Federal Court Cour fédérale

**Date: 20150622**

**Docket: T-1954-14**

**Citation: 2015 FC 776**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

**Ottawa, Ontario, June 22, 2015**

**PRESENT: The Honourable Mr. Justice Gascon**

**BETWEEN:**

**ROGER CODERRE,**
**MADELEINE CODERRE,**
**JOCELYN CODERRE,**
**RICHARD CODERRE,**
**ST-GERMAIN TRANSPORT LTÉE,**
**LES IMMEUBLES S.G.T. LTÉE AND**
**GESTION S.G.T. LTÉE**

**Applicants**

**and**

**THE INFORMATION COMMISSIONER OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

## I. Introduction

[1] In this case, applicants Roger Coderre, his spouse, his two children and three companies controlled by him or a member of his family filed an application for judicial review pursuant to section 18 of the *Federal Courts Act*, RSC 1985, c F-7, seeking a writ of mandamus requiring the respondent, the Information Commissioner of Canada [the Commissioner], to disclose to them the reports of the findings of various investigations initiated by the Commissioner under the *Access to Information Act*, RSC 1985, c A-1 [the AIA].

[1] These investigations were launched by the Commissioner in response to complaints submitted to her by the applications after the Canada Customs and Revenue Agency, now the Canada Revenue Agency [CRA], refused to disclose certain records that they had requested.

[2] For the reasons that follow, the application for judicial review is dismissed.

## II. Facts

[3] Applicant Roger Coderre is the spouse of applicant Madeleine Coderre and the father of applicants Richard Coderre and Jocelyn Coderre. Roger Coderre is also president of applicant St-Germain Transport Ltée [SGT] and was acting president of applicant Gestions S.G.T. Ltée [Gestions] before these two companies merged. SGT is a holding company, just as Gestions was. Applicant Richard Coderre, meanwhile, is president of the third company, applicant Les Immeubles S.G.T. Ltée [Immeubles].

[4] The Commissioner is an independent agent of the Parliament of Canada whose role is to enforce the AIA and investigate complaints made to her, under the AIA, in respect of refusals by federal government institutions to disclose a record or a part of a record.

[5] On November 10, 2003, the applicants received notices of reassessment made by the CRA pursuant to the *Income Tax Act*, RSC 1985, c 1 (5th Supp.) [ITA], with regard to income declared by the applicants for the years 1997 to 2000.

[6] On January 16, 2014, six of the applicants made a request to the CRA for access to records that the CRA had seized in its investigation leading to notices of reassessment. On January 22, 2014, the seventh applicant, Jocelyn Coderre, also made a similar request to the CRA for access to records. These access requests pertained to [TRANSLATION] "[a]ll records in the possession of Revenue Canada concerning the reassessments for the years 1997 to 2000". In addition, the applicants asked that certain records described in the requests be given priority.

[7] On February 28, 2014, the CRA gave notice, pursuant to section 9 of the AIA, of an extension of the time limit to respond to the applicants' requests for access to records. By this notice of extension, the CRA notified the applicants that it was extending the time limit granted to it under the AIA to respond to their requests by an additional 180 days. Section 7 of the AIA provides that a government institution that receives an access request is required to respond to it within 30 days, unless this time limit is extended.

[8] On March 12, 2014, each of the applicants submitted a complaint to the Commission, alleging that the length of the extension declared by the CRA was excessive [extension complaints].

[9] Then, between March 27 and August 6, 2014, the CRA sent the applicants some of the records to which they had requested access, including a portion of the records to which they had requested priority access. However, the CRA had redacted these records in places, on various grounds provided for in the AIA. All these records disclosed by the CRA thus became the subject of a second series of five complaints by the applicants, on the basis that several pages had been redacted or removed without justification [exemption complaints].

[10] The applicants submitted these five exemption complaints to the Commissioner between April 2 and August 11, 2014.

[11] On August 28, 2014, the CRA's 180-day extension came to an end. However, the CRA still did not disclose all the initially requested records to the applicants.

[12] On September 8, 2014, the applicants filled out and submitted a third series of complaints, this time of the basis of a "deemed refusal to grant access" under section 10 of the AIA [deemed refusal complaints]. In these seven deemed refusal complaints, the applicants alleged that the CRA had failed to give them access to all the records described in their requests for access to records, despite the extended time limit that the CRA had to do so.

[13] On September 12, 2014, the applicants instituted this application for judicial review by which they are seeking a writ of mandamus requiring the Commissioner to give access, within 30 days of the judgment, to reports of the findings of her investigations into all the applicants' complaints, of which there are now 19.

[14] On November 5, 2014, the Commissioner sent the CRA and each of the applicants the reports on her findings with regard to the first series of seven extension complaints submitted on March 12, 2014. The Commissioner's investigation into the seven initial complaints having been completed, this portion of this application for judicial review is now moot, so there is nothing to be gained by hearing and dealing with it here (*Nichol v Canada (Privacy Commissioner)*, 2001 FCT 412, at paras. 6-7).

[15] The Commissioner's investigations regarding the applicants' other 12 complaints exemption or deemed refusal complaints, however, have not been completed.

## III. Issue

[16] The only issue raised in this case is whether the applicants have met the necessary conditions for the Court to exercise its discretion and issue a writ of mandamus ordering the Commissioner to provide reports of the findings from her investigations into the various complaints submitted by the applicants.

## IV. Applicable statutory provisions

[17] The relevant provisions of the AIA are found in sections 30, 34, 35, 37, 41, 62 and 63 of that Act. They read as follows:

| | |
|---|---|
| *Receipt and investigation of complaints* | *Réception des plaintes et enquêtes* |
| 30. (1) Subject to this Act, the Information Commissioner shall receive and investigate complaints; | 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;

(*b*) from persons who have been required to pay an amount under section 11 that they consider unreasonable;

b) déposées par des personnes qui considèrent comme excessif le montant réclamé en vertu de l'article 11;

(*c*) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;

c) déposées par des personnes qui ont demandé des documents dont les délais de communication ont été prorogés en vertu de l'article 9 et qui considèrent la prorogation comme abusive;

(*d*) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;

d) déposées par des personnes qui se sont vu refuser la traduction visée au paragraphe 12(2) ou qui considèrent comme contre-indiqué le délai de communication relatif à la traduction;

(*d.1*) from persons who have not been given access to a record or a part thereof in an alternative format pursuant to a request made under subsection 12(3), or have not been given such access within a period of time that they consider appropriate;

d.1) déposées par des personnes qui se sont vu refuser la communication des documents ou des parties en cause sur un support de substitution au titre du paragraphe 12(3) ou qui considèrent comme contre-indiqué le délai de communication relatif au transfert;

(*e*) in respect of any publication or bulletin referred to in section 5; or

e) portant sur le répertoire ou le bulletin visés à l'article 5;

(*f*) in respect of any other matter relating to requesting or obtaining access to records under this Act.

f) portant sur toute autre question relative à la demande ou à l'obtention de documents en vertu de la présente loi.

*Marginal note: Complaints submitted on behalf of complainants*

*Note marginale : Entremise de représentants*

(2) Nothing in this Act precludes the Information Commissioner from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorized by the complainant

(2) Le Commissaire à l'information peut recevoir les plaintes visées au paragraphe (1) par l'intermédiaire d'un représentant du plaignant. Dans les autres articles de la présente loi, les dispositions qui concernent le

to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorized.

plaignant concernent également son représentant.

*Marginal note: Information Commissioner may initiate complaint*

(3) Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Commissioner may initiate a complaint in respect thereof.

*Note marginale : Plaintes émanant du Commissaire à l'information*

(3) Le Commissaire à l'information peut lui-même prendre l'initiative d'une plainte s'il a des motifs raisonnables de croire qu'une enquête devrait être menée sur une question relative à la demande ou à l'obtention de documents en vertu de la présente loi.

. . .

[…]

*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.

*Marginal note: 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

*Note marginale : 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

b) le responsable de l'institution

institution concerned, and

(*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.

However no one is entitled as of right to be present during, to have access to or to comment on representations made to the Information Commissioner by any other person.

. . .

*Findings and recommendations of Information Commissioner*

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

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

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

fédérale concernée;

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 auxalinéas 20(1)c) ou d).

[…]

*Conclusions et recommandations du Commissaire à l'information*

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

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

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

*Report to complainant and third parties*

(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant and any third party that was entitled under subsection 35(2) to make and that made representations to the Commissioner in respect of the complaint the results of the investigation, but where a notice has been requested under paragraph (1)(*b*) no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

. . .

*Review by Federal Court*

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

. . .

*Confidentiality*

62. Subject to this Act, the Information Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act.

*Compte rendu au plaignant*

(2) Le Commissaire à l'information rend compte des conclusions de son enquête au plaignant et aux tiers qui pouvaient, en vertu du paragraphe 35(2), lui présenter des observations et qui les ont présentées; toutefois, dans les cas prévus à l'alinéa (1)b), le Commissaire à l'information ne peut faire son compte rendu qu'après l'expiration du délai imparti au responsable de l'institution fédérale.

[…]

*Révision par la Cour fédérale*

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

[…]

*Secret*

62. Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information et les personnes agissant en son nom ou sous son autorité sont tenus au secret en ce qui concerne les renseignements dont ils prennent connaissance dans l'exercice des pouvoirs et fonctions que leur confère la présente loi.

| | |
|---|---|
| *Disclosure authorized* | *Divulgation autorisée* |
| 63. (1) The Information Commissioner may disclose or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information | 63. (1) Le Commissaire à l'information peut divulguer, ou autoriser les personnes agissant en son nom ou sous son autorité à divulguer, les renseignements : |
| (*a*) that, in the opinion of the Commissioner, is necessary to | a) qui, à son avis, sont nécessaires pour : |
| (i) carry out an investigation under this Act, or | (i) mener une enquête prévue par la présente loi, |
| (ii) establish the grounds for findings and recommendations contained in any report under this Act; or | (ii) motiver les conclusions et recommandations contenues dans les rapports et comptes rendus prévus par la présente loi; |
| (*b*) in the course of a prosecution for an offence under this Act, a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, a review before the Court under this Act or an appeal therefrom. | b) dont la divulgation est nécessaire, soit dans le cadre des procédures intentées pour infraction à la présente loi ou pour une infraction à l'article 131 du *Code criminel* (parjure) se rapportant à une déclaration faite en vertu de la présente loi, soit lors d'un recours en révision prévu par la présente loi devant la Cour ou lors de l'appel de la décision rendue par celle-ci. |
| [emphasis added] | [nos soulignements] |

## V. Parties' arguments

[18] The applicants submit that they should have received the Commissioner's reports on the findings regarding the complaints by now, and that it is clearly unreasonable and contrary to the principles of natural justice that they have not yet received them. According to the applicants, the Commissioner's failure to disclose these reports prevents them from filing an application for judicial review, pursuant to section 41 of the AIA, of the CRA's decisions to refuse to disclose certain information and records to them under statutory exemptions in the Act.

[19] According to section 41 of the AIA, making a complaint to the Commissioner and receiving a report on the results of her investigation are conditions precedent to being able to apply for judicial review of a government institution's refusal to disclose a record or part thereof (*Statham v Canadian Broadcasting Corporation*, 2010 FCA 315; *Whitty v Canada (Attorney General)*, 2013 FC 595). The applicants state that, if the Commissioner were given an extension for disclosing her reports, the disclosure could end up not being made until such time as the reports would no longer be of any relevant use to the applicants. In such circumstances, argue the applicants, this would be a clear case allowing a writ of mandamus to be issued, since the conditions established by the case law would be met (*Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (FCA), aff'd [1994] 3 SCR 1100 [*Apotex*]; *Nautica Motors Inc c Canada (Minister of National Revenue)*, 2002 FCT 422).

[20] More specifically, the applicants submit that they have proved the existence of their right and have already given the Commissioner more than reasonable time; that the Commissioner's power under the AIA is fettered and non-discretionary; that they have no other recourse but this application for mandamus; and that the balance of convenience is in their favour.

[21] In their oral submissions to the Court, the applicants also argue that the delay in receiving the reports on the Commissioner's findings is unreasonable when compared with the time usually involved in such cases. This situation therefore meets, according to the applicants, the criteria laid down by the Supreme Court in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] to establish that an administrative agency's delay is unreasonable. In fact, the applicants note that the Commissioner's silence prevents them from

even knowing what stage has been reached in processing their complaints and that the Commissioner has given no explanation for the slow progress of her investigations.

[22] The Commissioner, in contrast, states that the applicants have not shown that the necessary conditions for issuing a writ of mandamus, as set out in *Apotex*, have been met in this case. According to the Commissioner, these criteria are cumulative and must be strictly met (*Rocky Mountain Ecosystem Coalition v Canada (National Energy Board)* (1999), 174 FTR 17 [*Rocky Mountain*]). The Commissioner notes that she did not refuse, expressly or implicitly, to investigate the applicants' complaints or disclose her reports; this is simply a situation where her investigations are still in progress and have not yet been completed. Given the nature of the investigation process required under the AIA and the various steps that the Act imposes, the Commissioner submits that the delays in this case are not unreasonable.

[23] Moreover, according to the Commissioner, there is another avenue available to the applicants (under the ITA) to directly obtain access to the CRA records they requested under the AIA, and they have not shown that the balance of convenience favours issuing the order sought.

[24] The Commissioner points out that, with regard to the seven deemed refusal complaints, the application for judicial review filed by the applicants is clearly premature because it was instituted even before the applicants received confirmation that these complaints had been received by the Commissioner. Finally, the Commissioner submits that under the AIA, the applicants do not have an acquired right to receive reports on the findings of her investigations, their right being limited to requesting, through a complaint, that the Commissioner conduct an investigation where a government institution has denied access to certain records.

## VI. Analysis

[25] The conditions that an applicant must meet to satisfy the Court that a writ of mandamus may issue were established by the Federal Court of Appeal in *Apotex*. These conditions can be summarized as follows in respect of the exercise of a fettered, non-discretionary power such as that of the Commissioner under the AIA:

1. There must be a public legal duty to act;
2. The duty must be owed to the applicant;
3. There is a clear right to performance of that duty, in particular:
    a. The applicant has satisfied all conditions precedent giving rise to the duty;
    b. There was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;
4. No other adequate remedy is available to the applicant;
5. The order sought will be of some practical value or effect;
6. The Court in the exercise of its discretion finds no equitable bar to the relief sought;
7. On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

[26] Mandamus is an extraordinary remedy. The criteria for mandamus are cumulative, and all the conditions set out in *Apotex* must be strictly met before a writ of mandamus will issue (*Rocky Mountain*, at para. 30).

[27] Given the cumulative nature of these conditions, the application for judicial review in this case can be disposed of by considering the third condition mentioned above, namely, the existence of "a clear right to performance of that duty", which includes the reasonableness or

unreasonableness of the delay in performing the duty. I am of the opinion that, in this case, the applicants have not met this condition precedent to issuing a writ of mandamus against the Commissioner. The Commissioner has not breached the duty imposed on her by the AIA, and there has been no unreasonable delay in handling the applicants' complaints.

[28] I note with regard to the five exemption complaints that the first was filed on April 2, 2014, while the last is dated August 11, 2014. The seven deemed refusal complaints, meanwhile, are all dated September 8, 2014. When the application for judicial review was filed by the applicants on September 12, 2014, the time elapsed since the date of the first exemption complaint was therefore a little more than five months, and barely four days for the more recent deemed refusal complaints. At the date of this judgment, the time elapsed since the applicants' various complaints were filed with the Commissioner varied from a minimum of a little more than 9 months for the most recent one to a maximum of a little more than 14 months for the oldest one.

**A.** ***Lack of refusal by Commissioner***

[29] The evidence in the record shows that the Commissioner did start an investigation into the applicants' complaints, as prescribed by section 30 of the AIA, and that there was no refusal to perform this duty on her part. Indeed, the Commissioner's investigations into the applicants' complaints are still in progress and are not yet completed, be it for the exemption complaints or for the deemed refusal complaints. Moreover, there is nothing to indicate or suggest that the Commissioner is not pursuing these investigations.

[30] As for the duty to report the findings of her investigations, as provided in subsection 37(2) of the AIA, this duty is triggered only in cases where, as per subsection 37(1) of the AIA, the Commissioner "finds that the complaint [in respect of a record] is well-founded", which cannot happen until the Commissioner's investigation into the complaint in question has been completed.

[31] It should be noted that the AIA does not specify or impose a time limit for the Commissioner to complete her investigations and issue the reports on the findings of her investigations under section 37 of the Act. Moreover, the AIA does not contain any provisions imposing a duty of care on the Commissioner in conducting her investigations or issuing her reports. Finally, section 34 of the AIA expressly provides that the Commissioner alone determines the procedure to be followed in the performance of her duties and functions.

[32] The Commissioner not only did not refuse to perform her duties under the AIA, but also followed, in respect of the applicants' complaints, the procedure and requirements prescribed by the AIA for conducting her investigations.

[33] The investigation process established in the AIA for complaints such as those filed by the applicants has numerous steps and imposes multiple duties on the Commissioner, such as the duty to conduct investigations in private (section 35) or to give the complainant or the government institution an opportunity to make representations (section 35) before making findings and, if necessary, discussing them with the government institution (section 37). It is

only at the end of this entire process that the Commissioner can close her investigation and forward the report on her findings to the complainant under section 37 of the AIA.

[34] Incidentally, the Federal Court of Appeal has qualified the investigative powers of the Commissioner as the "cornerstone" of the access to information system in Canada (*Canada (Information Commissioner) v Canada (Minister of National Defence)* (1999), 240 N.R. 244, at para. 27; *Statham v Canadian Broadcasting Corporation*, 2009 FC 1028, at para. 18).

[35] The evidence therefore clearly demonstrates that the application for judicial review filed by the applicants is premature because the Commissioner needs more time to complete her investigation into their complaints before being able to make the reports on her findings.

[36] This Court has also stated, in the context of an application for permanent residence under Canadian immigration legislation, that reasonable time must be given to the authorities to complete their investigation, review and analyze the facts of the case (*Hechavarria v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 767, at para. 16). When the request that is the subject of an application for mandamus is still being processed and the file is progressing, as is the case here, there is no denying that one of the conditions for issuing a writ of mandamus has not been met since there has been no categorical refusal on the part of the administrative body to deal with the applicant's request.

[37] Finally, I note not only that the applicants' complaints are still in the process of being dealt with by the Commissioner, but that the delay in dealing with the complaints will in no way

deprive the applicants of their right to institute an application for judicial review, pursuant to section 41 of the AIA, of any future decision that the CRA might make to refuse to give them access to certain records following the Commissioner's investigation report. Indeed, the time limit for bringing an application under section 41 does not start to run until the report on the Commissioner's findings has been received.

[38] Moreover, as the Commissioner notes, it is possible that, once her report has been completed and her reports and recommendations have been given to the CRA, the government institution may decide to give the applicants the records to which they have requested access. If this does not happen, the applicants will then be able to apply for judicial review of the CRA's refusal to give access to these records. In either case, it is clear that the time the Commissioner takes to process the applicants' complaints and issue the reports on the findings of her investigations is not prejudicial to the applicants.

[39] This is not a situation where the applicant has suffered significant prejudice because of the delay, such that this delay could be called unreasonable (*Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159, at para. 52 [*Vaziri*]; *Blencoe*, at para. 101).

**B.** ***No unreasonable delay***

[40] It remains to be determined, however, whether the time it has taken, up to now, to complete the investigations into the applicants' complaints and issue the reports on the Commissioner's findings can be considered to be an unreasonable delay.

[41] In *Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 33, at para. 23 [*Conille*], the Federal Court established that the following three conditions must be met for a delay to be considered unreasonable: the delay has been longer than the necessary delay normally required by the nature of the process and for conducting the proceedings in question; the applicant and his or her counsel are not responsible for the delay; and the administrative tribunal has not provided satisfactory justification for the delay.

[42] It should be added that, as the Supreme Court stated in *Blencoe*, at para. 122, the determination of whether a delay has become inordinate depends on, among other things, the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings.

[43] It is common ground that the applicants and their legal counsel are not responsible for the delay.

[44] However, based on the analysis of the evidence in the record and considering the provisions of the AIA, I am of the opinion that the applicants have not shown that the delay in

processing their complaints exceeds the time required for the Commissioner to conduct an investigation. Moreover, the Commissioner has provided satisfactory justification for the delay in processing the applicants' complaints.

[45] Indeed, a maximum delay of a little more than 5 months up to the date this application for judicial review was instituted (or a little more than 14 and a half months up to the date of this judgment) cannot be a delay that exceeds what the nature of the process under the AIA requires, *prima facie*. Given all the steps required by the AIA investigation process, I am of the opinion that the delay in completing the investigation into the applicants' complaints and preparing the reports on the findings is by no means unreasonable.

[46] According to the evidence adduced by the Commissioner, the investigations into the applicants' complaints are taking no more time than what the Commissioner usually requires in such cases. The reports submitted by the Commissioner state, among other things, that in 2013–2014, 63% of the complaints received were settled within nine months of being filed, which means that 37% of the complaints required an investigation exceeding nine months. On the whole, the median time for settling a complaint was approximately six and a half months from the date of filing. I acknowledge that the statistics that the Commissioner relies on are general in nature and do not contain precise data that more specifically address times for processing complaints relating to CRA activities. However, there is nothing in the evidence or in the applicants' submissions to suggest that the situation with CRA would be any different from the overall reality experienced by the totality of government institutions named in complaints received by the Commissioner.

[47] While average processing times on their own are not necessarily determinative of acting within a reasonable time, such averages give a benchmark from which the Court may assess delay in a particular file (*Tumarkin v Canada (Minister of Citizenship and Immigration)*, 2014 FC 915, at para. 18). In the case before us, the delays in processing the applicants' complaints, which range from a minimum of a few days to a little more than five months up to the date the applicants filed the application for judicial review, are shorter than the median processing time experienced by the Commissioner for processing the complaints she receives. What is more, if we look at the lengths of these delays in relation to the date of this judgment (which delays then range from a little more than 9 months to a maximum of a little more than 14 months), they still fall within a category (that of investigations requiring more than 9 months) that represents more than a third of the complaints received and processed by the Commissioner.

[48] The Commissioner also referred to the volume of complaints that she must process in a fiscal year (which is growing) and to the limited resources available to her to carry out her responsibilities (which, according to the 2014–2015 Plans and Priorities, should likely result in longer times for conducting her investigations). Although this is a contextual factor to consider, I nonetheless note that delays attributable to a government institution's limited resources or to a growing volume of complaints cannot be considered as an explanation that could justify a delay that would otherwise be unreasonable (*Dragan v Canada (Minister of Citizenship and Immigration)*, [2003] 4 F.C. 189, at para. 57 [*Dragan*]).

[49] It is also important to place the longer investigation time in the more specific context of the complaints filed by the applicants. Several of the complaints concern the CRA's application

of exclusions and exemptions and the redactions that the government institution made in certain requested records. Such complaints require a more onerous process by which the Commissioner must look at the records page by page and hold discussions with the CRA to determine whether the exemptions relied on by the government institution to refuse to disclose the information redacted or deleted are justified and comply with the provisions of the AIA. This is an additional factor supporting the conclusion that the delay is not unreasonable in this case.

[50] All these circumstances provide a reasonable explanation for the delay in the Commissioner's process for investigating the applicants' complaints, and thus meet the third condition of the legal test set out in *Conille*, namely, a satisfactory explanation for the administrative body's delay.

[51] I also note that the delays in this case, ranging from a few days to a maximum of a little more than 14 and a half months depending on the reference date used, are significantly less than many other cases where this Court has recognized, in citizenship and immigration cases, that the time that the government institution concerned spent processing applications was reasonable (*Vaziri*, at para. 48; *Dragan*, at para. 57; *Conille*, at para. 23). Indeed, in those cases, the time to process the applications exceeded three or even four years. Similarly, in *Ashley v Canada (Commissioner of Competition)*, 2006 FC 459, the applicants sought a writ of mandamus requiring the Commissioner of Competition to complete an inquiry commenced pursuant to the *Competition Act*, RSC 1985, c C-34. The applicants alleged that the Commissioner had unreasonably delayed in completing his inquiry. The time between the beginning of the inquiry and the filing of the application for judicial review was nearly 17 months in that case, and the

Court nevertheless concluded that the applicant had not shown that the Commissioner had delayed in conducting his inquiry.

[52] Moreover, the Commissioner argued in her submissions that granting a writ of mandamus in these circumstances would be contrary to Parliament's intent and the scheme of the AIA. I agree. The AIA does indeed provide for a two-level, independent review process for government institution decisions to refuse to give access to records: the Commissioner is the first level, and this court will intervene only at the second, after the investigation initiated by the Commissioner and the notice issued by her regarding the position taken by the government institution (*Blank v Canada (Department of Justice),* 2009 FC 1221, at para. 26).

[53] The system set up under the AIA therefore provides that, after a government institution decides to refuse to give access to a record, it is up to the Commissioner to investigate to determine whether the federal agency's position complies with the law. Issuing a writ of mandamus while this investigation is still unfinished would put an end to the Commissioner's investigation and short-circuit the AIA process before the Commissioner could report her findings regarding the refusal to disclose information. This is a power that Parliament specifically gave to the Commissioner, and it is not this Court's place, in the context of an application for judicial review, to supplant the Commissioner in regard to this determination. In such a case, the Court's intervention is not warranted.

[54] Judicial review by this Court (pursuant to section 41 of AIA) will remain as a remedy available to the applicants should the government institution in question here ultimately refuse to disclose the requested information after they receive the Commissioner's investigation report.

[55] The Commissioner adds that she cannot provide any more details or adduce in evidence any specific information regarding the state of advancement of her investigations into the applicants' complaints because of section 62 of the AIA, which requires the Commissioner to protect the confidentiality of the information she handles and not disclose any information that comes to her knowledge in the performance of her duties and functions. According to the Commissioner, this section prevents her from disclosing any information whatsoever regarding these investigations. In light of the conclusion I have reached regarding the reasonableness of the delay in this case, there is no need for the Court to determine the scope of section 62 to conclude that the applicants' mandamus application must be rejected.

[56] I note, however, that the Supreme Court stated in *Blencoe* that the reasonableness of a delay must be assessed in relation "to the inherent time requirements of the matter before the particular administrative body", which includes the legal and factual complexities of the case (including "the need to gather large amounts of information or technical data") (at para. 160). To the extent that a contextual analysis must be conducted to determine whether a delay is reasonable, general information on the magnitude of the investigatory work required in a particular case (in terms, for example, of the number of records or pages to be examined) could therefore become an important fact in explaining or justifying a longer than normal delay in a particular investigation.

## VII. Conclusion

[57] Given that the Commissioner did not refuse to perform her duties to investigate and to report on her findings regarding the investigation into the applicants' complaints, that the investigations into these complaints are still active and ongoing, and that the delay in completing the investigations initiated by the Commissioner is reasonable, I find that the applicants have not met the required conditions for a writ of mandamus to issue.

[58] The Court, exercising its discretion, is therefore not inclined to issue the writ of mandamus sought, and this application for judicial review filed by the applicants is dismissed.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that:**

**1.** The application for judicial review and a writ of mandamus is dismissed, with costs against the applicants.

"Denis Gascon"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1954-14 |
| **STYLE OF CAUSE:** | ROGER CODERRE, MADELEINE CODERRE, JOCELYN CODERRE, RICHARD CODERRE, ST-GERMAIN TRANSPORT LTÉE, LES IMMEUBLES S.G.T. LTÉE AND GESTION S.G.T. LTÉE v THE INFORMATION COMMISSIONER OF CANADA |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | APRIL 13, 2015 |
| **JUDGMENT AND REASONS:** | GASCON J. |
| **DATED:** | JUNE 22, 2015 |

**APPEARANCES:**

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|---|---|
| Isabelle Théberge | FOR THE APPLICANTS |
| Diane Therrien<br>Carolina Mingarelli | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Information Commissioner of Canada<br>Gatineau, Quebec | FOR THE RESPONDENT |