documents have been withheld, "there must exist some evidence of the fact beyond mere suspicion" at para. 11. The fact that the applicant could not provide "concrete evidence" was fatal to his claim, and "without any substantial support for these allegations, the request for judicial review must be dismissed for lack of jurisdiction as the legislation provides for no available remedy in the immediate situation." (para. 19).

[14] The applicant alleges that the records she seeks do exist and are simply being withheld by the respondent. She states in her second motion record that she has proven that

the information does exist, which "includes convincing proof in the form of documentary evidence in the Notice of Application including: List of Chemicals In Use H.P.B. Labs Ralston Bldg; Report of Lab Operations 1978; and Govt Inspection Reports on 1970 and 1971." The applicant states that she obtained these documents after being informed by ICC that the documents she sought were destroyed after 6 years.

[15] The applicant submits: "[t]he fact is ... Access to Information health Can. denied requested evidence existed and claimed it was destroyed. It is my opinion this constitues [sic] failure to disclose evidence. It is clear proof beyond reasonable doubt there's good chance there is more evidence in H.P.B. files and certainly in the brain files of H.P.B. office and lab employees' especially the ones employed in H.P.B. labs...".

[16] I do not agree with the applicant's submissions. The fact that the applicant has in her possession the above noted documents - the list of chemicals and government inspection reports dating from the 1970's - does not constitute proof of her allegation that the department is withholding information. The provenance of these documents is not clear. I cannot conclude from the fact that she has the documents that they continue to exist in the department. For one thing, the documents are dated in the 1970's which is consistent with the claim that if these are destroyed every 6 years, then the department cannot have them. The applicant presents no "concrete evidence" to counter the findings of the ICC that the department does not have records in its possession that could be considered responsive to her request. Her allegations are based on suspicion without requisite supporting evidence. As such, she has not shown that her requests for information have been "refused" as required by s. 41 of the *Access to Information Act* and her application must fail for lack of the Court's jurisdiction.

Conclusion

[17] The applicant's application for judicial review will be struck, since there was no "refusal" to provide information as required by s. 41 of the *Access to Information Act*. As such, the Court has no jurisdiction to grant the remedies sought.

[18] I note that in the absence of a refusal of access under the *Access to Information Act*, it is the ICC and not the Court that is in a position to receive the applicant's complaint, and consider the appropriate relief. The record is unclear as to whether the documents in possession of the applicant, and upon which the applicant bases her argument of refusal of access, were brought to the attention of the ICC. The ICC noted in his June 18, 2002 response that the applicant sent no further representation on this issue despite a request from the investigator. Had this been done, the existence of the documents in possession of the applicant may have had a bearing on the Commissioner's investigation.

[19] In the exercise of my discretion, no costs will be awarded on this application.

ORDER

THIS COURT ORDERS:

1. The motion is granted.

2. The application for judicial review dated July 31, 2002 is struck;

3. No costs are awarded on the motion.

"Edmond P. Blanchard"

Judge

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1224-02

STYLE OF CAUSE: MARY CLANCY, APPLICANT CITIZEN v. THE MINISTER OF HEALTH

PLACE OF HEARING: HALIFAX

DATE OF HEARING: NOVEMBER 13, 2002

REASONS FOR ORDER AND ORDER : BLANCHARD J.

DATED: DECEMBER 31, 2002

APPEARANCES:

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ON HER OWN BEHALF	
MELISSA R. CAMERON	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MORRIS ROSENBERG	FOR THE RESPONDENT
DEPUTY ATTORNEY	
GENERAL OF CANADA	

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

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