Cour d'appel fédérale | Federal Court of Appeal

Date: 20150303

Docket: A-163-14

Citation: 2015 FCA 56

CORAM: **NOËL C.J.**
STRATAS J.A.
SCOTT J.A.

BETWEEN:

INFORMATION COMMISSIONER OF CANADA

Appellant

and

MINISTER OF NATIONAL DEFENCE

Respondent

and

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Intervener

Heard at Ottawa, Ontario, on November 19, 2014.

Judgment delivered at Ottawa, Ontario, on March 3, 2015.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: STRATAS J.A.
SCOTT J.A.

Cour d'appel fédérale | Federal Court of Appeal

Date: 20150303

Docket: A-163-14

Citation: 2015 FCA 56

CORAM: **NOËL C.J.**
STRATAS J.A.
SCOTT J.A.

BETWEEN:

INFORMATION COMMISSIONER OF CANADA

Appellant

and

MINISTER OF NATIONAL DEFENCE

Respondent

and

INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

Intervener

REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal brought by the Information Commissioner of Canada (the Commissioner) from a decision of the Federal Court (2014 FC 205) wherein Kane J. (the Federal Court judge) dismissed her application for judicial review of a decision by the Department of National Defence (DND) to assert, in response to a request for records under the *Access to Information Act*, R.S.C., 1985, c. A-1 (the Act), an extension of 1,110 days.

[2] The Information and Privacy Commissioner of Ontario (the intervener) was granted leave to intervene in the present appeal.

[3] At issue is whether the Federal Court has jurisdiction under section 42 of the Act to review a decision by a government institution under subsection 9(1) to extend the time limit set out in section 7. The Federal Court judge answered this question in the negative.

[4] For the reasons that follow, I would propose that the appeal be allowed.

[5] The legislative provisions which are relevant to the analysis are set out in the annex to these reasons.

BACKGROUND

[6] On February 3, 2011, a lawyer acting for his clients (the requester) requested from DND access to records relating to the sale of certain military assets.

[7] On March 4, 2011, DND notified the requester that, pursuant to subsection 9(1) of the Act, it was extending the 30-day time limit set out in section 7 by 1,110 days in order to deal with the request. In response, the requester communicated his intent to file a complaint with the Commissioner and proceeded to do so on or about March 22, 2011.

[8] On March 29, 2011, the Commissioner provided notice of her intention to investigate pursuant to section 32 of the Act. During the course of the investigation, DND informed the Commissioner that 230 of the 1,110 days had been taken under paragraph 9(1)(*a*) to deal with the large number of records involved and that the remaining 880 days had been taken under paragraph 9(1)(*b*) to complete the necessary consultations with third parties.

[9] In May 2012, DND informed the Commissioner that it had identified 2,400 pages requiring review and consultation. DND also provided several reasons for the length of the extension taken, citing among other things the need to review the documents for matters of solicitor-client and litigation privilege, the occurrence of a major and unprecedented software malfunction in the department's access to information unit, and the need to consult with three government departments, being Public Works and Government Services Canada (PWGSC), the Department of Justice (DOJ), and the Department of Foreign Affairs and International Trade

(DFAIT). DND advised that DFAIT might in turn be required to consult with foreign governments.

[10] On July 9, 2012, DND sent the relevant records to the three consulting departments. While PWGSC and DOJ provided a response to DND by August 15, 2012, DFAIT responded only on August 31, 2012, and notified DND that it would need another 120 days to complete its consultations.

[11] On October 18, 2012, the Commissioner reported the results of her investigation to DND. DND was found to have breached its duty under subsection 4(2.1) of the Act, as it failed to make every effort to process the request in a timely manner. DND's asserted extension was also found to be invalid, as the criteria for an extension under paragraph 9(1)(*a*) were not all met, and the time taken under paragraph 9(1)(*b*) was unreasonably long. Given the Commissioner's finding of invalidity, she concluded that the applicable time limit for meeting the requester's request remained March 4, 2011, 30 days past the point in time at which the original request had been made. Because no response had been received by that date, DND was found to have been in a state of deemed refusal pursuant to subsection 10(3) of the Act.

[12] The Commissioner recommended that DND commit to respond by February 28, 2013. On November 6, 2012, DND informed the Commissioner that it could not so commit, as the consultations in question were external and beyond its control.

[13] On January 11, 2013, acting under section 42 of the Act, the Commissioner filed an application for judicial review in Federal Court. The Commissioner sought a declaration that DND was in a state of deemed refusal for having failed to give access within the time limits set out in the Act and an order directing DND to respond to the request within a 30-day period.

[14] On September 11, 2013, 27 days before the Federal Court hearing, DND gave the requester access to the requested documents. Given this development, DND moved to dismiss the Commissioner's application on the basis that the underlying issue had become moot.

[15] The motion to dismiss was heard on October 8, 2013, in conjunction with the judicial review application.

DECISION OF THE FEDERAL COURT

[16] By decision rendered on March 3, 2014, the Federal Court judge disposed of both the motion to dismiss and the judicial review application. Though she agreed that the dispute was moot, consideration of the factors set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 led her to exercise her discretion to nevertheless consider the Commissioner's request for a declaration.

[17] Before considering the reasonableness of the extension taken by DND, the Federal court judge first considered whether the Federal Court had jurisdiction pursuant to section 42 of the Act to issue the requested declaration.

[18] According to the Federal Court judge, the answer to this question turned on whether and when a time extension taken by a government institution pursuant to subsection 9(1) of the Act can amount to a deemed refusal under subsection 10(3). Because the Federal Court's jurisdiction is limited to instances of refusal (sections 41 and 42), a deemed refusal is the only route by which to challenge a government institution which extends the time under subsection 9(1), without actually refusing to provide the requested records.

[19] The Federal Court judge ultimately concluded that, where a government institution takes an extension under subsection 9(1), it will not enter a state of deemed refusal unless and until it fails to give access by the date on which the asserted extension expires (Reasons at paras. 97 to 99).

[20] The Federal Court judge supported this conclusion on several grounds. First, she pointed to the language of the Act. Under section 7 of the Act, the head of a government institution has 30 days to respond to an access request. Subsection 9(1) of the Act allows for the extension of this 30-day limit "for a reasonable period of time, having regard to the circumstances". Subsection 10(3) of the Act deems a refusal to have taken place where the records requested are not provided within the time limits provided by the Act. According to the Federal Court judge, this last provision provides in effect that "where there is no outright refusal of access, if the requested records are not provided within 30 days or within the period of time claimed as an extension under section 9, there is a deemed refusal" (Reasons at para. 66).

[21] The Federal Court judge also contrasted the language in section 30 of the Act with that in sections 41 and 42. Section 30, in setting out when the Commissioner shall investigate complaints, distinguishes between complaints following a refusal of access (paragraph 30(1)(*a*)) and those following an asserted extension that the requester believes to be unreasonable (paragraph 30(1)(*c*)). Sections 41 and 42, however, in setting out the grounds for judicial review, speak only of refusals. Had Parliament intended to grant the Federal Court jurisdiction to review the reasonableness of extensions, it would have done so expressly, as it did in setting out the grounds for complaints to the Commissioner (Reasons at paras. 96, 105 and 106). Read together, the provisions make it clear that, ultimately, the only remedy available for an allegedly unreasonable extension is to invite the Commissioner to investigate, make recommendations to the government institution concerned and, if necessary, make note of the behaviour in her Annual or Special Report (Reasons at paras. 105 and 109).

[22] The Federal Court judge further based her conclusion on several earlier Federal Court decisions. She relied in particular on *Public Service Alliance of Canada v. Canada (Attorney General)*, 2011 FC 649, 391 F.T.R. 28 [*PSAC*] wherein Beaudry J. stated (at para. 21):

> In my view, there can be no refusal and therefore no review pursuant to section 41 of the Act until the deadline for processing a request has passed. The language of the Act clearly limits this Court's jurisdiction to the review of refusals, whether actual or deemed, and leaves no room for the review of extensions.

[23] The Federal Court judge also cited another Federal Court decision (*Canada (Attorney General) v. Canada (Information Commissioner)*, 2002 FCT 136, 216 F.T.R. 274 [*Attorney General*]) wherein Kelen J. held that (at paras. 26 and 27):

> In the case at bar, the time limit for giving access has been extended to three years and that time period has not yet passed. Accordingly, there is no "deemed refusal

> to give access" since the government institution has not refused to give access within the extended time limit.

[24] The Federal Court judge took note of two other Federal Court decisions which, according to the Commissioner, went the other way (Reasons at para. 89, citing *Canada (Information Commissioner) v. Canada (Minister of External Affairs)*, [1989] 1 F.C. 3 (T.D.) [*External Affairs(I)*] and *Canada (Information Commissioner) v. Canada (Minister of External Affairs)*, [1990] 3 F.C. 514, 3 T.C.T. 5297 [*External Affairs(II)*]), but held nevertheless that the jurisprudence has not been shown to be inconsistent (Reasons at para. 101).

[25] The Federal Court judge further supported her conclusion on the basis of policy reasons. If the Commissioner's position were accepted, the asserted extension would have been held to be invalid and DND would therefore have been deemed to have refused access following the expiry of the 30-day time limit provided for under section 7 of the Act. In the Federal Court judge's view, such a decision would not necessarily have sped up the provision of the requested records in the case at bar (Reasons at para. 112). Moreover, the Court might not be best positioned to determine what the appropriate time to comply would be (*ibidem*). Finally, DND would be required to respond at once to both the judicial review application and the access request, potentially "duplicat[ing] efforts and spread[ing] resources even thinner" (*ibidem*). According to the Federal Court judge, if government institutions are to make the 30-day time limit without extensions, they will simply need greater resources (Reasons at paras. 126 to 127).

[26] As DND provided access to the documents claimed within its own deadlines as asserted under subsection 9(1), the Federal Court judge held that she had no jurisdiction to issue the

declaration sought. Hence, there was no need for the Court to decide whether the 1,110-day extension was reasonable (Reasons at para. 122).

POSITION OF THE APPELLANT

[27] The Commissioner argues that an extension under section 9 of the Act represents a conditional exception to the 30-day time limit set out in section 7 (Commissioner's memorandum at paras. 42, 45, and 51). Where a government institution asserts an extension under section 9, but fails to meet the conditions, the extension is void *ab initio* (Commissioner's memorandum at para. 63). One of the conditions under section 9 is that the extension be for "a reasonable period of time, having regard to the circumstances" (Commissioner's memorandum at paras. 42, 45, and 51).

[28] Subsection 10(3) provides that a deemed refusal occurs where a government institution fails to give access to a requested record "within the time limits set out in [the] Act". Read together, sections 7 and 9 set out these time limits (Commissioner's memorandum at para. 61). A deemed refusal will therefore occur after 30 days if a government institution has given neither an actual refusal nor access in response to a request and has taken no valid extension (Commissioner's memorandum at paras. 49 and 63).

[29] The Commissioner argues that the Federal Court judge erred in her comparison of section 30 to sections 41 and 42. Specifically, she ignored several cases which show that these latter sections are to be broadly construed, and contemplate grounds of judicial review not expressly set out in their language (Commissioner's memorandum at paras. 67 to 68, citing *Clearwater v.*

Canada (Minister of Canadian Heritage), 177 F.T.R. 103 (F.C.), [1999] F.C.J. No. 1441 and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [1990] 3 F.C. 22 (T.D), [1990] F.C.J. No. 152).

[30] The Commissioner further submits that the Federal Court judge's interpretation conflicts with the principle, enshrined in section 2 of the Act, that "decisions on the disclosure of government information should be reviewed independently of government" (Commissioner's memorandum at para. 69, citing section 2 of the Act). The decision of the Federal Court judge would, if allowed to stand, permit government institutions to immunize themselves from judicial review (Commissioner's memorandum at para. 72).

[31] The Commissioner argues that the Federal Court judge erred in her assessment of earlier Federal Court decisions. The Commissioner maintains that *PSAC* and *Attorney General* dealt with an entirely different set of facts (Commissioner's memorandum at para. 78). Moreover, *Attorney General* was decided before subsection 4(2.1) was added to the Act in 2006, and the judge deciding *PSAC* did not consider this amendment, which requires government institutions to assist requesters and provide timely access to sought records (Commissioner's memorandum at para. 80). Finally, the Commissioner argues that the Federal Court judge erred in failing to confront the statement made in *External Affairs(I)* to the effect that (*per* Jerome A.C.J. at para. 19):

> … (w)here the application is based on an allegedly unauthorized extension taken under section 9, that enquiry consists of determining … whether it amounts to a deemed refusal. To perform that task, it is inescapable that the Court must be able to review the extension itself and reasons given therefor.

[32] The Commissioner also takes issue with the Federal Court judge's suggestion that the Court may not be well-placed to determine whether an extension of time is reasonable. The Act empowers the Commissioner to investigate extensions of time and assemble a factual record that may be brought before the Federal Court for adjudication (Commissioner's memorandum at paras. 84 and 88). Concerns that the courts should avoid "second-guessing" government institutions evince a concern that the courts will micro-manage extensions. This concern can be seen to be misplaced given the deferential standard to be applied (*i.e.* reasonableness) (Commissioner's memorandum at para. 91).

[33] In this instance, the Commissioner says, the asserted extension was invalid and, for purposes of efficiency, this Court should exercise its discretion to rule on the matter. Because the evidentiary record is in writing, this Court is in no worse a position than the court below to decide this question.

[34] According to the Commissioner, the asserted extension was invalid on three accounts. First, it claims that the 230-day portion of the extension taken pursuant to paragraph 9(1)(*a*) was not taken in compliance with the statutory conditions, as DND could not show, as required by the provision in question, that meeting the request within the 30-day time limit would unreasonably interfere with its operations (Commissioner's memorandum at paras. 96 to 98).

[35] Second, the Commissioner claims that the remaining period, being the 880 days asserted pursuant to paragraph 9(1)(*b*), was unreasonably long. DND's initial explanation was that it had merely calculated the average DFAIT response time (110 days) and multiplied it by eight,

because the requester had sought approximately eight times the number of records typically sent to DFAIT for consultation (Commissioner's memorandum at para. 102). Such an exercise ignores many factors, such as the nature and accessibility of records (Commissioner's memorandum at para. 103). Though DND later amended its answer to suggest that such factors were accounted for, it could not explain why the number had then remained exactly 880 days (Commissioner's memorandum at para. 104). That the actual consultations took no longer than 173 days further supports the unreasonableness of this estimate (Commissioner's memorandum at paras. 105 and 106).

[36] Third, the Commissioner claims generally that DND exercised its discretion unreasonably in asserting the extension it did. First, it failed to consider such relevant factors as its duty to assist under subsection 4(2.1) of the Act, the quasi-constitutional status of the Act, and relevant government policies (Commissioner's memorandum at paras. 108 to 110, citing Treasury Board of Canada, *Policy on Access to Information,* sections 3.1, 6.2.1 and 6.2.2). Second, it considered irrelevant factors such as potential causes of delay and abdicated all responsibility by asserting that it had no control over the responses of other institutions (Commissioner's memorandum at paras. 111 to 113).

POSITION OF THE INTERVENER

[37] In his submissions, the intervener undertook to illustrate that, in Ontario, the reasonableness of an extension to respond to an access to information request has proven to be a justiciable question (Intervener's memorandum at para. 35). In support of this effort, the intervener canvassed the evidentiary factors considered in determining whether a government

institution has proven its claim that a given extension was required for the reasons set out in the intervener's enabling statute (Intervener's memorandum at paras. 22 to 25).

[38] Though the intervener took no formal position on the disposition of the case at bar, he took issue with the duration of the extension claimed. In particular, he questioned the validity of the formula originally offered by DND in support of the 880-day portion of the extension taken (Intervener's memorandum at paras. 9 and 23). More generally, the intervener noted that, in the Ontario setting, no extension exceeding 10 months has ever been found to be reasonable (Intervener's memorandum at para. 25).

POSITION OF THE RESPONDENT

[39] DND argues that the Federal Court judge correctly construed the Act and properly assessed the case law, essentially for the reasons that she gave. Significant sections of the written submissions repeat the judge's own language (see for instance DND's memorandum at paras. 35 and 70).

[40] In addition to reiterating the Federal Court judge's reasoning, DND argues that the Commissioner's proposed interpretation of the Act is flawed. DND argues that, in reviewing the Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, it can be seen that the government was not prepared to impose a definitive time limit for extensions under subsection 9(1) of the Act (DND's memorandum at para. 47). Furthermore, if Parliament had intended the Federal Court to have the jurisdiction to review extensions, it would have used more specific language rather than simply requiring that extensions be "reasonable … having

regard to the circumstances" (DND's memorandum at para. 48). For instance, it could have elected to provide for clear deadlines defined in days (*ibidem*). Finally, if Parliament had intended for deemed refusals under subsection 10(3) of the Act to include instances in which the government institution takes an unreasonable extension under section 9 or an extension beyond a defined length, it could have specified this (DND's memorandum at para. 49).

[41] DND reiterates its argument, accepted by the Federal Court judge, that while the paragraphs of subsection 30(1) of the Act clearly distinguish between refusals and unreasonable extensions in setting out the grounds of complaint to the Commissioner, sections 41 and 42 are limited to refusals (DND's memorandum at paras. 51 to 52). Had Parliament wished to grant the Federal Court jurisdiction to decide the reasonableness of extensions, it could have included in the judicial review section of the Act a provision like the one included in the complaint section (DND's memorandum at para. 52).

[42] DND further argues that, contrary to some equivalent provincial statutory schemes, Parliament expressly limited the Commissioner to an ombudsman role, declining to vest her with the powers to compel compliance with the Act (DND's memorandum at para. 55). The Commissioner's findings are therefore not "decisions" that may be judicially reviewed. This undermines the Commissioner's argument that, the moment she finds that an unreasonable extension has been asserted, she may initiate a judicial review application (DND's memorandum at para. 56).

[43] Finally, DND argues that the Federal Court judge's ruling is not inconsistent with the section 2 principle that decisions on the disclosure of government information should be reviewed independently of government. Simply put, this principle does not require that all decisions made under the Act be subject to judicial review (DND's memorandum at para. 58).

[44] In the event that this Court finds that it does have jurisdiction to issue the declaration sought, DND argues that its extension was reasonable.

[45] DND insists that its only obligation under subsection 9(1) was to notify the requester that it would be taking an extension and to specify the length of the extension (DND's memorandum at para. 61).

[46] DND argues that many variables were taken into account in determining the amount of time it took under paragraph 9(1)(*a*) of the Act, including previous experience with similar requests, sensitivity of the information and the current workload of the analyst assigned to the file (DND's memorandum at para. 63). Furthermore, DND's access to information unit had suffered a "major and unprecedented" software malfunction, which further affected the response time (*ibidem*).

[47] As to consultations, DND argues that previous experience and communication with the other institutions was taken into account (DND's memorandum at para. 64). Estimates were particularly difficult to generate in respect of the DFAIT consultations, as the reactions of

foreign governments often prove difficult to predict accurately (DND's memorandum at paras. 65 to 67).

[48] DND emphasized that, under subsection 9(1) of the Act, it only has 30 days to determine the extension it will take (DND's memorandum at para. 68). Furthermore, it cannot change that estimate. It is therefore reasonable to consider potential causes of delay (*ibidem*). Furthermore, that the consultations ultimately took less time than expected is irrelevant to whether, at the time the extension was asserted, the duration selected was reasonable (DND's memorandum at para. 69).

[49] In reply to the submissions made by the intervener, DND outlined the differences between the Act and the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, emphasizing that the latter gives the provincial Commissioner an adjudicative role, while the former gives the federal Commissioner an investigative one (Respondent's reply memorandum at paras. 15 to 18). With respect to the intervener's view that extensions beyond 10 months would require an exceptional justification, DND submits that the intervener has no expertise or experience in cases such as this one, which involves military assets and consultation with foreign governments (Respondent's reply memorandum at paras. 25 and 26).

ANALYSIS

Standard of Review

[50] In this case, this Court is determining an appeal of a decision by the Federal Court to dismiss an application for judicial review brought by the Commissioner under paragraph 42(1)(*a*).

[51] The appeal raises two issues. The first is whether the Federal Court had jurisdiction under section 42 of the Act to hear the Commissioner's application. The second, which must be answered only if the first question is answered in the affirmative, is whether the extension taken by DND was valid.

[52] The first issue is preliminary to any consideration of the underlying application, concerning whether the preconditions for a judicial review are met. As such, this question was first decided by the Federal Court, and never arose before the administrative decision-maker in question. Therefore, on appeal, we employ the appellate standard of review in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*], not the administrative standard of review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[53] Whether the preconditions for a judicial review had been met turns on a pure question of statutory construction, *i.e.* when an extension is taken by a government institution, does the Act (specifically sections 41 and 42 when read with section 7 and subsections 9(1) and 10(3)) give the Federal Court jurisdiction to assess the legal validity of the extension? The Federal Court

answered this in the negative. As a determination on a question of law, this holding stands within the appellate framework to be reviewed on the standard of correctness: *Housen*, *supra* at paras. 8 and 9.

[54] If I hold that the section 42 preconditions have been met in this case, I must examine whether the extension taken by DND in this case was valid. The Federal Court judge did not rule on that question. Therefore, consistent with the approach set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45 to 47, I must select the appropriate standard of review and then apply it myself.

[55] Like the parties, I accept that this second question should be reviewed on a standard of reasonableness. I would add that, because the decision under review is essentially fact and policy driven, the range of possible acceptable outcomes or the margin of appreciation to be given to DND is broad: *Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha*, 2014 FCA 56 at paras. 91 to 92; *Canada (Attorney General) v. Abraham,* 2012 FCA 266, [2012] F.C.J. No. 1324 at para. 44.

Are the preconditions for a judicial review under section 42 met?

[56] With respect to the first issue, the determinative holding made by the Federal Court judge appears at paragraph 66 of her reasons:

> … subsection 10(3) provides that where the records are not provided within the time limits set out in this act, the head of the institution is deemed to have refused to give access. In other words, where there is no outright notice of refusal, if the requested records are not provided within 30 days or within the period of time claimed as an extension under section 9*,* there is a deemed refusal.

Stated conversely and perhaps more accurately, the Federal Court judge held that so long as there is compliance with the time extension taken, there can be no deemed refusal pursuant to subsection 10(3) regardless of the reasonableness of the extension, and therefore no right of judicial review arises in the circumstances of this case.

[57] As will be seen, the reading proposed by the Federal Court judge is consistent with a number of Federal Court decisions (*X v. Canada (Minister of National Defence)*, [1991] 1 F.C. 670, 41 F.T.R. 73 at paras. 8 and 10 [*X*]; *Attorney General* at paras. 25 to 27, citing *X* at para. 8; *PSAC* at para. 21, citing *Attorney General* at para. 25). There are, however, other cases from the same court which go the other way (*External Affairs(I)* at para. 19 and *External Affairs(II)* at para. 9).

Statutory Construction

[58] I first turn to the issue of statutory construction. In my view, a reading of subsection 10(3) which would prevent judicial review of an extension, as is being proposed here, falls short of what Parliament intended. The correct approach to statutory interpretation requires that courts read "the words of an Act … 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" (*Thibodeau v. Air Canada*, 2014 SCC 67, [2014] S.C.J. No. 67 at para. 112).

[59] Part of the statutory scheme are the "time limits set out" in the Act, which, when breached, give rise to a deemed refusal pursuant to subsection 10(3). There are only two such limits: the 30-day time limit that arises by operation of section 7 following a request for access,

and the extended time limit that arises as a result of a notice of extension issued pursuant to section 9. Based on the Federal Court judge's interpretation, the length of this last time limit would rest exclusively in the hands of the government institution asserting it, and escape judicial review regardless of its duration.

[60] For the purpose of applying subsection 10(3), construing subsection 9(1) as allowing for whatever period of time the institution may wish to take reads out of the Act the requirement that the extension be "reasonable … having regard to the circumstances" and the criteria set out in paragraphs 9(1)(*a*) and 9(1)(*b*). Moreover, the extended "time limit" that the Federal Court judge accepts as falling within the "time limits set out in [the] Act" (Reasons at para. 66) is not a time limit at all. If a government institution is free to choose the deadline of its choice, without regard to the statutory conditions set out in subsection 9(1), there are no limits on the deadline it may choose.

[61] The Federal Court judge's interpretation is not aided by her comparison of section 30 of the Act to sections 41 and 42. According to her, had Parliament intended unreasonable time limits to be judicially reviewed, it would have set this out expressly, as it did in subsection 30(1) with respect to complaints. The suggestion as I understand it is that if unreasonable extensions could give rise to deemed refusals pursuant to subsection 10(3) as the Commissioner contends, there would be no need for paragraph 30(1)(*c*) (subsection 30(1) is reproduced in part, for ease of reference):

Receipt and Investigation of Complaints	**Réception des plaintes et enquêtes**
30. (1) Subject to this Act, the Information Commissioner shall	**30.** (1) Sous réserve des autres dispositions de la présente loi, le

receive and investigate complaints	Commissaire à l'information reçoit les plaintes et fait enquête sur les plaintes:
(*a*) from persons who have been refused access to a record requested under this Act or a part thereof;	(*a*) déposées par des personnes qui se sont vu refuser la communication totale ou partielle d'un document qu'elles ont demandé en vertu de la présente loi;
…	[…]
(*c*) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;	(*c*) déposées par des personnes qui ont demandé des documents dont les délais de communication ont été prorogés en vertu de l'article 9 et qui considèrent la prorogation comme abusive;
…	[…]

[My emphasis]

[62] This reasoning gives rise to two difficulties. First, subsection 10(3) makes it clear that a deemed refusal occurs where a government institution has missed either of "the time limits set out in [the] Act". It is therefore not useful to resort to inferences to elucidate the meaning of a deemed refusal for purposes of applying sections 41 and 42 and particularly problematic when, as here, doing so would lead to a meaning that is different from what is expressly stated in the Act.

[63] Second, the reasoning according to which paragraph 30(1)(*c*) would be rendered meaningless does not account for the situation where a requester receives a notice of extension within the initial 30-day time period. In these circumstances, paragraph 30(1)(*c*) provides a requester with the same immediate right to invoke the assistance of the Commissioner as he or she would have if confronted with an outright refusal. I stress in this respect, and in the context

of the appeal generally, that timely access is a constituent part of the right of access (see subsection 4(2.1) of the Act).

The Federal Court Jurisprudence

[64] The Federal Court judge's conclusion that "there is no footing to argue that the jurisprudence is inconsistent" is unexplained (Reasons at para. 101). As noted earlier, there are at least two decisions that take the opposite view. In *External Affairs(I)*, Jerome A.C.J. held that, where an application under section 42 of the Act is based on an allegedly unjustified extension under section 9, the court is required to review the extension itself and decide whether it was justified (at para. 19). In *External Affairs(II)*, Muldoon J. came to the same conclusion, holding that, "in order to show that extensions are for 'a reasonable period of time'… the department must state cogent, genuine reasons for the extension, and for its length" (at para. 9).

[65] Though the Federal Court judge adopts the reasoning of Beaudry J. in *PSAC* (Reasons at paras. 99 to 101, citing *PSAC* at paras. 21 to 24), who declined to follow *External Affairs(I) and (II)*, his decision has no more precedential value than the other two. It was of course open to the Federal Court judge to adopt one position and reject the other, subject to explaining her reasons for doing so (*Apotex Inc. v. Allergan Inc.*, 2012 FCA 308, 105 C.P.R. (4th) 371 [*Allergan*] at paras. 48 and 50; *Apotex Inc. v. Pfizer Canada Inc.*, 2014 FCA 250 at paras. 112 to 115).

[66] For reasons already explained, *PSAC* ought not to be followed because the reasoning advanced in that case does not confront or take into account the requirement that a valid

extension must comply with the statutory conditions set out in subsection 9(1). The same observation extends to *X* and *Attorney General*.

Other grounds

[67] I do not accept DND's attempts to support the interpretation of the Federal Court judge on other grounds. Specifically, it does not follow that specific time limits defined in days would have been set out in the Act had Parliament intended that extensions be judicially reviewed. The concept of "reasonableness" embodied in subsection 9(1) is a core legal standard which courts are regularly called upon to apply. There is no reason to believe that this standard is not appropriate or workable in assessing the legality of extensions taken pursuant to subsection 9(1).

[68] Similarly, the excerpts relied upon by DND from the Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs are of no assistance (Appeal Book, Vol. II, Tab 41):

> I find it rather difficult to set a definitive period of time within which the head of the institution must give access to the record. Basically, if no notice is given, the request is deemed refused and there are appeals to the Information Commissioner and from the Information Commissioner to the Court. It is difficult to say when you have a request for a whole flood of material … the amount of time required to go through that is rather large, so it is rather difficult to give the undertaking that the answer must be given within a certain period of time. That is why we are trying to build into the clause the type of amendment recommended this morning, ensuring that notice be given to the Information Commissioner, which always gives the Information Commissioner the opportunity to ask questions.

[69] I do not read this passage as suggesting that the Federal Court was to have no jurisdiction over the extensions taken under section 9 (DND's memorandum at para. 47). Rather, it is clear when regard is had to the passage when read in its fuller context that the only proposition being

rejected is the one which prompted this response*, i.e.* limiting the extensions permissible by applying a firm 30-day cap.

[70] Moreover, the fact that the Commissioner's investigative findings made pursuant to subsection 37(1) are not subject to judicial review cannot be set up as a bar against the Commissioner's entitlement to bring an application for judicial review upon finding that an extension taken is unreasonable (DND's memorandum at para. 56). In that context, the decision under review is the one taken by the government institution to extend the time limit, not the findings made by the Commissioner in respect of that decision. Indeed, it is difficult to visualize a scheme whereby the Commissioner would make a decision and then seek its judicial review.

The Correct Interpretation

[71] In my view, the correct construction is the one offered by the Commissioner. Section 7 of the Act requires a government institution to respond to an information request within 30 days. This requirement is subject to several exceptions, one of which is the power which may be exercised by a government institution, pursuant to section 9 of the Act, to extend the time.

[72] A government institution may avail itself of this power subject to certain conditions. One such condition is that the period taken be reasonable when regard is had to the circumstances set out in paragraphs 9(1)(*a*) and/or 9(1)(*b*). If this condition is not satisfied, the time is not validly extended with the result that the 30-day time limit imposed by operation of section 7 remains the applicable limit.

[73] Construing subsection 10(3) in context and in light of what it says, I conclude that a deemed refusal arises whenever the initial 30-day time limit has expired without access being given, in circumstances where no legally valid extension has been taken. It follows that a right to judicially review the validity of an extension arises pursuant to sections 41 and/or 42 upon the expiration of the 30-day time limit, subject of course to a complaint being filed and an investigation report being completed (compare *Statham v. Canadian Broadcasting Corporation*, 2010 FCA 315 at para. 64).

[74] In the present case, I conclude that the Federal Court had the jurisdiction to entertain the Commissioner's application for judicial review of the extension taken by DND and to go on to consider the validity of the extension of time asserted by DND. This is the issue to which I now turn.

Was the extension of time asserted by DND valid?

[75] The Commissioner in insisting on a declaration being issued is seeking nothing more than general guidance for future cases. Although the period taken by DND in this case appears long, a large number of documents was involved and extensive consultations were required.

[76] That said, it can usefully be said that it is not enough for a government institution to simply assert the existence of a statutory justification for an extension and claim an extension of its choice. An effort must be made to demonstrate the link between the justification advanced and the length of the extension taken. In the case of paragraph 9(1)(*a*), this will mean not only demonstrating that a large number of documents are involved, but that the work required to

provide access within any materially lesser period of time than the one asserted would interfere with operations. The same type of rational linkage must be made pursuant to paragraph 9(1)(*b*) with respect to necessary consultations.

[77] I note that the English text of subsection 9(1)(*a*) provides that a government institution is entitled to an extension when compliance with a shorter delay "would unreasonably interfere with the operations" whereas the French text uses the words "entraverait de façon sérieuse le fonctionnement de l'institution". Similarly, the notion of reasonableness is incorporated in the English text of subsection 9(1)(*b*), but the French text contemplates that an extension is warranted when compliance "rendrait pratiquement impossible l'observation du délai". Finally, the introductory words of subsection 9(1) speak of "a reasonable period of time, having regard to the circumstances" whereas the French text reads "d'une période que justifient les circonstances".

[78] Read together, what these two texts contemplate is that the extension be reasonable or justified in the circumstances and that a demonstration be made that unless the extension is taken, providing access will result in unreasonable or undue interference with the "operations of the government institution" in the case of paragraph 9(1)(*a*), and that it is not reasonable, or practically possible, to expect that the necessary consultations can be completed in the case of paragraph 9(1)(*b*).

[79] It would not be opportune or useful to say more than is necessary to dispose of the present case. It suffices to say that a government institution confronted with a request involving a

great number of documents and/or necessitating broad consultation must make a serious effort to assess the required duration, and that the estimated calculation be sufficiently rigorous, logic and supportable to pass muster under reasonableness review.

[80] In the case at bar, DND originally claimed to have estimated the time taken under paragraph 9(1)(*b*) (880 days) by simply dividing the number of pages requested by the number of pages involved in the average DFAIT consultation, and applying the resulting quotient (8) as a multiplier against the average DFAIT consultation time (110 days). Recognizing that the exercise will always contemplate a projection, this type of formula has on the face of it a deficient logic and falls short of demonstrating that a genuine attempt was made to assess the required duration. Though DND later claimed that other variables were taken into account, it could not explain why, if such other variables were accounted for, they had no impact whatsoever on the amount of time required under the formula disclosed in its original explanation.

[81] This type of perfunctory treatment of the matter shows that DND acted as though it was accountable to no one but itself in asserting its extension. Its treatment of the matter falls short of establishing that a serious effort was made to assess the duration of the extension. As such, the extension taken by DND does not meet the requirements of subsection 9(1). This suffices to establish the Commissioner's entitlement to the declaration sought.

DISPOSITION

[82] For the foregoing reasons, I would allow the appeal and giving the judgment which the Federal Court judge should have given, I would declare DND to have entered into a state of deemed refusal pursuant to subsection 10(3) of the Act on March 5, 2011, upon the expiration of the 30-day time limit set out in section 7 of the Act. As no costs were sought, none are awarded.

"Marc Noël"
Chief Justice

"I agree
David Stratas J.A."

"I agree
A.F. Scott J.A."

ANNEX

Purpose	**Objet**
2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.	**2.** (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.
…	[…]
Responsibility of government institutions	**Responsable de l'institution fédérale**
4. (2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.	**4.** (2.1) Le responsable de l'institution fédérale fait tous les efforts raisonnables, sans égard à l'identité de la personne qui fait ou s'apprête à faire une demande, pour lui prêter toute l'assistance indiquée, donner suite à sa demande de façon précise et complète et, sous réserve des règlements, lui communiquer le document en temps utile sur le support demandé.
…	**[…]**
Request for access to record	**Demandes de communication**
6. A request for access to a record under this Act shall be made in writing to the government institution that has control of the record and shall provide sufficient detail to enable an	**6.** La demande de communication d'un document se fait par écrit auprès de l'institution fédérale dont relève le document; elle doit être rédigée en des termes suffisamment précis pour

experienced employee of the institution with a reasonable effort to identify the record.

Notice where access requested

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.

…

Extension of time limits

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

permettre à un fonctionnaire expérimenté de l'institution de trouver le document sans problèmes sérieux.

Notification

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.

[…]

Prorogation du délai

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

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.

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).

…

Deemed refusal to give access

…

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

…

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.

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.

[…]

Présomption de refus

[…]

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

[…]

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;

…

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

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;

[…]

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

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.

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.

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.

Information Commissioner may apply or appear

42. (1) The Information Commissioner may

(*a*) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;

(*b*) appear before the Court on behalf of any person who has

Exercice du recours par le Commissaire, etc.

42. (1) Le Commissaire à l'information a qualité pour:

a) exercer lui-même, à l'issue de son enquête et dans les délais prévus à l'article 41, le recours en révision pour refus de communication totale ou partielle d'un document, avec le consentement de la personne qui avait demandé le document;

b) comparaître devant la Cour au nom de la personne qui a

applied for a review under section 41; or

(*c*) with leave of the Court, appear as a party to any review applied for under section 41 or 44.

exercé un recours devant la Cour en vertu de l'article 41;

c) comparaître, avec l'autorisation de la Cour, comme partie à une instance engagée en vertu des articles 41 ou 44.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-163-14
STYLE OF CAUSE:	INFORMATION COMMISSIONER OF CANADA v. MINISTER OF NATIONAL DEFENCE AND INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 19, 2014
REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	STRATAS J.A. SCOTT J.A.
DATED:	MARCH 3, 2015

APPEARANCES:

Marlys Edwardh Daniel Sheppard	FOR THE APPELLANT
Diane Therrien Michael De Santis	FOR THE APPELLANT
Sharon Johnston	FOR THE RESPONDENT
William S. Challis	FOR THE INTERVENER

SOLICITORS OF RECORD:

Sack Goldblatt Mitchell LLP Toronto, Ontario	FOR THE APPELLANT

Office of the Information Commissioner of Canada Gatineau, Québec	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT
Information and Privacy Commissioner of Ontario Toronto, Ontario	FOR THE INTERVENER