Federal Court of Appeal | Cour d'appel fédérale

Date: 20191120

Docket: A-340-17
A-338-17

Citation: 2019 FCA 286

[ENGLISH TRANSLATION]

CORAM: **NADON J.A.**
GAUTHIER J.A.
BOIVIN J.A.

Docket: A-340-17

BETWEEN:

TRANSPORT CANADA/MINISTER OF TRANSPORT

Appellant

and

AIR TRANSAT A.T. INC. and INFORMATION COMMISSIONER OF CANADA

Respondents

Docket: A-338-17

BETWEEN:

INFORMATION COMMISSIONER OF CANADA

Appellant

and

AIR TRANSAT A.T. INC. and
TRANSPORT CANADA/MINISTER OF TRANSPORT

Respondents

Heard at Montréal, Quebec, on November 7, 2018.

Judgment delivered at Ottawa, Ontario, on November 20, 2019.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: GAUTHIER J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] These are appeals against the decision of Mr. Justice Bell (the Judge) of the Federal Court on October 13, 2017 (2017 FC 910), whereby a report prepared by Transport Canada (TC) inspectors entitled "Transport Canada Regulatory Inspection Report of Air Transat AT Inc. November 12-14, 2003" (the SMS Report), was to remain confidential pursuant to paragraphs 20(1)(*a*) and (*b*) of the *Access to Information Act*, R.S.C., 1985, c. A-1 (the Act).

[2] In addition to this, the Judge concluded that there was a violation of the principles of natural justice since TC had not given the respondent, Air Transat A.T. Inc. (Air Transat), an additional opportunity, under the circumstances, to make submissions when TC decided to disclose the SMS Report.

[3] Lastly, the Judge concluded that, given that an unreasonable amount of time had passed for the investigation and preparation of the report by the Information Commissioner of Canada (the Commissioner), under the circumstances, he was justified in ordering a stay of proceedings and in prohibiting the disclosure of the SMS Report.

[4] To be clear, at this point, between July 1998 and May 9, 2016, the date that Air Transat filed proceedings before the Federal Court, three people have held the office of Information

Commissioner of Canada, namely John M. Reid (1998-2006), Robert Marleau (2007-2009) and Suzanne Legault (2009-2018). Given that Ms. Legault was Information Commissioner at the time of the most recent events in this case, I will refer to her in these reasons as "the Commissioner."

[5] For the reasons that follow, I conclude that these appeals should be allowed.

II. Facts

A. *SMS Report*

[6] On March 22, 2005, TC received an access to information request (ATI request) to obtain a copy of the following documentation: "the special report for the interim/final audit prepared following the November and December 2003 review of Air Transat's quality safety management system (QSMS), the evaluation methodology used to conduct the audit, the audit lists of the inspectors used, on-site visit reports, Air Transat's responses, corrective measures plans put in place and the progress made."

[7] The ATI request was originally for over 600 pages of documentation. For the purposes of this case, however, the request is for the 21-page SMS Report only.

[8] The SMS Report, dated November 2003, was prepared as part of a TC pilot project, the purpose of which was to implement safety management regulations for Canada's airline industry. It should be noted that Air Transat voluntarily participated in this project upon TC's request.

After TC prepared a special audit in August 2001, Air Transat volunteered for the TC pilot project entitled “Safety Management System” (SMS), the purpose of which was to assess the possibility of implementing regulations that apply to all airline transport businesses in Canada. More specifically, the pilot project involved developing an airline operations safety plan to minimize safety risks.

[9] By asking Air Transat to participate in its pilot project, TC was asking them to develop a safety plan, to apply it and have it undergo assessment so that this could be used to develop a national program that would be applied to all airline businesses in Canada.

[10] The bulk of the SMS Report bears on the results of TC’s assessment of Air Transat’s safety management system. The SMS Report was prepared following an audit conducted by TC between November 12 and 14, 2003, based on information that Air Transat provided or exchanged as well as visits that TC was allowed to make under the agreement entered into between Air Transat and TC for the pilot project.

[11] The purpose of the inspection that took place in November 2003, when Air Transat’s safety management system was being developed, was to determine whether Air Transat’s SMS functioned effectively and whether it was in line with the draft regulations TC was preparing.

[12] After the pilot project with Air Transat was over, TC adopted a formal SMS program that was integrated into the regulations that entered into force in 2005, making the SMS program apply to the entire Canadian airline transport industry. More specifically, amendments were

made to the *Canadian Aviation Regulations*, SOR/96-433 (the Regulations) to include the following definition of a SMS: “a documented process for managing risks that integrates operations and technical systems with the management of financial and human resources to ensure aviation safety or the safety of the public” (subsection 101.01(1) of the Regulations).

[13] It should be noted that before TC implemented the SMS, there was no obligation in line with that of the SMS program for ongoing risk assessment. Consequently, it appears indisputable that Air Transat’s participation in TC’s pilot project was an important aspect of the process that resulted in the amendments to the Regulations making the SMS mandatory for Canadian air carriers.

B. *ATI request and complaint from the access requester with the Commissioner*

[14] In February 2004, TC received an initial ATI request for the disclosure of the SMS Report, and TC provided this request to Air Transat by mail on February 19, 2004. More specifically, TC requested that Air Transat provide them with written submissions regarding the applicability of the exceptions provided for in subsection 20(1) of the Act.

[15] In a letter dated March 31, 2004, Air Transat provided TC with written submissions concerning the ATI request through their counsel.

[16] On April 28, 2004, upon receipt of Air Transat’s submissions, TC refused to disclose the SMS Report in the light of the exceptions provided for in paragraphs 20(1)(*b*) and (*d*) of the Act.

[17] On April 29, 2005, TC notified Air Transat that a new ATI request had been received on March 22, 2005, for the disclosure of the SMS Report as well as the disclosure of documents related to the report. TC also informed Air Transat that it still considered that the SMS Report was exempt from disclosure but asked for their consent to disclose documents that were not an integral part of the SMS Report.

[18] In response to TC's letter, Air Transat stated that it had no objection to the disclosure of any documents that were not an integral part of the SMS Report. The case before us does not turn on those documents.

[19] In a letter dated June 2, 2005, TC informed the access requester that it intended to only disclose a portion of the documentation requested, in the light of subsection 19(1) and paragraphs (*a*), (*b*), (*c*) and (*d*) of the Act.

[20] In the light of TC's refusal to provide all documentation included in the ATI request, the access requester submitted a complaint to the Commissioner on July 19, 2005.

[21] In September 2005, the Commissioner informed TC that an investigation had been called following the complaint from the access requester.

[22] On November 24, 2005, Air Transat received a copy of a new ATI request from TC for documents other than those required by the ATI request received by TC on March 22, 2005. The letter, dated November 24, 2005, also informed Air Transat that the ATI request was now for

653 pages, 167 of which had already been disclosed by TC to the access requester. According to Air Transat, they did not have an opportunity to make submissions about the disclosure of those 167 pages.

[23] In a letter dated January 19, 2006, Air Transat provided TC with written submissions that TC then shared with the Commissioner.

[24] In July 2006, the Commissioner requested written submissions from TC once again. Those submissions were provided in June 2007.

[25] In 2009 and 2010, the Commissioner required additional written submissions from TC.

[26] It should be noted that, following the letter dated January 19, 2006, whereby Air Transat provided their written submissions to TC, Air Transat received no communication from TC about the outcome of their written submissions in relation to the applicability of the exceptions provided for in subsection 20(1) of the Act. In other words, from Air Transat's perspective, the matter appeared to be resolved.

[27] That said, on July 5, 2012, Air Transat received a communication from the Commissioner informing them that a complaint had been submitted by the access requester on July 19, 2005, and that she was in the process of conducting an investigation. In addition, on August 3, 2012, Air Transat received a letter from the Commissioner that included documents requested in the ATI request. Pursuant to section 35 of the Act, the Commissioner required written submissions

from Air Transat with regard to the applicability of the exceptions provided for in subsection 20(1) of the Act in relation to the documents requested in the ATI request.

[28] It should be noted that, before receiving the Commissioner's letter on July 5, 2012, Air Transat was unaware that the access requester had submitted a complaint to the Commissioner.

[29] Air Transat provided their written submission to the Commissioner in a letter dated September 28, 2012. In these submissions, which reiterated their written submissions that had been previously sent to TC in March 2004 and January 2006, Air Transat stated that the exceptions invoked were applicable and that no additional document should be disclosed to the access requester. Air Transat added that they considered that given the amount of time that had passed since the investigation began, justice had been denied to Air Transat in the Commissioner's investigation, under the circumstances.

[30] Notwithstanding Air Transat's position, the Commissioner continued with her investigation by requesting, in January 2015, that TC provide her with their written submissions about specific aspects of the documentation requested by the access requester. Those submissions were provided to the Commissioner in January 2015 and February 2016.

[31] In April 2015, the access requester advised the Commissioner that the complaint now bore on the SMS Report only, namely pages 84 to 112 of the request.

[32] On February 25, 2016, the Commissioner wrote to the Minister of Transport (the Minister) to inform him that she had concluded that the complaint was justified and that she, as the head of the relevant government institution, consequently recommended disclosing the near-entirety of the SMS Report.

[33] After receiving the Commissioner's report recommending the disclosure of the SMS Report (other than a few parts of the report that had to be redacted at various points), TC wrote to Air Transat on April 18, 2016, indicating that they intended to disclose the remaining 21 pages requested in the ATI request. TC also stated that Air Transat had the right to apply for review under section 44 of the Act.

[34] It should be reiterated that from Air Transat's perspective, the case had been at a standstill between the time when they sent a letter to the Commissioner on September 18, 2012, and the time when they received the letter from TC on April 18, 2016. It was not until May 2, 2016, that Air Transat's lawyers obtained a copy of the Commissioner's report, dated February 25, 2016, from TC.

[35] On May 9, 2016, Air Transat submitted an application for judicial review before the Federal Court pursuant to sections 18 and 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, as well as an application under section 44 of the Act. Air Transat asked the Court to overturn the Commissioner's report and overturn TC's decision to disclose the SMS Report. More specifically, Air Transat argued that the SMS Report should remain confidential pursuant to paragraphs 20(1) (*a*), (*b*), (*c*) and (*d*) of the Act and that given the amount of time that had passed

since the investigation was launched, the Commissioner had lost her jurisdiction, rendering her report and TC's decision to disclose the SMS report invalid.

[36] On June 3, 2016, TC informed the Commissioner that they had accepted her recommendation for disclosure and that they had advised Air Transat of their intention to disclose the requested documentation. The Commissioner was also informed that Air Transat had applied for review by the Federal Court of TC's decision and the Commissioner's report.

[37] TC also stated to the Commissioner that the access requester would be informed that Air Transat had applied for review by the Federal Court and that the SMS Report would not be disclosed until a decision was rendered in relation to the application of the exceptions provided for in subsection 20(1) of the Act.

[38] In August 2016, the Commissioner completed her investigation and provided the access requester and Air Transat with a summary of her conclusions.

III. Applicable legislation

[39] It goes without saying that paragraphs 20(1)(*a*), (*b*), (*c*) and (*d*) as well as sections 27 to 35 and 44 of the Act are at the centre of this dispute. The relevant parts of these provisions have been provided in an appendix to these reasons.

IV. Federal Court decision

[40] After a brief summary of the conclusions of the Commissioner's report dated February 25, 2016, according to which the exceptions provided for in subsection 20(1) of the Act were not applicable in this case, the Judge addressed the issues raised by Air Transat as well as the applicable standard of review for these issues.

[41] Firstly, the Judge concluded that the standard of review for the decision made by the head of a government institution under the Act was that of correctness. In other words, it is up to the Federal Court Judge to determine whether the decision made by the head of the institution was the correct decision. The Judge also considered that this same standard should be applied to matters of natural justice and procedural fairness.

[42] As for the matter related to the unreasonable amount of time that passed during the Commissioner's investigation, the Judge concluded that the reasonableness standard applied, given that this matter involved questions of mixed fact and law.

[43] Secondly, the Judge concluded that the exceptions provided for in paragraphs 20(1)(*a*) and (*b*) of the Act were applicable. More specifically, he expressed the view that the information contained in the SMS report constituted not only trade secrets but also technical information that is confidential. Consequently, the SMS Report was not to be disclosed by TC.

[44] Given his conclusions regarding paragraphs 20(1)(*a*) and (*b*), the Judge considered there was no need to rule on the applicability of the exceptions provided for in paragraphs 20(1)(*c*) and (*d*).

[45] Thirdly, the Judge decided upon a stay of proceedings for breach of procedural fairness and abuse of process. More specifically, according to the Judge, TC had failed to discharge its obligations in relation to procedural fairness towards Air Transat by denying them the right to be heard following TC's decision to disclose the SMS Report upon the Commissioner's recommendation.

[46] Lastly, the Judge addressed Air Transat's request to overturn the Commissioner's report, given the time that had passed between the investigation's initiation in 2005 and the 2016 recommendation. Citing a Supreme Court case, *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 [*Blencoe*], the Judge concluded that "a delay of 10 years in this case undermines the standards of natural justice and procedural fairness." (Reasons, at paragraph 68). According to the Judge, given that this amount of time resulted in substantial prejudice to Air Transat, under these circumstances, a stay of proceedings was necessary.

[47] Consequently, the Judge allowed Air Transat's application for judicial review as well as their request under section 44 of the Act and ordered the non-disclosure of the SMS Report.

[48] On November 9, 2017, the Commissioner filed a notice of appeal against the Judge's decision, and TC filed their appeal the following day, on November 10, 2017.

V. Analysis

A. *Issues*

[49] This case raises the following issues:

1) What are the applicable standards of review?

2) Did the Judge err in ruling that paragraphs 20(1)(*a*) and (*b*) of the Act applied to the SMS Report? In the affirmative, are paragraphs 20(1)(*c*) and (*d*) applicable?

3) Did the Judge err in ruling that TC was required to give Air Transat an opportunity to be heard before deciding to adopt the Commissioner's recommendation?

4) Did the Judge err in ruling that a stay of proceedings was necessary given the amount of time that had passed during the Commissioner's investigation?

(1) Standards of review

[50] Recently, in *Canada (Office of the Information Commissioner) v. Canada (Prime Minister)*, 2019 FCA 95, the Court was required, *inter alia*, to determine the standard of review applicable to a Federal Court decision on certain exceptions provided for in the Act.

[51] In view of cases decided by the Supreme Court, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at paragraph 43, [2012] 1 S.C.R. 23 [*Merck Frosst*] and *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 [*Agraira*], this Court, through Mr. Justice de Montigny (de Montigny J.A.), concluded that we must follow the methodology propounded in *Agraira*, that is to say that our role, in reviewing a Federal Court decision on exceptions under the Act, was to determine whether the Federal Court had identified the correct standard and applied it correctly.

[52] The parties all agree that the standard that the Judge had to apply to determine whether the exceptions raised by Air Transat were valid was the standard of correctness. The Judge correctly selected this standard (*Blank v. Canada (Justice)*, 2016 FCA 189, at paragraphs 22 to 24; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R .306, at paragraphs 21 and 22; *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, at paragraphs 28 to 42; *Blank v. Canada (Justice)*, 2010 FCA 183, at paragraphs 16 and 17).

[53] There is also no dispute between the parties in relation to the applicable standard for the issue of procedural fairness raised by Air Transat, particularly TC's failure to give them an opportunity to make new submissions after TC received the Commissioner's recommendation and shared its intention to disclose the SMS Report. The Judge concluded that the standard of correctness applied to this issue as well, and in my opinion, he did not err in so ruling.

[54] Lastly, in relation to the issue regarding the unreasonable amount of time that had passed during the Commissioner's investigation, the Judge concluded that the standard of reasonableness applied. This conclusion stemmed from the fact that, in his opinion, this matter involved questions of mixed fact and law. In my opinion, the Judge erred in selecting the standard of reasonableness given that the issue related to the unreasonableness of the amount of time that passed falls under the category of matters of procedural fairness and the principles of natural justice, matters that always involve questions of mixed fact and law but that must be determined according to the standard of correctness.

[55] The Judge himself, at paragraph 68 of his reasons, concluded in relation to the unreasonableness of the time that had passed, that there had been a breach of the standards of natural justice and procedural fairness. It also appears clear from *Blencoe* that the issue of the amount of time that had passed in this case was addressed by the Supreme Court in the context of a potential breach of the duty to act fairly. Even though the Supreme Court did not discuss the matter of the applicable standard for the issue before it, there can be no doubt that the majority and minority applied the standard of correctness when ruling on this issue. Consequently, I conclude that the standard of correctness should have been applied by the Judge in this case, and that is therefore, what we will apply in this case.

> (2) Did the Judge err in ruling that paragraphs 20(1)(*a*) and (*b*) of the Act applied to the SMS Report? In the affirmative, are paragraphs 20(1)(*c*) and (*d*) applicable?

[56] In my opinion, the Judge erred in concluding that the exceptions provided for in paragraphs 20(1)(*a*) and (*b*) of the Act were applicable in this case. More specifically, even

though I cannot agree entirely with the Commissioner's analysis, I can fully agree with the conclusions included in her report of February 25, 2016, addressed to the Minister, including the recommendation to disclose the SMS Report.

a) *Paragraph 20(1)(a)*

[57] Paragraph 20(1)(*a*) provides that the head of a government institution shall refuse to disclose any record that contains "trade secrets of a third party". In support of his conclusion, namely that, in the light of the exception provided for in paragraph 20(1)(*a*), the SMS Report need not be disclosed, the Judge based his decision on a case decided by the Supreme Court, *Merck Frosst*, wherein the Supreme Court, at paragraph 109 of its reasons, defined the characteristics of 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.

[58] The Judge consequently reviewed the four above-mentioned criteria in the light of the evidence and concluded that all criteria had been met. Although it is not stated expressly, the Judge's conclusion takes the position that the entire SMS Report constitutes a trade secret.

[59] In my opinion, that conclusion is erroneous; having read the SMS Report, I was immediately convinced that the entire Report is in no way a trade secret. In other words, all the information that appears in the SMS Report obviously does not constitute trade secrets held by Air Transat.

[60] By concluding that the SMS Report constituted a trade secret held by Air Transat, the Judge failed to consider that even if the information met the four criteria propounded in *Merck Frosst* at paragraph 107, that information had to, according to the Supreme Court:

> . . . In the context of an action against a former employee to restrain disclosure of the former employer's trade secrets, several characteristics of a trade secret are set out. 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.
>
> [Italics in the original - Emphasis added].

[61] It is useful to remember that the SMS Report contains a summary of a TC inspection of Air Transat's SMS development project. The SMS Report is in no way a definitive or final evaluation of Air Transat's SMS project. With that in mind, it is difficult to see how the SMS Report could constitute a plan or process belonging to Air Transat and how the disclosure of such a report on the development of Air Transat's SMS could result in commercial or technical application by Air Transat's competitors.

[62] In view of the above, I share the Commissioner's opinion that the information included in the SMS Report is not specific or customized enough to reveal a plan or process used by Air Transat that could consequently be applied industrially and/or commercially.

[63] According to the Judge, the disclosure of the SMS Report would make Air Transat's techniques and methodologies publicly accessible. Given that no Air Transat methodology or technique is described in the SMS Report, I cannot agree with the Judge's conclusions. I would also like to underscore that Air Transat has identified no passages in the SMS Report that would reproduce or reveal what it considers to be a "trade secret".

[64] Furthermore, the Judge made no association between the relevant criteria, as set out in *Merck Frosst*, and the information contained in the SMS Report. In fact, nowhere in his decision does the Judge indicate or explain what information contained in the SMS Report could constitute a trade secret. In other words, the Judge simply concludes, with no explanation, that all the information contained in the SMS Report constituted one or more trade secrets.

[65] For these reasons, I conclude that the Judge erred in concluding that the exception provided for in paragraph 20(1)(*a*) of the Act was applicable.

[66] In any case, even if it could be concluded that certain parts of the SMS Report includes trade secrets held by Air Transat, the Judge should have, pursuant to section 25 of the Act, identified these parts of the SMS Report and allowed for the disclosure of other information

contained in the SMS Report, which he failed to do. Consequently, the Judge also erred in failing to apply section 25 of the Act.

b) *Paragraph 20(1)(b)*

[67] Paragraph 20(1)(*b*) of the Act provides that the head of a government institution shall refuse to disclose any record that contains "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".

[68] The Judge concluded that, since the information contained in the SMS Report met the criteria defined by the case law, he had to conclude that said information could not be disclosed. More specifically, the Judge based his decision on the criteria defined by Mr. Justice MacKay (MacKay J.) of the Federal Court in *Air Atonabee Ltd. v. Minister of Transport*, (1989), 27 F.T.R. 194 (T.D.) [*Air Atonabee*] at paragraph 34, criteria that the Supreme Court approved in *Merck Frosst* at paragraph 133, stating:

> In order to qualify for the exemption, the information must be (i) financial, commercial, scientific or technical information; (ii) confidential and consistently treated in a confidential manner by the third party; and (iii) supplied to a government institution by a third party. The parties accept the factors identified by MacKay J. in *Air Atonabee* as being appropriate to consider the question of whether information is confidential within the meaning of s. 20(1)(*b*).
>
> [Emphasis added.]

[69] As he did for the issue of paragraph 20(1)(*a*), the Judge again concluded, without stating it expressly, that the entire SMS Report was covered under the exception provided for in paragraph 20(1)(*b*). In my view, the Judge erred in this conclusion.

[70] Firstly, having read the SMS Report, I was immediately convinced me that the entire report is not covered by this exception. In other words, it is obvious that none of the information contained in the SMS Report is financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party.

[71] Secondly, the Judge misinterpreted the third criterion by concluding that the information contained in the SMS Report constituted information provided by Air Transat (a third party) to TC (a government institution). In my opinion, in coming to this conclusion, the Judge misunderstood the scope of consistent case law concerning reports/documents containing observations made by government institution inspectors/officials in that these observations do not constitute information provided by a third party, even when the observations made by inspectors are founded or based on documents belonging to a third party.

[72] According to the Judge, this jurisprudential doctrine did not apply in this case because it was not a regulatory inspection and there was no doubt that the observations made by TC inspectors were based on information voluntarily provided by Air Transat and their employees in confidence during TC’s pilot project.

[73] In my opinion, the question the Judge had to answer was not whether TC inspectors' observations were made as part of a regulatory inspection, but rather, whether the information contained in the SMS Report constituted information provided by Air Transat to TC or observations from TC inspectors/officials about, in this case, Air Transat's SMS.

[74] There is no doubt that the information included in the SMS Report essentially constitutes observations made by TC inspectors about Air Transat's SMS.

[75] In *Merck Frosst*, at paragraphs 154 to 156, the Supreme Court propounds the governing legal principles for the question of whether information had been provided by a third party to a government institution. Those principles are:

1) The burden of demonstrating that the information contained in a document constitutes information provided by the third party to the government institution is assumed by the third party;

2) Where government officials collect information, as in the case of an inspection or investigation, the information they obtain in that way will not be considered as having been supplied by the third party;

3) Whether or not information was supplied by a third party constitutes a question of fact.

[76] In *Merck Frosst*, at paragraph 158, the Supreme Court summarized its views on this question as follows:

> To summarize, whether confidential information has been "supplied to a government institution by a third party" is a question of fact. The content rather than the form of the information must be considered: the mere fact that the information appears in a government document does not, on its own, resolve the issue. The exemption must be applied to information that reveals the confidential information supplied by the third party, as well as to that information itself. Judgments or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.
>
> [Emphasis added.]

To the same effect, see cases decided by this Court and the Federal Court: *Canada Packers Inc. v. Canada (Minister of Agriculture)* [1989] 1 F.C. 47 (C.A.F.) [*Canada Packers*]; *Toronto Sun Wah Trading Inc. v. Canada (Attorney General)*, 62 C.P.R. (4th) 337; *Hibernia Management and Development Company Ltd. v. Canada - Newfoundland and Labrador Offshore Petroleum Board*, 2012 FC 417, [2012] FCJ No 764; *Porter Airlines Inc v. Canada (Attorney General)* 2014 FC 392, 453 FTR 221; *Air Atonabee* at paragraph 47.

[77] The Judge's reasoning on this matter appears clearly at paragraph 52 of his reasons, where he states:

> 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 stated above, there was no regulatory inspection; all observations by the inspectors in the Report were based on information provided by Air Transat in an setting of confidentiality. Unlike the situation in *Porter*, the inspectors did not make any regulatory conclusions. The inspectors made observations based on information provided by Air Transat, which they included in their Report. The observations cannot be separated from the information provided. Regardless the form in which it is eventually presented by TC, the information came from Air Transat and cannot be disclosed (*Merck Frosst*, at para 158; *Porter*, at para 40).
>
> [Emphasis added.]

[78] Nothing in the case law supports the distinction made by the Judge between a regulatory inspection and an inspection like the one conducted by TC officials in this case. In addition to this distinction, the Judge concluded that, given that the observations made by TC inspectors were based on information provided by Air Transat and that these observations could not be separated from information provided by Air Transat, the information contained in the SMS Report must constitute information provided by Air Transat to a government institution.

[79] In my opinion, this conclusion made by the Judge clearly goes against comments of the Supreme Court in *Merck Frosst* and various cases decided by our Court and the Federal Court.

[80] In my opinion, other than certain portions that have been redacted and that TC does not intend to disclose, the SMS Report contains no information that was provided by Air Transat to the government institution, but rather, observations made by TC officials. In other words, when the SMS Report is read through, it becomes clear that it essentially contains observations made by TC inspectors about various aspects related to Air Transat's SMS. According to TC's submissions, the SMS Report is essentially the work product of its officials and essentially presents their analyses and conclusion. I agree.

[81] For these reasons, I conclude that the Judge erred in concluding that the exception provided for in paragraph 20(1)(*a*) of the Act was applicable.

c) *Paragraphs 20(1)(c) and (d)*

[82] As a result of his conclusion that the exceptions provided for in paragraphs 20(1)(*a*) and (*b*) were applicable, the Judge did not rule on the applicability of the exceptions provided for in paragraphs 20(1)(*c*) and (*d*). In my opinion, these exceptions are not applicable in this case. My reasons are as follows.

[83] Under paragraphs 20(1)(*c*) and (*d*), a third party may object to the disclosure of information that, if disclosed, could reasonably be expected to result in material financial loss, to prejudice the competitive position of the third party or interfere with contractual negotiations.

[84] In *Canada Packers*, our Court stated, on page 60 of its reasons, that a third party who objects to disclosure under paragraphs 20(1)(*c*) and (*d*) has to demonstrate that "a reasonable expectation of probable harm" would result from disclosure of the information in question.

[85] In *Merck Frosst*, the Supreme Court, in paragraphs 192 to 200 of its reasons, explained why it was required to confirm this Court's approach in *Canada Packers*. In paragraph 199 of its reasons in *Merck Frosst*, the Supreme Court stated:

> I would affirm the *Canada Packers* formulation. A third party claiming an exemption under s. 20(1)(*c*) of the Act must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur. This approach, in my view, is faithful to the text of the provision as well as to its purpose.

[86] Consequently, as stated by the Supreme Court above, demonstrating that there is simply a possibility that harm would result from disclosure is insufficient to trigger the exceptions provided for in paragraphs 20(1)(*c*) and (*d*). In the light of this, the evidence must show, for the purposes of preventing the disclosure of information, how and why disclosure would result in probable harm specified by the third party. As a result, one of several affidavits indicating that disclosure could reasonably be expected to result in material financial loss, to prejudice the competitive position of the third party or interfere with contractual negotiations, do not constitute adequate evidence to prevent disclosure under paragraphs 20(1)(*c*) and (*d*).

[87] Air Transat submits that disclosure of the SMS Report would divulge the general parameters of their SMS to their competitors, along with the related implementation procedure, which would allow their competitors to save money seeing as they will be benefiting from this information without incurring expenses, making investments or putting effort into implementing their own SMS.

[88] An initial comment must be made. The SMS Report in no way divulges the parameters of Air Transat's SMS or the procedure for implementing it.

[89] My second comment is as follows. It is difficult to accept that a report that dates back over 15 years, namely a report that was prepared as part of a TC evaluation protocol that was being developed at a time when Air Transat's SMS and future regulations were far from finalized, could still be of serious interest to Air Transat's competitors. It should be noted that

since 2008, all of Air Transat's competitors have been required to have their own SMS in place, pursuant to regulations.

[90] Why would Air Transat's competitors want to refer to or make use of a 2003 SMS Report when regulatory requirements are currently in place? In my opinion, the answer is obvious.

[91] Given the information contained in the SMS Report, I cannot fathom how or why the probable harm alleged by Air Transat would result from its disclosure. In my opinion, Air Transat's evidence is purely speculative, given that they have provided no tangible or compelling facts to support their fear of harm.

[92] I therefore conclude that the exceptions provided for in paragraphs 20(1)(*c*) and (*d*) cannot prevent the disclosure of the SMS Report.

(3) Was there a breach of procedural fairness given TC's failure to give Air Transat an opportunity to be heard before deciding to adopt the Commissioner's recommendation?

[93] Air Transat submits that, and the Judge accepted that argument, TC should have given them another opportunity to provide written submissions about the applicability of the exceptions that they had raised about the SMS Report after TC had received the Commissioner's recommendation and decided to disclose the SMS Report. In other words, according to Air Transat, TC could not change their position about disclosing the SMS Report without obtaining comments from them about the Commissioner's recommendation, namely that TC

should disclose the SMS Report, because the exceptions provided for in subsection 20(1) of the Act did not apply.

[94] In my view, that conclusion was erroneous.

[95] Considering that the Act provides, in sections 27 to 35 and more specifically in paragraphs 28(1)(*a*) and 35(2)(*c*), the particular circumstances that establish a third party's right to be heard, I am strongly inclined to conclude that Air Transat had no right to be heard again after TC had received the Commissioner's recommendation and decided to disclose the SMS Report.

[96] It should be noted that Air Transat had an opportunity to make written submissions about the applicability of the exceptions they had raised on two occasions: once in 2006, after they had received a notice from TC under section 27 of the Act, and again in 2012, after receiving a notice from the Commissioner pursuant to section 35 of the Act.

[97] Notwithstanding these observations, I consider ruling definitively on this matter completely unnecessary given that, under the circumstances, I find this question to be moot. After TC decided to disclose the SMS Report, Air Transat submitted an application before the Federal Court, *inter alia*, under section 44 of the Act. As I stated previously, the applicable standard of review for such a procedure is the standard of correctness. In the light of the applicable standard, TC's decision to disclose the SMS Report was not entitled to deference on the part of the Judge Consequently, the Judge had to determine whether, in the light of the

applicable provisions and more specifically the exceptions provided for in subsection 20(1) of the Act, the disclosure of the SMS Report should be prohibited.

[98] Under section 44 of the Act, Air Transat had an opportunity to present the Judge with all the arguments that, in their opinion, should be made in support of the exceptions provided for in subsection 20(1). In other words, if, as Air Transat submits, their rights to procedural fairness had been violated given TC's failure to give them another opportunity to present their arguments, that violation was corrected when they presented their arguments to the Judge as part of the application submitted under section 44 of the Act.

[99] I, therefore, cannot see how it is possible to submit that TC's refusal to allow Air Transat to provide additional submissions constitutes, under the circumstances, a violation of their right to procedural fairness.

> (4) Do the ten years between the moment when the Commissioner initiated the investigation and the moment when she provided her recommendation warrant a stay of proceedings?

[100] The Judge concluded, as I stated in paragraph [46] of my reasons, that the ten years that passed between the moment when the Commissioner initiated the investigation and the moment when she produced her report constituted, under the circumstances, a violation of Air Transat's rights to procedural fairness.

[101] The Judge came to this conclusion on the basis of *Blencoe*, wherein the Supreme Court stated at paragraphs 101 and 102 of its reasons:

> In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, 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] 1 S.C.R. 1091, at p. 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.
>
> There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 9-67; W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at pp. 435-36). It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied (see, for example, J. M. Evans, H. N. Janisch and D. J. Mullan, *Administrative Law*: Cases, *Text, and Materials* (4th ed. 1995), at p. 256; Wade and Forsyth, *supra*, at pp. 435-36; *Nisbett*, supra, at p. 756; *Canadian Airlines*, supra; *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Ont. Div. Ct.); *Freedman v. College of Physicians & Surgeons (New Brunswick)* (1996), 1996 CanLII 4828 (NB QB), 41 Admin. L.R. (2d) 196 (N.B.Q.B.)).
>
> [Emphasis added.]

[102] Also recognizing that the delay itself did not warrant a stay of proceedings, in the light of the evidence, the Judge concluded that Air Transat had been significantly prejudiced because some of the documents that would have been useful for their case had been destroyed under their five-year record keeping practice and because some of their employees who had significant knowledge of the case had quit their jobs at Air Transat and were no longer available when the Commissioner provided her report. Furthermore, the Judge said that he considered that given the amount of time that had passed, some employees had lost their "memories" of the relevant facts.

[103] The Judge consequently said that he felt that, given the fact that the length of the Commissioner's investigation was unreasonable and that Air Transat had established significant prejudice, he was bound to order a stay of proceedings.

[104] The appellants, TC and the Commissioner, submit that this conclusion is erroneous. Firstly, they submit that the principles of *Blencoe* do not apply because, unlike the situation in *Blencoe*, Air Transat had not been the subject of a complaint. More specifically, they submit that the Commissioner's investigation in no way faulted Air Transat or made allegations against them.

[105] TC and the Commissioner also make the argument that the Commissioner, as provided for in section 34 of the Act, may determine the procedure to be followed and that no provisions specify a deadline for completing the investigation. TC adds that they are the ones who are the subject of the complaint submitted by the access requester to the Commissioner and that, ultimately, they are the ones who have suffered from the length of the investigation. For TC and the Commissioner, a stay of proceedings simply does not apply in this case.

[106] Secondly. TC and the Commissioner argue that if the principles of *Blencoe* should be applied in this case, Air Transat was unable to show significant prejudice resulting from the length of the investigation. According to TC and the Commissioner, Air Transat's evidence does not show that they could not provide full submissions in support of their position that the exceptions under subsection 20(1) of the Act apply in this case.

[107] More specifically, TC and the Commissioner argue that the evidence submitted by Air Transat was vague and unspecific about the loss or disappearance of relevant documents and the unavailability of witnesses with full knowledge of the matter.

[108] According to TC and the Commissioner, there is no doubt that Air Transat had an opportunity, at least on two occasions, once in 2006 and again in 2012, to show the applicability of the exceptions they raised in support of their objection to the disclosure of the SMS Report. Furthermore, they submit that the ten years that passed were beneficial for Air Transat in that the documents requested by the access requester were not disclosed during the investigation.

[109] Lastly, TC and the Commissioner argue that there are no provisions for the access requester's quasi-constitutional right to receive a copy of the requested documents.

[110] Before responding to TC and the Commissioner's arguments, I consider it important to carefully review the principles set out in *Blencoe*.

[111] In that case, Mr. Blencoe, a Minister of the Government of British Columbia, was accused of sexual harassment by an assistant, and then two other women submitted complaints against him before the British Columbia Human Rights Commission (BC Commission). Mr. Blencoe was informed of these complaints in July 1995 and September 1995.

[112] Following the BC Commission's investigation, hearings were scheduled before the appropriate court for March 1998—thirty months after the complaints were submitted.

[113] In November 1997, Mr. Blencoe submitted an application for judicial review seeking a stay of proceedings against him on the grounds that the BC Commission had lost its jurisdiction given the length of time it took to process the complaints. According to Mr. Blencoe, he and his family had suffered significant prejudice equivalent to an abuse of process and denial of natural justice.

[114] The trial court dismissed his application for judicial review, so Mr. Blencoe brought that decision before the British Columbia Court of Appeal, which allowed the appeal. According to majority of the Court of Appeal, Mr. Blencoe had been denied his right to fundamental justice and security under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982 c. 11 (U.K.) (the Charter). The case was taken before the Supreme Court of Canada, which overruled the Court of Appeal's decision.

[115] According to the majority, through Mr. Justice Bastarache (Bastarache J.), the right to be tried within a reasonable time applies to criminal matters only. Consequently, the Court of Appeal erred in applying principles from paragraph 11(*b*) of the Charter to procedures related to human rights, based on section 7 of the Charter, that apply only in criminal law.

[116] According to the majority, administrative law allows for an appropriate remedy when an unacceptable, state-caused delay causes significant prejudice to someone involved in an administrative proceeding. Furthermore, according to the majority, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law.

[117] Considering that the harm suffered by Mr. Blencoe was insufficient to conclude that his right to a fair trial had been violated, the majority then addressed the question "whether the delay in this case could amount to a denial of natural justice or an abuse of process even where the respondent has not been prejudiced in an evidentiary sense." (*Blencoe*, para. 104).

[118] After a brief review of relevant case law, in particular *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477, at p. 490 [*Misra*]; *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (B.C.S.C.); and *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 [*Ratzlaff*], Bastarache J. concluded, in paragraph 115 of his reasons, that an unreasonable delay may, under certain circumstances, constitute an abuse of process. He stated the following:

> I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an "unacceptable delay" that amounts to an abuse of process.
>
> [Emphasis added.]

[119] At paragraph 116 of his reasons, Bastarache J. concluded that "[a]buse of process is a common law principle invoked principally to stay proceedings where to allow them to continue would be oppressive." At paragraph 117, he added that a stay of proceedings is not the only remedy available in administrative law proceedings.

[120] At paragraph 122 of his reasons, Bastarache J. stated that the determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, and whether the respondent contributed to the delay or waived the delay.

[121] In that same paragraph, Bastarache J. added that the determination of whether a delay is inordinate and whether the community's sense of fairness would be offended by the delay is not based on the length of the delay alone, "but on contextual factors, including the nature of the various rights at stake in the proceedings".

[122] Then, after citing Lord Justice Salmon (Salmon L.J.) in *Allen v. Sir Alfred McAlpine & Sons, Ltd.*, [1968] 1 All E.R. 543 (C.A.), at p. 561, [*McAlpine*], according to whom "it should not be too difficult to recognise [sic] inordinate delay when it occurs", Bastarache J. concluded that the delay in this case was not one that would offend "the community's sense of decency and fairness." (*Blencoe*, at para. 132).

[123] Consequently, the majority allowed the appeal and overturned the Court of Appeal's ruling. Notwithstanding this conclusion, the Supreme Court awarded the costs of the case to Mr. Blencoe, given the BC Commission's lack of diligence.

[124] The minority, through Mr. Justice LeBel (LeBel J.), stated that they agreed with the majority's opinion that a stay of proceedings was not warranted in this case. According to the minority, the Court of Appeal had not considered the complainants' interests when it ordered the stay of proceedings. Furthermore, according to the minority, it was appropriate to order an expedited complaints hearing and to order the BC Commission to pay Mr. Blencoe common costs between the parties before the Supreme Court and before British Columbia courts.

[125] The minority's reasoning is as follows.

[126] In their opinion, there is no doubt that the delay in this case was inordinate and in violation of recognized principles in administrative law. According to the minority, the fundamental question that needed to be answered to determine whether an abuse of procedure had occurred in administrative law was the following: "has an administrative agency treated people inordinately badly?" (*Blencoe*, at para. 144).

[127] After briefly reviewing relevant case law and more specifically *Misra* and *Ratzlaff*, and after citing with approval Mr. Justice Hollinrake (Hollinrake J.) as cited in paragraph 19 of *Ratzlaff*, LeBel J. stated the following at paragraph 154 of his reasons:

> Abusive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing. The cases that have been part of this evolution have sometimes expressed the point differently, but the key consideration is this: administrative delay that is determined to be unreasonable based on its length, its causes, and its effects is abusive and contrary to the administrative law principles that exist and should be applied in a fair and efficient legal system.
>
> [Emphasis added.]

[128] According to LeBel J., two principles must be kept in mind in determining whether an administrative delay was inordinate: not all delay is the same; and not all administrative bodies are the same. Thus, inevitably, a court's assessment of an administrative delay has to depend on certain contextual analytic factors, namely: (1) the time taken compared to the inherent time requirements of the matter before the particular administrative body; (2) the causes of delay beyond the inherent time requirements of the matter; and (3) the impact of the delay on the parties. At paragraph 160 of his reasons, LeBel J. explains these factors in the following terms:

> (1) the time taken compared to the inherent time requirements of the matter before the particular administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data), as well as reasonable periods of time for procedural safeguards that protect parties or the public;
>
> (2) the causes of delay beyond the inherent time requirements of the matter, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as efficiently as possible those resources it had available; and
>
> (3) the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.
>
> [Emphasis in the original.]

[129] According to LeBel J., these three factors are such that judges must consider the particular facts of the case before them to arrive at a conclusion about the nature of the delay.

[130] As for the first factor, namely the time taken compared to the inherent time requirements of the matter, LeBel J. concluded that the BC Commission had been "slow at every step along the way." (*Blencoe*, at para. 170). In other words, the inherent time requirements of the matter did not justify the time taken.

[131] As for the second factor, namely the causes of delay beyond the inherent time requirements of the matter, LeBel J., concluded that it could in no way be attributed to Mr. Blencoe. On the contrary, the delay was clearly the result of "the sheer inefficiency of the Commission in dealing with these and other matters." (*Blencoe,* at para. 171).

[132] LeBel J. then addressed the third factor, namely the impact of the delay. Firstly, he stated that the BC Commission had shown a lack of concern for the possible effects of delays and that it had done nothing to reduce that impact on Mr. Blencoe. He added that the blunders made by the BC Commission in the management of complaints had harmed all parties involved "in this sorry process." According to LeBel J., "[i]ts flaws were such that it may rightly be termed to have been abusive in respect of [Mr. Blencoe]." (*Blencoe*, at para. 177).

[133] Lastly, in paragraphs 178 *et seq.* of his reasons, LeBel J. addressed the appropriate remedy and underscored the clear need to consider not only the interest of Mr. Blencoe, but also that of the complainants themselves and "the public interest of the community itself". In

LeBel J.'s opinion, whoever asks for a stay of proceedings carries a heavy burden and even more so in a human rights proceeding, given the potential consequences on complainants' right to have their complaints heard and dealt with.

[134] Consequently, according to LeBel J., a stay of proceedings should not generally appear as the sole or even the preferred remedy (*Blencoe*, at para.180). In paragraph 181 of his reasons, LeBel J. stated the following:

> . . . For a stay to be appropriate as a remedy for an abuse that has already occurred, the abuse must rise to a level such that the mere carrying forward of the case will offend society's sense of justice (*Tobiass*, at para. 91): i.e., in my analysis, where there is a gross or shocking abuse, or where the societal interest in proceeding does not outweigh the considerations I have enumerated.
>
> [Emphasis added.]

[135] In that case, the minority concluded that the stay of proceedings ordered by the Court of Appeal was excessive and unfair in the circumstances of this case. They also found it justified, as explained earlier, to order an expedited hearing before the appropriate court and to award Mr. Blencoe costs between the parties before the Supreme Court and lower courts.

[136] In my opinion, there is no substantial difference between the majority's and the minority's opinion. The principles set out in *Blencoe* that must inform our decision can be summarized as follows.

[137] Firstly, contrary to what TC and the Commissioner submit, there is no doubt that *Blencoe* applies in this case. At paragraph 102 of his reasons, on behalf of the majority, Bastarache J.

stated that the principles of natural justice and the duty of fairness are part of every administrative proceeding. In other words, there was no need for a complaint against a person, in this case, against Air Transat, in order for the principles set out in *Blencoe* to apply.

[138] Secondly, according to *Blencoe* states that administrative law allows for an appropriate remedy, including a stay of proceedings, when an unacceptable, state-caused delay causes significant prejudice to someone.

[139] Thirdly, both the majority and minority agreed that unacceptable delay may amount to an abuse of process in certain circumstances even where "the fairness of the hearing" has not been compromised. In paragraph 115 of his reasons, on behalf of the majority, Bastarache J. qualified the delay in this case as one that would, in the circumstances of the case, "bring the human rights system into disrepute."

[140] Fourthly, both the majority and the minority stated that the stay of proceedings did not constitute the sole possible remedy in administrative law and that determining the appropriate remedy required consideration of a certain number of criteria, including, obviously, the facts of the case, the issues, the purpose of the proceedings, and whether the person requesting the stay of proceedings, on the grounds of a delay, contributed to the delay.

[141] Both the majority and minority also stated that it was essential to consider the different rights subject to the administrative proceeding in issue.

[142] Fifthly, according to the opinions of both the majority and minority in *Blencoe*, the complainants' rights must be considered by deciding what was the appropriate remedy. According to LeBel J., on behalf of the minority, the Court of Appeal failed to take account of these rights when it ordered a stay of proceedings against Mr. Blencoe. In his opinion, more particularly in a human rights context, both the complainants' interests and the public interest of the community are important.

[143] LeBel J. added in paragraph 181 of his reasons, that the abuse must offend society's sense of justice. In his opinion, a stay of proceedings is justified where there is a gross or shocking abuse, or where the societal interest in proceeding "does not outweigh the considerations I have enumerated."

[144] In the light of these principles, we must answer the following question: does a stay of proceedings, on the grounds of a ten-year delay between 2005 and 2016, constitute an appropriate remedy in this case? In my opinion, even if the delay was unacceptable and significantly prejudiced Air Transat, that question, given the particular circumstances of this case, must be answered in the negative.

[145] The Judge concluded that a stay of proceedings was the appropriate remedy, given the ten-year delay and his finding that Air Transat was significantly prejudiced as a result of this delay, including a violation of their right to a fair hearing.

[146] In paragraphs [104] to [109] of my reasons, I summarized TC's and the Commissioner's arguments in support of their position that the Judge erred in concluding that the delay had caused significant prejudice to Air Transat. In short, TC and the Commissioner are challenging the Judge's conclusion on the ground that *Blencoe* does not apply at all in this case, and even if it did, Air Transat had been unable to show a prejudice resulting in a violation of their right to a fair hearing.

[147] TC's and the Commissioner's arguments in no way address the issue, which was discussed in full by both the majority and minority in *Blencoe*, concerning the abuse of process that may, under certain circumstances, result in a stay of proceedings. Instead, the arguments raised by TC and the Commissioner address only what I can describe as the first component of *Blencoe*, i.e. whether, because of a long delay, a person experienced significant prejudice affecting his or her right to a fair hearing. In relation to this issue, I would like to reiterate that in paragraphs 101 and 102 of their reasons in *Blencoe*, the majority stated that a delay alone does not warrant a stay of proceedings, but that if such a delay results in significant prejudice undermining a person's right to a fair hearing, this may result in a stay of proceedings.

[148] Before I address the issue of abuse of process, which I would describe as the second component of *Blencoe*, I will address the issue of whether the ten-year delay caused significant prejudice to Air Transat in relation to their right to a fair hearing, as concluded by the Judge

[149] For the purposes of this discussion and the discussion on the theory on which is based the notion of abuse of process in administrative law, as described by the Supreme Court in *Blencoe*, I

am of the view that there can be no doubt that the delay between the moment when the ATI request was submitted in 2005 and the moment when the Commissioner's report was issued in 2016 and TC decided to disclose the SMS Report, can only be described as unreasonable. The Commissioner submitted the affidavit of Layla Michaud, Deputy Commissioner for the Office of the Information Commissioner of Canada, sworn on September 15, 2016, to explain the reasons for the delay. I will come back to Ms. Michaud's affidavit in my discussion on the issue of abuse of process in administrative law.

[150] Air Transat's position is as follows. They submit that they have been significantly prejudiced such that their right to procedural fairness was undermined, given that, as a result of the delay, certain documents relevant to the case had been destroyed in accordance with their five-year record-keeping practice, and certain witnesses who would have been useful in this case had left their employment and had, in any case, partially lost their "memories" of relevant events. Consequently, Air Transat submits that their ability make full and complete submissions was seriously affected.

[151] In my view, Air Transat's submission must be rejected. I fully agree with TC's and the Commissioner's submissions that Air Transat's evidence is vague and unspecific about the destroyed documents and their relevance as well as witnesses who, had it not been for the delay and their departure from Air Transat, could have provided relevant evidence that would have an impact on legal proceedings.

[152] In other words, I am in no way persuaded by Air Transat's evidence that the loss of documents and the departure of witnesses prevented them from providing adequate submissions in support of the exceptions invoked to warrant the non-disclosure of the SMS Report. As underscored by the Commissioner, the Judge [TRANSLATION] "did not raise any issues with the sufficiency or quality of the evidence submitted by AT to decide that the exceptions applied." (Memorandum of the Commissionner, at paragraph 105.)

[153] More specifically, I consider that Air Transat was unable to identify any relevant document that could have had an impact on the outcome of their case. Once again, Air Transat had an opportunity to make written submissions in support of their position on two occasions: on January 19, 2006, and again on September 28, 2012. When they made their submissions in 2006, their record-keeping policy had clearly not yet required the destruction of documents relevant to the period between 2001 and 2006. Although the Judge, in paragraph 64 of his reasons, mentions the disappearance of certain documents, he does not explain how these documents could have had an impact on the outcome of the case and how these documents prevented Air Transat from providing additional submissions.

[154] In any case, it appears clear, upon reviewing their written submissions, that Air Transat has not changed much over the years and that, for all intents and purposes, they submitted the same documents in support of their position. Air Transat also provided over 1,600 pages of documentation in support of their submissions.

[155] As for their argument based on witnesses' departure and loss of their "memories" of relevant events, I would like to underscore that one of the affiants, Mr. Dilollo, had been involved in presenting Air Transat's evidence since 2004. That witness was, at the relevant time, technical lead for Air Transat. I do not accept that his leaving his position with Air Transat in 2011 resulted in a significant prejudice for Air Transat.

[156] In conclusion, I accept TC's and the Commissioner's arguments that Air Transat [TRANSLATION] "instead chose to state generally that certain 'key employees' had left their positions, that others had faded memories and that documents relevant to the legal proceedings had probably been destroyed." (Memorandum of Fact and Law filed on behalf of TC, at para. 112.) More specifically, as I already stated, Air Transat did not identify which relevant documents that were no longer available could have had a deciding effect on the exceptions they invoked.

[157] TC and the Commissioner also submitted, and I agree, that the central argument put forward by Air Transat was not that there was a confidentiality agreement between them and TC, but rather, that the confidential nature of the process that resulted in the production of the SMS Report was inherent to their participation in the process. In that perspective, I am of the view that Air Transat's argument that they were significantly prejudiced as a result of the disappearance of certain documents that had existed but were apparently destroyed because of their record-keeping policy cannot be considered a serious or strong argument. The evidence of record, as I stated earlier, is insufficient to support Air Transat's argument.

[158] Consequently, I conclude that the Judge erred in concluding that the over-ten-year delay significantly prejudiced Air Transat, thereby undermining their right to procedural fairness.

[159] Notwithstanding this conclusion, in line with statements made by Bastarache J. (paragraph 115) and LeBel J. (paragraphs 144 and 181) in *Blencoe*, I am of the view that the administrative agencies in this case, i.e. TC and the Commissioner, treated Air Transat "inordinately badly", that the administrative proceeding in this case constitutes gross and shocking abuse, that this process brings the access to information regime into disrepute, and finally that the societal interest in the proceeding does not outweigh the negative effects exerted on Air Transat and the access requester. I have so concluded for the following reasons.

[160] Although I am of the view that the ten-year delay did not significantly prejudice Air Transat in terms of their right to procedural fairness, I have no doubt that the process strongly prejudiced Air Transat in a broader sense, i.e. having to manage a case of this nature (voluntary and confidential disclosure) over ten years without ever knowing whether the matter has been settled, having to ask their staff and counsel to repeat work that had already been done several years prior, having to track down certain employees and attempt to refresh their memory, and finally, having to incur clearly unnecessary expenses.

[161] In support of that point of view, it is worth reiterating that Air Transat's lawyers closed this case on two occasions given that their client had received no news or communication from TC or the Commissioner. The periods in question are from January 2006 to July 2012 and from September 2012 to April 2016. From Air Transat's perspective, the case had remained "at a

standstill" or "completed" during these periods. It is therefore easy to imagine the consternation at Air Transat when they received TC's letter dated April 18, 2016, informing them that TC intended to disclose the SMS Report.

[162] I would also like to underscore the fact that neither TC nor the Commissioner thought to inform Air Transat that their case was still active and that because of technical or other difficulties, was progressing slowly. I can only conclude that these two administrative agencies had little consideration for Air Transat and for respecting their rights in relation to the process underway.

[163] It is also important to mention that in 2004, TC adopted the position that the SMS Report was exempt from disclosure and that TC maintained that position until spring 2016. Consequently, during all the years since 2004, Air Transat had reason to believe that the SMS Report would not be disclosed by TC.

[164] Although I conclude that, after receiving the Commissioner's report, TC had no legal duty to consult Air Transat or request further arguments from them before making a final decision, TC nevertheless acted in a cavalier fashion in the circumstances. In other words, as worded by LeBel J. in paragraph 144 of his reasons in *Blencoe*, TC treated Air Transat "inordinately badly."

[165] I also consider that the access requested was significantly prejudiced as a result of the ten-year delay. In other words, had the case been handled diligently, the access requester would

have already received a copy of the SMS Report several years ago, or would have understood that the SMS Report could not be disclosed in the light of exceptions.

[166] It should be reiterated that the SMS Report discusses Air Transat's 2003 SMS. If disclosure were required, it seems to me undeniable that the process must be diligent given the fact that, as we know now, airline security has come a long way since 2001. In other words, in this case, the SMS Report was relevant in the context of security issues that existed in 2003, which explains why its disclosure was required by the access requester.

[167] Although there is no need to rule on this issue, I have serious doubts about the relevance of the SMS Report in 2019. In effect, I am confident that Air Transat's 2019 SMS Report is substantially different from the SMS plan they prepared between 2001 and 2003 upon TC's request so that TC could develop a national security plan that would apply to all airline companies in Canada. Given that the access requester had the right to receive the requested document within a reasonable time frame after the ATI request was submitted in 2005, the access requester was significantly prejudiced by the ten-year delay.

[168] Consequently, had I concluded that the stay of proceedings was the appropriate remedy in this case, that remedy would in no way prejudice the access requester. In other words, I am satisfied that the prejudice suffered by the access requester occurred before the stay of proceedings.

[169] Before I explain why I have concluded that a stay of proceedings does not constitute the appropriate remedy in this case, I must return to Layla Michaud's affidavit on behalf of the Commissioner, dated September 15, 2016, in which she explains the ten-year delay, which she attributes to the following factors:

1) TC's refusal to disclose the SMS Report before receiving the Commissioner's recommendation;
2) the complexity of the case, which initially involved 600 documents;
3) resource scarcity for both the Commissioner and TC;
4) the fact that the Commissioner had updated her analyses of the case in the light of cases decided in 2012 and 2013 on section 20 of the Act;
5) the fact that three people held the position of Commissioner between 2005 and 2016;
6) the volume of complaints submitted to the Commission during the period in question;
7) the Commissioner's lack of resources to process cases diligently;
8) the lack of competent staff to process cases;
9) the fact that there was a similar resource and staff situation at TC.

[170] In my opinion, although they explain why the case was processed so slowly, these factors do not justify the delay in question. I consider the fact that the case should have been resolved over a much shorter period of time than the delay in question to be indisputable. I can only conclude that the Commissioner's lack of diligence resulted in bringing the access to information regime into disrepute. Lastly on this point, despite the fact that Ms. Michaud submits that the

case was complex in her affidavit, she in no way attempts to demonstrate the truth of her claim. Under the circumstances, the complexity of the case cannot justify the ten-year delay.

[171] Despite my conclusion regarding the delay and process in question, I cannot conclude that a stay of proceedings constitutes the appropriate remedy in this case. Even were we to order a stay of proceedings for the process initiated in 2005 by the submission of the access to information request, that remedy could not be enforced for a new request made by another person requesting the disclosure of Air Transat's SMS Report. Consequently, our remedy would be pointless.

[172] Under the circumstances, it appears clear to me that the appropriate remedy, as in *Blencoe*, is an order awarding Air Transat costs before the Federal Court and before this Court. Given that during the hearing the matter of costs was not discussed, I consider that we should give the parties thirty days to provide written submissions of no more than ten pages with regard to the amount of costs that should be awarded to Air Transat. I will leave it up to the parties, unless they advise otherwise, to agree upon an acceptable time frame for everyone for providing their respective submissions.

VI. Conclusion

[173] For these reasons, it is my view that the appeals should be allowed with costs in favour of Air Transat, that the Federal Court ruling should be overturned and, as the Federal Court should have ruled, that the application for judicial review and the process provided for under section 44 of the Act should be dismissed with costs in favour of Air Transat. Once submissions from the

parties have been received, the Court shall determine the amount of costs to be awarded to Air Transat.

"M. Nadon"

J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Richard Boivin J.A."

APPENDIX

***Access to information Act*, R.S.C. 1985, c. A-1**	***Loi sur l'accès à l'information*, L.R.C. 1985, ch. A-1**
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*) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.	*d*) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.
…	[…]
Severability	**Prélèvements**
25 Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of	25 Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé,

the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

s'autoriser de la présente loi pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

…

[…]

Notice to third parties

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.

Avis aux tiers

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

(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 waived the requirement.

Renonciation à l'avis

(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.

…

[…]

Representations of third party and decision

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,

(*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

(*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.

…

Where the Information Commissioner recommends disclosure

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

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

(*b*) any third party that the head of the institution has notified under

Observations des tiers et décision

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) 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) 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.

[…]

Recommandation du Commissaire à l'information

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) la personne qui en a fait la demande;

b) le tiers à qui il a donné l'avis prévu au paragraphe 27(1) ou à qui il

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.

l'aurait donné s'il avait eu l'intention de donner communication totale ou partielle du document

…

[…]

Receipt and investigation of complaints

30(1) Subject to this Act, the Information Commissioner shall receive and investigate complaints

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*) from persons who have been refused access to a record requested under this Act or a part thereof;

a) déposées par des personnes qui se sont vu refuser la communication totale ou partielle d'un document qu'elles ont demandé en vertu de la présente loi;

…

[…]

Written complaint

31 A complaint under this Act shall be made to the Information Commissioner in writing unless the Commissioner authorizes otherwise. If the complaint relates to a request by a person for access to a record, it shall be made within sixty days after the day on which the person receives a notice of a refusal under section 7, is given access to all or part of the record or, in any other case, becomes aware that grounds for the complaint exist.

Plainte écrite

31 Toute plainte est, sauf dispense accordée par le Commissaire à l'information, déposée devant lui par écrit; la plainte qui a trait à une demande de communication de document doit être faite dans les soixante jours suivant la date à laquelle le demandeur a reçu l'avis de refus prévu à l'article 7, a reçu communication de tout ou partie du document ou a pris connaissance des motifs sur lesquels sa plainte est fondée.

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

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

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.

concernée de son intention d'enquêter et lui fait connaître l'objet de la plainte.

Notice to third parties

33 Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof and receives a notice under section 32 of a complaint in respect of the refusal, the head of the institution shall forthwith advise the Information Commissioner of 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 intended to disclose the record or part thereof.

Avis aux tiers

33 Dans les cas où il a refusé de donner communication totale ou partielle d'un document et qu'il reçoit à ce propos l'avis prévu à l'article 32, le responsable de l'institution fédérale mentionne sans retard au Commissaire à l'information le nom du 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.

Regulation of procedure

34 Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act.

Procédure

34 Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information peut établir la procédure à suivre dans l'exercice de ses pouvoirs et fonctions.

Investigations in private

35(1) Every investigation of a complaint under this Act by the Information Commissioner shall be conducted in private.

Secret des enquêtes

35(1) Les enquêtes menées sur les plaintes par le Commissaire à l'information sont secrètes.

Right to make representations

(2) In the course of an investigation of a complaint under this Act by the Information Commissioner, a reasonable opportunity to make representations shall be given to

Droit de présenter des observations

(2) Au cours de l'enquête, les personnes suivantes doivent avoir la possibilité de présenter leurs observations au Commissaire à l'information, nul n'ayant toutefois le droit absolu d'être présent lorsqu'une autre personne présente des

observations au Commissaire à l'information, ni d'en recevoir communication ou de faire des commentaires à leur sujet :

(*a*) the person who made the complaint,

a) la personne qui a déposé la plainte;

(*b*) the head of the government institution concerned, and

b) le responsable de l'institution fédérale concernée;

(*c*) a third party if (i) the Information Commissioner intends to recommend the disclosure under subsection 37(1) of all or part of a record that contains — or that the Information Commissioner has reason to believe might contain — trade secrets of the third party, information described in paragraph 20(1)(*b*) or (*b*.1) that was supplied by the third party or information the disclosure of which the Information Commissioner can reasonably foresee might effect a result described in paragraph 20(1)(*c*) or (*d*) in respect of the third party, and (ii) the third party can reasonably be located.

c) un tiers, s'il est possible de le joindre sans difficultés, dans le cas où le Commissaire à l'information a l'intention de recommander, aux termes du paragraphe 37(1), la communication de tout ou partie d'un document qui contient ou 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, selon lui, d'entraîner pour le tiers les conséquences visées aux alinéas 20(1)*c*) ou *d*).

…

[…]

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

Avis à la personne qui a fait la demande

44(2) Le responsable d'une institution

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 person who requested access to the record.

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 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.

Comparution

44(3) La personne qui est avisée conformément au paragraphe (2) peut comparaître comme partie à l'instance.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKETS:	A-340-17 and A-338-17
STYLE OF CAUSE:	A-340-17 TRANSPORT CANADA/MINISTER OF TRANSPORT CANADA v. AIR TRANSAT A.T. INC. and INFORMATION COMMISSIONER OF CANADA A-338-17 INFORMATION COMMISSIONER OF CANADA AND AIR TRANSAT A.T. INC. and TRANSPORT CANADA/MINISTER OF TRANSPORT OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 7, 2018
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	GAUTHIER J.A. BOIVIN J.A.
DATED:	NOVEMBER 20, 2019

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