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**CASE SUMMARY: FEDERAL COURT OF APPEAL  
REMITS MATTER TO FEDERAL COURT TO  
RECEIVE EVIDENCE CONCERNING LATE-  
ASSERTED MANDATORY EXEMPTION FOR THE  
PRODUCTION OF REQUESTED RECORDS**

The Federal Court of Appeal overturned the Federal Court’s decision requiring the production of documents in the hands of a government institution on the basis that the Federal Court refused to hear evidence regarding the government institution’s late assertion of a mandatory exemption for the production of the requested records. The Federal Court of Appeal declined to make a ruling regarding the general admissibility of a late-asserted mandatory exemption.

**Administrative law; Decisions of administrative tribunals; Privacy commissioner; Judicial review; Appeals; Standard of review; Correctness; Freedom of information and protection of privacy; Disclosure of records**

*Defence Construction Canada v. Canada (Office of the Information Commissioner)*, [2017] F.C.J. No. 6391, 2017 FCA 133, Federal Court of Appeal, June 22, 2017, D.W. Stratas, R. Boivin and D.J. Rennie JJ.A.

Ucanu Manufacturing (“UM”) filed an information request under the *Access to Information Act*, R.S.C. 1985, c.A-1 (the “Act”) against Defence Construction Canada (“DCA”), a government institution, for records related to a contract awarded to a joint venture for the construction of a maintenance hangar on an air force base. DCA produced some records in response, but it relied on exemptions in the Act to refuse the disclosure of certain other documents.

UM complained to the Information Commissioner. During the Information Commissioner’s investigation, DCA produced some further records, but not all of them. The Information Commissioner held that the undisclosed records were properly exempt from disclosure. UM applied to the Federal Court for review of the matter.

The issue before the Federal Court of Appeal was that, before the Federal Court, DCA for the first time asserted a new mandatory exemption from disclosure found in the *Defence Production Act*, R.S.C. 1985, c. D-1. The Federal Court refused DCA’s request to file evidence in support of its claim to the mandatory exemption. The Federal Court held that it was too late to assert the mandatory exemption because it had not been raised in DCA’s initial response, nor during the Information Commissioner’s investigation. DCA appealed the Federal Court’s decision.

In allowing the appeal, the Federal Court of Appeal considered (1) the fact-based issue (whether the mandatory exemption applies on the facts of this case); and (2) the jurisprudential issue (whether it is ever too late to assert a mandatory exemption).

The Federal Court of Appeal noted that the late nature of the assertion of the exemption and the need to file evidence in support of it could not be, by itself, a sufficient ground to refuse the adjournment so that the issue of lateness could be considered. The Federal Court was bound to allow DCA an opportunity to adduce evidence supporting its assertion of the mandatory exemption, as this evidence may have explained why the exemption was being asserted late and why it should be allowed to be asserted late. Without this evidence, the Federal Court could not properly consider whether the mandatory exemption could be asserted late. Therefore, DCA's appeal was allowed.

Though the Federal Court of Appeal found that the fact-based issue provided sufficient grounds for overturning the Federal Court's decision, it went on to consider whether it should provide guidance on the jurisprudential issue, given that it was not necessary in the circumstances of this case. A review of the jurisprudence confirmed that the question of whether mandatory exemptions can be asserted late has never been settled by the Federal Court of Appeal. Despite the parties' urging for a decision, the Court of Appeal held that it would be unwise to express a definitive view on the jurisprudential question in this case, given that the issue is a high-stakes one, fraught with ramifications of a far-reaching and hazardous kind. The Court noted that mandatory exemptions appear in different forms in different statutes with different wordings. The Court observed that an incorrect legal test could allow for the disclosure of sensitive and harmful material that should be kept confidential in the public interest, or conversely could prevent the production of important material the public should see.

This case was digested by [JoAnne G. Barnum](#) and edited by [William W. Clark](#) of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact them directly at [jbarnum@harpergrey.com](mailto:jbarnum@harpergrey.com) or [wclark@harpergrey.com](mailto:wclark@harpergrey.com) or review their biographies at <http://www.harpergrey.com>.