Federal Court of Appeal

Cour d'appel fédérale

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.

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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, 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. <u>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</u>.
>
> [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)*, [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.
>
> [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)*, [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] 4 F.C. 245 at paragraph 12 (T.D.), and *Canada (Attorney General) v. Canada (Information Commissioner)*, [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	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

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.]	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] 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)*, [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 unless the Court orders otherwise.	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.
(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	9. (1) Le responsable d'une institution fédérale peut proroger le délai

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 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.

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 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

Refus de communication

10. (1) En cas de refus de

government institution refuses to 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*)	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*) that the record does not exist, or	*a*) soit le fait que le document n'existe pas;
(*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.	*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	Dispense de divulgation de l'existence d'un document
(2) The head of a government institution may but is not required to indicate under subsection (1) whether a record exists.	(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	Présomption de refus
(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.	(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 relating to requesting or obtaining access to records under this Act.

Complaints submitted on behalf of complainants

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 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) 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.

(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.

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.

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.

[…]

. . .

Regulation of procedure

34. Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act.

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.

[…]

. . .

Powers of Information Commissioner in carrying out investigations

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

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

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

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 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

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;

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

control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

auxquels la présente loi s'applique; aucun de ces documents ne peut, pour quelque motif que ce soit, lui être refusé.

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 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.

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 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

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

subsection precludes the Commissioner from again requiring its production in accordance with this section.

fin, mais rien n'empêche le Commissaire d'en réclamer une nouvelle production.

Findings and recommendations of Information Commissioner

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.

Conclusions et recommandations du Commissaire à l'information

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

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

subsection until the expiration of the time within which the notice is to be 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.

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 of the matter is requested under section 44.

Right of review

imparti au responsable de l'institution fédérale.

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.

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

Recours en révision

(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.

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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.

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.

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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

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

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.

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.

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, 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.

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 elle l'estime indiqué.

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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.

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

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.

(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

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