Federal Court  Cour fédérale

**Date: 20140206**

**Docket: T-367-13**

**Citation: 2014 FC 133**

**Ottawa, Ontario, February 6, 2014**

**PRESENT: Madam Prothonotary Mireille Tabib**

**BETWEEN:**

**THE INFORMATION COMMISSIONER OF CANADA**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR ORDER AND ORDER

[1] The Attorney General brings this motion to strike the application for a reference brought by the Information Commissioner of Canada (the "Commissioner") pursuant to section 18.3 of the *Federal Courts Act*. The Attorney General takes the position that the reference mechanism provided by section 18.3 is not available to government bodies whose functions are merely advisory, rather than determinative.

**Background**

[2] Section 11(2) of the *Access to Information Act*, RSC 1985, c A-1 (ATIA) allows government institutions to charge fees for the time, in excess of five hours, reasonably required to search and prepare records requested under the ATIA, as such fees may be prescribed and calculated by regulations made under the ATIA. Section 7(2) of the *Access to Information Regulations*, SOR/83-507 (the "*Regulations*") provides that a government institution may charge a fee of $2.50 per person per quarter hour for every hour in excess of five hours that is spent on search and preparation of a "non-computerized record".

[3] Where a fee is assessed pursuant to section 11(2) of the ATIA that the requester considers unreasonable, the requester may make a complaint to the Commissioner, who is then required to investigate.

[4] Under the investigation process mandated by the ATIA, once the Commissioner has investigated a complaint and found it well-founded, she must provide a report to the head of the government institution containing her findings and recommendations. Where appropriate, she must also request the institution to give her notice, within a specified delay, of any action taken or proposed to implement the recommendations, or the reasons why the recommendations will not be implemented. Where such a request is made, the Commissioner must await the government institution's response (or the expiration of the delay she has set for a response) before reporting to the complainant the results of her investigation, including the government institution's response to her request, and any comment she may have in that regard. Regardless of the result of the Commissioner's investigations or her comments, a complainant who is dissatisfied with the

institution's response may then seek judicial review of the institution's response pursuant to section 41 of the ATIA.

[5] In 2011, Human Resources and Skills Development Canada (HRSDC) assessed and charged a fee in respect of a request for information that was mostly kept in the form of electronic records. On October 6, 2011 the Commissioner received a complaint regarding those fees.

[6] This was not the first time that the Commissioner had been seized of a complaint in respect of similar fees charged for searching and preparing electronic records. The Commissioner had earlier investigated a complaint in respect of fees charged by DFAIT, and concluded that electronic records (records stored in a computer or in an electronic format) cannot properly be characterized as "non-computerized records" and that fees pursuant to section 7(2) of the *Regulations* can therefore not be assessed for the search and preparation of such records. DFAIT disagreed with the Commissioner's interpretation. Although an Application for Judicial Review was instituted by the requesting party, it was later discontinued. This investigation and conclusions were reported in the Commissioner's 2011-2012 Annual Report to Parliament.

[7] In the case of the 2011 complaint against HRSDC, in the context of which this reference is brought, the Commissioner investigated the complaint and concluded that most of the records requested were kept in electronic form. The Commissioner reported to HRSDC her conclusion that the complaint was well-founded, and, referring to the interpretation of section 7(2) of the *Regulations* she had previously made, recommended that HRSDC cease to assess fees for searching

and preparing electronic records. HRSDC disagreed with the Commissioner's interpretation and gave notice that it would not implement the Commissioner's recommendation.

[8] The Commissioner has brought this reference, seeking a judicial determination of the correct interpretation of section 7(2) of the *Regulations*, prior to issuing her final report to the complainant.

[9] The Commissioner advises that she also received five other complaints in respect of fees charged for searching and preparing electronic records, all of which are at an earlier stage of proceeding.

**The Attorney General's position**

[10] The Attorney General submits that because the Commissioner's role is only to make non-binding recommendations that are not determinative of any person or body's legal rights and do not carry legal consequences, there is no "live dispute" that is susceptible of being resolved through the determination of the questions posed in the reference.

[11] The Attorney General argues that there is strong and constant jurisprudence to the effect that the reference provisions of the *Federal Courts Act* do not provide authority to seek, or for the Court to give, an advisory opinion or to determine academic questions that can have no immediate and direct effect in proceedings below.

[12] The Attorney General relies, for this proposition, on *Alberta (Attorney General) v Westcoast Energy Inc.*, (1997), 208 NR 154, which directly interpreted section 18.3 and subsection 28(2) as

they currently exist in the *Federal Courts Act*, and on other decisions of the Federal Court of Appeal interpreting former subsection 28(4) of the *Federal Court Act*, *inter alia*, *Martin Service Station Ltd. v Canada (Minister of National Revenue)*, [1974] 1 FC 398 and *Rosen (Re)*, [1987] 3 FC 238.

**Analysis**

[13] It must be stressed that the matter before the Court is a preliminary motion to strike. Such motions should only be brought and granted where the application is so clearly improper as to be bereft of any possibility of success. Otherwise, the appropriate way for a respondent to contest an application which it believes to be improperly brought or without merit is to appear and argue the matter at the hearing of the application itself. (*David Bull Laboratories Canada Inc. v Pharmacia Inc.*, [1995] 1 FC 588 (FCA)).

[14] Sub-section 18.3(1) reads as follows:

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| "A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination." | « Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure. » |

[15] Sub-section 2(1) defines a federal board, commission or other tribunal as follows :

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| "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers | « office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant |

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| conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*." | ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*. » |

[16] The Attorney General does not dispute that the Information Commissioner is a federal board, commission or other tribunal, as defined by section 2 of the *Federal Courts Act*.

[17] Section 18.3 was introduced in 1990, but the wording of subsection 18.3(1) is not substantially different from the wording of former subsection 28(4).

[18] The notable change effected by the introduction of section 18.3 was to grant to the Federal Court the jurisdiction to hear and determine references brought by the federal boards, commissions or other tribunals over which it otherwise exercises judicial review functions. The jurisdiction to hear references was previously given solely to the Federal Court of Appeal, and applied only in respect of those federal boards, commissions or tribunals over which the Federal Court of Appeal exercised judicial review functions. As noted by Justice Tremblay-Lamer in *Air Canada v Canada (Commissioner of Official Languages)*, [1997] FCJ No 976, at paragraphs 13 and 14, the bodies that

were permitted to refer questions to the Court of Appeal for determination pursuant to subsection 28(4) of the *Federal Court Act* were all bodies or tribunals exercising quasi-judicial powers. The "federal boards, commissions or other tribunals" who may, pursuant to section 18.3, refer questions to the Federal Court include bodies who exercise solely administrative powers, and even merely advisory functions, as is the case for the Commissioner.

[19] Accordingly, while the jurisprudence developed under subsection 28(4) of the *Federal Court Act* may still serve as a guide in applying section 18.3, "they must be applied flexibly to adapt them to the context of section 18.3" (*Air Canada*, above, at paragraph 14).

[20] The general test applied by the Federal Court of Appeal as to the questions that may be the subject of a reference under subsection 28(4) of the *Federal Court Act* were summarized as follows in: *Re: Immigration Act (Canada)*, [1991] FCJ No 1155, 137 NR 64:

> "The Court's jurisprudence clearly establishes that a question of law, jurisdiction or procedure may not be the subject of a reference under subsection 28(4) of the Federal Court Act unless the following conditions are fulfilled:
> 1. the issue must be one for which the solution can put an end to the dispute that is before the tribunal;
> 2. the issue must have been raised in the course of the action before the tribunal that makes the reference;
> 3. the issue must result from facts that have been proved or admitted before the tribunal; and
> 4. the issue must be referred to the Court by an order from the tribunal that, in addition to formulating the issue, shall relate the observations of fact that gave rise to the reference."

[21] On the present motion, the Attorney General does not deny that this application fulfills the second, third and fourth conditions of the test. It takes the position, however, that the Commissioner does not meet the first condition of the test for two reasons: First, because "proceedings" before her are essentially at an end; and second, because, in any event, the nature of the Commissioner's function is not to determine or resolve disputes and that the reference can therefore not put an end to "a dispute" that is before her.

[22] The Attorney General's first objection is founded on the Federal Court of Appeal's decision in *Alberta (Attorney General) v Westcoast Energy Inc.*, above, which dismissed, on a preliminary motion, a reference brought by the National Energy Board after it had concluded its proceedings and issued an authorization. The Court found that, in the circumstances, the reference was "susceptible of no immediate or direct effect in any proceeding below" and was therefore purely academic.

[23] It is quite plain that the Commissioner's duties and functions with respect to the complaint giving rise to the present reference are not, formally, at an end until she has reported to the complainant. The Attorney General's argument is, however, that because the Commissioner has already reached her conclusion that the complaint is well founded and reported same to HRSDC, her proceedings are <u>substantively</u> at an end, and that the Federal Court of Appeal's reasoning in *Westcoast Energy* applies.

[24] I accept, as the Commissioner does, that her functions and duties are not adjudicative of a requester's rights or of a government institution's obligations. The Commissioner's duties and

functions are well recognized as being to receive and investigate complaints, to make non-binding recommendations and to report her findings, recommendations and comments to the complainant.

[25] The Attorney General's argument that the Commissioner's proceedings are "substantively" at an end in this case dismisses the final step of the Commissioner's statutory duty, to report to the complainant, as a mere administrative formality and an essentially insignificant task. Such an approach, however, ignores the importance that both Parliament and the Courts have attached to the role of the Commissioner as an ombudsman-type officer and to her final report to the complainant as a condition precedent to any judicial review of an institution's refusal of access, as highlighted in *Canada (Attorney General) v Canada (Information Commissioner)*, 2007 FC 1024, at p 51:

> "The role of the Commissioner in achieving these objectives is central. As an officer of Parliament, the Commissioner is charged with the duties to receive and investigate any complaint made to him pursuant to subsection 30(1) of the *Act* and to report thereon to the complainant and the appropriate government institution pursuant to section 37 of the *Act*. Parliament has provided that the final decision of a head of a government institution to refuse to disclose information is to be made only after that person has had the opportunity to review the Commissioner's findings and recommendations. The importance of the Commissioner's investigation was highlighted by the Federal Court of Appeal as follows:
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> The investigation the Commissioner must conduct is the cornerstone of the access to information system. It represents an informal method of resolving disputes in which the Commissioner is vested not with the power to make decisions, but instead with the power to make recommendations to the institution involved. The importance of this investigation is reinforced by the fact that it constitutes a condition precedent to the exercise of the power of review, as provided in sections 41 and 42 of the Act."

[26] Sections 41 and 42 of the ATIA requires, as a condition precedent to either the complainant or the Commissioner seeking review of an institution's refusal of access, that the Commissioner has reported the results of her investigation to the complainant. Parliament must have intended that the complainant's decision as to whether or not to pursue judicial review be guided and informed by the Commissioner's report, including any assessment she may make in that report as to the government institution's response to her recommendations. On that basis, I cannot conclude that the Commissioner's proceedings are, as suggested, so clearly "substantively" at an end that the reference must necessarily fail.

[27] The Attorney General extracts from the case law dealing with references generally the principle that the reference powers found in section 18.3 must be read as limited to questions that are dispositive and determinative of a specific legal dispute affecting the rights of individuals. Because of the non-binding nature of the Commissioner's determination as to whether a complaint is well founded, the Commissioner could, on that argument, never bring a reference in respect of any question of law that would otherwise be directly determinative of the finding she is required to make. The Attorney General finds further support for this proposition in the case law that has established that no judicial review lies against the findings of the Information Commissioner or other ombudsman-type officers, because they do not determine or affect a complainant's substantive rights (*Pieters v Canada (Attorney General)*, 2007 FC 556). Given that the findings of the Commissioner are not amenable to judicial review, allowing the Commissioner to bring a reference as to the correctness of her findings would enable her to do indirectly what neither she nor the complainant could do directly.

[28] Section 18.1 of the *Federal Courts Act* expressly limits the right to bring a judicial review application to "anyone directly affected by the matter in respect of which relief is sought". There is no such limiting language in section 18.3, nor does section 18.3 include any language that would limit the kind of question that can be referred to those that are determinative, or directly affect, another person's rights. The Federal Court of Appeal and the Federal Court have interpreted the reference provisions of the *Federal Courts Act* as limiting references to questions that are determinative of the proceedings or of a matter before them (see, for example, *Westcoast Energy*, above, at paragraph 16, *Martin Service Station*, above, at paragraphs 4 and 14, *Air Canada*, above, at paragraph 15). However, there is no authority directly to the effect that, in addition to being determinative of a matter before the tribunal, the question referred must also be determinative of the substantive rights of the parties before it. That may of course have been a given for the adjudicative bodies that were, pursuant to former subsection 28(4) of the *Federal Court Act*, entitled to bring a reference, but, since section 18.3 has extended the reference provision to bodies that may not have adjudicative functions, one must be careful to interpret cases decided under former subsection 28(4) as requiring that the question referred be determinative of the substantive rights of the parties to the "proceedings below". In *Air Canada*, above, the Court determined, on a preliminary motion to strike, that it was sufficient that one of the possible answers to the questions referred have the effect of requiring the Official Language Commissioner to close its cases.

[29] It is certainly arguable that Parliament intended advisory bodies such as the Commissioner to have the right to refer to the Court for determination issues of law that arise in the course of the performance of their duties. If so, if follows that it is arguably enough to meet the requirements of section 18.3 that the question be susceptible of determining how the Commissioner is to conduct

herself. In the present case, a positive answer to the question posed by the Commissioner would be decisive of the "matter" before her. She would have no choice but to report to the complainant that the complaint is not well founded, and that HRSDC's decision not to implement her recommendations is justified.

[30] For these reasons, I cannot conclude that this reference is so manifestly ill-founded that it does not have the slightest chance of success. Accordingly, the Attorney General's preliminary motion to strike must be dismissed.

**ORDER**

**THIS COURT ORDERS that:**

1. The Respondent's motion is dismissed.

2. The Applicant shall, within 20 days, in consultation with and on notice to the Respondent, bring the motion required by Rule 322.

"Mireille Tabib"
Prothonotary

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-367-13 |
| **STYLE OF CAUSE:** | THE INFORMATION COMMISSIONER OF CANADA v THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 21, 2013 |
| **REASONS FOR ORDER AND ORDER:** | TABIB P. |
| **DATED:** | FEBRUARY 6, 2014 |

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| Brian Harvey | FOR THE RESPONDENT |

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