Court File No.: 13-A-37

FEDERAL COURT OF APPEAL

BETWEEN:

COL. CHRISTOPHER C. JOHNSON and DR. GÁBOR LUKÁCS

Moving Parties

– and –

CANADIAN TRANSPORTATION AGENCY and AIR CANADA

Respondents

REPLY OF THE MOVING PARTIES

Motion for Leave to Appeal, Rule 352

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REPLY OF THE MOVING PARTIES

1. Air Canada mischaracterizes the complaint before the Agency and the proposed appeal as if it were about the individual experience of Johnson and the $309.56 owed to him. This is not the case. Johnson and Lukács are seeking the appellate intervention of this Honourable Court because of the systemic breach of Air Canada's obligations to delayed passengers under the *Montreal Convention*, which affects not only Johnson but the **35,999,999** other passengers that Air Canada transports every year.

2. The proposed appeal raises questions of law of considerable public interest and importance, because the Final Decision turns the statutory liability for delay of passengers under Article 19 of the *Montreal Convention* into what is in substance a dead letter, contrary to the role and mandate of the Agency.

> ***Lukács v. Canada (CTA)*, 2016 FCA 220, paras. 19 & 26** — **Tab 41, pp. 590 & 592**

3. As explained below, and contrary to Air Canada's submission, the proposed appeal raises pure questions of law relating to procedural fairness, the

interpretation of Article 19 of the *Montreal Convention*, and the constitutionally protected open court principle.

A. PRELIMINARY MATTER: AIR CANADA MISREPRESENTS THE RECORD

4. Air Canada's statement at paragraph 6 that "None of the other 19 volunteers experienced any difficulties locating the van" is not supported by the record, and the reference to paras. 39-42 of the Agency's Decision is a bluff. Johnson never gave nor could have possibly given evidence as to the fate of the 19 other volunteers.

5. At paragraph 9 of its submissions, Air Canada materially misrepresents its Expense Policy and similar "internal documents" as if they applied only "in cases of uncontrollable flight delays (such as mechanical failure)." It is apparent on the face of the record that the Expense Policy also applies to "Controllable Situations":

Irregular Operations - Controllable Situations

- Outbound flight (start of passenger journey with Air Canada) NO EXPENSES
- Return flight, connection point or diversion as follows:

	Accommodation	Breakfast	Lunch	Dinner	Transport
Regular Customers	$100.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Shuttle service
Premium Customers	$150.00 per room	7.00 per person Canada/10 per person USA	10.00 per person Canada/12 per person USA	15.00 per person Canada/USA	Taxi cost if applicable

Air Canada's Expense Policy **Tab 6, p. 130**

Air Canada's Expense Guidelines **Tab 15, p. 211**

B. THE PROPOSED APPEAL RAISES ARGUABLE QUESTIONS OF LAW

(i) Denial of procedural fairness

6. The reference to the "uncontradicted evidence before the Agency" at paragraph 9 of Air Canada's submissions highlights the denial of procedural fairness, because the record shows that:

(a) the Agency excluded all evidence capable of contradicting Air Canada's position (such as emails sent by Air Canada to passengers, the documents tendered by Mr. Powell, and the witnessed statements of the Rubensteins); and

(b) the Agency refused to direct Air Canada to produce documents that would contradict Air Canada's position.

7. Air Canada misstates the law with respect to exclusion of evidence and procedural fairness at paragraph 39 of its submissions. The correct statement of the law is that:

> Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice. It is one thing to adopt special rules of procedure for a hearing, and another not to comply with a fundamental rule, that of doing justice to the parties by hearing relevant and therefore admissible evidence.
>
> ***Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, para. 59** **Tab 48, p. 690**

8. In particular, contrary to Air Canada's submissions at paragraphs 42-49, the following of rules of procedure cannot excuse exclusion of relevant and admissible evidence. Furthermore, questions relating to admissibility and relevance of evidence are questions of law.

9. The *Prohaska v. Howe* case, cited by Air Canada at paragraph 50, is not relevant to the proposed appeal, because no question relating to expert evidence has been raised, and the Agency is not a court.

***Lukács v. Canada (CTA)*, 2016 FCA 220, para. 20** **Tab 41, p. 590**

10. In paragraphs 51-52 of its submissions, Air Canada overlooks the role of the Agency to ensure that "policies pursued by the legislator are carried out." This role entails inquiring into and addressing systemic issues, and is not confined to awarding compensation to individual complainants.

***Lukács v. Canada (CTA)*, 2016 FCA 220, paras. 19 & 26** **Tab 41, pp. 590 & 592**

11. The main issue raised in the complaint of Johnson and Lukács is not Johnson's individual experience, but rather Air Canada's systemic breach of its obligations to delayed passengers under the *Montreal Convention* by applying its Expense Policy instead of the *Convention*. The evidence of the five passengers (other than Johnson) is relevant to this systemic issue, because: (i) all five passengers were delayed; (ii) Air Canada refused to fully reimburse all five passengers for the expenses they incurred as a result of delay; and (iii) Air Canada applied in the case of all five passengers the same Expenses Policy that Johnson and Lukács are challenging.

12. The exclusion of the evidence relating to these five passengers by the Agency amounts to denial of procedural fairness, because it deprived Johnson and Lukács of the right to lead evidence about the main issue raised in their complaint, namely, Air Canada's systemic breach of its obligations under the *Montreal Convention*.

(ii) Misinterpretation of the *Montreal Convention*

13. Contrary to Air Canada's submissions (para. 37), the proposed appeal raises questions of law relating to the interpretation of the *Montreal Convention*:

(a) Do mechanical failures constitute "uncontrollable" events, akin to snow-storms, that relieve Air Canada from liability for delay (as suggested by Air Canada at para. 9)?

(b) Is the performance of routine maintenance and check-ups on an aircraft sufficient to rebut the presumption of liability under Article 19 of the *Montreal Convention*?

(c) In the absence of any evidence to rebut the presumption of Air Canada's liability under Article 19 of the *Convention* for the delay of Mr. Leatherman and Ms. Allen, was it open for the Agency to not find that Air Canada breached its obligations (para. 73 of the Final Decision)?

14. Air Canada conflates the issue of liability with quantum of damages in paragraph 57 of its submissions. Under Article 19 of the *Montreal Convention*, liability for delay is presumed and does not have to be proven. While an air carrier may attempt to rebut this presumption, it is settled law that routine maintenance and checking of the aircraft does not exonerate the carrier from liability for delay caused by a mechanical failure. (Holding otherwise would virtually immunize airlines to liability for delay due to mechanical failures.)

***van der Lans v. KLM*, European Court of Justice, Case C-257-14, para. 43**	**Tab 35, p. 510**
***Elharradji c. Compagnie nationale Royal Air Maroc*, 2012 QCCQ 11, para. 13**	**Tab 34, p. 495**
***Quesnel c. Voyages Bernard Gendron inc.*, [1997] J.Q. no 5555, paras. 15-16**	**Tab 43, p. 603**

15. With respect to quantum of damages for delay, Air Canada's submission at paragraph 57 is a strawman. Johnson and Lukács never argued that Air Canada must pay $8,500 to each passenger who is delayed; rather, their complaint is that Air Canada has been systematically evading its obligations under the *Montreal Convention* (and its tariff) by refusing to compensate delayed passengers for out-of-pocket expenses in excess of the amounts set out in Air Canada's Expense Policy.

Air Canada's Expense Policy	**Tab 6, p. 130**
Air Canada's Expense Guidelines	**Tab 15, p. 211**

(iii) Confidentiality Decision

16. Air Canada misconstrues in paragraph 56 of its submissions the grounds for the proposed appeal relating to the Confidentiality Decision. The Moving Parties do not challenge the Agency's jurisdiction. Instead, they submit that the Agency erred in law and rendered an unreasonable decision by granting the request for confidentiality in part. Notably, Air Canada failed to make any submissions as to why the Confidentiality Decision might be reasonable.

Memorandum of Fact and Law of the Moving Parties, paras. 92-95	**Tab 30, pp. 378-379**

17. This ground of the proposed appeal is tied to the very essence of the constitutionally protected open court principle, and raises an arguable question of law that is independent of the Final Decision rendered by the Agency. Since the open court principle appears to be posing a significant and recurrent difficulty for the Agency, it is submitted that leave to appeal should be granted on this ground independently of whether this Honourable Court grants leave to appeal from the Final Decision.

***Lukács v. Canada (CTA)*, 2015 FCA 140**	**Tab 47, p. 647**

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 25, 2016

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Moving Party

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Moving Party

Case Name:

Lukacs v. Canada (Canadian Transportation Agency)

Between
Dr. Gabor Lukacs, Applicant, and
Canadian Transportation Agency et al., Respondents, and
The Privacy Commissioner of Canada, Intervener, and
The Attorney General of Canada, Intervener

[2015] F.C.J. No. 707

[2015] A.C.F. no 707

2015 FCA 140

253 A.C.W.S. (3d) 751

386 D.L.R. (4th) 163

2015 CarswellNat 1893

88 Admin. L.R. (5th) 24

473 N.R. 263

Docket: A-218-14

Federal Court of Appeal
Halifax, Nova Scotia

Ryer, Near and Boivin JJ.A.

Heard: March 17, 2015.
Judgment: June 5, 2015.

(82 paras.)

Government law -- Access to information and privacy -- Access to information -- Inspection of public documents -- Redaction or summation prior to disclosure -- Bars and grounds for refusal -- Protected personal information -- Application by transport passenger advocate for review of

Agency's refusal to provide unredacted copy of public record allowed -- Record related to family's complaint about delayed flight and request for compensation -- Once record of proceedings before Agency placed in public record, it became subject to production to members of public -- Open court principle applied -- Privacy Act, ss. 2, 3, 4, 7, 8, 69.

Transportation law -- Air transportation -- Regulation -- Federal -- Complaints about air carriers -- Canadian Transportation Agency -- Application by transport passenger advocate for review of Agency's refusal to provide unredacted copy of public record allowed -- Record related to family's complaint about delayed flight and request for compensation -- Once record of proceedings before Agency placed in public record, it became subject to production to members of public -- Open court principle applied -- Canadian Transportation Agency Rules, Rules 7, 31.

Application by Lukacs for judicial review of the Canadian Transportation Agency's refusal of his request for an unredacted copy of materials the Agency placed on its public record in a dispute resolution proceeding between Air Canada and a family whose flight from Vancouver to Cancun was delayed. Lukacs was an air transportation passenger advocate. He sought copies of all public documents filed with the Agency in relation to the family's claim for compensation for denied boarding and costs. The Agency asserted that it was bound by the provisions of the Privacy Act to remove personal information from its public record prior to providing a copy to Lukacs.

HELD: Application allowed. The Agency's status as a specialized tribunal did not warrant a divergence from the open court principle. The public record of the proceedings before the tribunal relating to the family's complaint was subject to production in response to a request from a member of the public.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 6, s. 17, s. 25, s. 35

Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 1, s. 2(b)

Canadian Transportation Agency General Rules, SOR/2005-35, Rule 23(1), Rule 23(3), Rule 23(4), Rule 23(9)

Canadian Transportation Agency Rules (Dispute Proceedings at Certain Rules Applicable to All Proceedings), SOR/2014-104, Rule 7, Rule 7(2), Rule 31

Federal Courts Rules, SOR/98-106, Rule 151, Rule 151(2), Rule 152

Privacy Act, R.S.C. 1985, c. P-21, s. 2, s. 3, s. 4, s. 7, s. 7(a), s. 7(b), s. 8, s. 8(1), s. 8(2), s. 8(2)(a), s. 8(2)(b), s. 8(2)(m), s. 8(2)(m)(i), s. 69(2)

Counsel:

Dr. Gabor Lukacs, on his own behalf.

Allan Matte, for the Respondent.

Jennifer Seligy, Steven J. Welchner, for the Intervener.

Melissa Chan, for the Attorney General of Canada.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 RYER J.A.:-- Dr. Gabor Lukacs is a Canadian air passenger rights advocate. He brings this application for judicial review of a decision of the Canadian Transportation Agency (the "Agency") to refuse his request for an unredacted copy of the materials that the Agency placed on its public record in a dispute resolution proceeding between Air Canada and a family whose flight from Vancouver to Cancun had been delayed (the "Cancun Matter").

2 The Agency is constituted under the *Canada Transportation Act*, S.C. 1996, c.10 (the "CTA"). The jurisdiction of the Agency is broad, encompassing economic regulatory matters in relation to air, rail and marine transportation in Canada, and adjudicative decision-making in respect of disputes that arise in areas under its jurisdiction.

3 When engaged in adjudicative dispute resolution, the Agency acts in a quasi-judicial capacity, functioning in many respects like a court of law, and members of the Agency, as defined in section 6 of the CTA, function like judges, in many respects.

4 Adjudicative proceedings before a court of law are subject to the open court principle, which generally requires that such proceedings, the materials in the record before the court and the resulting decision must be open and available for public scrutiny, except to the extent that the court otherwise orders.

5 These rights of access to court proceedings, documents and decisions are grounded in common law, as an element of the rule of law, and in the Constitution, as an element of the protection accorded to free expression by s.2(*b*) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c. 11 (the "*Charter*").

6 Court-sanctioned limitations on the rights arising from the open court principle are often

imposed under the procedural rules applicable to the court. In the context of the *Charter*, the appropriateness of requested limitations to the open court principle are determined under a judge-made test requiring the court to consider whether the salutary effects of the requested limitation on the administration of justice outweighs the deleterious effects of that limitation.

7 In responding to Dr. Lukacs' request for the materials on its public record in the Cancun Matter, the Agency acknowledged that it was subject to the open court principle. However, the Agency asserted that, unlike courts of law, the application of that principle to the Agency s public record was circumscribed by the provisions of the *Privacy Act*, R.S.C., 1985, c. P-21 (the *"Privacy Act"*). Thus, before providing the materials to Dr. Lukacs, one of the Agency's administrative employees removed portions of them that she determined to contain personal information ("Personal Information"), as defined in section 3 of the *Privacy Act*.

8 The Agency refused Dr. Lukacs' further request for a copy of the unredacted material on its public record, asserting that subsection 8(1) of the *Privacy Act* prevented it from disclosing Personal Information under its control.

9 Dr. Lukacs brought this application for judicial review challenging the Agency's refusal to provide the unredacted materials on a number of bases. Among his arguments, he asserted that because the requested materials had been placed on the Agency's public record ("Public Record") in accordance with subsection 23(1) of the *Canadian Transportation Agency General Rules*, SOR/2005-35 (the "Old Rules"), all of those materials -- in an unredacted form -- were publicly available ("Publicly Available") within the meaning of subsection 69(2) of the *Privacy Act*, and, as such, the prohibition on disclosure in subsection 8(1) of the *Privacy Act* does not apply to his request.

10 In my view, this argument is persuasive and, accordingly, the Agency's refusal to provide an unredacted copy of the requested materials to Dr. Lukacs is impermissible.

I. BACKGROUND

11 The Agency's decision in the Cancun Matter (Decision 55-C-A-2014) dealt with a claim for compensation for denied boarding and costs from flight delays that was made by a family in relation to a flight from Vancouver to Cancun, Mexico.

12 On February 14, 2014, Dr. Lukacs made a request to the Secretary of the Agency for a copy of all of the public documents that were filed with the Agency in the Cancun Matter.

13 On February 24, 2014, Ms. Patrice Bellerose, a staff employee of the Agency, sent an email to Dr. Lukacs indicating that the Agency would provide the Public Record as soon as they could do so.

14 On March 19, 2014, Ms. Bellerose sent an email to Dr. Lukacs that contained a copy of the materials that had been filed, but portions of those materials were redacted.

15 Ms. Bellerose made the redactions on the basis that section 8 of the *Privacy Act* prevented the Agency from disclosing what she determined to be Personal Information contained in the materials that the Agency placed on its Public Record. Importantly, none of the materials filed in the Cancun Matter was subject to a confidentiality order, which the Agency was empowered to make, pursuant to subsections 23(4) to (9) of the Old Rules, upon request from any person who files a document in any given proceeding.

16 On March 24, 2014, Dr. Lukacs wrote to the Secretary of the Agency requesting "unredacted copies of all documents in File No. M4120-3/13-05726 with respect to which no confidentiality order was made by a member of the Agency."

17 On March 26, 2014, Mr. Geoffrey C. Hare, Chairperson and CEO of the Agency, wrote to Dr. Lukacs and, without specifically so stating, refused (the "Refusal") to accede to Dr. Lukacs' request for unredacted copies of the materials (the "Unredacted Materials") in the Cancun Matter.

18 On April 22, 2014, Dr. Lukacs brought this application for judicial review in respect of the Agency's practice of limiting public access to Personal Information in documents filed in the Agency's adjudicative proceedings, specifically challenging the refusal of the Agency to provide him with the Unredacted Materials.

19 The relief sought by Dr. Lukacs is as follows:

1. a declaration that adjudicative proceedings before the Canadian Transportation Agency are subject to the constitutionally protected open-court principle;

2. a declaration that all information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings are part of the public record in their entirety, unless confidentiality was sought and granted in accordance with the Agency's *General Rules*;

3. a declaration that members of the public are now entitled to view all information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings, unless confidentiality was sought and granted in accordance with the Agency's *General Rules*;

4. a declaration that information provided to the Canadian Transportation Agency in the course of adjudicative proceedings fall within the exceptions

of subsections 69(2) and/or 8(2)(*b*) and/or 8(2)(*m*) of the *Privacy Act*, R.S.C. 1985, c. P-21;

5. in the alternative, a declaration that provisions of the *Privacy Act*, R.S.C. 1985, c. P-21 are inapplicable with respect to information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings to the extent that these provisions limit the rights of the public to view such information pursuant to subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms*;

6. a declaration that the power to determine questions related to confidentiality of information provided in the course of adjudicative proceedings before the Canadian Transportation Agency is reserved to Members of the Agency, and cannot be delegated to Agency Staff;

7. an order of *mandamus* directing the Canadian Transportation Agency to provide the Applicant with unredacted copies of the documents in File No. M4120-3/13-05726, or otherwise allow the Applicant and/or others on his behalf to view unredacted copies of these documents;

8. costs and/or reasonable out-of-pocket expenses of this application;

9. such further and other relief or directions as the Applicant may request and this Honourable Court deems just.

20 By order dated December 10, 2014, Stratas J.A. granted the Privacy Commissioner of Canada (the "Privacy Commissioner") leave to intervene in this application on the basis that the application raises issues as to whether certain provisions of the *Privacy Act* provide justification for the Refusal.

21 On November 21, 2014, Dr. Lukacs filed a Notice of Constitutional Question in which he challenged the constitutional validity of certain provisions of the *Privacy Act*. Dr. Lukacs contends that he has a constitutional right under the open court principle, protected by paragraph 2(b) of the *Charter*, to obtain the Unredacted Documents. He submitted that, if any provisions of the *Privacy Act* limit his right to obtain such documents, those provisions infringe paragraph 2(b) of the *Charter*. Further, Dr. Luk cs argues that any infringement is not saved under section 1 of the *Charter*.

22 On March 5, 2015, the Attorney General of Canada filed a Memorandum of Fact and Law and became a party to this application.

II. THE REFUSAL

23 In the Refusal, Chairperson Hare stated that the Agency is a government institution ("Government Institution"), as defined under section 3 of the *Privacy Act*, that is subject to the full application of that legislation. He then referred to sections 8, 10 and 11 of the *Privacy Act* and stated that:

> The purpose of the Act is to protect the privacy of individuals with respect to personal information about themselves held by a government institution. Section 8 of the Act is clear that, except for specific exceptions found in that section, personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution. Also, in accordance with sections 10 and 11 of the Act, personal information under the control of a government institution such as the Agency must be accounted for in either personal information banks or classes of personal information. Because there are no provisions in the Act that grant to government institutions that are subject to the Act, the discretion not to apply those provisions of the Act, personal information under the control of the Agency is not disclosed without the consent of the individual and are accounted for either in personal information banks or classes of personal information and consequently published in InfoSource. This is all consistent with the directions of the Treasury Board Canada Secretariat.
>
> Although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social insurance number, driver's licence number, or credit card or passport details, is not available for consultation.
>
> The file you requested has such sensitive personal information and it has therefore been removed by the Agency as required under the Act.

24 While these reasons do not explicitly so state, it is apparent to me that the Agency concluded that subsection 8(1) of the *Privacy Act* circumscribes the scope and ambit of the open court principle. Thus, the Agency concluded that subsection 8(1) of the *Privacy Act* requires it to redact Personal Information contained in documents placed on its Public Record in dispute resolution proceedings before such documents can be disclosed to a member of the public who requests them.

25 Chairperson Hare's reasons do not explain why any of the disclosure-permissive provisions in the *Privacy Act*, such as paragraphs 8(2)(*a*), (*b*) or (*m*), are inapplicable to Dr. Lukacs' request. Additionally, his reasons do not discuss whether the Personal Information that the Agency redacted, in intended compliance with the non-disclosure requirement in subsection 8(1) of the *Privacy Act*, was Publicly Available.

III. ISSUES

26 This appeal raises two general issues:

(a) whether subsection 8(1) of the *Privacy Act* requires or permits the Agency to refuse to provide the Unredacted Materials to Dr. Lukacs (the "Refusal Issue"); and

(b) if the answer to the first issue is in the affirmative, whether subsection 8(1) of the *Privacy Act* infringes upon Dr. Lukacs' rights under paragraph 2(*b*) of the *Charter* (the "Constitutional Issue").

IV. ANALYSIS

A. Introduction

The open court principle

27 I will begin this analysis by considering what is meant by the open court principle. In the words of Chief Justice McLachlin in her speech "Openness and the Rule of Law" (Annual International Rule of Law Lecture, delivered in London, United Kingdom, 8 January 2014), at page 3:

> The open court principle can be reduced to two fundamental propositions. First, court proceedings, including the evidence and documents tendered, are open to the public. Second, juries give their verdicts and judges deliver their judgments in public or in published form.
>
> [Emphasis added]

28 It is the first aspect of this formulation that is presently in issue. More particularly, the issue under consideration relates to disclosure of documents that were on the Agency's Public Record and formed the basis for its decision in the Cancun Matter.

29 The open court principle has been recognized for over a century, as noted by the Supreme

Court in *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253 at paragraph 31. In that case, Bastarache J. stated at paragraph 33:

> In addition to its longstanding role as a common law rule required by the rule of law, the open court principle gains importance from its clear association with free expression protected by s. 2(*b*) of the Charter. In the context of this appeal, it is important to note that s. 2(*b*) provides that the state must not interfere with an individual's ability to "inspect and copy public records and documents, including judicial records and documents (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at 1328, citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), at p. 597). La Forest J. adds at para. 24 of [*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480]: "[e] ssential to the freedom of the press to provide information to the public is the ability of the press to have access to this information" (emphasis added). Section 2(*b*) also protects the ability of the press to have access to court proceedings (*CBC*, at para. 23; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at para. 53).
>
> [Emphasis added]

30 Thus, where the open court principle is unrestricted in its application, a member of the public has a common law and perhaps a constitutional right to inspect and copy all documents that have been placed on the record that is or was before a court.

31 An important consideration is whether there are any limits on the extent of the application of the open court principle. Clearly, there are.

32 In *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, 132 D.L.R. (3d) 385, Dickson J., as he then was, stated at page 189:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

33 In the context of access to documents, courts generally have procedural rules that permit the filing of documents on a confidential basis where an order to that effect is obtained. For example, sections 151 and 152 of the *Federal Courts Rules*, SOR/98-106 set out a scheme for claiming confidentiality with respect to materials filed in proceedings before the Federal Court and this Court. Importantly, subsection 151(2) of those Rules stipulates that before a confidentiality order can be made, the Court must be satisfied that the material should be treated as confidential,

notwithstanding the public interest in open and accessible court proceedings. Thus, both the Federal Court and this Court are empowered to circumscribe the open court principle in appropriate circumstances.

34 More broadly, limitations on the application of the open court principle have been challenged, in a number of circumstances, on the basis that they infringe upon rights protected under s 2(*b*) of the *Charter*. For example:

(a) A time-limited publication ban to protect the identity of undercover police officers was upheld, but a publication ban on police operational methods was found to be unnecessary (*R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442);

(b) In connection with the construction and sale of two nuclear reactors by a Crown corporation to China, the Supreme Court granted a confidentiality order with respect to an affidavit that contained sensitive technical information about the ongoing environmental assessment of the construction site by Chinese authorities (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522);

(c) A request for a blanket sealing order with respect to search warrants and supporting information was denied because the party seeking the order failed to show a serious and specific risk to the integrity of a criminal investigation, but editing of the materials was permitted to protect the identity of a confidential informant (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188);

(d) A request for a publication ban prohibiting a newspaper from reporting on settlement negotiations between the federal government and a company with respect to the recovery of public funds in connection with the federal "Sponsorship Program" was denied on the basis that the settlement negotiations were already a matter of public record and a publication ban would stifle the media's exercise of their constitutionally-mandated role to report stories of public interest (*Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592); and

(e) A teenage girl, who was seeking an order to compel disclosure by an internet service provider of information relating to cyber-bullying, was granted permission to proceed anonymously, but a publication ban on

> those parts of the internet materials that did not identify the girl was denied (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567).

35 In determining whether or not it was appropriate to limit the application of the open court principle in each of these matters, the courts adopted the approach taken by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 and *Mentuck* (the so-called *Dagenais/Mentuck* test). This test was described in *Toronto Star Newspapers*, at paragraph 4, as follows:

> Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration.*

Stated another way, the test is whether the salutary effects of the requested limitation of the open court principle will outweigh the deleterious effects of that limitation.

36 Another important consideration is whether the open court principle applies only to courts or whether it also applies to quasi-judicial tribunals.

> *The Agency and the Open Court Principle*

37 In this application, all parties are agreed that the open court principle applies to the Agency when it undertakes dispute resolution proceedings in its capacity as a quasi-judicial tribunal. Support for this proposition can be found in *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726, 327 D.L.R. (4th) 470, at paragraph 22, where Sharpe J.A. stated:

> [22] The open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. The strong public policy in favour of openness and of "maximum accountability and accessibility" in respect of judicial or quasi-judicial acts pre-dates the Charter: *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, at p. 184 S.C.R. As Dickson J. stated, at pp. 186-87 S.C.R.: At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance".
>
> [Emphasis added]

However, the Agency asserts that it is nonetheless obliged to first apply section 8 of the *Privacy Act* before it can give effect to the open court principle. This assertion necessitates a consideration of

both the *Privacy Act* and the particular circumstances of the Agency.

The Privacy Act

38 Section 2 of the *Privacy Act* contains Parliament's stipulation as to its purpose. That provision reads as follows:

Purpose

2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

* * *

Object

2. La présente loi a pour objet de compléter la législation canadienne en matière de protection des renseignements personnels relevant des institutions fédérales et de droit d'accès des individus aux renseignements personnels qui les concernent.

39 The Supreme Court of Canada has elaborated upon the objectives of the *Privacy Act*. In *Lavigne v. Canada*, 2002 SCC 53, [2002] 2 S.C.R. 773 at paragraph 24, Justice Gonthier stated,

> [24] The *Privacy Act* is also fundamental in the Canadian legal system. It has two major objectives. Its aims are, first, to protect personal information held by Government Institutions, and second, to provide individuals with a right of access to personal information about themselves...

Several paragraphs later, Justice Gonthier further stated:

> [27] To achieve the objectives of the *Privacy Act*, Parliament has created a detailed scheme for collecting, using and disclosing personal information. First, the Act specifies the circumstances in which personal information may be collected by a government institution, and what use the institution may make of it: only personal information that relates directly to an operating program or activity of the government institution that collects it may be collected (s.4), and it may be used for the purpose for which it was obtained or compiled by the institution or for a use consistent with that purpose, and for a purpose for which the information may be disclosed to the institution under s. 8(2) (s.7). As a rule, personal information may never be disclosed to third parties except with the

consent of the individual to whom it relates (s.8(1)) and subject to the exceptions set out in the Act (s.8(2)).

40 These passages from *Lavigne* indicate the importance of the protection of privacy in relation to Personal Information collected and held by our government and its emanations. However, they also point to a number of specific instances in which such Personal Information can be used and disclosed.

41 The *Privacy Act* applies to Government Institutions. Section 4 of the *Privacy Act* prohibits the collection of Personal Information about individuals unless it relates directly to an operating program or activity of the institution.

42 Once Personal Information has been collected and becomes subject to the control of a Government Institution, paragraph 7(*a*) of the *Privacy Act* limits its use to the purpose for which it was obtained or compiled, or to a use consistent with that purpose. Paragraph 7(*b*) of the *Privacy Act* permits such information to be used for a purpose for which it may be disclosed under subsection 8(2) of the *Privacy Act*.

43 Section 7 of the *Privacy Act* reads as follows:

> **7.** Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except:
>
> (*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or
>
> (*b*) for a purpose for which the information may be disclosed to the institution under subsection 8(2).
>
> * * *
>
> **7.** À défaut du consentement de l'individu concerné, les renseignements personnels relevant d'une institution fédérale ne peuvent servir à celle-ci:
>
> *a*) qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins;
>
> *b*) qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).

44 Subsection 8(1) of the *Privacy Act* prohibits disclosure of Personal Information under the control of a Government Institution without the consent of the individual, subject to certain exceptions contained in subsection 8(2) of the *Privacy Act*. Subsection 8(1) reads as follows:

> 8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.
>
> * * *
>
> 8. (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.

45 Of particular relevance to this appeal are the exceptions to paragraph 8(1) of the *Privacy Act* contained in paragraphs 8(2)(*a*) and (*b*) and sub-paragraph (*m*)(i) of the *Privacy Act*, which read as follows:

> 8. (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> (*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
>
> (*b*) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;
>
> ...
>
> (*m*) for any purpose where, in the opinion of the head of the institution,
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure,
>
> * * *
>
> 8. (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :

> *a*) communication aux fins auxquelles ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;
>
> *b*) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;
>
> ...
>
> *m*) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :
>
> (i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,

46 A further exemption with respect to the use and disclosure of Personal Information is found in subsection 69(2) of the *Privacy Act*, which reads as follows:

> 69. (2) Sections 7 and 8 do not apply to personal information that is publicly available.
>
> * * *
>
> 69. (2) Les articles 7 et 8 ne s'appliquent pas aux renseignements personnels auxquels le public a accès.

The *Privacy Act* contains no definition of Publicly Available.

The Agency

47 There is no doubt that the Agency falls within the definition of Government Institution. As such, the Agency is bound by the provisions of that legislation. However, this case raises interesting questions as to how the Agency's adjudicative function -- one part of its broad legislative mandate -- is affected by the scope and application of the *Privacy Act*.

48 A helpful description of the Agency and its functions can be found in *Lukacs v. Canadian Transportation Agency*, 2014 FCA 76, 456 N.R. 186, wherein, at paragraphs 50 to 53, Justice Dawson of this Court stated:

> [50] the Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.
>
> [51] First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.
>
> [52] Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

49 This description highlights the duality of the Agency's functions. It acts in an administrative capacity, when carrying out its economic regulatory mandate, and in a quasi-judicial, or court-like capacity, when carrying out its adjudicative dispute resolution mandate. In this latter capacity, the Agency exercises many of the powers, rights and privileges of superior courts (see sections 25 to 35 of the CTA).

The Agency's Rules

50 Section 17 of the CTA empowers the Agency to make rules governing the manner of and procedures for dealing with matters and business that come before it. At the time that Dr. Lukacs brought this application, the Old Rules were in force. They have been superseded by the *Canadian Transportation Agency Rules (Dispute Proceedings at Certain Rules Applicable to All Proceedings*), SOR/2014-104 (the "New Rules").

51 While both sets of Rules relate to proceedings before the Agency, the New Rules are more comprehensive and, in general, apply only to the Agency's dispute resolution proceedings. In an annotated version of the New Rules (the "Annotation") (See: Canadian Transportation Agency, *Annotated Dispute Adjudication Rules* (21 August 2014), online: Canadian Transportation Agency <https://www.otc-cta.gc.ca/eng/publication/annotated-dispute-adjudication-rul es>), the Agency provides the following description of its adjudicative and non-adjudicative functions:

> The Agency performs two key functions within the federal transportation system:
>
> * Informally and through formal adjudication (where the Agency reviews an application and makes a decision), the Agency resolves a range of commercial and consumer transportation-related disputes, including accessibility issues for persons with disabilities. It operates

like a court when adjudicating disputes.

* As an economic regulator, the Agency makes decisions and issues authorities, licences and permits to transportation service providers under federal jurisdiction.

[Emphasis added]

52 Both the Old Rules and the New Rules contemplate the commencement of dispute resolution proceedings by the filing of complaint documentation. The New Rules specifically provide that the proceedings do not commence until the application documentation has been accepted by the Agency.

53 Both sets of Rules require that documents filed with the Agency in respect of dispute resolution proceedings must be placed by it on its Public Record. Subsection 23(1) of the Old Rules reads as follows:

Claim for confidentiality

23. (1) The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person filing the document makes a claim for its confidentiality in accordance with this section.

* * *

Demande de traitement confidentiel

23. (1) L'Office verse dans ses archives publiques les documents concernant une instance qui sont déposés auprès de lui, à moins que la personne qui les dépose ne présente une demande de traitement confidentiel conformément au présent article.

Subsection 7 of the New Rules reads as follows:

Filing

7. (1) Any document filed under these Rules must be filed with the Secretary of the Agency.

Agency's public record

(2) All filed documents are placed on the Agency's public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document.

* * *

Dépôt

7. (1) Le dépôt de documents au titre des présentes règles se fait auprès du secrétaire de l'Office.

Archives publiques de l'Office

(2) Les documents déposés sont versés aux archives publiques de l'Office, sauf si la personne qui dépose le document dépose au même moment une requête de confidentialité, en vertu de l'article 31, à l'égard du document.

Both sets of Rules -- subsections 23(3) to (9) of the Old Rules and section 31 of the New Rules -- empower the Agency to grant confidentiality protection in respect of documents that are filed by parties to the proceedings.

54 The Agency's perspective with respect to the privacy implications of filings made under subsection 7(2) of the New Rules is set forth in the Annotation as follows:

The Agency's record

The Agency's record is made up of all the documents and information gathered during the dispute proceeding that have been accepted by the Agency. This record will be considered by the Agency when making its decision.

The Agency's record can consist of two parts: the public record and the confidential record.

Public Record

Generally, all documents filed with and accepted by the Agency during the dispute proceeding, including the names of parties and witnesses, form part of the public record.

Parties filing documents with the Agency should not assume that a document that they believe is confidential will be kept confidential by the Agency. A request to have a document kept confidential may be made pursuant to section 31 of the Dispute Adjudication Rules.

Documents on the public record will be:

* Provided to the other parties involved;

* Considered by the Agency in making its decision; and

* Made available to members of the public, upon request, with limited exceptions.

Decisions and applications are posted on the Agency's website and include the names of the parties involved, as well as witnesses. Medical conditions which relate to an issue raised in the application will also be disclosed. The decision will also be distributed by e-mail to anyone who has subscribed through the Agency's website to receive Agency decisions.

Confidential record

The confidential record contains all the documents from the dispute proceeding that the Agency has determined to be confidential.

If there are no confidential documents, then there is only a public record.

No person can refuse to file a document with the Agency or provide it to a party because they believe that it is confidential. If a person is of the view that a

> document is confidential, they must file it with the Agency along with a request for confidentiality under section 31 of the Dispute Adjudication Rules. This will trigger a process where the Agency will determine whether the document is confidential. During this process, the document is not placed on the public record.
>
> Decisions that contain confidential information that is essential to understanding the Agency's reasons will be treated as confidential as well and will not be placed on the Agency's website. However, a public version of the decision will be issued and placed on the website.
>
> [Emphasis added]

55 There is no definition of Public Record in either the Old Rules or the New Rules.

The Factual Context in this Application

56 It is undisputed that the documents that were requested by Dr. Lukacs were placed by the Agency on its Public Record in the Cancun Matter and that the Agency made no confidentiality order in respect of any of those documents

57 It is equally clear that certain portions of the documents that were provided by the Agency to Dr. Lukacs were redacted. Moreover, those redactions were made by an employee of the Agency, not by a member of the Agency carrying out a quasi-judicial function.

B. The Refusal Issue

The Standard of Review

58 The issue is whether the Agency, acting through its Chairperson, erred in concluding that subsection 8(1) of the *Privacy Act* required it to redact Personal Information contained in the documents on its Public Record in the Cancun Matter, before disclosing those documents to Dr. Lukacs in response to his request.

59 In accordance with this Court's decision in *Nault v. Canada (Public Works and Government Services)*, 2011 FCA 263, 425 N.R. 160 at paragraph 19, citing *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at paragraphs 14 to 19, the standard of review applicable to the decision of the head of a Government Institution to refuse to disclose documents containing Personal Information is correctness. *Nault* also stipulates that the interpretation of provisions of the *Privacy Act* that are

relevant to the refusal to disclose is also to be reviewed on the standard of correctness.

The Positions of the Parties

60 The determination of the correctness of the Refusal requires the interpretation of a number of provisions of the *Privacy Act*.

61 By virtue of subsection 69(2) of the *Privacy Act*, it is clear that the prohibition on disclosure of Personal Information in subsection 8(1) of the *Privacy Act* is inapplicable in respect of Personal Information that is Publicly Available.

62 Thus, if the documents placed by the Agency on its Public Record in the Cancun Matter are Publicly Available, then the redactions made to them on behalf of the Agency were impermissible and, without more, the application for judicial review must be allowed.

Dr. Lukacs' Submission -- "Publicly Available"

63 Dr. Lukacs argues that he is entitled to receive the Unredacted Documents because they were placed on the Agency's Public Record and, accordingly, any Personal Information that might be contained in them is Publicly Available. As such, he asserts that the prohibition in subsection 8(1) of the *Privacy Act* is inapplicable.

The Agency's Position -- "Publicly Available"

64 Counsel for the Agency asserts that Personal Information of each party to an adjudicative proceeding before the Agency is put into a personal information bank (a "Personal Information Bank"), as contemplated by section 10 of the *Privacy Act*, and therefore is not information that is Publicly Available. Further, counsel for the Agency asserts that this Court should reject the argument that, in absence of a confidentiality order, the Agency is required to disclose documents on its Public Record in an unredacted form. Finally, counsel for the Agency asserted that, if Parliament had intended that the right to disclosure of documents pursuant to the open court principle was to override subsection 8(1) of the *Privacy Act*, that legislation would have contained a specific provision to that effect.

The Attorney General of Canada's Position
-- "Publicly Available"

65 The Attorney General of Canada took no position with respect to the interpretation and application of subsection 69(2) of the *Privacy Act* in this appeal.

The Privacy Commissioner's Position
-- "Publicly Available"

66 Counsel for the Privacy Commissioner asserts that Personal Information cannot be Publicly

Available unless it is obtainable from another source or available in the public domain for ongoing use by the public when Dr. Lukacs made his request. In addition, the Privacy Commissioner asserts that information on the Agency's Public Record cannot be Publicly Available simply because the Agency is subject to the open court principle.

Discussion

67 To decide this issue, it is necessary to interpret the terms Publicly Available and Public Record. Unfortunately, the parties were unable to provide the Court with any determinative authorities in this regard.

The interpretative approach

68 In *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, the Supreme Court provided the following interpretative guidance at paragraph 10:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> [Emphasis added]

"Publicly Available"

69 The term Publicly Available appears to me to be relatively precise and unequivocal. I interpret these words as meaning available to or accessible by the citizenry at large. This interpretation is also consistent with the apparent context and purpose of subsection 69(2) of the *Privacy Act*. That provision is located in a portion of the *Privacy Act*, entitled "Exclusions", that sets out circumstances in which the *Privacy Act*, or sections thereof, do not apply. The purpose of subsection 69(2) of the *Privacy Act* is to render the use and disclosure limitations that are contained in sections 7 and 8 of the *Privacy Act* inapplicable to Personal Information if and to the extent that

the citizenry at large otherwise has the ability to access such information.

"Public Record"

70 In my view, the meaning of Public Record is not precise and unequivocal. Instead, the context in which this term appears is critical to the discernment of its meaning. The term appears in subsection 23(1) of the Old Rules.

71 In the judicial context, the record consists of a documentary memorialization of the proceedings that have come before the court. The documents on the record constitute the foundation upon which the court grounds its ultimate decision. The purpose of the record is to facilitate scrutiny of the court's decision, whether for the specific purpose of appellate review or the more general purpose of judicial transparency. Thus, when a court places documents on its record, it adheres to the open court principle.

72 However, as has been noted earlier in these reasons, there are circumstances in which unfettered access to the record before the court runs counter to competing societal interests. In those circumstances, the affected party may apply to the court for relief, either under the procedural rules of that court or on the basis of the *Dagenais/Mentuck* test in respect of *Charter*-based applications. In appropriate circumstances, the court will circumscribe the scope and application of the open court principle. When it does so, the court will have determined that, in the circumstances, safeguarding the integrity of the administration of justice and protecting the often vulnerable party who seeks that protection, outweigh the benefits of open access that the open court principle would otherwise provide. Thus, the open court principle mandates that the record of the court will be available for public access and scrutiny, except to the extent that the Court otherwise determines.

73 In my view, there is no principled reason to employ a more limited interpretation of the term record simply because that term relates to a quasi-judicial adjudicative tribunal, such as the Agency, rather than a court. The record of the proceedings before the Agency performs essentially the same function as the record of a court.

74 In interpreting the term record, in subsection 23(1) of the Old Rules, I adopt the meaning referred to above, namely a documentary memorialization of the proceedings that have come before the Agency. The additional word "public" provides a useful contrast to the situation in which materials on the record have been determined by the Agency to be confidential. In other words, as noted in the excerpt from the Annotation referred to in paragraph 54 of these reasons, the Agency's Public Record can be viewed as a record that contains no confidential documents.

75 The Annotation provides an illustration of the Agency's perspective with respect to requests for confidentiality

> The Agency is a quasi-judicial tribunal that follows the "open court principle." This principle guarantees the public's right to know how justice is administered

> and to have access to decisions rendered by courts and tribunals, except in exceptional cases. That is, the other parties in a dispute proceeding have a fundamental right to know the case being made against them and the documents that the decision-maker will review when making its decision which must be balanced against any specific direct harm the person filing the documents alleges will occur if it is disclosed. This means that, upon request, and with limited exceptions, all information filed in a dispute proceeding can be viewed by the public.
>
> In general, all documents filed with or gathered by the Agency in a dispute proceeding, including the names of the parties and witnesses, form part of the public record. Parties filing documents with the Agency must also provide the documents to the other parties involved in the dispute proceeding under section 8 of the Dispute Adjudication Rules.
>
> [Emphasis added]

Is the Agency's public record publicly available?

76 The Privacy Commissioner asserts that to be Publicly Available, the documents requested by Dr. Lukacs must have been freely obtainable from a source other than the Agency. However, the Privacy Commissioner offers no jurisprudential authority for this proposition, and I reject it.

77 This assertion ignores the bifurcated nature of the Agency's mandate. As noted above, the Agency functions as an economic regulator and as a quasi-judicial dispute resolution tribunal.

78 The documents initiating a dispute may well be required to be kept in Personal Information Banks, immediately after their receipt by the Agency. However, compliance by the Agency with its obligation in subsection 23(1) of the Old Rules means that those documents have left the cloistered confines of such banks and moved out into the sunlit Public Record of the Agency. In my view, the act of placing documents on the Public Record is an act of disclosure on the part of the Agency. Thus, documents placed on the Agency's Public Record are no longer "held" or "under the control" of the Agency acting as a Government Institution. From the time of their placement on the Public Record, such documents are held by the Agency acting as a quasi-judicial, or court-like body, and from that time they become subject to the full application of open court principle. It follows, in my view, that, once on the Public Record, such documents necessarily become Publicly Available.

79 In this regard, two comments are apposite. First, in placing documents on its Public Record, the Agency is acting properly and within the law. Such disclosure by the Agency is necessary for it to fulfill its dispute resolution mandate, and in particular to comply with the requirements of

subsection 23(1) of the Old Rules or subsection 7(2) of the New Rules. Secondly, either subsections 23(3) to (9) of the Old Rules or section 31 of the New Rules will permit the parties to the proceedings to request a confidentiality order from the Agency. These confidentiality provisions enable the Agency to protect the privacy interests of participants in dispute resolution proceedings before it. They do so in substantially the same way that such interests are protected in judicial proceedings, while preserving the presumptively open access to the Agency's proceeding in accordance with the open court principle. To underscore this point, it was open to the parties in the Cancun Matter to request a confidentiality order in relation to any Personal Information filed in that matter, but no such request was made.

80 In conclusion, it is my view that once the Agency placed the documents in the Cancun Matter on its Public Record, as required by subsection 23(1) of the Old Rules, those documents became Publicly Available. As such, the limitation on their disclosure, contained in subsection 8(1) of the *Privacy Act*, was no longer applicable by virtue of subsection 69(2) of the *Privacy Act*. Accordingly, Dr. Lukacs was entitled to receive the documents that he requested and the Agency's refusal to provide them to him was impermissible.

C. The Constitutional Issue

81 The resolution of the Refusal Issue makes it unnecessary for me to consider the Constitutional Issue.

V. DISPOSITION

82 For the foregoing reasons, I would allow the application for judicial review and direct the Agency to provide the Unredacted Documents to Dr. Lukacs. In view of the complexities of the issues that were raised in this application and the considerable time that was spent by Dr. Lukacs I would award Dr. Lukacs a moderate allowance in the amount of $750.00 plus reasonable disbursements, such amounts to be payable by the Agency.

RYER J.A.
NEAR J.A.:-- I agree.
BOIVIN J.A.:-- I agree.

Indexed as:

Université du Québec à Trois-Rivières v. Larocque

Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières, appellant;
v.
Université du Québec à Trois-Rivières, respondent, and Alain Larocque, mis en cause, and Claude-Élizabeth Perreault and Céline Guilbert, mis en cause.

[1993] 1 S.C.R. 471

[1993] 1 R.C.S. 471

[1993] S.C.J. No. 23

[1993] A.C.S. no 23

File No.: 22146.

Supreme Court of Canada

1992: November 30 / 1993: February 25.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC (62 paras.)

Labour relations -- Judicial review -- Excess of jurisdiction -- Arbitration -- Dismissal due to lack of funds -- Refusal by arbitrator to hear admissible and relevant evidence -- Whether refusal to hear relevant evidence necessarily a breach of rules of natural justice -- New arbitration before another arbitrator.

Pursuant to an agreement between the respondent University and the Government of Quebec to conduct research, the University hired two research assistants for a period of 14 months. Before the

end of that period, they were advised that "as the result of a lack of funds" the University was forced to terminate their contracts. The employees filed grievances challenging this decision. At the hearing, the University sought to introduce evidence that the employees had done their work badly and that it was accordingly necessary to hire from the research funds provided for in the agreement another experienced person who would be able to redo the work already done. It was this additional expenditure which, [page472] according to the University, had led to the shortage of funds to pay the employees. The appellant union objected to this evidence and argued that the University was trying to alter the grounds relied on in the notices of termination of employment. The arbitrator allowed the objection. He subsequently allowed the grievances and ordered the University to pay the employees their full salaries. The arbitrator stated that when the University referred to a lack of funds, it could only mean funds of the University, with which the employees had entered into a contract. He concluded that the University had not discharged its burden of proving the lack of funds and that accordingly there was no cause for interrupting the contracts. He added that even if there had been a lack of funds, that lack could not be a valid reason for breaching a term contract, since this was a cause which was not within the employee's control, but "due to an agreement made between the University and a third party". The Superior Court allowed the motion in evocation submitted by the University, concluding that the arbitrator had exceeded his jurisdiction by refusing to hear relevant and admissible evidence. The court noted that the arbitrator had confined his ruling to the contractual relationship between the University and the employees in deciding on the merits of the grievance and had refused to hear the evidence that the reason the University lacked funds was precisely the poor quality of the work done by the employees. The court ordered that a new arbitration be held before another arbitrator. The Court of Appeal, in a majority decision, affirmed this judgment. This appeal is primarily to determine whether the refusal by a grievance arbitrator to admit evidence is a decision subject to judicial review.

Held: The appeal should be dismissed.

Per Lamer C.J. and La Forest, Gonthier and Iacobucci JJ.: The grievance arbitrator has jurisdiction to define the scope of the issue presented to him, and in this regard only a patently unreasonable error or a breach of natural justice can constitute an excess of jurisdiction and give rise to judicial review. The necessary corollary of this jurisdiction of the arbitrator is his exclusive jurisdiction then to conduct the proceedings, and he may inter alia choose to admit only the evidence he considers relevant to the case as he has chosen to define it. The arbitrator's exclusive jurisdiction to define the scope of the case is not a jurisdictional question.

An arbitrator does not necessarily commit a breach of the rules of natural justice, and therefore an excess of [page473] jurisdiction, when he erroneously decides to exclude relevant evidence. The arbitrator is in a privileged position to assess the relevance of evidence presented to him and it is not desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the arbitrator. An arbitrator commits an excess of jurisdiction, however, if his erroneous decision to reject relevant evidence has such an impact on the

fairness of the proceeding that it can only be concluded that there has been a breach of the rules of natural justice.

In this case, the Superior Court was justified in exercising its review power and ordering a new arbitration hearing. By refusing to admit evidence presented by the University, the arbitrator infringed the rules of natural justice. In the context of a hearing involving a dismissal due to a lack of funds, such evidence was crucial. Its purpose was to establish the cause of the lack of funds. The arbitrator added, moreover, that even if there had been a lack of funds, that lack could not be a valid reason for breaking a term contract, since that was a cause which was not within the employee's control but was due to an "agreement between the University and a third party". He thus recognized the importance of the lack of cause attributable to the employees but found himself in the position of disposing of it without having heard any evidence whatever from the University on the point, and even having expressly refused to hear the evidence which the University sought to present on the point. This quite clearly amounts to a breach of natural justice. The denial of the right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision.

The union did not succeed in establishing that the Superior Court had erred in the exercise of its discretion in ordering that the new arbitration be held before another arbitrator. The court was probably of the view that there could quite reasonably be doubt as to the ability of an arbitrator to objectively hear evidence which he already thought was so lacking in significance as to declare it irrelevant.

Per L'Heureux-Dubé J.: Although a reviewing court is held to a high standard of deference toward an administrative tribunal protected by a privative clause, an error on a question of law which goes to jurisdiction will always be reviewable. In this case, the arbitrator had jurisdiction to dispose of the grievances but committed an excess of jurisdiction by refusing to consider the evidence [page474] presented by the University. That evidence was relevant to the consideration and disposition of the grievances. Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice.

Cases Cited

By Lamer C.J.

Not followed: Toronto Newspaper Guild, Local 87 v. Globe Printing Co., [1953] 2 S.C.R. 18; distinguished: Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106, [1982] 2 S.C.R. 888; referred to: St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704; Canadian Union Public of Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227; U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048; National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324; Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643.

By L'Heureux-Dubé J.

Referred to: Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554; Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382.

Statutes and Regulations Cited

Labour Code, R.S.Q., c. C-27, s. 100.2 [ad. 1983, c. 22, s. 65].

Authors Cited

Evans, J.M., et al. Administrative Law, 3rd ed. Toronto: Emond Montgomery Publications Ltd., 1989.
Garant, Patrice. Droit administratif, vol. 2, Le contentieux, 3e éd. Cowansville: Yvon Blais, 1991.
Ouellette, Yves. "Aspects de la procédure et de la preuve devant les tribunaux administratifs" (1986), 16 R.D.U.S. 819.

APPEAL from a judgment of the Quebec Court of Appeal, [1990] R.J.Q. 2183, affirming a judgment of the Superior Court[1] allowing a motion in evocation. Appeal dismissed.

[page475]

Pierre Thériault, for the appellant. Marc St-Pierre and Louis Masson, for the respondent.

Solicitors for the appellant: Lapierre, St-Denis & Associés, Montréal. Solicitors for the respondent: Joli-Coeur, Lacasse, Simard, Normand & Associés, Trois-Rivières.

English version of the judgment of Lamer C.J. and La Forest, Gonthier and Iacobucci JJ. was delivered by

LAMER C.J.:--

Facts

1 In October 1985 an agreement was concluded between the Government of Quebec and the respondent Université du Québec à Trois-Rivières whereby research was to be conducted by the respondent by means of questionnaires and interviews. The agreement provided for an initial

payment of $25,000 on the signing of the agreement and a second payment of $33,000 after the questionnaire and the interview plan were submitted. A committee was set up under the authority of the director of research at the Ministère de l'éducation to provide follow-up on the research. Responsibility for the work was assigned to Professor Jean-Luc Gouvéia, who hired the mis en cause Perreault and Guilbert as grant-aided part-time professional research assistants. The date the employment commenced was to be October 15, 1985 and its termination December 15, 1986 [TRANSLATION] "or on notice from the University for cause".

2 An initial working document prepared by the mis en cause was submitted to the follow-up committee on or about April 15, 1986. This presentation was behind the schedule specified in the agreement between the Government and the respondent.

3 On May 1, 1986 the respondent advised the mis en cause by letter that [TRANSLATION] "as the result of a lack of funds" it would be forced to terminate their contract as of April 25, 1986.

4 A grievance was then filed for each of the mis en cause and at the first arbitration hearing, the respondent contended that the arbitrator lacked [page476] jurisdiction by alleging that the grievance could not be arbitrated under the collective agreement. This allegation was dismissed by the mis en cause arbitrator in a preliminary decision dated December 16, 1986.

5 In February 1987 the mis en cause arbitrator proceeded to hear the grievances on the merits. The respondent then sought to introduce evidence that the two mis en cause employees had done their work badly and that, accordingly, in order to meet the schedule agreed on in the contract between the Government and the respondent, it was necessary to hire from the research funds another experienced person who would be able to redo the work done by the mis en cause employees in April 1986 and found by the Government's representatives to be of poor quality. It is this additional expenditure which, on the evidence which the respondent sought to present, led to the shortage of funds to pay the two assistants.

6 The appellant objected to this evidence on the ground that the respondent was trying to add to or alter the grounds relied on in the notices of termination of employment of May 1, 1986. The appellant contended that the respondent wanted to present evidence on the competence of the two mis en cause professionals when the sole and exclusive reason given by the respondent for ordering the termination of employment was a lack of funds. The mis en cause arbitrator allowed the appellant's objection. On March 19, 1987, he made an award allowing the two grievances and ordering the respondent to pay the mis en cause employees their full salary.

7 The respondent then submitted a motion in evocation to the Superior Court, alleging first that the arbitrator had assumed jurisdiction which he did not have in deciding that the mis en cause employees benefited from the grievance procedure laid down in the collective agreement. Alternatively, it argued that the arbitrator had exceeded his jurisdiction by not admitting evidence of the lack of competence of the two mis en cause employees. The Superior Court allowed the motion, rejecting the respondent's arguments as to the arbitrator's jurisdiction to hear the grievances but

finding that [page477] his refusal to hear the evidence offered by the respondent constituted an excess of jurisdiction. It ordered that the case be re-heard before another arbitrator.

8 The appellant appealed the part of the judgment vacating the arbitral award and ordering a new arbitration. The respondent then filed a cross-appeal, challenging the other part of the judgment which recognized the arbitrator's jurisdiction to hear the grievances filed by the mis en cause employees. On August 21, 1990, the Court of Appeal dismissed the two appeals, Rousseau-Houle J.A. dissenting on the main appeal. The present appeal is from the Court of Appeal's judgment on the main appeal.

Applicable Legislation

9 Section 100.2 of the Labour Code, R.S.Q., c. C-27, reads as follows:

> 100.2 The arbitrator shall proceed with all dispatch with the inquiry into the grievance and, unless otherwise provided in the collective agreement, in accordance with such procedure and mode of proof as he deems appropriate.
>
> For such purpose, he may, ex officio, call the parties to proceed with the hearing of the grievance.

Applicable Provisions of the Collective Agreement

10 Clauses 2-1.03(A), 5-1.01 and 5-5.01 of the collective agreement read as follows:

> [TRANSLATION]
>
> 2-1.03 (A) A supernumerary, temporary, replacement or grant-aided professional is subject to the following provisions:
>
> ...
>
> (5) Hiring, probation, resignation (article 5-1.00), except for clauses 5-1.03, 5-1.04 and 5-1.05.
>
> ...

[page478]

(19) Procedure for the settlement of grievances and disputes and arbitration (chapter 11-0.00) to claim the benefits conferred herein.

5-1.01

All professionals shall be hired by a contract which the personnel branch will deliver to the professional, indicating to him certain of his terms and conditions of employment (group, classification, salary, date of hiring, probation period, probable length of employment in the case of a supernumerary, temporary, replacement, grant-aided or casual professional). A copy of this contract shall be sent to the union when the professional commences his or her employment.

5-5.01

(a) When an act done by a professional leads to disciplinary action the University, depending on the seriousness of the alleged act, shall take one of the following three (3) steps:

- written warning;

- suspension;

- dismissal.

(b) The University shall inform the professional in writing that he or she is subject to disciplinary action within twenty (20) working days of the time the University becomes aware of the offence alleged against him or her: this is a strict time limit and the burden of proof of subsequent knowledge of the facts by the University is on the University.

(c) In all cases in which the University takes disciplinary action, the professional concerned or the Union may have recourse to the grievance and arbitration procedure; the burden of proof that the cause in question is just and sufficient for disciplinary action to be taken is on the University.

(d) In the event that the University wishes to take disciplinary action against a professional, it shall summon the said professional by at least twenty-four (24) hours' written notice; at the same time, the University shall advise the Union that the professional has been summoned.

(e) The notice sent to the professional shall specify the time and place at which he shall attend and the nature of the facts alleged against him. The professional may be accompanied by

a union representative.

[page479]

Judgments

Arbitration Tribunal -- Preliminary Decision

11 In the preliminary decision of December 16, 1986 the arbitrator held that he had total, absolute and exclusive jurisdiction to hear and decide the grievances presented by the complainants. He accordingly dismissed the objection made by counsel for the University that the dismissal of the grant-aided professionals was not subject to arbitration. The arbitrator pointed out that clause 2-1.03 (A) of the collective agreement, governing grant-aided professionals, makes them subject to the grievance procedure in claiming the benefits conferred by the collective agreement. Clause 5-1.01 provides that the hiring of any professional shall be by contract and that this contract shall specify, inter alia, the group, classification, salary, date of hiring, probation period and probable length of the employment in the case of a grant-aided professional. According to the arbitrator, it follows that if there is disagreement as to the interpretation or application of any of the provisions of the hiring contract, that disagreement is a grievance within the meaning of the Act and the collective agreement. The arbitrator stated that the contrary solution, namely referring complainants to proceedings in the ordinary courts of law, would be contrary to the manifest intention of the legislature that all grievances be subject to arbitration. This solution would also, the arbitrator concluded, be contrary to the spirit of the Supreme Court decision in St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219, [1986] 1 S.C.R. 704. Finally, the arbitrator stated that there would have to be a very clear provision to exempt a privilege conferred under a collective labour agreement from the arbitration mechanism provided for in the event of a dispute.

Arbitration Tribunal -- Decision on the Merits

12 In his decision on the merits of the grievances rendered on March 19, 1987, the arbitrator first stated that when the University referred to a lack of funds, it could only mean funds of the employer, the Université du Québec à Trois-Rivières, with which the complainants had entered [page480] into a contract. He noted that the University had the burden of establishing the lack of funds, and found that the University had not succeeded in showing that it lacked funds to pay the two employees up to the date of termination provided for in the contract. He observed that there was no evidence that the Government had broken its contract with the University and indicated that the University was under no obligation to offer 14-month contracts. He concluded that the University had not discharged its burden of proving the lack of funds and that accordingly there was no cause for interrupting the contracts.

13 The arbitrator added that even if there had been a lack of funds, that lack could not be a valid

reason for breaching a term contract, since [TRANSLATION] "[i]t is a cause which is not within the employee's control, but is due to an agreement between the University and a third party". He stated that, in cases of dismissal for cause in the context of term contracts, the authors and cases require that the employer establish a breach of an essential condition of the contract of employment, a breach for which the employee is responsible. This is why he found that a [TRANSLATION] "... fact beyond the employee's control, such as the non-payment of money by a third party to the employer, and indeed the employer's poor economic situation, cannot be a cause for the breach of a contract of employment that relieves the employer of its obligations".

Superior Court

14 On the question of the arbitrator's jurisdiction Lebrun J., after recalling the principles set out by the Supreme Court in St. Anne Nackawic Pulp & Paper, supra, and listing the provisions of the collective agreement in effect between the parties and applicable to the complainants, held that:

> [TRANSLATION] In deciding to hear the grievance, the respondent arbitrator applied what I would call the presumption that a grievance is arbitrable when, as here, everything tends to show that the individual contract of the parties is clearly subject to the provisions of the collective agreement and therefore to the arbitration mechanisms provided for therein.

[page481]

15 However, Lebrun J. accepted the respondent's alternative argument. Referring to the arbitral award, he noted that the arbitrator had confined his ruling to the contractual relationship between the respondent and the mis en cause employees in deciding on the merits of the grievance and had refused to hear the evidence that the reason the respondent lacked funds was precisely the poor quality of the work done by the mis en cause employees. Accordingly, he was of the view that:

> [TRANSLATION] On the one hand, by blaming [the respondent] for not establishing that the cause of dismissal was something for which the mis en cause employees were responsible, and on the other, by denying [the respondent] the opportunity to establish that very fact based on a narrow interpretation of the "cause" of dismissal, the [mis en cause] arbitrator was refusing to hear admissible and relevant evidence ... .

Relying on the Supreme Court judgment in Roberval Express Ltée v. Transport Drivers, Warehousemen and General Workers Union, Local 106, [1982] 2 S.C.R. 888, the judge concluded that the arbitrator had exceeded his jurisdiction by refusing to hear relevant and admissible evidence.

Court of Appeal, [1990] R.J.Q. 2183

Baudouin J.A.

16 On the question of the arbitrator's jurisdiction, Baudouin J.A. agreed that the relevant provisions of the collective agreement were not [TRANSLATION] "crystal clear". However, he held that this document should be read as a whole and its purposes taken into account. He also referred to the general philosophy of Quebec labour law and concluded that the arbitrator had jurisdiction to decide the two grievances and so had not arrogated to himself jurisdiction exercisable only by the ordinary courts of law.

17 On the second issue, Baudouin J.A., for the majority, upheld the Superior Court's decision that the arbitrator had exceeded his jurisdiction. Noting first that the Superior Court had found in the respondent's favour mainly owing to the fact that [page482] the arbitrator had not observed the audi alteram partem rule, the judge went on to say (at p. 2187):

> [TRANSLATION] With all due respect, it does not seems to me that that resolves the problem. It is still necessary to determine whether this evidence was relevant and admissible. There does not seem to be any doubt as to the relevance of the evidence, since it seeks to establish that the need to terminate the employment before the time specified was caused by what the two research assistants themselves did. I am of the view that its admissibility results from the very interpretation of the collective agreement between the parties. No provision is to be found in that agreement requiring the employer in cases of grant-aided professionals ... to give the facts or reasons behind the dismissal. On the contrary, article 2-1.03 expressly excludes the application to this class of employees of clause 5-5.01 requiring the employer to do that. The university accordingly had no contractual obligation to give in writing the specific reasons for terminating the employment, subject to not being able to rely on them in the event of arbitration. The allegation of lack of funds was sufficient. Evidence of the reasons for this lack of funds was nonetheless not irrelevant or inadmissible.

Rousseau-Houle J.A. (dissenting on the main appeal)

18 Rousseau-Houle J.A. concurred with the reasons of Baudouin J.A. regarding the arbitrator's jurisdiction. However, she was of the view that the arbitrator had not exceeded his jurisdiction in not admitting evidence of the poor quality of the work done by the mis en cause employees.

19 Rousseau-Houle J.A. held that under s. 100.2 of the Labour Code, it is up to the arbitrator to decide on the relevance and admissibility of the evidence the parties intend to submit. His decisions are thus subject to judicial review only if there is a breach of natural justice or patently unreasonable error.

20 The judge considered that the respondent had been allowed to present argument on the lack of funds and that it had only been prevented from establishing another ground of dismissal, namely the incompetence of the research assistants, a [page483] ground which it had not mentioned in the employment termination notices.

21 Bearing in mind the limited purpose of the arbitrator's jurisdiction, namely to hear and decide the grievance before him, the judge was of the view that the arbitrator [TRANSLATION] "may consider the notion of relevance of the evidence more narrowly than a judge would when hearing witnesses" (p. 2188). She noted that the dispute submitted to the arbitrator here concerned the probable length of the contracts hiring the two mis en cause employees and the reason given by the respondent for terminating them.

22 The judge considered that the arbitrator's decision to refuse to admit the evidence on the ground that the respondent was actually trying to prove a cause of dismissal not mentioned in the notices was not unreasonable. She went on to say (at p. 2189):

> [TRANSLATION] That decision does not seem arbitrary or illogical to me either, since it was a necessary part of determining the point at issue and noted that there was not really an adequate connection between that point and the evidence presented.
>
> ...
>
> In adopting a strict interpretation of the cause of dismissal, rather than granting an adjournment or admitting the evidence under advisement, the arbitrator did not exercise his jurisdiction unreasonably.

23 The judge further held that the arbitrator's refusal to allow the evidence also should not be regarded as a refusal to exercise his jurisdiction contrary to the rules of natural justice, since it is only a refusal to hear relevant and admissible evidence which constitutes an excess of jurisdiction. She felt that the respondent here had had an opportunity to put forward evidence regarding the lack of funds. She noted that the arbitrator had to reconcile the demands of the decision-making process with the rights of all parties and pointed out that the audi alteram partem rule was intended essentially to give the parties a reasonable opportunity to respond to the evidence presented against them.

[page484]

Issues

24 Though the appellant formulated six questions, in my opinion this appeal really only raises

two. First, it must be determined whether the refusal by a grievance arbitrator to admit evidence is a decision subject to judicial review, and in particular whether the Superior Court was justified in exercising its review power in the case at bar. Secondly, the Court must decide whether the Superior Court erred in ordering that the new arbitration hearing would be before another arbitrator.

Analysis

(a) Refusal to Admit Evidence and Judicial Review

25 The question therefore is whether, in deciding not to admit the evidence offered by the respondent, the arbitrator committed an error giving rise to judicial review. In their consideration of this question, Lebrun J. of the Superior Court and Baudouin J.A. speaking for the majority of the Court of Appeal both referred to the following passage from Chouinard J.'s judgment in Roberval Express, supra, at p. 904:

> Appellant alleged a refusal by the arbitrator to hear admissible and relevant evidence. A refusal to hear admissible and relevant evidence is so clear a case of excess or refusal to exercise jurisdiction that it needs no further comment.

26 It should be noted, however, that Roberval Express did not involve a simple refusal by a grievance arbitrator to hear relevant evidence. The arbitrator, who was to hear four grievances, had refused to hear the first three and heard only the grievance relating to the dismissal of the employee in question. The first three grievances concerned disciplinary action leading up to that dismissal. The employer contended that the dismissal resulted from incidents which gave rise to the disciplinary action, and it was therefore necessary to hear all the grievances at the same time. Accordingly, it attacked the arbitrator not only for not hearing certain evidence, but more importantly, for refusing [page485] to exercise his jurisdiction over three of the grievances presented to him.

27 When thus seen in their context it is not clear that Chouinard J.'s remarks can be used to dispose of this case. Accordingly, this Court must examine the question presented to it on the basis of the particular circumstances of this case, the arguments made by the parties and the general principles governing judicial review in the field of grievance arbitration.

(i) Determining the Scope of This Case

28 The appellant first argued that the present appeal actually concerns not the mis en cause arbitrator's failure to admit the evidence submitted by the respondent, but the mis en cause arbitrator's understanding of the issue presented to him, a question over which the grievance arbitrator has exclusive jurisdiction, free from judicial review except in the case of a patently unreasonable error or a breach of natural justice. In other words, the appellant argued that the exclusion of the evidence resulted here from the mis en cause arbitrator's decision to confine himself to the cause mentioned in the notice of dismissal and that that decision could only be

reversed once it was shown to be patently unreasonable or a breach of natural justice.

29 As far as this argument is concerned, in my opinion, there is no doubt that the mis en cause arbitrator had complete jurisdiction to define the scope of the issue presented to him, and that in this regard only a patently unreasonable error or a breach of natural justice could give rise to judicial review. The question is in no way one which could be characterized as jurisdictional in nature.

30 For some years, since the decision of Dickson J. in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, [page486] this Court has made an effort to limit the scope of the theory of preliminary questions. In U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, Beetz J. favoured instead a functional and pragmatic approach to identifying questions of jurisdiction. He said (at p. 1087):

> The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"

31 Applying this approach to the question of the grievance arbitrator's jurisdiction to define the scope of the issue presented to him, I am unable to conclude that the legislature intended such a matter to be beyond the arbitrator's exclusive jurisdiction. This is especially true in the instant case in that in order to determine the scope of the issue presented to him the arbitrator had primarily to interpret the collective agreement, the contracts concluded between the mis en cause Perreault and Guilbert and the respondent -- contracts covered by clause 5-1.01 of the collective agreement -- and the wording of the grievances filed by the appellant. Interpretation of such documents is clearly within the grievance arbitrator's exclusive jurisdiction.

32 This approach may seem to be at odds with the decision of this Court in Toronto Newspaper Guild, Local 87 v. Globe Printing Co., [1953] 2 S.C.R. 18. In that case, which also involved the exclusion of evidence, Kerwin J. suggested that, far from being non-reviewable by the courts, the error of an administrative tribunal in determining the questions which were the subject of its inquiry was on the contrary, depending on whether the tribunal was wrongly refusing to examine a question or concerning itself with a question not presented to it, a refusal by that tribunal to exercise its jurisdiction or an excess of jurisdiction justifying intervention by the courts.

33 This judgment, however, may be classified among the decisions of this Court which, as Wilson J. noted in National Corn Growers Assn. v. [page487] Canada (Import Tribunal), [1990] 2 S.C.R. 1324, demonstrates the reluctance Canadian courts had long shown "... to accept the proposition that tribunals should not be subject to the same standard of review as courts" (p. 1335). As Wilson J. explained, administrative law has developed considerably since that time, so that courts of law now allow administrative tribunals much greater independence. New Brunswick Liquor Corp., supra, represents the culmination of this development.

34 In view of the foregoing, I have no hesitation in concluding that the arbitrator had complete jurisdiction to define the scope of the issue presented to him, and that only an unreasonable error on his part in this regard or a breach of natural justice could have constituted an excess of jurisdiction. I also think, though in my opinion it is not necessary to decide this point in the case at bar, that the necessary corollary of the grievance arbitrator's exclusive jurisdiction to define the issue is his exclusive jurisdiction then to conduct the proceedings accordingly, and that he may inter alia choose to admit only the evidence he considers relevant to the case as he has chosen to define it.

35 In my opinion, however, these comments do not dispose of the case at bar. The respondent is not complaining only, or even primarily, of the fact that in refusing to admit the evidence it had to offer the arbitrator erred in understanding the issue presented to him. Rather, it is arguing that even within the issue as defined by the arbitrator -- that is, an issue limited to the cause relied on in the notices of dismissal, the lack of funds -- this evidence was relevant since its very purpose was to establish the reason for this lack of funds. It maintained that the refusal to admit relevant and admissible evidence infringes the rules of natural justice and for that reason constitutes an excess of jurisdiction.

[page488]

36 In other words, the question now before this Court is not whether, after deciding wrongly but not unreasonably that he should limit his analysis to a single ground of dismissal, an arbitrator who then decides to exclude evidence of other possible reasons for dismissal commits an error that is beyond judicial review by the courts. The answer to this question is simple: it is yes. The arbitrator is then acting within his jurisdiction.

37 The question before this Court is instead whether, in erroneously deciding to exclude evidence relevant to the ground of dismissal which he has himself identified as being that which he must examine, the arbitrator necessarily commits an excess of jurisdiction. In my view the answer to this question must in general be no. It will be yes, however, if by his erroneous decision the arbitrator was led to infringe the rules of natural justice. I therefore now turn to considering this question.

(ii) Refusal to Admit Relevant Evidence and Natural Justice

38 The only rule of natural justice with which the Court is concerned here is the right of a person affected by a decision to be heard, that is, the audi alteram partem rule. The question is whether there is a breach of that rule whenever relevant evidence is rejected by a grievance arbitrator. In order to answer this question, we must determine whether judicial review should be available whenever an arbitrator errs, regardless of the seriousness of his error, in declaring evidence submitted by the parties to be irrelevant or inadmissible.

39 The difficulty of this question arises from the tension existing between the quest for

effectiveness and speed in settling grievances on the one hand, and on the other preserving the credibility of the arbitration process, which depends on the parties' believing that they have had a complete opportunity to be heard. Professor Ouellette speaks in this regard of the [TRANSLATION] "... perpetual contradiction between freedom of operation and its [page489] necessary procedural aspects" (Y. Ouellette, "Aspects de la procédure et de la preuve devant les tribunaux administratifs" (1986), 16 R.D.U.S. 819, at p. 850). Professor Evans also states:

> There is a certain tension between the proposition that an administrative tribunal, even if required to hold an adjudicative-type hearing, is not bound by the whole body of the law of evidence applied in proceedings in courts of law, and the imposition of a duty to decide in a procedurally fair manner.
>
> (J. M. Evans et al., Administrative Law (3rd ed. 1989), at p. 452.)

40 For this reason, the question before the Court cannot simply be answered, as the appellant suggests, by reference to s. 100.2 of the Labour Code, which provides:

> 100.2 [Inquiry into grievance] The arbitrator shall proceed with all dispatch with the inquiry into the grievance and, unless otherwise provided in the collective agreement, in accordance with such procedure and mode of proof as he deems appropriate.

The appellant argued that this provision gave a grievance arbitrator exclusive jurisdiction to decide on the relevance of the evidence presented to him and that his decisions in this regard are consequently beyond the scope of judicial review except in the event of patently unreasonable error.

41 This argument cannot be accepted. Section 100.2 of the Labour Code does give a grievance arbitrator complete autonomy in dealing with points of evidence and procedure; but the rule of autonomy in administrative procedure and evidence, widely accepted in administrative law, has never had the effect of limiting the obligation on administrative tribunals to observe the requirements of natural justice. This is what Professor Ouellette says in this regard, supra, at p. 850:

> [TRANSLATION] ... the major decisions which formulated the principle of the independence of administrative evidence from technical rules have in the same breath made it clear that this independence must be exercised in accordance with the rules of fundamental justice. It is [page490] not sufficient for administrative tribunals to operate simply and effectively: they must attain this high ideal without sacrificing the fundamental rights of the parties.

42 It is true that the error of an administrative tribunal in determining the relevance of evidence is an error of law, and that in general the decisions of administrative tribunals which enjoy the protection of a complete privative clause are beyond judicial review for mere errors of law.

43 That is not true, however, in cases where, as occurred here in the submission of the respondent, the arbitrator's decision on the relevance of evidence had the effect of breaching the rules of natural justice. A breach of the rules of natural justice is regarded in itself as an excess of jurisdiction and consequently there is no doubt that such a breach opens the way for judicial review; but that brings us back to the point at issue in this case: was there a breach of natural justice as a result of the mis en cause arbitrator's refusal to admit the evidence submitted by the respondent?

44 The proposition that any refusal to admit relevant evidence is in the context of a grievance arbitration a breach of natural justice is one which could have serious consequences. It in effect means that the arbitrator does not have the power to decide in a final and exclusive way what evidence will be relevant to the issue presented to him. That may seem incompatible with the very wide measure of autonomy which the legislature intended to give grievance arbitrators in settling disputes within their jurisdiction and the attitude of restraint demonstrated by the courts toward the decisions of administrative bodies.

45 At the same time, it is clear that the confidence of the parties bound by the final decisions of grievance arbitrators is likely to be undermined by the reckless rejection of relevant evidence. A certain caution is therefore unquestionably necessary in this regard. As Professor Garant observes:

[page491]

> [TRANSLATION] A tribunal must be cautious, however, as it is much more serious to refuse to admit relevant evidence than to admit irrelevant evidence, which may later be rejected in the final decision. The practice of a tribunal taking objections to evidence "under advisement" where possible, and when the party making them does not absolutely insist on having a decision right then, is usually advisable; it does not in any way contravene natural justice.
>
> (P. Garant, Droit administratif, vol. 2, Le contentieux (3rd ed. 1991), at p. 231.)

46 For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.

47 Accordingly, in the case before the Court there is no doubt, in my opinion, that there was a

breach of natural justice. The respondent wished to present evidence of the poor quality of the work of the mis en cause Perreault and Guilbert. It sought to show that as a consequence of the poor quality of their work it had been forced to obtain other resources in order to meet the requirements of the granting organization, and that accordingly not enough money remained from the grant to pay the salaries of the mis en cause employees. In the context of a hearing involving a dismissal due to a lack of funds, such evidence is prima facie crucial. Its purpose is to establish the cause of the lack of funds. If there are still any doubts as to the significance of this evidence, they are dispelled by the following remarks by the mis en cause arbitrator:

> [TRANSLATION] Even if there was a lack of funds, that lack could not be a valid reason for breaking a term contract. It is a cause which is not within the employee's [page492] control, but is due to an agreement between the University and a third party.

48 In light of these remarks by the mis en cause arbitrator, one can only conclude that there was a breach of natural justice. As Lebrun J. pointed out, the mis en cause arbitrator adopted a paradoxical position:

> [TRANSLATION] On the one hand, by blaming [the respondent] for not establishing that the cause of the dismissal was something for which the mis en cause employees were responsible, and on the other, by denying [the respondent] the opportunity to establish that very fact based on a narrow interpretation of the "cause" of dismissal... .

The consequence of this paradoxical position taken by the mis en cause arbitrator is that he found himself in the position of disposing of an extremely important point in the case before him -- namely the lack of cause attributable to the employees -- without having heard any evidence whatever from the respondent on the point, and even having expressly refused to hear the evidence which the respondent sought to present on the point. This quite clearly amounts to a breach of natural justice.

49 The appellant argued that the arbitrator's comments on the lack of any cause attributable to the mis en cause employees were only obiter and that the arbitrator would quite clearly have come to the same decision even if he had heard the evidence the respondent was seeking to present. It contended that the real reason for the arbitrator's decision was that the lack of funds itself had not been established in this case and moreover could never be a valid cause for dismissal.

50 This argument cannot be accepted. First, it is impossible to say with any certainty what the decision of the mis en cause arbitrator would have been if he had heard the evidence offered by the respondent. That evidence might have convinced him that in the particular circumstances of this case, and especially in view of the relationship existing between the respondent and the granting organization, the lack of funds could be a cause for dismissal attributable to the fault of the employees [page493] and that this ground could accordingly justify the respondent in terminating

the employment contracts.

51 Secondly, and more fundamentally, the rules of natural justice have enshrined certain guarantees regarding procedure, and it is the denial of those procedural guarantees which justifies the courts in intervening. The application of these rules should thus not depend on speculation as to what the decision on the merits would have been had the rights of the parties not been denied. I concur in this regard with the view of Le Dain J., who stated in Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643, at p. 661:

> ... the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

52 For all these reasons, I conclude that by refusing to admit the evidence which the respondent was seeking to present the mis en cause arbitrator infringed the rules of natural justice. The Superior Court therefore did not err in ordering a new arbitration. Did the Superior Court however err in ordering that the new arbitration be held before another arbitrator?

(b) Referral of Case to Another Arbitrator

53 The appellant contended that the Superior Court had erred in ordering that the new arbitration be held before another arbitrator, since there was no real, objective reason for doubting the impartiality of the mis en cause arbitrator.

54 On this point, in my opinion, the appellant did not succeed in establishing that the Superior Court had erred in the exercise of its discretion so as to justify intervention by this Court. Though he did not actually say so, Lebrun J. was probably of the view that there could quite reasonably be doubt as [page494] to the ability of a grievance arbitrator to objectively hear evidence which he already thought was so lacking in significance as to declare it irrelevant.

Conclusion

55 For these reasons, the appeal is dismissed with costs.

The following are the reasons delivered by

56 L'HEUREUX-DUBÉ J.:-- I agree entirely with the Chief Justice on the outcome of this case. However, I would adopt the approach taken by the trial judge, Lebrun J., and by Baudouin J.A. for the majority of the Court of Appeal, [1990] R.J.Q. 2183.

57 When faced with a privative clause an appellate court will be held to a high standard of

deference toward an administrative tribunal. However, an error on a question of law which goes to jurisdiction will always be reviewable (see Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, and the decisions cited therein).

58 Although the arbitrator in the case at bar had jurisdiction to dispose of the grievances before him, as the lower courts correctly held, he could not in so doing commit an excess of jurisdiction. In Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382, Dickson J. (as he then was), speaking for the Court, made this point very clearly (at p. 389):

> A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. [Emphasis added.]

[page495]

59 Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice. It is one thing to adopt special rules of procedure for a hearing, and another not to comply with a fundamental rule, that of doing justice to the parties by hearing relevant and therefore admissible evidence. That is the case here.

60 In my view, the formalism and inflexibility demonstrated by the arbitrator in this case have no place in the hearing of a grievance. If the arbitrator had doubts as to the relevancy of the evidence sought to be introduced, he could have taken it under advisement as courts regularly do. This would have facilitated and speeded up the hearing. Furthermore, as is often the case, the relevance or otherwise of the evidence in question would have become apparent during the proceedings. In these circumstances, the ends of justice would have been better served for all the parties involved.

61 In any event, I subscribe entirely to the reasons of the majority of the Court of Appeal that the evidence presented by the respondent was relevant to the consideration and disposition of the grievances before the arbitrator. The arbitrator's refusal to consider such evidence was an excess of jurisdiction.

62 For these reasons, I would dispose of the appeal as the Chief Justice suggests, with costs.

1 Université du Québec à Trois-Rivières v. Larocque, Sup. Ct. Trois-Rivières, No. 400-05-000148-875, August 26, 1987.