Federal Court  Cour fédérale

Date: 20130711

Docket: T-1768-11

Citation: 2013 FC 780

Ottawa, Ontario, July 11, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

PORTER AIRLINES INC.

Applicant

and

ATTORNEY GENERAL OF CANADA AND THE INFORMATION COMMISSIONER OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application is brought pursuant to subsection 44(1) of the *Access to Information Act* RSC 1985, c A-1 (the Act) and seeks review of the decision of Transport Canada dated October 18, 2011, to disclose information requested under the Act which relates to the Applicant and its operations. This application concerns the process prescribed by the Act for addressing requests for information concerning third parties and, in the alternative, whether the information is exempt from disclosure pursuant to subsections 20(1)(b),(c) or (d) of the Act.

Background

[2] The Applicant, Porter Airlines, is an air transport business launched in 2006. It provides airline services in Ontario, Quebec, the Atlantic Provinces and to certain locations in the United States.

[3] As a holder of an Air Operator Certificate and Approved Maintenance Organization Certificate issued pursuant to the *Canadian Aviation Regulations*, SOR/96-433 (Regulations), the Applicant is required to implement a safety management system. Between May 25, 2010 and June 2, 2010, Transport Canada (TC) conducted an assessment of the Applicant's safety management system. TC then generated a document titled "Assessment Report Porter Airlines Inc." reporting on its findings (the Assessment Report).

[4] By letter dated September 28, 2010, TC informed the Applicant that it had received a request, pursuant to the Act, seeking information concerning the Applicant, specifically, concerning the "Safety Management System (SMS) Audit Report of Porter Airlines 2010". The letter stated that TC was required to provide notice to the Applicant, as a third party, prior to releasing information that might be exempted from disclosure pursuant to subsection 20(1) of the Act. The Applicant was also advised that it had twenty days within which it could submit representations to TC as to why the information, in whole or in part, should not be disclosed. TC attached copies of sections 19, 20, 25, 27 and 28 of the Act and a copy of the Assessment Report (the Notice).

[5] The Applicant provided its representations in response to the Notice on October 15, 2010, arguing that the Assessment Report was wholly exempt from disclosure under section 20 of the Act

and, given the nature of the document, it was not reasonably severable pursuant to section 25 of the Act. Representatives of TC met with the Applicant on December 14, 2010. At that meeting or thereafter, TC provided a severed copy of the Assessment Report to the Applicant which redacted those portions of the document that TC deemed exempt from disclosure pursuant to section 20 of the Act. TC invited the Applicant to file further submissions concerning the intended disclosure. By letter dated January 17, 2010, the Applicant responded by providing a copy of the severed report containing further redactions proposed by the Applicant as in keeping with its October 15, 2010 submissions.

[6] By letter dated May 13, 2011, TC advised the Applicant that the Assessment Report was partially exempt pursuant to subsections 20(1)(b) and (c) of the Act and would therefore be partially released to the requestor. TC also advised that, pursuant to section 44 of the Act, the Applicant had the right to apply for judicial review of that decision. Attached to the letter were copies of section 44 of the Act and a severed Assessment Report (the First Decision).

[7] On June 3, 2011, the Applicant filed a Notice of Application seeking judicial review of the First Decision (the First Application).

[8] By letter of August 26, 2011, TC informed the Applicant that, further to the First Application, TC had re-examined the requested information and concluded that further disclosure would be required. TC informed the Applicant that if it did not agree with this decision, then it could seek judicial review pursuant to section 44 of the Act. TC attached a copy of section 44 and a revised severed copy of the Assessment Report which it intended to disclose (the Second Decision).

[9] On September 14, 2011, the Applicant wrote to TC stating that, in its view, it was not open to TC to disclose any information while the First Application was pending. Further, that case law indicted that a federal department could not sit in appeal of its own decision and could not, of its own initiative, reverse itself and start the disclosure process over. This rendered the Second Decision a nullity and the Applicant accordingly requested that it be withdrawn. By letter dated September 16, 2011, TC confirmed that it had withdrawn the Second Decision. The Applicant discontinued its First Application on September 21, 2011.

[10] On that same day, counsel for TC sent a letter to counsel for the Applicant acknowledging that the Second Decision had been withdrawn and clarifying TC's position, being that only the information identified as exempt in the revised and severed Assessment Report as attached to the Second Decision was properly exempted under subsection 20(1) of the Act. The letter also stated that should the Applicant discontinue the First Application, then TC would have to issue a further section 28 notice in keeping with its position and its obligations under the Act, and that a discontinuance could not serve to thwart TC's legal obligations in that regard.

[11] By letter dated October 18, 2011, TC informed the Applicant that it had decided that the records requested were partially exempt pursuant to subsection 20(1)(b) of the Act and advised the Applicant of its section 44 right to seek judicial review of that decision. TC attached a copy of section 44 and a copy of the severed Assessment Report that it intended to disclose (the Third Decision). The disputed information is, in essence, the information that was severed from the First

Decision, but was not severed from the Third Decision. That information will be hereafter referred to as the "Disputed Information", the term adopted by the parties.

[12] On October 31, 2011, the Applicant issued a Notice of Application seeking judicial review of the Third Decision which is the decision at issue in this proceeding.

[13] On September 14, 2012, Madam Prothonary Aronovitch issued a Confidentiality Order pursuant to Rules 151 and 152 of the *Federal Courts Rules*, SOR/98-106 and subsection 47(1) of the Act. That order identifies confidential information contained in the records filed by the parties and specifies how that information is to be dealt with up to the hearing of this application. This included the filing of confidential records, as well as public records where appropriate.

[14] The Information Commissioner of Canada's (ICC) first involvement in this matter arose as a result of receiving a complaint filed by the requestor on February 18, 2011. The complaint concerned the delay experienced by the requestor in obtaining the requested information.

[15] On February 25, 2011, the ICC notified TC of its intention to commence an investigation pursuant to section 32 of the Act. The ICC sought representations from TC which were received on August 8, 2011. The ICC generated a report dated September 23, 2011 and provided the requestor with a copy of its report.

[16] The ICC found that the complaint was well-founded. TC had failed to abide by the timelines in the Act and acted contrary to its subsection 4(2.1) statutory obligations when it delayed

responding to the request and when it failed to keep the requestor informed of the steps being taken to process its request. ICC also found that subsection 28(1)(b) of the Act required TC to have made and communicated a decision on disclosure within thirty days from providing the Applicant with the third party Notice, being by October 28, 2010. Instead, TC continued negotiating with the Applicant, receiving further representations on January 17, 2011, after which the matter lay dormant until May 12, 2011. The ICC concluded that TC's failure to abide by the timelines set out in the Act unjustifiably delayed the processing of the request and that its failure to make a decision concerning disclosure within the prescribed time contravened the Act.

[17] The ICC was, by its motion, added as a party to this proceeding on January 4, 2012.

Legislative Framework

[18] The provisions of the Act which are relevant to this application for judicial review are set out in Annex A of this decision.

Issues

[19] The Applicant and the Respondent agree on the issues raised in this application. The ICC submits that this application also raises the issue of the effects of TC's decisions on the requestor's right to be granted access to records under TC's control.

[20] I would reframe the issues as follows:

i. What is the applicable standard of review?

ii. Is the Third Decision void and of no effect?

iii. In the alternative, is the Disputed Information exempt from disclosure pursuant to subsection 20(1) of the Act?

Standard of Review

[21] Where previous jurisprudence has satisfactorily determined the appropriate standard of review applicable to a particular issue, that standard may be adopted by a subsequent reviewing court (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at paras 57 and 62).

[22] In this case, prior jurisprudence has established that the standard of review for applications brought pursuant to section 44 of the Act is correctness (*Merck Frosst Canada Ltd v* Canada *(Health)*, 2012 SCC 3, [2012] 1 SCR 23 [*Merck Frosst*] at para 53 ; *Wyeth-Ayerst Canada Inc v Canada (Attorney General)*, [2003] FCJ No 916 (QL) (CA), at paras 8-15). Under a correctness review, the Court will show no deference to the decision-maker. Rather, it will undertake its own analysis and if it disagrees with the decision-maker's analysis, it can substitute its own view (*Dunsmuir*, above at para 50).

Is the Third Decision void and of no effect?

Applicant's Submissions

[23] The Applicant submits that the Third Decision is void and of no effect because the Act does not permit TC to make multiple access decisions regarding a single request for information. In *Matol Botanical International Inc v Canada (Minister of National Health and Welfare)*, [1994] FCJ No 860 (QL) [*Matol Botanical*] at paras 36 and 41- 42, the Court confirmed that an institution cannot sit in appeal of its own decision and found that "[o]nly one decision may be made with

respect to an information request, and once it is made the institution in question does not have the discretion to get around it."

[24] *Matol Botanical*, above, was followed in *AstraZeneca Canada Inc v Health Canada*, 2005 FC 1451 at para 66, [2005] FCJ No 792 at para 11 (QL), aff'd [2006] FCJ No 1076 (QL) (FCA) [*AstraZeneca*], where this Court held:

> […] the Minister cannot initiate another disclosure process after the Minister has made the decision not to disclose some of the information requested.
>
> […]
>
> Therefore the Minister cannot, on its own initiative reverse itself and start the disclosure process anew with the necessary notices, representations and other procedural steps.

[25] The Applicant states that when the Second Decision was withdrawn and the First Application discontinued, the Applicant accepted the First Decision. It was not open to TC to revisit the request for information or to issue the Third Decision.

Respondent's Submissions

[26] The Respondent submits that the Third Decision was valid. Further, that declaring the Third Decision to be void and of no effect is not appropriate relief in the context of section 44 of the Act. A section 44 review is not a judicial review of a minister's decision pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. Rather, it is a separate and distinct process to determine if the institutional head had correctly applied the section 20 exemptions (*Merck Frosst*, above, at para 92).

[27] While appearing before me, the Respondent argued that if the Applicant sought to declare the Third Decision void and of no effect, then it should have commenced its application pursuant to section 18.1 of the *Federal Courts Act*.

[28] According to the Respondent, regardless of the procedural history of this matter, TC is entitled to change its mind about what portions of the requested information are exempt under section 20 (*Wells v Canada (Minister of Transport)* (1995), 96 FTR 178, [1995] FCJ No 822 [*Wells 1995*] at para 6). Furthermore, the Minister is permitted to change its position within the context of a section 44 application and argue that further information should be disclosed (*AstraZeneca*, above, at para 73). The Applicant cannot simply go back and accept an earlier position and thereby preclude the Minister from disclosing certain records on the basis that it discontinued its application.

[29] The Respondent also submits that there was no impediment to TC determining that the Act required further disclosure and issuing the Third Decision.

[30] In addition, the Respondent submits that the Applicant has been inconsistent in its position on accepting the First Decision and is basically arguing its position anew. Given that this matter is brought pursuant to section 44, the Court should proceed to determine whether the exemptions have been correctly applied to the Third Decision.

The ICC's Submissions

[31] The ICC submits that despite explicit obligations under the Act, TC failed to provide the requestor with timely access to the requested information. A determination by this Court of the exemptions applicable to the Disputed Information would be the most timely manner by which the requestor can now receive the information.

[32] The ICC adopts TC's position that it would not be appropriate relief in the current matter for the Court to declare the Third Decision to be void and of no effect. Further, that the Applicant cannot, on one hand, use section 44 to seek review of the Third Decision and, on the other hand, argue that there is no Third Decision because it is void and of no effect.

[33] While the manner in which TC proceeded to issue a further decision in the current matter is not explicitly anticipated under the Act, it is what best accords with the requestor's substantive rights and with the intent of the Act at this point in the process. Finding the Third Decision void and of no effect would serve no useful purpose. It would prejudice the requestor by resulting in a further delay. Conversely, a determination now as to whether or not the Disputed Information is exempt from disclosure pursuant to subsection 20(1) of the Act would not prejudice the Applicant.

[34] The ICC argues that any procedural defects that might have occurred have been cured as the Applicant has been provided with an ample opportunity to make representations. The Applicant has also exercised its own rights by bringing applications for judicial review.

Analysis

[35] In my view, this Court has jurisdiction to assess whether a decision made by a head of a government institution to disclose information pursuant to subsection 28(1)(b) of the Act is void and of no effect.

[36] The wording of section 44 does not limit a review by this Court to only determinations of whether the section 20 exemptions have been correctly applied, although it clearly has that role (*Merck Frosst*, above at para 53; *Air Atonabee Ltd v Minister of Transport*, [1989] FCJ No 453 (QL) (TD) [*Air Atonabee*]. Rather, section 44 permits a broader court review process. A third party that has been notified pursuant to subsection 28(1)(b) or subsection 29(1) of a decision of a head of a government institution to disclose a record or a part of a record may "apply to the Court for a review of the matter".

[37] In the context of answering the question of whether section 19 of the Act may be raised in a section 44 review proceeding, the Supreme Court of Canada in *HJ Heinz Co of Canada Ltd v Canada (Attorney General)*, 2006 SCC 13, [2006] 1 SCR 441 [*HJ Heinz Co*] at para 41 found that it was the intent of the legislature to give the courts "a generous ambit of review on a s. 44 application" (para 41). It also confirms a broad interpretation of the term "matter" in a section 44 review:

> [44] Third, s. 44 allows the third party to apply to the court for a review of "the matter". Nothing in the plain language of s. 44 expressly limits the scope of "the matter". The French version is even more general because the subject of the review is not mentioned. What is more, in a case dealing with the interpretation of s. 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the Federal Court of Appeal held that "matter" embraces "not only a 'decision or order' but any matter in respect of which a remedy may be available under section

> 18 of the *Federal Court Act*": *Krause v. Canada*, [1999] 2 F.C. 476, at para. 21; see also *Morneault v. Canada (Attorney General)*, [2001] 1 F.C. 30 (C.A.), at para. 42.

[38] In my view, it is clear from the above that any aspect of a decision by a head of a government institution to disclose third party information pursuant to the Act, including the validity of the decision itself, is a "matter" that may be reviewed by the Court as a part of a section 44 review.

[39] Moreover, in *Matol Botanical*, above, an application was brought under section 44 seeking judicial review of four decisions of the Minister of National Health and Welfare permitting the disclosure of certain information pursuant to four requests made under the Act. Before the review was heard, Matol received two new notices of intention and two new decisions to disclose arising from the original requests. Those decisions would have permitted the disclosure of further information that the Minister, in the prior decisions, determined was exempt from disclosure. With respect to the Minister's second decisions, for reasons addressed in greater detail below, this Court held at para 40, "[t]hat second decision is void and of no effect since the Act authorizes the institution concerned to make only one decision with respect to a single request…" Clearly in that case this Court considered itself to have jurisdiction, within the section 44 application before it, to determine that the challenged second decisions were void and of no effect.

[40] *AstraZeneca*, above, and again discussed in more detail below, concerned an application under section 44 of the Act brought as a result of the applicant therein being provided with notice of a decision of the Minister of Health to disclose certain records. During the course of the section 44 litigation and after reviewing the applicant's supporting affidavit evidence, the Minister decided to

disclose further information in response to the original request for information. The Court referred to *Matol Botanical*, above, and held that, in the context of a section 44 *de novo* review, the Minister was not required to sustain all or part of a decision that the Minister no longer believed was sustainable.

[41] Notable for purposes of the question of this Court's jurisdiction is that in *AstraZeneca*, above, the Court did not decline to deal with the Minister's authority to make a subsequent decision even though, had it decided the matter differently, the second decision would have been rendered void and of no effect.

[42] Counsel for the Respondent was unable to refer me to any case law in support of its position that a challenge to the validity of the Third Decision must be brought pursuant to section 18.1 of the *Federal Courts Act*. I also note that sections 45 to 53 of the Act describe the role of this Court in a section 44 application which includes the manner in which it hears matters, examines records, takes precautions to avoid the disclosure of confidential information in dispute, and the orders it may issue. Given this codification, I have difficulty accepting, in the absence of explicit legislative intent, that the discrete issue of the validity of a decision made under subsection 28(1)(b) of the Act would fall outside a section 44 review and within the provisions of the *Federal Courts Act*.

[43] For all of these reasons, I find that this Court has jurisdiction under section 44 to determine whether a decision of a head of a government institution made pursuant to subsection 28(1) of the Act is void and of no effect.

[44] This finding leads to an analysis on the merits of the question of the validity of the Third Decision. The Applicant submits that it is void and of no effect as the Act does not permit TC to make multiple decisions regarding a single request for information. The Respondent argues that TC was entitled to change its position.

[45] It is important to note that the Act sets out a detailed process and precise timetable within which government departments, third parties and others must respond to and otherwise address information requests. This process is in keeping with the purpose of the Act which seeks to balance public access to information with principles governing privacy (*HJ Heinz Co*, above, at para 31; *Matol Botanical*, above, at para 35).

[46] Pursuant to section 7 of the Act, information requests must, in principle, be processed and resolved within 30 days. If the head of a government institution intends to disclose a record requested under the Act that contains, or which the head of the institution has reason to believe may contain, third party information that is exempted from disclosure by subsection 20(1), then it must give the third party written notice of the request and of its intention to disclose the information within thirty days after the request is received (subsection 27(1)). That period may be extended, in specified circumstances, for up to a further thirty days (subsection 27(4) and subsection 9(1)). Where such notice is given to the third party, it in turn has twenty days to make representations as to why the information, or any part of it, should not be disclosed (subsection 28(1)(a)). Within thirty days after the notice is given to the third party, the head of the institution shall make a decision as to whether or not to disclose the information, or any part of it, and give written notice of its decision to the third party (subsection 28(1)(b)).

[47] Where the head of the government institution decides to disclose the requested information, or any part of it, then the head must give the requestor access to that information "forthwith" on completion of the twenty days after notice is given to the third party unless the third party requests a section 44 review of the decision (subsection 28(4)).

[48] In *Matol Botanical*, above, the factual background of which is described above, the Court stated the following in finding that neither of the second decisions to disclosure further information was valid:

> [33] In my view, neither of these later decisions has the force of law. Subsection 28(1)(b) of the Act provides that the respondent was required:
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> > Within thirty days after the notice is given, …, [to] make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.
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> [34] This is what was done in each of these files three years earlier: […]. The Act does not authorize the institution in question to sit on appeal from its own decision and from the outset to decide what the outcome will be on two subsequent occasions. Only one decision may be made with respect to an information request, and once it is made the institution in question does not have the discretion to get around it.
>
> [35] This is clear from the scheme of the Act, which sets out a very precise timetable and detailed procedure for processing an information request and with respect to the decision-making process with the institution concerned must follow.
>
> […]
>
> [39] While these time lines are not mandatory, the Act nonetheless provides for a very precise decision-making process which must, on its face, result in only one decision.

> [40] The second decision made in file no. T-2912-90 is not intended to correct a clerical error. As established by the letters of November 3 and December 22, 1993, the respondent simply changed his mind on the question of whether or not the additional records should be disclosed. At the time when the first decision was made, he had concluded that these records were exempted under section 20. In his second decision, three years after the fact, the respondent claimed to be exercising his decision-making power again by reversing his first decision respecting the additional records in question. That second decision is void and of no effect since the Act authorizes the institution concerned to make only one decision with respect to single request, that being the decision made in November 1990.

[49] While the Applicant relies on *Matol Botanical*, above, interestingly, both the Applicant and the Respondent rely on *AstraZeneca*, above, to support their respective positions. In *AstraZeneca*, the Court referred to *Matol Botanical*, but came to a different conclusion. I think that it is useful to set out, in full, the reasoning of the Court in *AstraZeneca*:

> [62] This Court granted a motion for reconsideration to deal with the issue (which the Court had initially understood as no longer being in dispute) of whether the Minister had the jurisdiction to "unsever" information (disclose information) which the Minister had previously decided should be severed (not disclosed). The issue is whether the Minister can change his/her mind and disclose information which the Minister had previously decided fit within one or more of the exemptions from disclosure under section 20(1) of the Act.
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> [63] <u>During the course of this litigation under section 44 of the Act</u>, the Respondent decided, after reviewing the affidavit of an officer of the Applicant, that certain information should now be disclosed. This decision to disclose is a reversal of the Respondent's earlier decision that this specific information was exempt from disclosure.
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> […]
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> [65] The Applicant argues that the Minister has no jurisdiction to make a second decision to disclose and that the original decision cannot be altered during the review of the decision. It puts its case succinctly that the Minister's decision to disclose cannot be made a

"moving target". The Applicant relies upon the decision of *Matol Botanical International Inc. v. Canada (Minister of National Health and Welfare)* (1998), 84 F.T.R. 168 (F.C.T.D.).

[66] For the reasons given by Justice Noël in *Matol*, I agree that the Minister cannot initiate another disclosure process after the Minister has made the decision not to disclose some of the information requested. There must be some other triggering event provided for under the Act to allow for this additional disclosure.

[67] The Act provides an elaborate process to deal with third party information. The Act sets up a tension between the right of the public to know and the right of a third party to keep its affairs confidential. The Act provides for two opportunities where the Minister may change the original decision or at least take a position inconsistent with the original decision.

[68] The first is found in section 29 where the Minister may, upon recommendation of the Information Commissioner, decide to disclose information which the Minister had originally decided was exempt from disclosure.

[69] The second is inherent to the Court review process under section 44. It has been held in such cases as *Air Atonabee*, *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2001] F.C.A. 254 and *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)*, [2003] F.C.J. No. 916 that the Court review to be conducted is a de novo review in which the standard of review is correctness.

[70] In my view, in the context of that review, a Minister is not required to sustain all or a part of the decision which the Minister no longer believes is sustainable. The Minister is free to argue that the exemption from disclosure no longer applies to the particular information. A third party is free to make of it what they will in respect of the Minister's change of position - no doubt contending that the Minister was correct in the first place and that there is no good reason in fact, law or both, for the change of mind.

[71] It is for the Court to decide whether the exemption from disclosure is truly applicable and whether a requester is entitled to the information.

[72] Therefore the Minister cannot, on its own initiative, reverse itself and start the disclosure process anew with the necessary notices, representations and other procedural steps. However, the Minister cannot be forced to defend in this Court, what it now

> believes is, an indefensible position regarding the particular information.
>
> [73] In the present case, the Minister was entitled to change its position and argue that the information should be disclosed. The Minister is neither *functus* nor estopped and the information cannot be exempt from disclosure solely on the basis that the Minister made an earlier and different decision. The information either falls within the section 20 exemption or it does not, based upon the evidence before the Court.
>
> [Emphasis added]

[50] Thus, *AstraZeneca*, above, upheld *Matol Botanical*, above, in finding that a Minister cannot, on his or her own initiative, reverse themselves and start the process anew with the necessary notices, representations and procedural steps.

[51] Rather, *AstraZeneca*, above, identifies two triggering events or opportunities provided for in the Act where a Minister may change his or her original decision, or at least take a position inconsistent with the original decision:

i. pursuant to section 29 where the Minister, may, upon the Information Commissioner's recommendation decide to disclose information which the Minister originally decided was exempt from disclosure; or

ii. pursuant to a section 44 court review process.

[52] In that case, the Minister changed position during pending court proceedings and, therefore, the Court found that this was acceptable given that the court performs a *de novo* review pursuant to section 44. That is not the situation in the present case.

[53] Here, pursuant to subsection 27(1), TC gave the Applicant notice of its intention to disclose the requested information on September 28, 2010. The Applicant provided representations in response on October 15, 2010, within the twenty days permitted by subsection 28(1)(a). Pursuant to subsection 28(1)(b), TC was then required to make and give the Applicant notice of the First Decision.

[54] Subsequent to the commencement of the First Application, which precluded release of the First Decision until that application was addressed, TC informed the Applicant of its intention to disclose the additional information contained in its Second Decision, which was subsequently withdrawn as was the First Application. The September 21, 2011, letter from counsel for TC to counsel for the Applicant took the position that, although the Second Decision had been withdrawn, the Minister's position remained that only the information severed from the Second Decision was properly exempt under the Act. Further, if the Applicant withdrew the First Application, the Minister "will then have to issue a further section 28 notice in keeping with this position and his obligations under the AIA". The letter also stated that the Second Decision had been withdrawn because *AstraZeneca*, above "precluded any further notice while a section 44 application was pending". TC subsequently notified the Applicant of the Third Decision.

[55] In my view, the Respondent misinterpreted *AstraZeneca* in both its September 21, 2011 letter and in is submissions in the current Application. Further, by issuing the Third Decision, TC has done what both *Matol Botanical*, above, and *AstraZeneca*, above, said cannot be done, that is by its own initiative it started the disclosure process anew although it already made the First Decision.

[56] The Third Decision did not result from either of the two triggering events noted in *AstraZeneca*, above, being a recommendation of the Information Commissioner, or, a section 44 review. At the time that the Third Decision was rendered, there was no section 44 review process in place. In the result, the Third Decision was made without authority under the Act and is void and of no effect and, therefore, there is no decision for this Court to review. Had TC not withdrawn the Second Decision, then at the hearing of the First Application, a *de novo* review of the First Decision, TC could have argued that it was entitled to change its position and that the Disputed Information captured by the Second Decision should also be released.

[57] It follows that because the Third Decision is void and of no effect, TC is now not afforded the opportunity to change its position within the context of a hearing *de novo*. In any event, this section 44 application pertains only to the Third Decision which would have permitted the disclosure of information severed from the First Decision. Thus, in the context of any *de novo* review, TC would not be seeking to change a position that it no longer believes to be sustainable rather, it would seek to have its decision upheld. It is the First Decision from which TC seeks to retrench but that decision is not under review, the time frame within which a section 44 review of the First Decision could be made by the Applicant has long since lapsed and there is no authority under the Act that would permit TC to make a further decision or revise its First Decision.

[58] The Respondent cites the case of *Wells 1995*, above. There, the respondent first informed the applicant that the access request would be granted, without having conducted a review of the documents. It later changed its position as it found that some of the disclosure was protected by solicitor-client privilege. The Court held that the head of a public body is not confined by an initial

decision to grant access to the requested records where, upon further review, the information comes within an exemption. However, *Wells 1995* pre-dates *AstraZeneca* which, along with *Matol Botanical*, is factually more similar to the present case.

[59] Counsel for the ICC and the Respondent urge me to decide this matter on the merits of the Third Decision given that the submissions of all parties were before me. They submit that this would preserve the time and resources of the parties and of the Court, and would prevent further delay as the question of disclosure will only resurface in the future. While I agree that this would be the most economical and expeditious route and that, in this instance, the Applicant is unlikely to be prejudiced if it were adopted, I cannot agree that it is the correct route.

[60] The ICC stresses the importance of government departments adhering to the timelines and process set out in the Act. I agree that compliance with the Act and its timelines is essential to preserve the decision-making process provided for in the Act as well as achieving and balancing its objectives. As noted above, the Act sets out a very detailed and specific procedure to be followed by government departments, third parties and others. Accordingly, I cannot accept the further submission by the ICC that while the manner in which TC proceeded to issue a further decision in the current matter is not explicitly anticipated under the Act, TC's manner of proceeding is what best accords with the requestor's substantive rights and with the intent of the Act at this point in the process. This is, essentially, an argument that the ends justify the means.

[61] The manner in which TC issued the Third Decision is not permitted by the Act. That cannot be ignored or cured merely because of a view that to do so would now best serve the requestor's

interests. Further, to accept this reasoning would mean that TC, and any government department in its decision making process, need not concern itself with compliance with the Act, and would lead to future uncertainty.

[62] Further, third parties as well as requestors have substantive rights under the Act. The September 21, 2011 letter of TC's counsel refers to the issuing of a further section 28 notice if the First Application were withdrawn. However, a notice of a decision under subsection 28(1)(b) presumes that a third party notice of an intention to disclose has first been given under subsection 27(1). This, in turn, triggers the twenty day period within which the Applicant could make representations prior to the decision being made. In fact, no further subsection 27(1) notice was given prior to TC issuing the Third Decision. Thus, the manner in which TC proceeded potentially prejudiced the Applicant and did not address its rights as prescribed by the Act.

[63] Any delays in the release of the information to the requestor have arisen from TC's election to issue new decisions after issuing the First Decision. TC was in a position to release the First Decision as of October 28, 2010, until the First Application was filed. It was again in a position to do so when the First Application was withdrawn and remained and remains in a position to do so as only the Third Decision was challenged by the current section 44 application. The Applicant also confirmed at the hearing before me that it accepted the First Decision. Thus, only the release of the Disputed Information, which is limited in scope, is at issue and may potentially be at risk of further delay.

[64] It is also important to note that the requestor is not without remedy. If the requestor takes issue with the First Decision it may avail itself of subsection 30(1)(a) of the Act which clearly establishes a mechanism for a requestor to file a complaint with the ICC if it has been refused access to a record or part thereof.

[65] For the above reasons, this application is granted. The Third Decision is of no force or effect and is quashed. As I advised the parties at the hearing, the Confidentiality Order dated September 14, 2012 remains in effect and the *in camera* portion of the hearing before me shall also be considered to be part of the Confidential Information defined and governed by that Order.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision of Transport Canada made pursuant to the *Access to Information Act*, RSC 1985, c A-1 and dated October 18, 2011 is void and of no effect and is quashed. The Confidentiality Order dated September 14, 2012 remains in effect and the *in camera* portion of the hearing held on May 30, 2013 shall be considered to be part of the Confidential Information defined and governed by that Order. The Applicant shall have its costs.

"Cecily Y. Strickland"

Judge

ANNEX A

PURPOSE OF ACT	**OBJET DE LA LOI**
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.
Complementary procedures	Étoffement des modalités d'accès
(2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.	(2) La présente loi vise à compléter les modalités d'accès aux documents de l'administration fédérale; elle ne vise pas à restreindre l'accès aux renseignements que les institutions fédérales mettent normalement à la disposition du grand public.
[…]	[…]
ACCESS TO GOVERNMENT RECORDS	**ACCÈS AUX DOCUMENTS DE L'ADMINISTRATION FÉDÉRALE**
RIGHT OF ACCESS	**DROIT D'ACCÈS**

Right to access to records

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(*a*) a Canadian citizen, or

(*b*) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,

has a right to and shall, on request, be given access to any record under the control of a government institution.

[…]

THIRD PARTY INFORMATION

Third party information

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(*a*) trade secrets of a third party;

(*b*) financial, commercial, scientific or technical information that is confidential information

Droit d'accès

4. (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :

a) les citoyens canadiens;

b) les résidents permanents au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.

[…]

RENSEIGNEMENTS DE TIERS

Renseignements de tiers

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) des secrets industriels de tiers;

b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution

supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

(*b.1*) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the *Emergency Management Act* and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

b.1) des renseignements qui, d'une part, sont fournis à titre confidentiel à une institution fédérale par un tiers en vue de l'élaboration, de la mise à jour, de la mise à l'essai ou de la mise en oeuvre par celle-ci de plans de gestion des urgences au sens de l'article 2 de la *Loi sur la gestion des urgences* et, d'autre part, portent sur la vulnérabilité des bâtiments ou autres ouvrages de ce tiers, ou de ses réseaux ou systèmes, y compris ses réseaux ou systèmes informatiques ou de communication, ou sur les méthodes employées pour leur protection;

(*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*) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a

d) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des

third party.

négociations menées par un tiers en vue de contrats ou à d'autres fins.

[…]

[…]

THIRD PARTY INTERVENTION

INTERVENTION DE TIERS

Notice to third parties

Avis aux tiers

27. (1) If the head of a government institution intends to disclose a record requested under this Act that contains or that the head has reason to believe might contain trade secrets of a third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by a third party, or information the disclosure of which the head can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party, the head shall make every reasonable effort to give the third party written notice of the request and of the head's intention to disclose within 30 days after the request is received.

27. (1) Le responsable d'une institution fédérale qui a l'intention de communiquer un document fait tous les efforts raisonnables pour donner au tiers intéressé, dans les trente jours suivant la réception de la demande, avis écrit de celle-ci ainsi que de son intention, si le document contient ou s'il est, selon lui, susceptible de contenir des secrets industriels du tiers, des renseignements visés aux alinéas 20(1)b) ou b.1) qui ont été fournis par le tiers ou des renseignements dont la communication risquerait vraisemblablement, selon lui, d'entraîner pour le tiers les conséquences visées aux alinéas 20(1)c) ou d).

Waiver of notice

Renonciation à l'avis

(2) Any third party to whom a notice is required to be given under subsection (1) in respect of an intended disclosure may waive the requirement, and where the third party has consented to the disclosure the third party shall be deemed to have

(2) Le tiers peut renoncer à l'avis prévu au paragraphe (1) et tout consentement à la communication du document vaut renonciation à l'avis.

waived the requirement.

Contents of notice

(3) A notice given under subsection (1) shall include

(*a*) a statement that the head of the government institution giving the notice intends to release a record or a part thereof that might contain material or information described in subsection (1);

(*b*) a description of the contents of the record or part thereof that, as the case may be, belong to, were supplied by or relate to the third party to whom the notice is given; and

(*c*) a statement that the third party may, within twenty days after the notice is given, make representations to the head of the government institution that has control of the record as to why the record or part thereof should not be disclosed.

Extension of time limit

(4) The head of a government institution may extend the time limit set out in subsection (1) in respect of a request under this Act where the time limit set out in section 7 is extended under paragraph 9(1)(a) or (b) in

Contenu de l'avis

(3) L'avis prévu au paragraphe (1) doit contenir les éléments suivants :

a) la mention de l'intention du responsable de l'institution fédérale de donner communication totale ou partielle du document susceptible de contenir les secrets ou les renseignements visés au paragraphe (1);

b) la désignation du contenu total ou partiel du document qui, selon le cas, appartient au tiers, a été fourni par lui ou le concerne;

c) la mention du droit du tiers de présenter au responsable de l'institution fédérale de qui relève le document ses observations quant aux raisons qui justifieraient un refus de communication totale ou partielle, dans les vingt jours suivant la transmission de l'avis.

Prorogation de délai

(4) Le responsable d'une institution fédérale peut proroger le délai visé au paragraphe (1) dans les cas où le délai de communication à la personne qui a fait la demande est prorogé en vertu des alinéas 9(1)a) ou b), mais le

respect of the same request, but any extension under this subsection shall be for a period no longer than the period of the extension under section 9.

délai ne peut dépasser celui qui a été prévu pour la demande en question.

Representations of third party and decision

Observations des tiers et décision

28. (1) Where a notice is given by the head of a government institution under subsection 27(1) to a third party in respect of a record or a part thereof,

28. (1) Dans les cas où il a donné avis au tiers conformément au paragraphe 27(1), le responsable d'une institution fédérale est tenu :

(*a*) the third party shall, within twenty days after the notice is given, be given the opportunity to make representations to the head of the institution as to why the record or the part thereof should not be disclosed; and

a) de donner au tiers la possibilité de lui présenter, dans les vingt jours suivant la transmission de l'avis, des observations sur les raisons qui justifieraient un refus de communication totale ou partielle du document;

(*b*) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (a), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.

b) de prendre dans les trente jours suivant la transmission de l'avis, pourvu qu'il ait donné au tiers la possibilité de présenter des observations conformément à l'alinéa a), une décision quant à la communication totale ou partielle du document et de donner avis de sa décision au tiers.

Representations to be made in writing

Observations écrites

(2) Representations made by a third party under paragraph (1)(a) shall be made in writing unless the

(2) Les observations prévues à l'alinéa (1)a) se font par écrit, sauf autorisation du responsable de l'institution

head of the government institution concerned waives that requirement, in which case they may be made orally.

fédérale quant à une présentation orale.

Contents of notice of decision to disclose

Contenu de l'avis de la décision de donner communication

(3) A notice given under paragraph (1)(b) of a decision to disclose a record requested under this Act or a part thereof shall include

(3) L'avis d'une décision de donner communication totale ou partielle d'un document conformément à l'alinéa (1)b) doit contenir les éléments suivants :

(*a*) a statement that the third party to whom the notice is given is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

a) la mention du droit du tiers d'exercer un recours en révision en vertu de l'article 44, dans les vingt jours suivant la transmission de l'avis;

(*b*) a statement that the person who requested access to the record will be given access thereto or to the part thereof unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

b) la mention qu'à défaut de l'exercice du recours en révision dans ce délai, la personne qui a fait la demande recevra communication totale ou partielle du document.

Disclosure of record

Communication du document

(4) Where, pursuant to paragraph (1)(b), the head of a government institution decides to disclose a record requested under this Act or a part thereof, the head of the institution shall give the person who made the request access to the record or the part thereof forthwith on completion of twenty days after a notice is given under

(4) Dans les cas où il décide, en vertu de l'alinéa (1)b), de donner communication totale ou partielle du document à la personne qui en a fait la demande, le responsable de l'institution fédérale donne suite à sa décision dès l'expiration des vingt jours suivant la transmission de l'avis prévu à cet alinéa, sauf

that paragraph, unless a review of the decision is requested under section 44.

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

Where the Information Commissioner recommends disclosure

Recommandation du Commissaire à l'information

29. (1) Where the head of a government institution decides, on the recommendation of the Information Commissioner made pursuant to subsection 37(1), to disclose a record requested under this Act or a part thereof, the head of the institution shall give written notice of the decision to

29. (1) Dans les cas où, sur la recommandation du Commissaire à l'information visée au paragraphe 37(1), il décide de donner communication totale ou partielle d'un document, le responsable de l'institution fédérale transmet un avis écrit de sa décision aux personnes suivantes :

(*a*) the person who requested access to the record; and

a) la personne qui en a fait la demande;

(*b*) any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had at the time of the request intended to disclose the record or part thereof.

b) le tiers à qui il a donné l'avis prévu au paragraphe 27(1) ou à qui il l'aurait donné s'il avait eu l'intention de donner communication totale ou partielle du document.

Contents of notice

Contenu de l'avis

(2) A notice given under subsection (1) shall include

(2) L'avis prévu au paragraphe (1) doit contenir les éléments suivants :

(*a*) a statement that any third party referred to in paragraph (1)(b) is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

a) la mention du droit du tiers d'exercer un recours en révision en vertu de l'article 44, dans les vingt jours suivant la transmission de l'avis;

(*b*) a statement that the person who requested access to the record will be given access thereto unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

b) la mention qu'à défaut de l'exercice du recours en révision dans ce délai, la personne qui a fait la demande recevra communication du document.

COMPLAINTS

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;

[…]

PLAINTES

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;

[…]

INVESTIGATIONS

Notice of intention to investigate

32. Before commencing an investigation of a complaint under this Act, the Information Commissioner shall notify the head of the government institution concerned of the intention to carry out the investigation and shall inform the head of the institution of the substance of the complaint.

ENQUÊTES

Avis d'enquête

32. Le Commissaire à l'information, avant de procéder aux enquêtes prévues par la présente loi, avise le responsable de l'institution fédérale concernée de son intention d'enquêter et lui fait connaître l'objet de la plainte.

[…]

Findings and recommendations of Information Commissioner

37. (1) If, on investigating a complaint in respect of a record under this Act, the Information Commissioner finds that the complaint is well-founded, the Commissioner shall provide the head of the government institution that has control of the record with a report containing

(*a*) the findings of the investigation and any recommendations that the Commissioner considers appropriate; and

(*b*) where appropriate, a request that, within a time specified in the report, notice be given to the Commissioner of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.

Report to complainant and third parties

(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant and any third party that was entitled under

[…]

Conclusions et recommandations du Commissaire à l'information

37. (1) Dans les cas où il conclut au bien-fondé d'une plainte portant sur un document, le Commissaire à l'information adresse au responsable de l'institution fédérale de qui relève le document un rapport où :

a) il présente les conclusions de son enquête ainsi que les recommandations qu'il juge indiquées;

b) il demande, s'il le juge à propos, au responsable de lui donner avis, dans un délai déterminé, soit des mesures prises ou envisagées pour la mise en oeuvre de ses recommandations, soit des motifs invoqués pour ne pas y donner suite.

Compte rendu au plaignant

(2) Le Commissaire à l'information rend compte des conclusions de son enquête au plaignant et aux tiers qui pouvaient, en vertu du paragraphe 35(2), lui

subsection 35(2) to make and that made representations to the Commissioner in respect of the complaint the results of the investigation, but where a notice has been requested under paragraph (1)(b) no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

présenter des observations et qui les ont présentées; toutefois, dans les cas prévus à l'alinéa (1)b), le Commissaire à l'information ne peut faire son compte rendu qu'après l'expiration du délai imparti au responsable de l'institution fédérale.

[…]

[…]

Third party may apply for a review

44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

Recours en révision du tiers

44. (1) Le tiers que le responsable d'une institution fédérale est tenu, en vertu de l'alinéa 28(1)b) ou du paragraphe 29(1), d'aviser de la communication totale ou partielle d'un document peut, dans les vingt jours suivant la transmission de l'avis, exercer un recours en révision devant la Cour.

Notice to person who requested record

(2) The head of a government institution who has given notice under paragraph 28(1)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the

Avis à la personne qui a fait la demande

(2) Le responsable d'une institution fédérale qui a donné avis de communication totale ou partielle d'un document en vertu de l'alinéa 28(1)b) ou du paragraphe 29(1) est tenu, sur réception d'un avis de recours en révision de cette décision, d'en aviser par écrit la personne qui avait demandé communication du document.

person who requested access to the record.

Person who requested access may appear as party

(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

Hearing in summary way

45. An application made under section 41, 42 or 44 shall be heard and determined in a summary way in accordance with any special rules made in respect of such applications pursuant to section 46 of the Federal Courts Act.

Access to records

46. Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 44, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

Court to take precautions against disclosing

47. (1) In any proceedings before the Court arising from

Comparution

(3) La personne qui est avisée conformément au paragraphe (2) peut comparaître comme partie à l'instance.

Procédure sommaire

45. Les recours prévus aux articles 41, 42 et 44 sont entendus et jugés en procédure sommaire, conformément aux règles de pratique spéciales adoptées à leur égard en vertu de l'article 46 de la Loi sur les Cours fédérales.

Accès aux documents

46. Nonobstant toute autre loi fédérale et toute immunité reconnue par le droit de la preuve, la Cour a, pour les recours prévus aux articles 41, 42 et 44, accès à tous les documents qui relèvent d'une institution fédérale et auxquels la présente loi s'applique; aucun de ces documents ne peut, pour quelque motif que ce soit, lui être refusé.

Précautions à prendre contre la divulgation

47. (1) À l'occasion des procédures relatives aux

an application under section 41, 42 or 44, the Court shall take every reasonable precaution, including, when appropriate, receiving representations ex parte and conducting hearings in camera, to avoid the disclosure by the Court or any person of

recours prévus aux articles 41, 42 et 44, la Cour prend toutes les précautions possibles, notamment, si c'est indiqué, par la tenue d'audiences à huis clos et l'audition d'arguments en l'absence d'une partie, pour éviter que ne soient divulgués de par son propre fait ou celui de quiconque :

(*a*) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or

a) des renseignements qui, par leur nature, justifient, en vertu de la présente loi, un refus de communication totale ou partielle d'un document;

(*b*) any information as to whether a record exists where the head of a government institution, in refusing to disclose the record under this Act, does not indicate whether it exists.

b) des renseignements faisant état de l'existence d'un document que le responsable d'une institution fédérale a refusé de communiquer sans indiquer s'il existait ou non.

Disclosure of offence authorized

(2) The Court may disclose to the appropriate authority information relating to the commission of an offence against a law of Canada or a province by a director, an officer or an employee of a government institution if, in the Court's opinion, there is evidence of such an offence.

Autorisation de dénoncer des infractions

(2) Si, à son avis, il existe des éléments de preuve touchant la perpétration d'une infraction fédérale ou provinciale par un administrateur, un dirigeant ou un employé d'une institution fédérale, la Cour peut faire part à l'autorité compétente des renseignements qu'elle détient à cet égard.

Burden of proof

48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

Charge de la preuve

48. Dans les procédures découlant des recours prévus aux articles 41 ou 42, la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document incombe à l'institution fédérale concernée.

Order of Court where no authorization to refuse disclosure found

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Ordonnance de la Cour dans les cas où le refus n'est pas autorisé

49. La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

Order of Court where reasonable grounds of injury not found

50. Where the head of a government institution refuses

Ordonnance de la Cour dans les cas où le préjudice n'est pas démontré

50. Dans les cas où le refus de communication totale

to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

ou partielle du document s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner communication totale ou partielle à la personne qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

Order of Court not to disclose record

Ordonnance de la Cour obligeant au refus

51. Where the Court determines, after considering an application under section 44, that the head of a government institution is required to refuse to disclose a record or part of a record, the Court shall order the head of the institution not to disclose the record or part thereof or shall make such other order as the Court deems appropriate.

51. La Cour, dans les cas où elle conclut, lors d'un recours exercé en vertu de l'article 44, que le responsable d'une institution fédérale est tenu de refuser la communication totale ou partielle d'un document, lui ordonne de refuser cette communication; elle rend une autre ordonnance si elle l'estime indiqué.

Applications relating to international affairs or defence

Affaires internationales et défense

52. (1) An application under section 41 or 42 relating to a record or a part of a record that the head of a government institution has refused to disclose by reason

52. (1) Les recours visés aux articles 41 ou 42 et portant sur les cas où le refus de donner communication totale ou partielle du document en litige s'appuyait

of paragraph 13(1)(a) or (b) or section 15 shall be heard and determined by the Chief Justice of the Federal Court or by any other judge of that Court that the Chief Justice may designate to hear those applications.

sur les alinéas 13(1)a) ou b) ou sur l'article 15 sont exercés devant le juge en chef de la Cour fédérale ou tout autre juge de cette Cour qu'il charge de leur audition.

Special rules for hearings

(2) An application referred to in subsection (1) or an appeal brought in respect of such application shall

(*a*) be heard in camera; and

(*b*) on the request of the head of the government institution concerned, be heard and determined in the National Capital Region described in the schedule to the National Capital Act.

Règles spéciales

(2) Les recours visés au paragraphe (1) font, en premier ressort ou en appel, l'objet d'une audition à huis clos; celle-ci a lieu dans la région de la capitale nationale définie à l'annexe de la Loi sur la capitale nationale si le responsable de l'institution fédérale concernée le demande.

Ex parte representations

(3) During the hearing of an application referred to in subsection (1) or an appeal brought in respect of such application, the head of the government institution concerned shall, on the request of the head of the institution, be given the opportunity to make representations ex parte.

Présentation d'arguments en l'absence d'une partie

(3) Le responsable de l'institution fédérale concernée a, au cours des auditions, en première instance ou en appel et sur demande, le droit de présenter des arguments en l'absence d'une autre partie.

Costs

53. (1) Subject to subsection (2), the costs of and incidental to all

Frais et dépens

53. (1) Sous réserve du paragraphe (2), les frais et dépens sont laissés à

proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.

Idem

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

Idem

(2) Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1768-11
STYLE OF CAUSE:	PORTER AIRLINES INC. v AGC ET AL.
PLACE OF HEARING:	Ottawa
DATE OF HEARING:	May 30, 2013
REASONS FOR JUDGMENT AND JUDGMENT BY:	STRICKLAND J.
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APPEARANCES:

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