Federal Court  Cour fédérale

Date: 20171013

Docket: T-739-16

Citation: 2017 FC 910

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 13, 2017

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

AIR TRANSAT A.T. INC.

Applicant

and

TRANSPORT CANADA/MINISTER OF TRANSPORT AND INFORMATION COMMISSIONER OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview

(1) This includes: (1) an application for judicial review of a decision by Transport Canada/Minister of Transport [TC], following a recommendation by the Information

Commissioner of Canada [Commissioner]; and (2) a motion to strike out two affidavits by the respondents.

(2) Under subsection 44(1) of the *Access to Information Act*, R.S.C. 1985, c A-1 [AIA], Air Transat A.T. Inc. [Air Transat] is applying for judicial review of a TC decision rendered on April 18, 2016, which authorized the disclosure of an inspection report concerning Air Transat, prepared by TC in 2003. Under sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c F-7 [FCA], Air Transat is also applying for judicial review to set aside a report prepared by the Commissioner on February 25, 2016, recommending that TC disclose the inspection report concerning Air Transat.

(3) In addition, Air Transat is seeking to strike out [TRANSLATION] "any allegation and any exhibit brought to the attention of Air Transat after that decision . . . to attempt to justify the delays between the date of the access request (November 24, 2005) and Air Transat's decision (April 18, 2016) . . .".

(4) For the following reasons, I would allow the application for judicial review. Having dismissed the motion to strike at the beginning of the hearing, I will briefly address my decision under this heading at the start of my reasons.

(5) I also feel it is important to advise readers at this stage of the judgment that I understand that Part III – Background is difficult to read because of the formulation of the dates. Given that

one of the grounds in my judgment deals with the issue of the delays in managing this case, I wanted to fully note the steps taken by the various participants.

II. Motion to strike

(6) Air Transat argues that certain paragraphs and certain exhibits in support of the respondents' affidavits dated August 13, 2016, and September 15, 2016, should be struck out, because they were subsequent to TC's decision dated April 18, 2016. In those affidavits, the affiants explain the delays in the conduct of the Commissioner's investigation.

(7) At the start of the hearing, I dismissed the motion to strike and authorized the arguments based on the affidavits dated August 13, 2016, and September 15, 2016, for the following reasons.

(8) It is a rule that an administrative tribunal whose decision is being challenged under judicial review may provide explanations and make representations relating to its jurisdiction (*Northwestern Utilities Ltd. and al. v. Edmonton*, [1979] 1 S.C.R. 684 at page 688, 89 DLR (3d) 161; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at paragraphs 41 et seq., [2015] 3 S.C.R. 147; *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1996] F.C.J. No. 1309 at paragraph 5, 121 F.T.R. 42). As a result, the Commissioner was entitled to submit affidavits to explain to the Court the steps that she took in her investigation and the causes of the delays in her investigation, even if the information in some paragraphs and some exhibits in support of the affidavits were not shared during the investigation. That information will allow the Court to determine whether the delays that

occurred during the investigation were reasonable, or whether they breached the right to procedural fairness in a way that deprived the Commissioner of jurisdiction.

(9) The applicant was also entitled to cross-examine the affiants on the information contained in the affidavits. For that reason, I do not believe that dismissing the motion to strike results in a denial of justice or a breach of the rule of *audi alteram partem*.

III. Background

(10) On March 22, 2005, TC received an access to information request for documents, worded as follows:

> [TRANSLATION]
> "Provide the interim/final special audit report produced following the November and December 2003 examination of Air Transat's Quality Safety Management System (QSMS), the evaluation methodology used to conduct the audit, the inspector checklists used, the reports regarding site visits, Air Transat' responses, the corrective measure plans put in place and the progress achieved. Include communications exchanged regarding the preparation of the audit and subsequent events by the senior investigators of the audit, the Director of Manufacturing and Maintenance and the Director General of Civil Aviation. Include the briefing notes prepared, or the media lines, communications and strategies developed. Include the plans related to similar audits and the proposed changes, if applicable, in the inspection process and methodology. Other documents published or about to be published."

(11) More than 600 pages of information and reports were referred to in the access to information request.

(12) On April 29, 2005, TC refused to disclose the vast majority of the documents requested in the access request. TC felt that those documents fell under certain exceptions in the AIA (which will be addressed later). Those undisclosed documents included an inspection report entitled “Transport Canada Regulatory Inspection of Air Transat AT Inc., November 12–14, 2003” [Report], which is at the heart of this litigation.

(13) Not having obtained disclosure of the desired documents, including the Report, the access to information requester [access requester] filed a complaint with the Commissioner on July 19, 2005.

(14) On September 7, 2005, the Commissioner informed TC that a complaint had been filed and that an investigation would be conducted into its refusal to disclose the documents referred to in the access request. In particular, the Commissioner questioned whether the exceptions in the AIA applied to the undisclosed documents. The Commissioner therefore asked TC to make additional submissions on that point.

(15) On November 28, 2005, Air Transat received a letter from TC informing it of the existence of the access to information request.

(16) On January 19, 2006, Air Transat sent written submissions to TC informing it of its formal objection to the disclosure of the documents referred to in the request. It argued that the exceptions in paragraphs 20(1)(*a*), 20(1)(*b*), 20(1)(*c*) and 20(1)(*d*) of the AIA were applicable to

the documents referred to in the access request and that those documents should therefore remain confidential in their entirety.

(17) Between September 2005 and July 2012, the Commissioner followed up several times with TC for the purposes of her investigation. After those follow-ups, TC agreed to disclose some parts of the documents referred to in the access request to the access requester. During that entire period, Air Transat did not receive any updates on the record from TC or the Commissioner.

(18) On July 5, 2012, the Commissioner contacted Air Transat for submissions regarding the application of paragraphs 20(1)(*a*), 20(1)(*b*), 20(1)(*c*) and 20(1)(*d*) of the AIA to the rest of the undisclosed documents.

(19) On September 28, 2012, Air Transat sent its submissions to the Commissioner. In its submissions, it argued that the application of the exceptions was justified. Air Transat also indicated that the delays experienced during the Commissioner's investigation constituted a denial of justice.

(20) On May 13, 2013, TC again agreed to disclose a few parts of the documents referred to in the access request to the access requester.

(21) That same day, the Commissioner asked TC to make further written submissions regarding the application of the exceptions to the documents in question. TC responded on May 14, 2013.

(22) On January 29, 2015, the Commissioner again asked TC to make further written submissions regarding the application of the exceptions to the documents in question. TC responded on February 16, 2016, and stated that, unlike Air Transat, it was no longer relying on paragraph 20(1)(*c*) to justify non-disclosure. It nonetheless maintained its objection to the disclosure of the documents under the other exceptions in the AIA.

(23) On April 16, 2015, the access requester agreed to limit the access request to the Report; more specifically, it agreed to limit the access request to pages 84 to 104 of the Report (as pages 105 to 112 had already been disclosed).

(24) On February 25, 2016, the Commissioner submitted her investigation report to TC. In it, the Commissioner confirmed the merits of the access request and recommended that TC disclose the 21 pages of the Report.

(25) On March 24, 2016, TC changed its position and advised Air Transat that it had decided to follow the Commissioner's recommendation and to disclose the 21 pages of the Report. Air Transat reviewed the Commissioner's report and TC's decision on April 19, 2016.

IV. Legislative provisions of the AIA

(26) The purpose of the AIA is to ensure access to documents that are under the control of a government institution, unless the information in the document falls under one of the exceptions specified in the AIA. This application for judicial review involves the exceptions found in subsection 20(1) of the AIA regarding third party information:

Third Party Information	**Renseignements de tiers**
20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains	20 (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :
(a) trade secrets of a third party;	a) des secrets industriels de tiers;
(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;	b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;
[…]	[…]
(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or	c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;
	d) des renseignements dont la divulgation risquerait

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.	vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

V. Impugned decision

(27) Air Transat is challenging TC's decision, rendered on April 18, 2016, authorizing the disclosure of the Report concerning it. The decision was based on the recommendation made by the Commissioner in her report dated February 25, 2016. Although the Commissioner's report addressed the numerous exceptions that were raised by TC and Air Transat during her investigation, this litigation concerns only the relevant provisions in subsection 20(1) of the AIA. I will therefore limit my summary of the Commissioner's findings to the exceptions in paragraphs 20(1)(*a*), 20(1)(*b*), 20(1)(*c*) and 20(1)(*d*) of the AIA.

(28) Paragraph 20(1)(*a*) deals with trade secrets of a third party. After considering the definition of "trade secret" proposed in *Merck Frosst Canada Ltd. v. Canada (Minister of Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 [*Merck Frosst*], the Commissioner determined that neither the Report nor the information contained therein constituted a trade secret. Therefore, the Report should not remain confidential under paragraph 20(1)(*a*).

(29) Paragraph 20(1)(*b*) requires that heads of government institutions refuse to disclose financial, commercial, scientific or technical information that is confidential information supplied by a third party. The Commissioner decided that the information in the Report was not

from a third party, but rather constituted regulatory conclusions drawn from information provided by Air Transat. The Commissioner therefore concluded that paragraph 20(1)(*b*) did not apply.

(30) Paragraph 20(1)(*c*) protects information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party. The exception was alleged by Air Transat, not TC. To prove that the exception applied, Air Transat had to demonstrate that disclosure of the Report could reasonably be expected to result in financial losses or prejudice its competitive position. Having decided that the evidence from Air Transat was speculative and had therefore not met the required degree of probability to be considered "reasonable", the Commissioner was not satisfied that the application of paragraph 20(1)(*c)* was justified. She reached the same conclusion for paragraph 20(1)(*d*), which protects information the disclosure of which could reasonably be expected to interfere with Air Transat's ability to negotiate contracts.

(31) For these reasons, the Commissioner concluded that none of the exceptions under the AIA applied in the circumstances. She concluded that the access requester's complaint was founded and recommended that TC disclose the Report in its entirety. TC accepted that recommendation and disclosed the undisclosed 21 pages after refusing to disclose them for about 10 years.

VI. Issues

(32) There are two issues related to the application for judicial review:

A. *Should TC's decision to disclose the Report be reviewed because of a breach of the obligations specified in the AIA?*

B. *Should the Commissioner's report be set aside because of:*

(1) a breach of natural justice?

(2) a lack of procedural fairness?

(3) a lack of jurisdiction on the part of the Commissioner?

(4) errors in the reasons supporting the Commissioner's decision?

VII. Standard of review

(33) The standard of review applicable to an application for judicial review filed under subsection 44(1) of the AIA has been previously determined by jurisprudence from the Supreme Court of Canada. According to that jurisprudence, it is the role of the Court judge to "review" a decision by the head of a government institution to disclose documents referred to in an access request. The standard of review applicable to the first question is therefore correctness; the Court must conduct a review de novo to determine whether the person responsible made the correct decision based on the law as prescribed by the AIA (*Merck Frosst* at paragraph 53; *Canada*

(Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), 2003 SCC 8 at paragraph 19, [2003] 1 S.C.R. 66).

(34) Concerning the question of whether there was a breach of natural justice or procedural fairness, most of the case law states that the applicable standard of review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 79, [2008] 1 S.C.R. 190 [*Dunsmuir*]; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraph 43; *Farha v. Canada (Citizenship and Immigration)*, 2016 FC 507 at paragraph 16; *Conocophillips Canada Resources Corp. v. Canada (National Revenue)*, 2016 FC 98 at paragraph 25, [2016] D.T.C. 5016; *Memari v. Canada (Citizenship and Immigration)*, 2010 FC 1196 at paragraph 30, [2012] 2 F.C.R. 350). Under the correctness test, the Court must undertake its own analysis and may substitute it for the reasoning of the decision maker, if it is found that the Court disagrees (*Dunsmuir* at paragraph 50).

(35) Finally, the questions of whether: (1) the delays in the investigation were unreasonable so as to cause the Commissioner to lose jurisdiction, and (2) there were errors in the reasons for the Commissioner's decision are mixed questions of fact and law. The applicable standard of review is therefore that of reasonableness; the Court must determine whether the Commissioner's decision was reasonable in respect of the facts and the law. The reasonableness of the decision will depend on the justification of the decision, the transparency and intelligibility of the decision-making process, and whether the decision falls within an acceptable range of outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at paragraph 47).

VIII. Analysis

A. *Review of the TC decision rendered on April 18, 2016*

(1) Paragraph 20(1)(*a*): trade secrets

(36) The trade secrets of a third party held by a government institution must remain confidential under the AIA. Air Transat submits that the information contained in the Report falls under that exception. More specifically, Air Transat considers that the operating methods related to air safety described in the Report constitute trade secrets and should not be disclosed. The respondents, for their part, submit that the Report instead contains a report on an inspection of the implementation of Air Transat's "Safety Management Systems" (SMS) and does not contain trade secrets.

(37) The two parties agree on the definition of a trade secret, set forth in *Merck Frosst*. In that decision, the Supreme Court defined a trade secret as follows:

> These elements are the same as in the Guidelines in evidence before us, which read:
>
> - the information must be secret in an absolute or relative sense (i.e., known only by one or a relatively small number of persons);
> - the possessor of the information must demonstrate that he has acted with the intention to treat the information as secret;
> - the information must be capable of industrial or commercial application;
> - the possessor must have an interest (e.g., an economic interest) worthy of legal protection.

> . . .
>
> These include that it is a plan or process, tool, mechanism or compound known only to its owner and his employees to whom it is necessary to confide it and that it usually is understood to mean a secret formula or process *not patented* but known only to certain individuals using it in compounding some article of trade having a commercial value.

(38) The exception set forth in paragraph 20(1)(*a*) is categorical. Once the information contained in a document is classified as trade secrets, the exception applies, and the information cannot be disclosed. It follows that, if the information contained in the Report corresponds to the definition of a trade secret set forth in *Merck Frosst*, the head of the government institution must refuse to disclose it (*Merck Frosst* at paragraph 99). Air Transat argues that the information in the Report meets the four criteria set forth in *Merck Frosst*. It relies on the contents of the Report and on two affidavits by Dave Bourdages (Mr. Bourdages), Senior Director of Safety, Quality and Security.

(39) First, regarding the first criterion, I accept that the Report was only known to a limited number of people. Indeed, the paper version was sent to the President and CEO of Air Transat, and the electronic version is in a limited-access computer directory. The first criterion is therefore met.

(40) Air Transat then had to show that it acted with the intention of treating the information as though it were secret. Air Transat argued that it only agreed to take part in the implementation of the SMS with TC on condition that the confidentiality of the data and the Report would be

respected by TC. I am of the view that the evidence shows an intent in that regard on the part of Air Transat. The second criterion is therefore also met.

(41) As for the third and fourth criteria, Air Transat argued that the information was technical in nature, concrete application processes in the airline industry regarding the implementation of air safety systems. It argues that the processes were ones developed by Air Transat and that could give its competitors a significant financial advantage.

(42) It must be noted that Air Transat took part in a pilot project with TC. Air Transat invested a lot of time, money and expertise in creating and, eventually, implementing an air safety system. I agree with Air Transat's arguments that the information regarding this system has a practical application, and that its competitors would have a financial advantage over it if the information were disclosed. The techniques and methods, and the identity of the personnel involved, would be available to them if the report were disclosed. The third and fourth criteria are therefore met.

(43) In *Pricewaterhousecoopers LLP v. Canada (Minister of Canadian Heritage)*, 2001 FCT 1040, 211 FTR 206 (FC), upheld by the Federal Court of Appeal in 2002, the Court concluded that the confidential methodology employed by the applicant to carry out certain parts of a government contract constituted a trade secret, even though the results were anticipated and not confidential. I believe that the same is true in this case.

(44) In light of the confidential nature of the pilot project, the exchange of confidential information between Air Transat and TC for the purposes of the pilot project, the fact that each

airline must nonetheless develop its own air safety system, and the fact that the expertise of the people involved and the methodology adopted (information available in the Report) were used by Air Transat to create an effective and optimal air safety system for itself, I consider that the information constitutes trade secrets and cannot be disclosed under paragraph 20(1)(*a*) of the AIA.

(2) Paragraph 20(1)(*b*): confidential technical information

(45) The applicability of paragraph 20(1)(*b*) requires that four distinct conditions be met: (1) the information must be financial, commercial, scientific or technical in nature; (2) the information must be confidential; (3) the information must be supplied to a government institution by a third party; and (4) the information must be treated consistently in a confidential manner by the third party (*Porter Airlines v. Canada (Attorney General*), 2014 FC 392 at paragraph 30, [2014] F.C.J. No. 493 [*Porter*]; *Air Atonabee Ltd. v. Canada (Minister of Transport)*, [1989] F.C.J. No. 453, 27 F.T.R. 194 at paragraph 34 [*Air Atonabee*]).

(46) Air Transat and TC agree that the Report deals with technical and commercial information, and that it was always treated by Air Transat as being confidential in nature. I agree. I will now move on to the other two conditions at issue.

a) *Confidential nature of the information*

(47) There are three necessary criteria for information to be considered confidential: (1) it has not been previously disclosed to the public; (2) it was transmitted with a reasonable expectation

that it would not be disclosed; and (3) the confidentiality is not contrary to the public interest (*Porter* at paragraph 44; *Air Atonabee* at paragraph 20).

(48) Air Transat argues that the information in the Report was never publicly disclosed and that it remained between the President and CEO and certain employees in the corporate quality assurance department. Other employees of the company did not have access to it. I accept that assertion.

(49) Air Transat also argues that it had a reasonable expectation that the SMS and the information in the Report concerning the SMS would remain confidential. It argues that it would not have taken part in the SMS implementation program without TC's assurance that the information would remain confidential. I also accept that assertion. Based on my reading of the record, I conclude that the facts clearly show that Air Transat and TC had agreed that the information would remain confidential. I rely upon the following facts: Air Transat was taking part in a pilot project to help TC implement an SMS throughout the airline industry. No one disputes that Air Transat was taking part in that pilot project voluntarily. Many emails between Air Transat and TC show that they agreed to keep the information confidential. In her letter dated June 15, 2007, the Commissioner stated:

> [TRANSLATION]
> "The information contained in the submissions is technical in nature and is confidential in that it is not available through other sources and was provided by Air Transat to Transport Canada confidentially. That information was treated as confidential by the third party, that is, it was not disclosed to others by the third party. It is important to note that Air Transat voluntarily cooperated, as no regulatory provisions required its participation in the evaluation. Transport Canada conducted lengthy consultations with Air Transat in this matter and concurred with the submissions

> made by Air Transat. Consequently, Transport Canada maintained the use of paragraphs 20(1)(*b*) and (*d*) of the Act."
>
> [Emphasis added.]

(50) I note that there is a question about whether the Report was based on information gathered during a regulatory investigation, meaning that the information is not confidential. However, although the title of the TC Report refers to a "regulatory inspection", it is clear that a regulatory inspection was not possible. At the time, there were no regulations regarding an SMS. In fact, the purpose of the pilot project was to develop regulations regarding that system.

(51) I accept Air Transat's arguments that the Report contains certain information regarding the SMS that was provided with the assurance that it would not be disclosed, such as the use of operational tools (pages 93, 95, 100 and 103) and other databases (pages 96, 98, 99 and 100). That information, as well as the identity of the people who took part in the study, the report on the steps of the inspection of Air Transat's SMS, and even the inspection results summary (which was not regulatory), is confidential information.

(b) *Information provided by a third party*

(52) To be excluded under paragraph 20(1)(*b*), the information must also be provided by a third party. In this case, Air Transat is the third party. As affirmed earlier, there was no regulatory inspection; all observations made by inspectors included in the Report were based on information provided confidentially by Air Transat. Unlike the situation in *Porter*, the inspectors did not make regulatory conclusions. The inspectors made observations based on information provided by Air Transat and included those observations in their Report. The observations

cannot be separated from the information provided. Regardless of the format in which it was presented later by TC, the information came from Air Transat and cannot be disclosed (*Merck Frosst* at paragraph 158; *Porter* at paragraph 40).

(53) In conclusion, the information contained in the Report meets the four conditions to be considered confidential technical information. That information cannot be disclosed under paragraph 20(1)(*b*) of the AIA.

(3) Paragraphs 20(1)(*c*) and 20(1)(*d*): material loss or gain or prejudice the competitive position

(54) Given my findings with respect to paragraphs 20(1)(*a*) and 20(1)(*b*) of the AIA, I make no comment on the applicability of paragraphs 20(1)(*c*) and 20(1)(*d*).

(4) TC obligation to give Air Transat the opportunity to be heard

(55) If I am wrong in holding that the information contained in the Report is protected under paragraphs 20(1)(*a*) and 20(1)(*b*) of the AIA, I am of the view that disclosure should nonetheless be stopped by a stay of proceedings on the grounds of an abuse of process and a lack of procedural fairness due to TC's failure to give Air Transat an opportunity to be heard before changing its position regarding the disclosure of the documents regarding it.

(56) The access to information request was filed on March 22, 2005. It was related to more than 600 pages of material. TC refused to disclose 469 of those pages. On November 24, 2005, TC sent Air Transat a notice under section 27 of the AIA, asking Air Transat to provide its

comments on the 469 pages that remained to be disclosed within 20 days. After TC extended the deadline, Air Transat had to respond by January 19, 2006, less than 60 days after receiving the notice, including the holiday period.

(57) Following its response on January 19, 2006, Air Transat did not hear from TC or the Commissioner until July 5, 2012. On September 28, 2012, Air Transat responded to the letter dated July 5, 2012, informing TC that it was maintaining its objections to the disclosure of the information and explaining why. TC then continued to support Air Transat in its objections. Air Transat then heard nothing from TC or the Commissioner until April 18, 2016, when TC informed Air Transat that it was reversing its position and would follow the recommendation from the Commissioner's office to disclose all the information, including the 21 pages that are the subject of dispute. TC did not give Air Transat the opportunity to make any submissions before changing its position.

(58) It is my view that this goes against the right to be heard that is part of natural justice. This right is an integral part of an obligation to act fairly, an obligation that extends to all administrative bodies acting under the authority of any statute (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.C. 249 at paragraph 75, 209 DLR (4th) 1 [*Moreau-Bérubé*]; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, 88 DLR (3d) 671; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, 24 DLR (4th) 44 [*Cardinal*]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 20 [*Baker*]; *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35 at paragraph 81 [*Therrien*]). Indeed, it is sufficient that an administrative decision is likely to

adversely affect a person's rights, privileges or property for the obligation to act fairly to apply (*Cardinal*; *Baker* at paragraph 20; *Therrien* at paragraph 81).

(59) Admittedly, the very nature and scope of the duty to act fairly varies (*Moreau-Bérubé* at paragraph 75; *Baker* at paragraph 21). A hearing is not always necessary, but the administrative authority must, at the very least, allow the interested party to put forward its case before making a decision (*Komo Construction Inc. et al. v. Commission des Relations de Travail du Québec et al*, [1968] S.C.R. 172 at page 175, 1 DLR (3d) 125; *Turcotte v. Canada (Attorney General)*, 2002 FCT 230 at paragraph 13, [2002] F.C.J. No. 292). This was not done in this case. After having been presented with the Commissioner's conclusions, TC did not allow Air Transat to present its case against those conclusions before making a decision that was prejudicial to Air Transat. When I consider that with the fact that TC only gave Air Transat a single opportunity of less than 60 days to present its case in a matter that went on for more than 10 years, I must conclude that TC breached its duty to act fairly regarding Air Transat's right to be heard.

B. *The application for nullity of the Commissioner's report*

(60) Air Transat is also seeking to have the Commissioner's report set aside. It argues: (1) that the delay between the start and end of the Commissioner's investigation constituted a denial of justice; (2) that the Commissioner failed in her duty of *audi alteram partem* in the investigation process, which constitutes a breach of procedural fairness; (3) that the unreasonable delays in the investigation process meant that the Commissioner did not have jurisdiction to issue her report; and (4) that the non-compliance with the alleged confidentiality agreement between Air Transat and TC makes the conclusions in the Commissioner's report unreasonable.

1) Denial of justice

(61) Air Transat stated that the delay of more than 10 years between the start of the investigation and the date on which the Commissioner's report was published is unreasonable and amounts to a denial of justice.

(62) There is no question that a delay of more than 10 years between the start and end of the Commissioner's investigation is long. Air Transat cites *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 in support of its argument. In that decision, the Court affirmed that natural justice includes the right to be heard within a reasonable time. The Court stated the following in *Blencoe*:

> [101] . . . delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R. v. L. (W.K.)*, 1991 CanLII 54 (SCC), [1991] 1 S.C.R. 1091, at page 1100; *Akthar v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 32 (C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.
>
> [102] . . . Where delay impairs a party's ability to answer the complaint against him or her, . . . then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy.

(63) Thus, Air Transat must show that it suffered significant prejudice because there was a delay in the administrative proceedings.

(64) In this regard, Air Transat showed that its document retention policy states that documents are only to be kept for a period of five years. For that reason, documents that Air Transat may have wanted to use in its defence were no longer available when the report was published. For example, the documents that were included in a letter from TC to Air Transat dated April 29, 2005, no longer existed.

(65) Air Transat also showed that some TC and Air Transat employees who had significant knowledge of the confidentiality agreement between the two, as well as other relevant facts, were no longer employed at TC or Air Transat when the report was published. For example, two individuals who were responsible for the SMS at the time were no longer employed or had changed responsibilities at Air Transat; the “technical lead” for the project had left the company in 2011, and a second key person had returned to be a pilot-in-command with Air Transat in 2008.

(66) Finally, Air Transat claimed that the memories of employees had faded after 10 years, and that Air Transat had suffered significant financial prejudice because of the difficulties caused by the delay (document destruction, loss of key employees, loss of relevant memories) when it was asked to reopen its file in 2012 and 2016. I accept all these arguments and am of the view that Air Transat suffered significant prejudice because of the Commissioner’s delay.

(67) I recognize that section 37 of the AIA does not impose any time limit on the Commissioner for completing her investigations and for communicating her recommendations. Under the AIA, the Commissioner is required to notify the government institution of an

investigation as soon as there is a complaint (section 32). If the Commissioner intends to recommend the disclosure of documents that affect a third party, the Commissioner must offer the third party an opportunity to make written representations (subsection 35(1)). The Commissioner alleges that she properly followed the procedure in this case. I agree.

(68) However, there was also a procedure to be followed in *Blencoe*. Regardless of whether there are procedures that were followed, action must be taken to respect the standards of natural justice and procedural fairness. I find that a delay of 10 years in this case undermines the standards of natural justice and procedural fairness. The delay of more than 10 years in completing the Commissioner's investigation was overly long, and significant prejudice was established by Air Transat as a result of that delay. In the circumstances, a stay of proceedings is an appropriate remedy, as contemplated in *Blencoe*.

(69) Given my conclusions regarding the issues addressed thus far, I will not comment on the other arguments presented by Air Transat.

JUDGMENT in T-739-16

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The 21 pages of the Report referred to in the access request and that have not yet been disclosed are protected under paragraphs 20(1)(*a*) and 20(1)(*b*) of the AIA. If I am wrong in that regard, disclosure is nonetheless stopped by a stay of proceedings on the grounds of abuse of process and a lack of procedural fairness as a result of: (1) TC's failure to give Air Transat an opportunity to be heard before changing its position on the disclosure of the documents concerning it; (2) the delays caused by the Commissioner; and (3) the significant prejudice suffered by Air Transat as a result of the delays; and
2. The Court maintains its jurisdiction to address the issue of costs if the parties are not able to resolve it.

"B. Richard Bell"
Judge

Certified true translation
This 17th day of April 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-739-16
STYLE OF CAUSE:	AIR TRANSAT A.T. INC. v. TRANSPORT CANADA/MINISTER OF TRANSPORT and INFORMATION COMMISSIONER OF CANADA
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	JUNE 13, 2017
JUDGMENT AND REASONS:	BELL J.
DATED:	OCTOBER 13, 2017

APPEARANCES:

Karl Delwaide and Marie-Gabrielle Bélanger	FOR THE APPLICANT
Bernard Letarte and Ludovic Sirois	FOR THE RESPONDENT TRANSPORT CANADA/ MINISTER OF TRANSPORT
Diane Therrien and Guy Régimbald	FOR THE RESPONDENT INFORMATION COMMISSIONER OF CANADA

SOLICITORS OF RECORD:

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