Federal Court Cour fédérale

Date: 20091013

Docket: T-782-08

Citation: 2009 FC 1028

Ottawa, Ontario, October 13, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

DAVID J. STATHAM

Applicant

and

PRESIDENT OF THE CANADIAN BROADCASTING CORPORATION

and

INFORMATION COMMISSIONER OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application brought by the applicant pursuant to section 41 of the *Access to Information Act* (R.S., 1985, c. A-1) (the "*Act*"), whereby the applicant asked this Court to grant an order enjoining the President of the Canadian Broadcasting Corporation (the "CBC") to disclose outstanding documents requested by Mr. Statham between September 1, 2007 and December 12, 2007, within a deadline the parties may agree to or that this Court may judge appropriate. The

applicant also sought an order from this Court declaring that the CBC acted unreasonably during the events that lead to this application. Finally, the applicant requested the costs of this application, including his professional disbursements and applicable Goods and Services Tax (GST).

THE FACTS

[2] On September 1, 2007, the CBC became subject to Canada's Access to Information legislation, along with four other Crown Corporations (*Federal Accountability Act*, S.C. 2006, c. 9). In the three months that followed, Mr. Statham, an agent at Michel Drapeau Law Office, submitted about 400 access to information requests ("ATI") to the CBC. These requests cover a wide range of topics and accounted for the vast majority of all the ATIs submitted to the CBC during those months.

[3] The CBC failed to acknowledge receipt of these requests within the 30-day limit mandated by section 7 of the *Act* and failed to claim any extension of time with respect to each of these ATIs, as it could have done under s. 9 of the *Act*. As a result, the CBC was deemed to have refused disclosure of all these records pursuant to s. 10(3) of the *Act*.

[4] The applicant therefore elected to complain to the Office of the Information Commissioner (the "OIC"). He filed a first letter of complaint on October 19, 2007 regarding the CBC's deemed refusal of access in response to the access requests he had made between September 1, 2007 and September 14, 2007. This first letter of complaint was followed by subsequent letters on November 2, November 16, December 4 and December 28, 2007 as well as on February 15, 2008;

each of these letters of complaint related to the deemed refusal of access in response to the access requests made in the preceding 30-day period.

[5] On November 2, 2007, Ms. Angevine of the CBC wrote to Mr. Statham to advise him that, given the volume of requests the CBC had received, it would not be able to meet the legislated time frame specified in the *Act*, but invited Mr. Statham to submit which of his ATI requests were more urgent in nature so that the CBC could treat them on a priority basis. By letter dated November 7, 2008, Mr. Statham responded to Ms. Angevine's letter indicating which of his ATI requests should receive priority treatment.

[6] On or about December 17, 2007, the CBC was advised that a significant number of complaints had been made to the OIC regarding ATI requests. After conducting a preliminary inquiry into the issues raised in Mr. Statham's complaints, the OIC served the CBC with a Notice of Intention to Investigate and a Summary of Complaint on January 9, 2008. From that date to approximately February 29, 2008, Mr. Scott Lohnes, who at the time of the events leading up to this application was the investigator at the OIC in charge of handling Mr. Statham's complaints, initiated an ongoing and frequent dialogue between the CBC and Mr. Statham and his assistant, as instructed by Mr. Statham. The purpose of this dialogue was, *inter alia*, to supervise the CBC in its treatment of Mr. Statham's priority list and to provide regular updates to Mr. Statham on the CBC's progress in that regard.

[7] Despite some difficulties in contacting persons at the CBC, several meetings took place between representatives of the OIC and representatives of the CBC to discuss the complaints filed and to consider the most efficient manner to deal with those complaints as well as to process the outstanding ATI requests, with particular emphasis on those complaints related to the delay. It appears that the CBC repeatedly failed to provide the OIC with a set "action plan" and frequently changed its commitment date for responding to the requests. Finally, during a meeting that took place on March 28, 2008, between representatives of the OIC and the CBC, representatives of the OIC proposed what they thought was a reasonable and realistic goal of April 1, 2009 to allow the CBC to respond to every outstanding ATI request of the applicant.

[8] On March 31, 2008, the OIC sent three letters to Mr. Statham, the purpose of which was to report to the applicant the results of the investigation of his complaints. In one of those letters, the OIC confirmed that some of the ATI requests that Mr. Statham alleged having sent to the CBC were in fact never sent. In another letter, the OIC advised Mr. Statham that his complaints of delay with respect to the requests for which a response had been provided by the CBC had been recorded as resolved. As for the files for which no response had yet been provided to Mr. Statham, a third letter stated:

> CBC's Access to Information and Privacy (ATIP) office received the various requests outlined in the Annex as well as their respective application fees between September 2007 and January 2008. However, 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 ATIP office. We also received assurances from the CBC that it will provide you with 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.

[9] The language used in the Annual Report of the Information Commissioner describes the situation and the rationale for the approach taken as follows:

> These complaints gave us an opportunity to take a different and more flexible approach to resolving delay complaints than we have in the past. We considered the CBC's circumstances: it had just become subject to the Act when it was inundated with hundreds of requests over a very short time period, and it did not have adequate resources to process them in a timely way. By negotiating a target date to respond to all the requests, the CBC could focus on the task of completing them, and we could close the complaint files but still monitor the CBC's progress to ensure that the complainant continues to receive responses.

[10] As of March 31, 2008, the CBC had responded to 122 requests that were included in the group of 377 complaints from Mr. Statham relating to delay. By November 21, 2008, CBC had yet to respond to 80 requests, and as previously mentioned, at the time of the hearing, all of the requests made by Mr. Statham had been responded to.

[11] The applicant brought this application for judicial review on May 18, 2008. On May 30, the Information Commissioner filed a motion for leave to appear as a party in the application, in order to rebut certain allegations made by the applicant to the effect that he had received no communication from the OIC with respect to its investigation of the complaints, that the position of the OIC was careless and contrary to the spirit of the *Act*, and to make representations relating to the interpretation and administration of the *Act*. In an Order dated June 20, 2008, Prothonotary Tabib granted this motion. During the hearing of that motion, the applicant also agreed to amend its application material in order to withdraw allegations made against the OIC, which he did on July 4 and October 8, 2008.

[12] The respondent CBC subsequently brought a motion to strike the notice of application on the ground that the Court had no jurisdiction in the matter as there had been no actual refusal to provide the information pursuant to s. 41 of the *Act*. The Prothonotary dismissed this motion and found that the principal issue in this application -- i.e. whether an institution's notice that it requires more time to respond to a request for access, if made after the time provided in the *Act* for doing so, is effective to cure a deemed refusal -- was not plainly and obviously devoid of any merit. She made

it clear, however, that the Court would not be called upon to determine the merits of any actual access to information refusal by the CBC.

[13] At the hearing of the respondent's motion to dismiss the application for judicial review, the applicant admitted that his application only covered the outstanding access to information requests. The Prothonotary recorded that admission, and stated in her Order:

> 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.

THE LEGISLATIVE FRAMEWORK

[14] Where an access request is made in writing to a government institution, within thirty days after the request is received, the institution must give written notice to the requesting party that either: (i) the records will be released, (ii) the records will not be released, or (iii) the institution requires additional fees for purposes of processing the request. If the records or part thereof are going to be released, the institution is required to provide the records within the same thirty day time limit:

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.

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

[…]

(*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;

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.

11. (1) Sous réserve des autres dispositions du présent article, il peut être exigé que la personne qui fait la demande acquitte les droits suivants :

[…]

b) un versement prévu par règlement et exigible avant la préparation de copies, correspondant aux frais de reproduction;

[15] Section 9 of the *Act* permits an institution to extend the time it has to reply to access requests, but does so only in respect of certain circumstances and only if the requesting party is notified of the extension within thirty days of receipt of the requests:

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	**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*) the request is for a large number 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,	*a*) l'observation du délai entraverait 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*) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or	*b*) les consultations nécessaires pour donner suite à la demande rendraient pratiquement impossible l'observation du délai;
(*c*) notice of the request is given pursuant to subsection 27(1)	*c*) avis de la demande a été donné en vertu du paragraphe 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	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

contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.	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.
(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).	(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.

[16] If an institution fails to respond to the request for access within thirty days, absent any notice of time extension as contemplated by section 9, the institution is deemed to have refused access to its records:

10. (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.	**10.** (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.

[17] When a requesting party is refused access, a complaint may be filed with the OIC. The OIC, in turn, may investigate the complaint and provide the institution with non-binding recommendations:

30. (1) Subject to this Act, the Information Commissioner shall receive and investigate complaints	**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*) from persons who have been refused access to a record requested under this Act or a part thereof;	*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*) from persons who have been required to pay an amount under section 11 that they consider unreasonable;	*b*) déposées par des personnes qui considèrent comme excessif le montant réclamé en vertu de l’article 11;
(*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;	*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;
[…]	[…]
(*f*) in respect of any other matter relating to requesting or obtaining access to records under this Act.	*f*) portant sur toute autre question relative à la demande ou à l’obtention de documents en vertu de la présente loi.

[18] The investigative powers of the Commissioner have been qualified as the “cornerstone” of the access to information system by the Federal Court of Appeal (*Canada (Information*

Commissioner) v. Canada (Minister of National Defence) (1999), 240 N.R. 244, at para. 27). Indeed, the exercise of these powers is a precondition to an application for review by this Court. Following a complaint, the OIC has the power to issue recommendations that the Commissioner considers appropriate to solve such complaint. That power encompasses the right to set a time frame within which an institution has to respond to a request for documents:

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	**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*) the findings of the investigation and any recommendations that the Commissioner considers appropriate; and	*a*) il présente les conclusions de son enquête ainsi que les recommandations qu'il juge indiquées;
(*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.	*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.
(2) The Information Commissioner shall, after investigating a complaint	(2) Le Commissaire à l'information rend compte des conclusions de son enquête au

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 given to the Commissioner.

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.

(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.

(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.

(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

(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

record or part thereof	cette communication au plaignant :
(*a*) forthwith on giving the notice if no notice is given to a third party under paragraph 29(1)(*b*) in the matter; or	*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*) 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 of the matter is requested under section 44.	*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 en révision a été exercé en vertu de l'article 44.
(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.	(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.

[19] Indeed, it appears from the *Act* that the OIC disposes of a large array of administrative, quasi-judicial and extraordinary powers in the course of its investigation, ranging from the power to make recommendations to the head of the institutions to a report to Parliament. These powers are

conferred on the OIC by the *Act* and are best summarized by Desjardins, J.A. in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, *supra*, at para. 20:

> The Commissioner may then initiate a complaint under section 30 of the Act. He notifies the head of the institution (section 32). He conducts the investigation, in the course of which the institution is given a reasonable opportunity to make representations (subsection 35(2)) and for the purposes of which the Commissioner has extraordinary powers (section 36), including the power to summon and enforce the appearance of persons in the same manner and to the same extent as a superior court of record (paragraph 36(1)*(a)*), to enter any premises occupied by the government institution (paragraph 36(1)*(d)*) and to examine any record, as no record may be withheld from him on any grounds (subsection 36(2)). He provides the head of the institution with a report containing his findings and recommendations (paragraph 37(1)*(a)*). He may specify the time within which the head is to give him notice of any action taken or proposed to be taken to implement the recommendations or reasons why no such action has been or is proposed to be taken (paragraph 37(1)(b); and reports the findings of his investigations to the complainant (subsection 37(2)), but where a notice has been requested under paragraph 37(1)*(b)* no report shall be made until the expiration of the time within which the notice is to be given to the Commissioner.

[20] The OIC also has the power to denounce actions or behaviours of uncooperative institutions subject to the *Act* by reports (annual or special) to Parliament and designated committees of both Houses under sections 38, 39 and 40 of the *Act*.

[21] Finally, section 41 of the *Act* allows a party that has been refused access and has made a complaint to the OIC in respect of the refusal, to apply to this Court for a review of the matter.

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a	**41.** La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente

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.	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.

THE ISSUES

[22] There are essentially three issues to be addressed in the context of this application for judicial review:

a) Is the application moot, in light of the fact that all ATI 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 ATI requests approved by the OIC 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?

ANALYSIS

a) Mootness

[23] The respondent CBC relies heavily on the Order of Madame Prothonotary Tabib for the proposition that this application is moot as a result of the fact that all ATI requests have now been responded to by the CBC. It is indeed clear from a reading of that Order, and, in particular, the extract quoted at paragraph 13 of these reasons, that the evolving mootness of this application was of paramount importance to her in allowing this application to continue. Not only does she mention the "mootness" condition twice at page 5 of her Order, but she also states that "[i]t is, accordingly, an acknowledged moving target but only in that its scope is liable to shrink".

[24] Not only has the applicant himself acknowledged that his application becomes moot with respect to every ATI request which receives a response, but this position appears to be in line with the case law on the subject. In *Canada (Cultural Property Export Review Board) v. Canada (Information Commissioner)*, 2002 FCA 150, for example, Strayer J.A. (writing for the Court) found that an application is moot where records are already disclosed at the time of the hearing.

[25] The decision of the Federal Court of Appeal in *Information Commissioner of Canada v. Canada (Minister of National Defence)*, *supra*, also bears some resemblance to the present case.

The applicant had asked the Minister of National Defence for access to a report, but the Minister had persistently failed to notify the applicant as to whether disclosure would be given. The applicant complained to the Information Commissioner, who initiated a complaint given the Minister's continuing failure to meet the time limits he had set for itself. The Commissioner could have initiated his investigation as if there had been a true refusal. Instead, he chose another approach. He hoped to persuade the Minister to voluntarily give the notice required under ss. 7 and 10, and tried to transform, as it were, what was then a deemed refusal into a true refusal. For all practical purposes, the Commissioner split his investigation into two parts, initially trying to solicit a response from the Minister so he could then consider the merits of whatever response might be provided.

[26] While he was still working on the first part of his investigation, the Commissioner lost patience and gave the Minister fifteen days to give its notice of refusal, warning that he would otherwise pursue the matter in the Federal Court. There was never any question of considering the merits of the refusal, and the Commissioner's recommendation dealt with the answer to be given, not at all with access to the record. Following a response by the Minister within the time limit the Commissioner had set, whereby partial release of the records sought was made, the Commissioner filed a notice of application for review in the Federal Court pursuant to s. 42(1)*(a)* of the *Act*. The Commissioner sought an order directing the Minister not only to give written notice to the applicant as to whether or not access to each of the requested records would be given, but also an order that the Minister give the applicant access to each of the requested records for which the Minister was

deemed to have decided to refuse access if the Court was of the view that the Minister had not established the merits of the refusal to give access to those records.

[27] The Federal Court of Appeal agreed with the Trial judge that it was premature to rule on the second stage of the investigation. A disclosure out of time did not necessarily nullify the government institution's right to avail itself of the exemptions and exceptions provided by the *Act*, as the Commissioner still had the opportunity to consider the merits of the exemptions and exceptions and to solicit the comments of the government institution. The Court therefore found that the Commissioner could not act as if he had investigated the merits of what until then had been a deemed refusal, although he had not yet done so.

[28] In the present case, the Commissioner chose to follow a similar approach. He decided to have the institution take a position in each of the requests for access so that the requester could then consider the merits of whatever answer might be provided, together with the records or part thereof and the specific provisions of the *Act* under which the refusal is based, if the case arises. There was never any question for the Commissioner to consider the merits of any specific provision of the *Act* on which a refusal to disclose may be based. The Commissioner's recommendations and the CBC's undertakings aim to provide a full response to the access requester. The requester could then bring a complaint with respect to the merits of the refusals, if any. The applicant acknowledged as much before the Prothonotary.

[29] It is not entirely clear from the reasons of Desjardins J.A. whether the Federal Court has jurisdiction to grant a remedy to direct a government institution to respond to an access request within a set time period, an issue I will be dealing at more length shortly. On the other hand, it is quite clear from her reasons that the first remedy sought, that is -- to compel the institution to give the required notice, had become moot because the institution had complied with the Commissioner's request by the time of the hearing before the Trial judge (see para. 25 of her reasons).

[30] For all of these reasons, I am therefore of the view that the application is now moot as all the records requested by the applicant had been disclosed at the time of the hearing. That being said, I believe this is a case where the Court ought to exercise its discretion to hear the application notwithstanding its mootness. The applicant raises issues that are of interest to other potential litigants and which have never been addressed by courts before, i.e. whether a deemed refusal can 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 whether this Court has jurisdiction to judicially review the determination of a delay for answering ATI requests approved by the OIC in the exercise of his power under the *Act*.

b) The jurisdiction of this Court

[31] It is not disputed that the CBC was deemed to have refused disclosure of all the records requested by the applicant, as it did not respond to the access requests within 30 days after these requests were received and did not avail itself of section 9 of the *Act* entitling it to extend the time to

reply. The applicant contends that the CBC could not cure these deemed refusals by agreeing, seven months after the initial requests and at the behest of the OIC, to provide responses by April 1, 2009.

[32] The right to access no doubt encompasses the right to timely access. Having regard to the operative provisions of the *Act*, Canada's access legislation explicitly mandates that government institutions are to reply to access requests within specified time frames. To the extent that an institution requires additional time in which to respond, the *Act* specifically provides a limited-use mechanism through which such time can be claimed.

[33] The provisions governing responses to access requests are clear in their requirements. Where an access request is made in writing to a government institution, there are clearly defined timelines governing the institution's response. Section 9, in particular, provides a mechanism by which an institution unable to respond to access requests in the statutorily mandated time frame may extend the thirty day period. That said, the section is applicable only in limited circumstances and only if proper notification of the extension is provided to the requesting party within thirty days of the institution receiving the access request.

[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 OIC 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.

[35] 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. Unlike the *Federal Courts Rules*, the *Access to Information Act* does not provide for an extension of time mechanism when an institution fails to claim it within the statutory time period. This is not to say, however, 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.

[36] Following a complaint, the OIC has the power to issue recommendations that he considers appropriate to solve such complaints, pursuant to s. 37(1). That power 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.

[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.

[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)*, [1990] 3 F.C. 514. This interpretation,

however, was rejected in two subsequent decisions: see *X v. Canada (Minister of National Defence)*, (1990) 41 F.T.R.16 and *X v. Canada (Minister of National Defence)*, [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.

[44] I am further of the opinion that this Court has no jurisdiction to make a declaratory judgment reprimanding the behaviour of an institution. I adopt as mine the following remarks made by Justice Strayer in *X v. Canada (Minister of Defence)*, [1991] 1 F.C. 670 (F.C.T.D.), at p. 678:

> The applicant here does not come within section 41, the only section relevant to the present situation and the one on which he relies, because he has not been refused access: access was delayed but in fact has long since been given to him and within the time limits permitted by the statute. That being the case there can be no remedy granted under sections 49 or 50, the sections authorizing appropriate orders by the Court, because those remedial powers arise only where the Court finds a refusal to disclose a record. I am satisfied that where those sections authorize "such other order as the Court deems appropriate" such orders must be directly pertinent to providing

> access or its equivalent where there is first a finding that access has been refused. Refusal of access is a condition precedent to an application under those sections and the only matter to be remedied by the Court where it finds for the applicant. The reference to "such other order", in my view, only authorizes the Court to modify the form of the remedy to achieve disclosure in some form or perhaps to declare that disclosure should have been made where the record no longer exists.

[45] A government institution may well be open for criticism in its dealing with a particular request, or as a result of systemic deficiencies in complying with the *Act*. These should not be taken lightly, as the *Act* has been interpreted as providing Canadians with quasi-constitutional rights of access to records under the control of government institutions, thus enabling them to participate meaningfully in the democratic process and ensuring that politicians and bureaucrats remain accountable to citizens. But the role of this Court is only to intervene where a genuine and continuing refusal of access can be demonstrated. Political and administrative sanctions are available to deal with delay issues and reprehensible behaviour of institutions.

c) Costs

[46] The applicant has sought costs on a solicitor-client basis, arguing that the CBC "retrenched into a defensive and adversarial stance" at every step of the process and argued issues of jurisdiction and procedural irregularities instead of providing responses. The CBC, of course, vehemently denies these allegations.

[47] Rule 400 of the *Federal Courts Rules* deals with the awarding of costs between parties and states that costs are granted under the complete discretion of the Court. Rule 400(6)*(c)* indicates

that, further to its general discretion as to costs, "the Court may (…) award all or part of costs on a solicitor-and-client basis".

[48] It is clear that the solicitor-client costs are awarded only in exceptional circumstances:

> The general rule in this regard is that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct (…). Reasons of public interest may also justify the making of such order…
> *Mackin v. New Brunswick (Minister of Justice)*, [2002] 1 S.C.R. 405, at para. 86.

[49] A "reprehensible, scandalous and outrageous conduct" has been defined by case law as follows:

> "Reprehensible" behaviour is that deserving of censure or rebuke; blameworthy. "Scandalous" comes from scandal which may describe a person, thing, event or circumstance causing general public outrage or indignation. Among other things, "outrageous" behaviour is deeply shocking, unacceptable, immoral and offensive.
> *Microsoft Corp. v. 9038-3746 Quebec Inc.*, 2007 FC 659, at para. 16.

[50] In awarding costs, case law stands for the proposition that courts should consider the behaviour of a party that has caused substantial, unnecessary difficulty or expense for another party in prosecuting or defending an action, or has required a party to be involved in unnecessary proceedings: see *Stamicarbon B.V. v. Urea Casale S.A.*, [2001] 1 F.C. 172, at para. 24.

[51] In this respect, it appears from the affidavits and the cross-examinations filed in the record that it is the applicant's conduct that has been far from exemplary. First of all, the Prothonotary was quite critical of the applicant's behaviour with respect to the Court's Rules, and granted costs to the CBC despite the fact that she dismissed the respondent's motion to dismiss the applicant's application.

[52] Second, Mr. Statham continued to show disrespect for the Rules by failing to properly amend his affidavit and his Amended Application, notably by trying to add a conclusion in his memorandum of fact and law that was not sought in his Amended Application and by failing to properly amend his affidavit in leaving a non relevant paragraph containing allegations that make reference to ATI requests not covered by this application.

[53] Third, Mr. Statham made a number of gratuitous allegations against the OIC and, to a lesser extent, against the CBC. Indeed, the OIC sought and was granted leave to intervene in part to refute some of these allegations. Mr. Statham eventually withdrew these allegations.

[54] All things considered, however, I am not prepared to hold that Mr. Statham's conduct in these proceedings has reached the level required to make an award of costs on a solicitor-client basis. While he may have been careless in his application of the Rules and may have gone too far in claiming that the CBC and the OIC acted unreasonably and behaved antithetically with respect to their respective obligations under the *Act*, I do not think that this amounts to a reprehensible, scandalous or outrageous behaviour.

[55] That being said, all of these factors do justify an assessment of costs under the highest column of Tariff B. In coming to that conclusion, I have taken into account the various factors described under Section 400(3) of the Rules, and more particularly subparagraphs 400(3)*(c)*, *(g)*, *(i)* and *(k)*. This case raised complex issues, which could nevertheless have been narrowed down had the applicant followed the Rules and abided by the Prothonotary's Order. As a result of the confusion surrounding the actual relief requested by the applicant, this case went on for much longer than it should have and was marred by a number of unnecessary procedural steps. Indeed, there were 143 entries in the Court Index at the time of hearing. In those circumstances, costs at the mid-range of column V under Tariff B are warranted in this application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed, with costs in favour of both respondents at the mid-range of column V under Tariff B.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ms. Sally Gomery	FOR THE APPLICANT
Mr. Michel Drapeau Ms. Zorica Guzina	
Mr. Christian Leblanc Mr. Marc-André Nadon	FOR THE RESPONDENT, PRESIDENT OF THE CANADIAN BROADCASTING CORPORATION
Mr. Laurence Kearley Ms. Diane Therrien	FOR THE RESPONDENT, INFORMATION COMMISSIONER OF CANADA

SOLICITORS OF RECORD:

OGILVY RENAULT LLP Barristers & Solicitors Ottawa, Ontario	FOR THE APPLICANT
MICHEL DRAPEAU LAW OFFICE Barristers & Solicitors Ottawa, Ontario	
FASKEN MARTINEAU Barristers & Solicitors Montreal, Quebec	FOR THE RESPONDENT, PRESIDENT OF THE CANADIAN BROADCASTING CORPORATION
OFFICE OF THE INFORMATION COMMISSIONER OF CANADA Ottawa, Ontario	FOR THE RESPONDENT, INFORMATION COMMISSIONER OF CANADA