Federal Court  Cour fédérale

**Date: 20110608**

**Docket: T-1671-09**

**Citation: 2011 FC 649**

**Ottawa, Ontario, June 8, 2011**

**PRESENT: The Honourable Mr. Justice Beaudry**

**BETWEEN:**

**PUBLIC SERVICE ALLIANCE OF CANADA**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant, the Public Service Alliance of Canada, seeks review pursuant to section 41 of the *Access to Information Act*, RSC 1985, c A-1 (the Act) of an access to information request made to the Department of Justice (the Department) dated June 5, 2009. The applicant seeks a declaration that the extension of time requested by the respondent is unreasonable and amounts to a deemed refusal of access to the requested information, and an order compelling the respondent to disclose the information requested in a timely fashion.

[2] For the reasons that follow, I am of the view that the application for judicial review should be dismissed.

**Facts**

[3] On January 27, 2009, the Federal Government introduced the *Public Sector Equitable Compensation Act* (PSECA) as a part of the *Budget Implementation Act, 2009*, SC 2009, c 2. (PSECA**),** a new regime for pay equity disputes which will replace employees' rights to bring pay equity complaints under the *Canadian Human Rights Act*, RSC 1985, c H-6.

[4] The applicant is a union which represents approximately 150,000 federal public service employees and has acted for its members in numerous pay equity disputes and related litigation. The applicant was unaware of PSECA until it was introduced, and immediately began a campaign opposing the changes. The applicant has also filed a lawsuit in the Ontario Superior Court of Justice alleging that PSECA and other parts of the *Budget Implementation Act, 2009* are unconstitutional. On March 20, 2009, to assist with its campaign and to better inform its members, the applicant filed an access to information request with the Department seeking information about the development of PSECA.

[5] When the Department responded that it would require a five year extension to respond to this request, the applicant agreed to split the request into several smaller ones. One of those requests sought all records, including notes, briefing notes, agendas, minutes, memoranda, reports, assessments, emails, letters, deck presentations, summaries, handouts, or other correspondence concerning the scheduling or conduct of any meetings, presentations or consultations dealing with policy or legislative development or amendments concerning pay equity, equitable compensation, or the *Public Sector Equitable Compensation* (and any related regulations) from January 1, 2006 to

January 26, 2008, held by the Public Law Sector; the request did not include matters pertaining to ongoing pay equity complaints, settlements, or related litigation. It is this request that is the subject of this application.

[6] The request was assigned to an analyst on June 30, 2009. Following a meeting of all access to information office staff to discuss requests dealing with pay equity, the Department determined that, pursuant to section 9 of the Act, it required an extension of 760 additional days or 25 months to respond to the request. That extension was to include 11 months for document review and 14 months for consultation with other government institutions. The Department advised the applicant of the extension on July 8, 2009.

[7] On July 10, 2009, the applicant contacted the Information Commissioner (the Commissioner) to file a complaint about the extension, which it claimed was unreasonable. The Commissioner investigated the complaint and on August 25, 2009, advised that it was in the process of negotiating with the Department to try and expedite the processing of the request.

[8] On August 27, 2009, the applicant received a letter from the Commissioner dated August 24, 2009 which stated that the Commissioner had determined that the complaint was not substantiated and that it was therefore dismissed. The applicant filed the application for judicial review on October 8, 2009.

**The issues**

[9] The issues in this application are as follows:

a. Does the Court have jurisdiction to hear this application?

b. If so, was the extension unreasonable?

***a. Does the Court have jurisdiction to hear this application?***

**Applicant's arguments**

[10] The applicant acknowledges that this Court has been divided as to whether section 41 of the Act includes the jurisdiction to review an extension. The applicant argues, however, that an interpretative approach to this issue and the consideration of *Charter* issues lead to the conclusion that a meaningful right to timely access requires this Court to have the jurisdiction to review extensions and to compel disclosure where an extension is unreasonable.

[11] The applicant relies on the decision of Justice Jerome in *Canada (Information Commissioner) v Canada (Minister of External Affairs)*, [1989] 1 FC 4, [1988] FCJ No 383 and the related decision of Justice Muldoon in *Canada (Information Commissioner) v Canada (Minister of External Affairs)*, [1990] 3 FC 514, [1990] FCJ No 721 (collectively, *External Affairs*); those decisions relate to the same application, and in both instances, the Court found that it had the jurisdiction to determine whether that extension amounted to a deemed refusal.

[12] The applicant argues that the more recent decisions to the contrary fail to consider the quasi-constitutional nature of the Act and the presumptive right of access enshrined in the Act. The applicant underlines that the decision in *X v Canada (Minister of National Defence)*, [1991] 1 FC 670, [1990] FCJ No 1081 is premised upon an incorrect characterization of the Act as purely administrative.

[13] The applicant further submits that the approach taken by this Court in *X* and in *Canada (Attorney General) v Canada (Information Commissioner)*, 2002 FCT 136, [2002] 4 FC 110 (*Attorney General*) leaves complainants without recourse when faced with extensions and delay, as the Commissioner cannot compel disclosure even if a complaint is substantiated.

[14] The applicant quotes various statements from the above decisions to support its argument that excessive delay amounts to a deemed refusal and also relies on a freedom of information decision from the United States District Court, Southern District of New York.

[15] The applicant cites the recent decision from the Supreme Court of Canada in *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, [2011] SCJ No 25, which confirmed the quasi-constitutional nature of the Act, and relies on the statement in paragraph 54 of that decision that “the notion of control must be given a broad and liberal interpretation in order to create a meaningful right to access to government information.”

[16] Finally, the applicant argues that the extension at issue has not been justified and that it is unreasonable because all of the searches required to respond to the request were completed by October 20, 2009. The applicant further contends that, according to the evidence of the analyst who is processing the request, it is extremely unlikely that a response will be received by August 4, 2011, when the extension expires.

**Respondent's arguments**

[17] The respondent says that this Court does not have the jurisdiction to hear this application. It takes the position that, until the extension has expired without a response to the request, there can be no refusal and therefore no review pursuant to section 41 of the Act.

[18] The respondent advances that the Court should not give any weight to the decisions in *External Affairs*, as those decisions were based on concessions made by the Crown which have not been made in this case. It underscores that *External Affairs* can be distinguished from this application because by the time that application came before the Court, the extension had lapsed without a response to the request and so there was a deemed refusal pursuant to subsection 10(3) of the Act.

[19] The respondent relies on *X*, which found that it was not the Court's role to second-guess government institutions as to whether an extension beyond the statutory limit of 30 days was reasonable. It cites also *Attorney General*, which adopted the *X* reasons and found that there could be no deemed refusal of a request until the extension had expired without a response being received.

[20] The respondent urges that the applicant's position in pleading that an unreasonably long extension amounts to a deemed refusal is not supported by the wording of the Act. Section 10(3) addresses deemed refusals and section 41 limits this Court's jurisdiction to instances where there has been a refusal. The respondent argues that this interpretation is supported by the grounds for a complaint to the Commissioner set out in subsection 30(1) of the Act, which distinguish between complaints based on a refusal and complaints based on an extension that the complainant considers unreasonable.

**Analysis**

[21] In my view, there can be no refusal and therefore no review pursuant to section 41 of the Act until the deadline for processing a request has passed. The language of the Act clearly limits this Court's jurisdiction to the review of refusals, whether actual or deemed, and leaves no room for the review of extensions. As this Court found in *Attorney General*, at para 25:

> [25] Parliament has clearly provided for "deemed refusals" in section 10(3) but not elsewhere in the Act. A "deemed refusal" is when the department fails to give access to the record within the time limits set out in the Act, i.e. either 30 days as provided in section 7 or an extended time limit under section 9. In my opinion, in this case, the extended time limit has not expired so that there can be no "deemed refusal" to give access.

[22] I am further persuaded by the reasoning in *X* in which the Court found at paragraph 13 that, except where there is an ongoing refusal of access, "it is not the role of the Court to immerse itself in the reasonability of the conduct of the internal affairs of a government department."

[23] I acknowledge that the decisions in *External Affairs* support the applicant's case, but I am not persuaded by them. In *External Affairs* the Crown conceded that an unreasonable extension amounted to a deemed refusal. No such concession has been made here, and in any event the Commissioner has found that the extension in the instant application was reasonable. Therefore, I am unable to find that the extension amounts to a deemed refusal that would give me jurisdiction to hear this application.

[24] If, as the applicant argues, no response is received by the conclusion of the extension, the applicant can complain to the Commissioner. However, there has not yet been a refusal and, as such, the Court does not now have the jurisdiction to decide the merits of this application.

***b. If so, was the extension unreasonable?***

[25] In light of my conclusions above, it is unnecessary to address the second issue.

**JUDGMENT**

**THIS COURT ORDERS that:**

1. The application for judicial review be dismissed.

2. The applicant shall pay costs to the respondent by way of a lump-sum for an amount of $4,500 inclusive of disbursements.

"Michel Beaudry"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1671-09 |
| **STYLE OF CAUSE:** | Public Service Alliance of Canada and Attorney General of Canada |
| **PLACE OF HEARING:** | Ottawa |
| **DATE OF HEARING:** | May 17, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | BEAUDRY J. |
| **DATED:** | June 8, 2011 |

**APPEARANCES:**

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|---|---|
| Mr. Andrew Astritis | FOR THE APPLICANT |
| Ms. Jennifer Francis | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Raven, Cameron, Ballantyne & Yazbeck LLP<br>Barristers and Solicitors<br>Ottawa (Ontario) | FOR THE APPLICANT |
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