Federal Court of Appeal

Cour d'appel fédérale

Date: 20101122

Docket: A-500-09

Citation: 2010 FCA 316

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

BETWEEN:

MICHAEL DAGG

Appellant

and

MINISTER OF INDUSTRY

Respondent

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] This is an appeal from an order of the Federal Court. The Court's reasons are cited as 2009 FC 1265. The sole issue to be determined on this appeal is whether the Judge made an error in principle when he dismissed a motion for costs brought by the appellant, Mr. Dagg. The issue arises out of the following facts.

The Facts

[2] By letter dated January 15, 2008, Mr. Dagg made a request to Industry Canada under the *Access to Information Act*, R.S.C. 1985, c. A-1 (Act) seeking access to certain records. Industry Canada responded that, pursuant to subsection 9(1) of the Act, an extension of up to 150 days beyond the 30-day limit contained in section 7 of the Act would be required to complete the processing of Mr. Dagg's request. Thereafter, Industry Canada did not process the access request within the 150-day extension. Mr. Dagg filed a complaint with the Information Commissioner (Commissioner) concerning Industry Canada's delay in responding to the access request. The sections of the Act referred to in these reasons are set out in the appendix to the reasons.

[3] The Commissioner investigated Mr. Dagg's complaint. By letter dated July 10, 2009, the then Commissioner advised Mr. Dagg of the results of his investigation. In material part, the letter advised Mr. Dagg that:

> The investigation confirmed that extensions invoked under section 9 were necessary and that the durations were reasonable. Hence, the due date for a response was extended. As you know, the department failed to respond to your request by the extended due date, thereby placing itself in a deemed refusal situation pursuant to subsection 10(3) of the Act. In our view, there is no lawful justification for [Industry Canada]'s failure to meet the response deadline.
>
> As a result of our intervention [Industry Canada] has provided our office with a work plan and commitment date for your request. [Industry Canada] is making every effort to respond to your request by September 28, 2009. Consequently, we will record your complaint as resolved. [Emphasis added.]

[4] On August 21, 2009, Mr. Dagg commenced an application for judicial review of the decision refusing his access request. This date was within the 45-day deadline for commencing

such applications set under section 41 of the Act, but was prior to the commitment date of September 28, 2009. On the commitment date, Industry Canada provided Mr. Dagg with the requested records. Certain exemptions were claimed under the Act, none of which were the subject of any further complaint.

[5] Mr. Dagg then brought a motion seeking an order dismissing the application for judicial review because it had been rendered moot. He also sought costs.

The Decision of the Federal Court

[6] The Judge began his decision by correctly noting that section 41 of the Act contains three prerequisites that must be met before an access requester may apply to the Federal Court. Only one of the prerequisites was in issue: had Mr. Dagg been refused access to the requested record?

[7] The Judge then reviewed the recent decision of the Federal Court in *Statham v. Canadian Broadcasting Corp.*, 2009 FC 1028. The Judge discussed the *Statham* decision in the following terms:

> In *Statham*, it is significant that the Court interprets the Act as granting the power to cure a deemed refusal to the Office of the Information Commissioner [Commissioner] upon conclusion of its investigation. This conclusion effectively precludes the applicant from applying to the Federal Court under section 41 of the Act if the [Commissioner] has approved a future commitment date from the government institution.

[8] The Judge viewed the facts in *Statham* to be similar to the facts before him. He therefore concluded that:

> 27. […] it is appropriate to defer to my colleague's interpretation of subsection 37(1) of the Act as set out in *Statham*, *supra* and apply it to the facts of this motion. Accordingly, the [Commissioner] cured the deemed refusal when it approved a new delay period, ending on September 28, 2009, for the respondent to comply with the request. The applicant's application for judicial review was premature as there was no refusal for the purpose of section 41.

[9] On the issue of costs, the Judge wrote:

> 28. Because I have concluded, on the basis of *Statham*, *supra*, that this Court had no jurisdiction to hear the underlying application for judicial review pursuant to section 41 of the Act, but the law in this area has yet to be determined by the Court of Appeal, I do not award costs against either party.

Consideration of the Issue

[10] Mr. Dagg argues that the Judge erred in law in failing to award costs to him. He states that he believes he only received the requested documents because he commenced his application in the Federal Court. He seeks reimbursement of the legal fees he incurred in the amount of $3,405.00.

[11] This Court may only interfere with the Judge's order as to costs if the Judge made an error in principle, or if the costs award is plainly wrong. See: *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303 at paragraph 27.

[12] In reasons cited as *Statham v. Canadian Broadcasting Corp.*, 2010 FCA 315 this Court found that the Federal Court erred when it interpreted the Act to empower the Commissioner to "cure" deemed refusals by establishing a commitment date so as to in effect extend the time frames established in the Act. The Court also affirmed that no distinction exists between a deemed refusal of access and a refusal based upon exemptions or exclusions in the Act.

[13] Applying those conclusions to the present case, when Mr. Dagg commenced his application for judicial review Industry Canada was deemed, under subsection 10(3) of the Act, to have refused access to him. This was because access was not provided within the extended time period set under subsection 9(1) of the Act. Subsequently, after the application for judicial review was commenced, access was provided. At that time, Mr. Dagg correctly took the position that his application had become moot.

[14] By following the decision of the Federal Court in *Statham*, the Judge committed an error in principle. Mr. Dagg's application for judicial review was not premature when it was commenced. The three prerequisites under section 41 of the Act were all met. Throughout, the Federal Court had jurisdiction under section 41 of the Act. Later, when access was provided the application was rendered moot.

[15] But for that error of principle, the Judge would have considered Mr. Dagg's claim for costs on the basis that his application had been properly commenced, but had been rendered moot. The Judge would also have considered that Mr. Dagg was provided with the requested records after the application for judicial review was commenced, some 20 months after the access request had been filed. In the specific circumstances now before the Court, considering the above factors, I conclude that the Court should have ordered that Mr. Dagg was entitled to have his costs in the Federal Court.

[16] As to the quantum of such costs, Mr. Dagg is effectively seeking costs on a solicitor-and-client basis. The jurisprudence is well settled that solicitor-and-client costs are "generally awarded

only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties." See: *Young v. Young*, [1993] 4 S.C.R. 3 at page 134. The conduct of Industry Canada cannot be so characterized.

[17] Rule 407 of the *Federal Courts Rules* provides that unless the Court otherwise orders, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B of the *Federal Courts Rules*. I would order that Mr. Dagg be paid his costs in the Federal Court assessed on that basis.

[18] In reaching this conclusion, I have considered the respondent's submission that to award costs in this case "may well encourage the practice by complainants of initiating applications for judicial review before the expiry of timelines for disclosure, knowing that they can pursue their costs in these kind[s] of moot applications." However, an award of party-and-party costs does not indemnify a litigant. It is a contribution to a party's solicitor-and-client costs. Because complainants will expend more money in legal fees than they receive as costs, I see little danger in the particular circumstances before me in awarding costs to Mr. Dagg. Further, the respondent's concerns are based on the incorrect premise that the Commissioner possesses the power to extend the time frames established in the Act.

[19] For these reasons, I would allow the appeal and, pronouncing the order the Judge should have, I would order that the appellant receive his costs in the Federal Court, assessed on the basis of

the midpoint of column III of the table to Tariff B of the *Federal Courts Rules*. As the appellant was successful on this appeal I would award him his costs of the appeal.

"Eleanor R. Dawson"
J.A.

"I agree
Johanne Trudel J.A."

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

APPENDIX

Sections 7, 9, 10 and 41 of the *Access to Information Act* are as follows:

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

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.

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

Notice of extension to Information Commissioner

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

Avis au Commissaire à l'information

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

Where access is refused

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

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

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

Refus de communication

10. (1) En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente loi, l'avis prévu à l'alinéa 7*a*) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l'information et, d'autre part :

a) soit le fait que le document n'existe pas;

b) soit la disposition précise de la présente loi sur laquelle se fonde le refus ou, s'il n'est pas fait état de l'existence du document, la disposition sur laquelle il pourrait vraisemblablement se fonder si le document existait.

request has a right to make a complaint to the Information Commissioner about the refusal.

Existence of a record not required to be disclosed

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

Deemed refusal to give access

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

[…]

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.

Dispense de divulgation de l'existence d'un document

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

Présomption de refus

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

. . .

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.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	November 22, 2010

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