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August 8, 2022 **VIA EMAIL**

Judicial Administrator, Federal Court of Appeal
90 Sparks Street, 5th floor
Ottawa, Ontario K1A 0H9

Dear Madam or Sir,

RE: Air Passenger Rights v. AGC and CTA (A-102-20)

Please bring this letter to Gleason J.A.'s attention. Her Ladyship is seized of all pre-hearing issues for this Application. The Applicant is responding to the CTA's letter of August 8, 2022 enclosing redacted Twitter messages and @Info emails [**Twitter and Email Materials**] and a certificate.

On July 29, 2022, the Court already ordered that the CTA's deadline for filing the Twitter and Email Materials be deferred until five-days after the motion is decided, and a timetable for the CTA's reply if the AGC files any response submissions. The AGC has not made any submissions. However, today, the CTA unilaterally filed a redacted version of the Twitter and Email Material and made an attempt to make further submissions through the backdoor, to justify the redactions.

The CTA is seeking to superimpose the *Access to Information Act* [***ATIA***] on the Court's orders and its processes. Respectfully, Webb, J.A. had already rejected the CTA's argument in another case.[1] The CTA's approach sets a dangerous precedent in the federal court as it would *de facto* allow a tribunal to circumvent the federal courts' orders or procedures by relying on the *ATIA*.

The CTA's filings today raises two further concerns. Firstly, it is unclear why the CTA is disclosing printed copies of documents that are re-scanned, when the original electronic versions exist. Secondly, the CTA's certificate contains the same deficiencies that were already brought to the CTA's attention. Should the Court have any directions, we would be pleased to comply.

Yours truly,
EVOLINK LAW GROUP

Simon Lin

SIMON LIN
Barrister & Solicitor

Cc: (1) Mr. Sandy Graham and Mr. Lorne Ptack, counsel for the AGC, and (2) Mr. Kevin Shaar, counsel for the CTA

[1] *Lukacs v. Canadian Transportation Agency*, 2014 FCA 205 at paras. 12-13 (copy of decision enclosed)

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140919

Docket: A-218-14

Citation: 2014 FCA 205

Present: **WEBB J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 19, 2014.

REASONS FOR ORDER BY: WEBB J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20140919

Docket: A-218-14

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Present: **WEBB J.A.**

BETWEEN:

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REASONS FOR ORDER

WEBB J.A.

[1] Dr. Gábor Lukács, on April 22, 2014, commenced "an application for judicial review in respect of:

> (a) the practices of the Canadian Transport Agency ("Agency") related to the rights of the public, pursuant to the open-court principle, to view information provided in the course of adjudicative proceedings; and

(b) the refusal of the Agency to allow the Applicant to view unredacted documents in File No. M4120-3/13-05726 of the Agency, even though no confidentiality order has been sought or made in that file."

[2] The Agency brought a motion to quash this application for judicial review pursuant to paragraph 52(a) of the *Federal Courts Act*. This paragraph provides that:

52. The Federal Court of Appeal may	52. La Cour d'appel fédérale peut :
(a) quash proceedings in cases brought before it in which it has no jurisdiction or whenever those proceedings are not taken in good faith;	a) arrêter les procédures dans les causes qui ne sont pas de son ressort ou entachées de mauvaise foi;
…	[…]

[3] The Agency does not allege that the notice of application for judicial review was not taken in good faith but rather that this Court does not have the jurisdiction to hear this application. The grounds upon which the Agency relies are the following:

1. Subparagraph 28(1)(k) of the *Federal Courts Act* provides that it has jurisdiction to hear application for judicial review made in respect of decisions of the Agency.

2. A "refusal" to disclose government information, containing personal information such as in the present case for example, is a "refusal" of the head of the institution. It is therefore not a decision of the Agency falling within the purview of section 28 of the Federal Courts Act.

3. The application for judicial review should have been filed with the Federal Court.

4. Any person who has been refused access to a record requested under the Access to Information Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Federal Court for a review of the matter within the time specified in the Access to Information Act.

5. There are three prerequisites that must be met before an access requestor may apply for Judicial Review:

    1) The applicant must have been refused access to a record

    2) The applicant must have complained to the Information Commissioner

    3) The applicant must have received an investigation report by the Information Commissioner

6. The applicant could not apply for a judicial review because (1) the applicant's request was treated informally and there is therefore no “refusal”; (2) the applicant did not complain to the Information Commissioner before filing the within judicial review application; and (3) the applicant did not receive an investigation report by the Information Commissioner.

7. Even if the application for judicial review had been filed with the appropriate Court, it would have had no jurisdiction to obtain this application.

8. Such further and other grounds as counsel may advise and this Honourable Court may permit.

[4] In *Canada (Minister of National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2013] F.C.J. No. 1155, Stratas J.A., writing on behalf of this Court, noted that:

> **(3)** Motions to strike notices of application for judicial review
>
> **47** The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" - an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf..Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
>
> **48** There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, *supra* at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, *supra*, subsection 18.1(2) and section 18.4. An unmeritorious motion - one that raises matters that should be advanced at the hearing on the merits - frustrates that objective.

[5] In this case the Agency is relying on the authority provided in section 52 of the *Federal Courts Act* to strike the notice of application for judicial review. However, the comments of Stratas J. that an application for judicial review will only be struck if the application is “so clearly improper as to be bereft of any possibility of success" are equally applicable in this case. In *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, this Court also

noted that a reason for such a high threshold is the difference between an action and an application for judicial review. As stated in paragraph 10:

> … An action involves, once the pleadings are filed, discovery of documents, examinations for discovery, and then trials with viva voce evidence. It is obviously important that parties not be put to the delay and expense involved in taking a matter to trial if it is "plain and obvious" (the test for striking out pleadings) that the pleading in question cannot amount to a cause of action or a defence to a cause of action…
>
> Further, the disposition of an application commenced by originating notice of motion does not involve discovery and trial, matters which can be avoided in actions by a decision to strike. In fact, the disposition of an originating notice proceeds in much the same way that an application to strike the notice of motion would proceed: on the basis of affidavit evidence and argument before a single judge of the Court. Thus, the direct and proper way to contest an originating notice of motion which the Agency thinks to be without merit is to appear and argue at the hearing of the motion itself…

[6] Therefore, there is a high threshold for the Agency to succeed in this motion to quash the application for judicial review.

[7] The first three grounds for quashing the application for judicial review identified by the Agency can be consolidated and summarized as a submission that there is no decision of the Agency and that this Court only has the jurisdiction under subparagraph 28(1)(k) of the *Federal Courts Act* to judicially review decisions of the Agency.

[8] Subparagraph 28(1)(k) of the *Federal Courts Act* provides that:

28. (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:	28. (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :
…	[…]

(k) the Canadian Transportation Agency established by the Canada Transportation Act;	k) l'Office des transports du Canada constitué par la Loi sur les transports au Canada;

[9] There is nothing in subsection 28(1) to suggest that an application for judicial review can only be made to this Court if there is a decision of the Agency.

[10] In *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2011] F.C.J. No. 1725, Stratas J.A. stated that:

> **23** Although the Federal Court judge and the parties focused on whether a "decision" or "order" was present, I do not take them to be saying that there has to be a "decision" or an "order" before any sort of judicial review can be brought. That would be incorrect.
>
> **24** Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.
>
> **25** As far as "decisions" or "orders" are concerned, the only requirement is that any application for judicial review of them must be made within 30 days after they were first communicated: subsection 18.1(2) of the *Federal Courts Act*.

[11] Subsection 28(2) of the *Federal Courts Act* provides that section 18 to 18.5 (except subsection 18.4(2)) apply to any matter within the jurisdiction of this Court. Therefore, a decision is not necessarily required in order for this Court to have jurisdiction under section 28 of the *Federal Courts Act*.

[12] The other grounds that are submitted for quashing the notice of application are related to the *Access to Information Act*, R.S.C., 1985, c. A-1. It is acknowledged by both Dr. Lukács and the Agency that Dr. Lukács did not submit a request for information under this *Act.* Section 41 of that *Act* would only apply if the conditions as set out in that section were satisfied. Since he did not submit a request under that *Act*, the conditions of this section are not satisfied.

[13] However, the argument of Dr. Lukács is that he has the right to the documents in question without having to submit a request for these under the *Access to Information Act*. The Agency did not refer to any provision of the *Access to Information Act* that provides that the only right to obtain information from the Agency is by submitting a request under that *Act*.

[14] The issue on this motion is not whether Dr. Lukács will be successful in this argument but rather whether his application is "so clearly improper as to be bereft of any possibility of success". I am not satisfied that the Agency has met this high threshold in this case. I agree with the comments of this Court in *David Bull Laboratories (Canada) Inc.* that "the direct and proper way to contest a [notice of application for judicial review] which the Agency thinks to be without merit is to appear and argue at the hearing of the [application] itself".

[15] The Agency's motion to quash the notice of application for judicial review in this matter is dismissed, with costs, payable in any event of the cause.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-218-14
STYLE OF CAUSE:	DR. GABOR LUKACS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	SEPTEMBER 19, 2014

WRITTEN REPRESENTATIONS BY:

Self-represented	FOR THE APPLICANT
Odette Lalumière	FOR THE RESPONDENT

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