Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The Applicant is seeking various declarations and a *mandamus* to enforce his rights pursuant to the open court principle and s. 2(b) of the *Charter* to view "tribunal files" of the Canadian Transportation Agency (the "Agency"), that is, files of adjudicative proceedings before the Agency, which contain documents received in the course of such proceedings, including submissions of the parties and exhibits.

2. The Applicant challenges the practices of the Agency that:

(a) the public can view only redacted tribunal files, even in cases where a confidentiality order was neither sought by the parties nor made by Member(s) of the Agency; and

(b) Agency Staff, who are not Members of the Agency, purport to make determinations of confidentiality in relation to tribunal files.

Notice of Application **[Tab 1, P1]**

B. BACKGROUND: THE AGENCY AND THE OPEN COURT PRINCIPLE

3. The Agency, established by the *Canada Transportation Act*, S.C. 1996, c. 10, consists of Members (including temporary members), who exercise the powers conferred upon the Agency by the Act. The Agency also has Staff, but they are not Members, and they cannot exercise the powers of the Agency.

***Canada Transportation Act*, ss. 7 and 19** **[App. "A", P239, P242]**

4. The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. One of the Agency's key functions is to adjudicate commercial and consumer transportation-related disputes as a quasi-judicial tribunal.

5. The Agency acknowledges in its "Important privacy information" notice, provided to parties in adjudicative proceedings, that it is subject to the open court principle when it acts in a quasi-judicial capacity:

> Open Court Principle
>
> As a quasi-judicial tribunal operating like a court, the Canadian Transportation Agency is bound by the constitutionally protected open-court principle. This principle guarantees the public's right to know how justice is administered and to have access to decisions rendered by administrative tribunals.
>
> Pursuant to the General Rules, all information filed with the Agency becomes part of the public record and may be made available for public viewing.
>
> [Emphasis added.]

Lukács Affidavit, Ex. "I", p. 000079 **[Tab 2I, P121]**

6. The open court principle is incorporated in both the Agency's old and current procedural rules, which speak about the "public record" and the "confidential record" of the Agency, and provide that:

(a) all documents filed with the Agency are to be placed on the public record, unless confidentiality was sought and granted;

(b) a request for confidentiality must be made by the party who is filing the document, and at the time of the filing;

(c) requests for confidentiality and redacted versions of confidential documents are to be placed on the Agency's public record; and

(d) unredacted versions of confidential documents are to be placed on the Agency's confidential record.

***Canadian Transportation Agency Rules (Dispute Proceedings)*, S.O.R./2014-104 ("New Rules"), ss. 7(2), 31(2)** **[App. "A", P248-P251]**

***Canadian Transportation Agency General Rules*, S.O.R./2005-35 ("Old Rules"), ss. 23(1), 23(6)** **[App. "A", P257, P259]**

C. THE AGENCY'S PRACTICE WITH RESPECT TO VIEWING TRIBUNAL FILES

7. In practice, members of the public are not permitted to view documents contained in the Agency's tribunal files that were placed on the Agency's "public record" in their entirety; only redacted versions of these documents can be viewed, with portions that contain "personal information" blacked out. What constitutes "personal information" is decided by Agency Staff.

Bellerose Cross-Examination, Q82-Q86 **[Tab 3, P189-P190]**

8. The aforementioned practice is followed even in cases where the Member(s) of the Agency hearing the case did not find it appropriate to grant confidentiality or where confidentiality was not requested by the parties at all.

Bellerose Cross-Examination, Q112-Q114 **[Tab 3, P195-P196]**

9. Agency Staff have an expansive notion of what constitutes “personal information”; for example, the name and business email address of a lawyer representing a corporation before the Agency may be “personal information” that, in their view, must be redacted from documents placed on “public record” before they would be disclosed to members of the public.

Bellerose Cross-Examination, Q53-Q57 **[Tab 3, P183]**

D. THE APPLICANT'S REQUEST TO VIEW A TRIBUNAL FILE

10. The Applicant, Dr. Gábor Lukács, is a Canadian air passenger rights advocate. Lukács frequently comments on issues related to air passenger rights for the press and on social media.

Lukács Affidavit, para. 1 **[Tab 2, P13]**

(i) The rights asserted: open court principle and s. 2(b) of the *Charter*

11. On February 14, 2014, Lukács made a request to the Agency to view the public documents in file no. M4120-3/3-05726, in respect of which the Agency rendered Decision No. 55-C-A-2014. Lukács clearly indicated that his request was made pursuant to subsection 2(b) of the *Charter*, which entails the open court principle.

Lukács Affidavit, para. 3, Ex. “A” **[Tab 2A, P18]**

12. Lukács clearly indicated in his subsequent correspondence with Agency Staff that he was seeking documents on the Agency's public record, and that the legal basis of his request was subsection 2(b) of the *Charter*.

Lukács Affidavit, paras. 4-10, Ex. “B”-“H” **[Tab 2B-2H, P20-P37]**

(ii) Agency staff understood the nature of the request

13. Agency Staff handling the request of Lukács clearly understood that Lukács was seeking documents that were placed on the Agency's public record and that Lukács was making a request to exercise his open court principle and s. 2(b) *Charter* rights.

Lukács Affidavit, para. 9, Ex. "G" **[Tab 2G, P33]**

Bellerose Cross-Examination, Q16-Q18 **[Tab 3, P175]**

(iii) Not a request under the *Access to Information Act*

14. Requests for access to documents received by the Agency are classified as "formal requests" or "informal requests." A "formal request" is one that is made under the *Access to Information Act*. A "formal request" requires the payment of a $5.00 fee and a completed and signed request form. All other requests are "informal requests."

Bellerose Cross-Examination, Q21, Q26-Q28 **[Tab 3, P176, P178]**

15. The request of Lukács was not made under the *Access to Information Act*; indeed, no fee was collected nor was a request form completed, and the Agency treated the request as an "informal request."

Bellerose Cross-Examination, Q25 **[Tab 3, P178]**

Second Affidavit of Ms. Patrice Bellerose, (sworn on July 29, 2014), para. 3

(iv) Redacted tribunal file

16. On March 19, 2014, Agency Staff sent Lukács a PDF file consisting of 121 numbered redacted pages from file no. M4120-3/3-05726 ("Redacted File"), with a substantial amount of information blacked out, including:

(a) name and/or work email address of counsel acting for Air Canada in the proceeding (e.g., pages 1, 27, 28, 36, 37, 45, 72, 75);

(b) names of Air Canada employees involved (e.g., pages 29, 31, 62, 64, 84, 87, 90, 92); and

(c) substantial portions of submissions and evidence (e.g., pages 41, 54-56, 63, 68-70, 85, 94, 96, 100-112).

Lukács Affidavit, para. 11, Ex. "I" **[Tab 2I, P41]**

Bellerose Cross-Examination, Q53-Q57, Q61-Q62 **[Tab 3, P183, P185]**

(v) Confidentiality was never sought nor granted

17. File no. M4120-3/3-05726 contains no claim for confidentiality made by any of the parties nor a directive, decision, or order made by a Member of the Agency that any of the documents in the file be treated confidentially.

Lukács Affidavit, Ex. "I" **[Tab 2I, P41]**

Bellerose Cross-Examination, Q38, Q45 **[Tab 3, P180, P181]**

(vi) Final demand

18. On March 24, 2014, Lukács sent the Agency a final demand that:

> [...] the Agency comply with its obligations under the open court principle and s. 2(b) of the *Canadian Charter of Rights and Freedoms*, to make documents that are part of the public record available for public viewing.
>
> ⋮
>
> [...] the Agency provide me, within five (5) business days, with 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.

Lukács Affidavit, Ex. "J" **[Tab 2J, P164]**

19. On March 26, 2014, Mr. Geoffrey C. Hare, Chair and Chief Executive Officer of the Agency, wrote to Lukács, among other things, that:

> The Canadian Transportation Agency (Agency) is a government institution which was included in the schedule to the *Privacy Act* (Act) in 1982. [...]
>
> [...] 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 that institution. [...]
>
> 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 license 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 is required under the Act.
>
> **Lukács Affidavit, Ex. "K"** **[Tab 2K, P167]**

20. Mr. Hare's letter contained no explanation for the sweeping redactions in the Redacted File, which go well beyond any stretch of the notion of "personal information."

PART II – STATEMENT OF THE POINTS IN ISSUE

21. The present application raises the following questions:

(a) Are members of the public entitled, pursuant to the open court principle and s. 2(b) of the *Charter*, to access tribunal files of the Agency in their entirety?

(b) If so, does the *Privacy Act* limit the open court principle and s. 2(b) *Charter* rights to access tribunal files of the Agency?

(c) If so, can the limitation be saved under s. 1 of the *Charter*?

(d) If it cannot be saved, what is the appropriate remedy?

22. Lukács submits that pursuant to the open court principle and s. 2(b) of the *Charter*, members of the public are entitled to view tribunal files in their entirety, unless documents in a file are subject to a confidentiality order made by Member(s) of the Agency. Such orders must be made judicially, in accordance with the *Dagenais/Mentuck* test.

23. Lukács further submits that documents contained in the tribunal files of the Agency fall within the exclusions and/or exceptions of subsections 69(2) and/or 8(2)(a) and/or 8(2)(b) and/or 8(2)(m) of the *Privacy Act*.

24. Alternatively, if the *Privacy Act* does limit the open court principle and s. 2(b) *Charter* rights to access tribunal files of the Agency, then such infringement cannot be justified under s. 1 of the *Charter*, and should be declared inapplicable to the tribunal files of the Agency.

PART III – STATEMENT OF SUBMISSIONS

Preliminary matter: inadmissible portions of the First Bellerose Affidavit

25. Affidavits filed in relation to an application must be confined to facts within the personal knowledge of the deponent; argumentative materials or legal conclusions are not permitted. Tendentious, opinionated, or argumentative portions of affidavits may be struck.

***Federal Courts Rules*, s. 81(1)**	**[Tab 6, P271]**
***Canadian Tire Corporation v. Canadian Bicycle Manufacturers Association*, 2006 FCA 56, paras. 9-10**	**[Tab 4, P373]**

26. Lukács is asking that the Honourable Court strike out or disregard the portions of the May 23, 2014 affidavit of Ms. Patrice Bellerose ("First Bellerose Affidavit") that contain arguments or legal conclusions: the third sentence of paragraph 2 ("When..."); paragraph 3; the first sentence of paragraph 4; all but the last sentence of paragraphs 5, 6, 8, and 9; the second sentence of paragraph 7; and the first sentence of paragraph 10.

First Affidavit of Ms. Patrice Bellerose, (sworn on May 23, 2014), paras. 2-10

27. Lukács also asks that paragraph 12 and Exhibit "I" to the First Bellerose Affidavit be disregarded, because they are an attempt to introduce legal opinions in the guise of evidence.

First Affidavit of Ms. Patrice Bellerose, (sworn on May 23, 2014), para. 12

A. STANDARD OF REVIEW: CORRECTNESS

28. Constitutional issues are necessarily subject to correctness review because of the unique role of the courts as interpreters of the Constitution. Correctness is also the standard of review for questions that are both of central importance to the legal system as a whole and outside the specialized expertise of a tribunal.

> ***Dunsmuir v. New Brunswick*, 2008 SCC 9, paras. 58, 60** **[Tab 5, P402, P403]**

29. The present application concerns the open court principle and s. 2(b) of the *Charter*, and their possible interaction with the *Privacy Act* in the context of tribunal files. Thus, the issues are of a constitutional nature, the open court principle is of central importance for the legal system as a whole, and interpreting the *Privacy Act* is outside the specialized expertise of the Agency.

30. Therefore, Lukács submits that the impugned actions and practices of the Agency should be subject to correctness review (if the remedies sought may require determination of the appropriate standard of review at all).

B. THE OPEN COURT PRINCIPLE AND S. 2(B) OF THE CHARTER

31. The century-old judgment of the House of Lords in *Scott v. Scott* has been a leading authority on the open court principle for Canadian courts in the pre-*Charter* era, and remained so even after the *Charter* came into force. Some of the issues in *Scott* were the validity of an order directing that an embarrassing divorce case be heard in camera, and whether parties were required to keep details of the hearing in secret after the trial. Viscount Haldane L.C. held that:

> to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.

The Earl of Halsbury opined that "every Court of justice is open to every subject of the King," with only very few and special exceptions. With respect to the injunction for perpetual secrecy, Earl Loreburn held that:

> It is not that a Court ought to refrain from exercising its power in such a way. It is that the Court does not possess such a power.

Lord Shaw of Dunfermline cited Jeremy Bentham with approval:

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity."

***Scott v. Scott*, [1913] A.C. 417, at 439, 440, 448, and 477** **[Tab 13, P619, P620, P628, P657]**

32. In the pre-*Charter* case of *A.G. (Nova Scotia) v. MacIntyre*, the Supreme Court of Canada rejected the argument that privacy, in and on its own, trumps the requirement for openness of proceedings:

> Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.
>
> ⋮
>
> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

***Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 SCR 175, p. 8-9** **[Tab 10, P536-P537]**

33. Since the *Charter* came into force, the open court principle has become a constitutionally protected right. The rights guaranteed by s. 2(b) of the *Charter* do entail the open court principle and the right of the public to obtain information about the courts, including court proceedings:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.
>
> [Emphasis added.]

***CBC v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, para. 23** **[Tab 3, P350]**

(i) Open court principle rights are enforceable by *mandamus*

34. Access to exhibits is a corollary to the open court principle. The open court principle and s. 2(b) *Charter* rights are not limited to attending court and observing what actually transpires in the courtroom.

***R. v. CBC*, 2010 ONCA 726, para. 28** **[Tab 11, P557]**

35. The "open court principle" is not a mere principle, but rather it confers enforceable rights on members of the public (and the media), and a public duty on those controlling documents that are subject to the open court principle. These rights and public duties are enforceable by way of an application for judicial review for a writ of *mandamus*.

***Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, para. 11** **[Tab 15, P682]**

***Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, para. 11 (citing para. 6 of the reasons of the Ontario Court of Appeal)** **[Tab 18, P730]**

(ii) The *Dagenais/Mentuck* test

36. Although legal proceedings are presumptively open, the open court principle is not absolute. Public access may be limited or barred if "disclosure would subvert the ends of justice or unduly impair its proper administration." This criterion has come to be known as the *Dagenais/Mentuck* test, and requires considering:

(a) the necessity of the order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and

(b) whether the salutary effects of the order outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

This test applies to all discretionary decisions that limit freedom of expression and freedom of the press in relation to legal proceedings.

***Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, paras. 3-4, 7, and 26-28** **[Tab 18, P728, P733]**

37. Protection of the innocent or a vulnerable party and preventing revictimization by publication of identifying details may justify departure from the rule of openness of proceedings. Such decisions are to be made using the *Dagenais/Mentuck* test. Protection of privacy may be the means by which "serious risk" can be prevented; however, privacy is not an end in itself that trumps the open court principle.

***A.B. v. Bragg Communications Inc.*, 2012 SCC 46, paras. 14, 27** **[Tab 1, P285, P289]**

(iii) The open court principle applies to tribunals engaged in quasi-judicial functions

38. The open court principle applies to statutory tribunals exercising judicial or quasi-judicial functions, because they constitute part of the administration of justice, and legitimacy of their authority requires that public confidence in their integrity be maintained. Tribunals must exercise their discretion to control their own procedures within the boundaries set by the *Charter*.

> ***Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, para. 9** **[Tab 15, P681]**
>
> ***Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 110, para. 13** **[Tab 17, P723]**
>
> ***Germain v. Saskatchewan (Automobile Injury Appeal Commission)*, 2009 SKQB 106, para. 104** **[Tab 7, P501]**
>
> ***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), para. 59** **[Tab 6, P454]**

39. Determining whether a tribunal exercises judicial or quasi-judicial functions requires considering a number of factors, including whether it involves adversarial-type processes, and whether the decision or order directly or indirectly affect the rights and obligations of a person.

> ***Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, para. 8** **[Tab 15, P681]**
>
> ***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), para. 60** **[Tab 6, P454]**

40. The presence of a provision in the enabling statute of a tribunal that allows the tribunal to determine that proceedings may be held in camera clarifies that the proceedings are presumptively open to the public.

> ***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), para. 61** **[Tab 6, P455]**

(iv) The open court principle applies to the Agency

41. In the *Tenenbaum v. Air Canada* case, the Agency correctly concluded after a very thorough analysis that when the Agency adjudicates complaints, it acts as a quasi-judicial tribunal, and as such, it is bound by the open court principle. In the same decision, the Agency also noted that:

> [...] section 23 of the General Rules provides that any document filed in respect of any proceeding will be placed on its public record, unless the person filing the document makes a claim for its confidentiality. The person making the claim must indicate the reasons for the claim. The record of the proceeding will therefore be public unless a claim for confidentiality has been accepted.
>
> [Emphasis added.]

***Tenenbaum v. Air Canada*, CTA Decision No. 219-A-2009, paras. 45-46** **[Tab 16, P689]**

42. The Agency's conclusions in *Tenenbaum* are further supported by the observation that subsection 17(b) of the *Canada Transportation Act* allows the Agency to make rules with respect to the circumstances in which hearings may be held in private. As noted in *El-Helou*, *supra*, such provisions clarify that the proceedings are presumptively open to the public.

***Canada Transportation Act*, s. 17(b)** **[App. "A", P242]**

***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), para. 61** **[Tab 6, P455]**

43. Lukács adopts the aforementioned conclusions of the Agency in *Tenenbaum* as his own position, and submits that members of the public are entitled to view all documents in tribunal files of the Agency in their entirety, with the exception of documents that are subject to a confidentiality order of the Agency (that is, a decision accepting a claim for confidentiality).

(v) Claims of confidentiality are to be decided by Members

44. Deciding whether a particular document or a portion thereof is to be granted confidentiality requires the decision-maker to apply the law, that is, the *Dagenais/Mentuck* test, to the facts. The power to make such decisions with respect to tribunal files of the Agency stems from the Agency's powers to control its proceedings and subsection 17(b) of the *Canada Transportation Act*. These powers have nothing to with the *Access to Information Act* or the *Privacy Act*.

***Canada Transportation Act*, s. 17(b)** **[App. "A", P242]**

45. Thus, decisions with respect to confidentiality of documents contained in tribunal files of the Agency are of a judicial or quasi-judicial nature, and not of an administrative or executive one. As such, the power to make such decisions must be exercised by the Agency, consisting of the Members (and temporary members) who are authorized to make orders and decisions.

***Canada Transportation Act*, ss. 7 and 19** **[App. "A", P239, P242]**

46. Section 73 of the *Access to Information Act* and the *Privacy Act* only permits delegation of administrative or executive powers, duties or functions of the head of the institute "under this Act," and do not authorize delegation of the Agency's judicial or quasi-judicial powers to control its own procedures and tribunal records, or to decide what matters will be heard in camera.

First Affidavit of Ms. Patrice Bellerose,
(sworn on May 23, 2014), Ex. "C"

47. Therefore, Agency Staff cannot be delegated the power to make decisions with respect to confidentiality of documents or portions thereof contained in the Agency's tribunal files, and these powers are reserved to Members of the Agency.

C. TRIBUNAL FILES FALL WITHIN THE EXCLUSIONS AND/OR EXCEPTIONS TO THE PRIVACY ACT

48. The Agency appears to claim that the *Privacy Act* prohibits the disclosure of "personal information" contained in the Agency's tribunal files, even if no confidentiality order was sought by any of the parties nor granted by Member(s) of the Agency.

Lukács Affidavit, Ex. "K" **[Tab 2K, P167]**

49. Lukács submits that the Agency's position is misguided in that it fails to recognize that the the Agency's tribunal files fall within the exclusions and/or exceptions to the *Privacy Act*.

(i) The "publicly available" exclusion and the "in accordance with any Act of Parliament or any regulation made thereunder" exception

50. Subsection 69(2) of the *Privacy Act* exempts personal information that is "publicly available" from the application of sections 7 and 8, while subparagraph 8(2)(b) permits disclosure for any purpose in accordance with legislation or regulation.

***Privacy Act*, R.S.C. 1985, c. P-21, ss. 69(2), 8(2)(b) [App. "A", P277, P273]**

51. Due to the open court principle, personal information that the Agency receives as part of its quasi-judicial functions is publicly available (unless a claim for confidentiality was granted). Thus, pursuant to s. 69(2) of the *Privacy Act*, personal information contained in the Agency's tribunal files is not subject to sections 7 and 8.

***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), para. 77** **[Tab 6, P461]**

52. The Agency is a statutory tribunal created by the *Canada Transportation Act* for the purpose of, among other things, carrying out quasi-judicial functions. The Agency's rules of procedures are regulations made under its enabling act. Both the Old Rules and the New Rules of the Agency require placing documents received by the Agency in the course of proceedings on "public record," unless a claim for confidentiality is made at the time of their filing.

New Rules, ss. 7(2), 31(2) **[App. "A", P248-P251]**
Old Rules, ss. 23(1), 23(6) **[App. "A", P257, P259]**

53. Therefore, disclosure of documents contained in the Agency's tribunal files, including any personal information that such documents may contain, is not only authorized, but explicitly required both by s. 2(b) of the *Charter*, and the Agency's Old and New Rules; hence, such disclosure is permitted by s. 8(2)(b) of the *Privacy Act*.

***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), paras. 69-71** **[Tab 6, P458-P459]**

(ii) The "use consistent with that purpose" exception

54. Subparagraph 8(2)(a) of the *Privacy Act* permits disclosure of personal information for the purpose for which the information was obtained or for a use consistent with that purpose.

***Privacy Act*, R.S.C. 1985, c. P-21, s. 8(2)(a)** **[App. "A", P273]**

55. Both the Agency's Old and New Rules require a party to a proceeding before the Agency to submit their complete address, telephone number, and all documents in support of their pleadings. These pieces of information are submitted by parties for the purpose of the adjudication by the Agency.

New Rules, ss. 18(1), 19, Schedules 5 and 6 **[App. "A", P249-P250, P254-P255]**
Old Rules, s. 40 **[App. "A", P262]**

56. Parties to adjudicative proceedings before the Agency are informed that the Agency is bound by the open court principle and that "all information filed with the Agency becomes part of the public record and may be made available for public viewing."

Lukács Affidavit, Ex. "I", p. 000079 **[Tab 2I, P121]**

57. Therefore, it is submitted that disclosure of information filed with the Agency in the course of adjudicative proceedings, by placing the documents on public record in their entirety, is consistent with the purpose for which the information was obtained.

***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), paras. 68, 71** **[Tab 6, P458-P459]**

(iii) Public interest in transparency

58. Subparagraph 8(2)(m)(i) of the *Privacy Act* also confers discretion to disclose personal information if public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure.

***Privacy Act*, R.S.C. 1985, c. P-21, s. 8(2)(m)(i)** **[App. "A", P274]**

59. In light of the role of the Agency as a quasi-judicial tribunal, there is an overwhelming public interest in the transparency of its proceedings through openness and public access.

***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), para. 72** **[Tab 6, P459]**

(iv) Conclusion with respect to the *Privacy Act*

60. In light of the foregoing, it is submitted that the *Privacy Act* does not limit access, pursuant to the open court principle, to documents in the tribunal files of the Agency, unless the documents are subject to a claim of confidentiality that was accepted by the Agency.

D. INAPPLICABILITY OF THE PRIVACY ACT: THE OAKES TEST

61. If the *Privacy Act* does limit the rights of the public, pursuant to the open court principle, to view documents in the tribunal files of the Agency (not subject to a confidentiality order), then these provisions of the *Privacy Act* infringe subsection 2(b) of the *Charter*, because the open court principle is a right protected by s. 2(b).

62. Thus, in this case, the Agency bears the onus of establishing that the impugned provisions are saved by s. 1 of the *Charter*. The Agency filed no affidavit evidence to discharge this burden of proof.

> ***Toronto Star Newspapers Ltd. v. Canada*, 2007 FC 128, para. 41** **[Tab 19, P748]**

63. The legal test for saving an infringing provision under s. 1 of the *Charter* is the *Oakes* test. The Supreme Court of Canada held that the *Dagenais/Mentuck* test requires neither more nor less than the *Oakes* test.

> ***A.B. v. Bragg Communications Inc.*, 2012 SCC 46, para. 16** **[Tab 1, P286]**

64. Thus, if a document (or personal information contained in a document) does not meet the *Dagenais/Mentuck* test for a confidentiality order, then restricting public access to the document cannot be justified pursuant to the *Oakes* test either.

65. Therefore, it is logically impossible to save, pursuant to s. 1 of the *Charter*, any provision of the *Privacy Act* that purports to restrict public access to tribunal files of the Agency with respect to which no confidentiality was sought nor granted, and thus they fail to meet the the *Dagenais/Mentuck* test.

66. Hence, if there are any provisions of the *Privacy Act* that purport to limit the rights of the public, pursuant to the open court principle, to view documents in the tribunal files of the Agency that are not subject to a confidentiality order, then these provisions are unconstitutional.

E. REMEDIES

(i) Mandamus

67. The Agency refused the request of Lukács for unredacted copies of the public documents in File No. M4120-3/13-05726, even though it was not subject to a confidentiality order. Lukács was provided only with redacted documents. The act of the redaction cannot be justified by the *Privacy Act*; even if it were, its extent cannot be justified (for example, the name or workplace contact information of counsel in an adjudicative proceeding is not personal information).

68. Lukács, whose s. 2(b) *Charter* rights were thus violated, is seeking a *mandamus* to enforce his open court principle rights. In *Apotex Inc. v. Canada*, this Honourable Court formulated eight requirements that must be met before a *mandamus* can be issued.

> ***Apotex Inc. v. Canada (Attorney General) (C.A.)*, [1994] 1 F.C. 742, para. 45** **[Tab 2, P313-P314]**

69. It is unclear whether these requirements must be individually addressed in the case of enforcing constitutional rights, such as the open court principle rights, or if s. 24(1) of the *Charter* is a sufficient basis for granting a *mandamus*.

> ***Southam Inc. v.Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, para. 11** **[Tab 15, P682]**
>
> ***Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, para. 11 (citing para. 6 of the reasons of the Ontario Court of Appeal)** **[Tab 18, P730]**

70. Lukács submits that all eight requirements for a *mandamus* set out in *Apotex* are met in the present case:

(a) the open court principle imposes a public legal duty upon the Agency, as a tribunal in control of records of its proceedings, to grant public access to its tribunal records in their entirety, with the exception of documents that are subject to a confidentiality order;

(b) the duty is owed to Lukács as a member of the public, and also as an individual who frequently comments on air passenger rights in the media;

(c) Lukács made numerous demands, including a final demand, for performance, that is, for unredacted copies of documents in File No. M4120-3/13-05726 (which is not subject to any confidentiality order), but was refused;

(d) the duty imposed on the Agency by the open court principle is not discretionary (only granting a confidentiality order is);

(e) there is no other adequate avenue for Lukács to obtain unredacted copies of the documents in question;

(f) the order will have a practical effect, namely, it will allow Lukács to obtain unredacted copies of the documents sought, which the Agency has refused to provide;

(g) there is no equitable bar to the relief sought; and

(h) since Lukács is seeking to enforce a constitutional right, the “balance of convenience” is clearly in favour of issuing an order.

(ii) Declarations

71. Lukács is challenging not only the Agency's actions with respect to his request to view File No. M4120-3/13-05726, but also the Agency's practices with respect to requests made pursuant to the open court principle. The reason for this broader challenge is that it would not be a good use of judicial resources if members of the public had to make an application for judicial review to this Honourable Court every time they wanted to view a public file of the Agency.

72. As the facts of the present case reveal, allowing the public to view only redacted documents in the Agency's tribunal files, even in the absence of a confidentiality order, is the *modus operandi* of the Agency. (Moreover, decisions as to what to redact is made by Agency Staff, who are not Members.) For the reasons set out above, this practice is inconsistent with the open court principle and s. 2(b) of the *Charter* and the enabling statute of the Agency. Such unconstitutional practices have been cured in *Southam* by a combination of a prohibition and a *mandamus*.

> ***Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, para. 11** **[Tab 15, P682]**

73. In the case of the Agency, the issue does not appear to be so much whether the open court principle applies to the Agency, but rather the extent of the duty it imposes on the Agency, and whether the *Privacy Act* affects this duty in any way.

74. Thus, guidance from this Honourable Court in the form of a declaration of the rights of members of the public, the duties of the Agency, and the state of the law with respect to the *Privacy Act* exclusions and exemptions might be sufficient to ensure that the Agency amends its practices.

(iii) Constitutional remedy with respect to the *Privacy Act*

75. As an alternative argument, Lukács submits that if there are any provisions of the *Privacy Act* that purport to limit open court principle rights of the public to view tribunal files of the Agency that are not subject to a confidentiality order, then these provisions are unconstitutional.

76. Lukács submits that in these circumstances the appropriate constitutional remedy, if such is necessary, is to "read down" the *Privacy Act* to apply only to confidential documents in the Agency's tribunal files, and to be inapplicable with respect to those documents that are not subject to a confidentiality order.

***Ruby v. Canada (Solicitor General)*, 2002 SCC 75, para. 60** **[Tab 12, P587]**

F. COSTS

77. The present application is of the nature of public interest litigation, because it raises a constitutional question that relates to the transparency of the administration of justice. The application is not frivolous; indeed, Webb, J.A. dismissed the Agency's motion to quash the application.

> ***Lukács v. Canadian Transportation Agency*, 2014 FCA 205** **[Tab 9, P519]**

78. Lukács is seeking disbursements and a moderate allowance for the considerable amount of time and effort he devoted to the present application.

> ***Sherman v. Canada (Minister of National Revenue)*, 2004 FCA 29** **[Tab 14, P669]**

79. In *Lukács v. Canada (Transportation Agency)*, this Honourable Court awarded the appellant disbursements even though the appeal was dismissed:

> In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.
>
> ***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, para. 62** **[Tab 8, P518]**

80. If Lukács is not successful on the present application, he is asking the Honourable Court to exercise its discretion by not awarding costs against him, and by ordering the Agency to pay Lukács his disbursements.

PART IV – ORDER SOUGHT

81. The Applicant, Dr. Gábor Lukács, is seeking an Order:

(a) granting a *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;

(b) declaring that adjudicative proceedings before the Canadian Transportation Agency are subject to the constitutionally protected open-court principle;

(c) declaring 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 rules;

(d) declaring that members of the public are 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 rules;

(e) declaring that information provided to the Canadian Transportation Agency in the course of adjudicative proceedings falls within the exceptions of subsections 69(2) and/or 8(2)(a) and/or 8(2)(b) and/or 8(2)(m) of the *Privacy Act*, R.S.C. 1985, c. P-21;

(f) in the alternative, declaring 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*;

(g) declaring 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;

(h) granting disbursements and a moderate allowance for the time and effort the Applicant devoted to the present application; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 30, 2014

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Applicant

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Canadian Charter of Rights and Freedoms,
ss. 2(b) and 24(1)

Canada Transportation Act, S.C. 1996, c. 10,
ss. 1-41

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings),
S.O.R./2014-104, ss. 7(2), 31(2)

Canadian Transportation Agency General Rules,
S.O.R./2005-35, ss. 23(1), 23(6)

Federal Courts Act, R.S.C. 1985, c. F-7
ss. 18, 18.1, 18.5, 28

Federal Courts Rules, S.O.R./98-106,
s. 81

Privacy Act, R.S.C. 1985, c. P-21
ss. 8(2)(a), 8(2)(b), 8(2)(m)(i), 69(2)

CASE LAW

A.B. v. Bragg Communications Inc., 2012 SCC 46

Apotex Inc. v. Canada (Attorney General) (C.A.),
[1994] 1 F.C. 742

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480

Canadian Tire Corporation v. Canadian Bicycle Manufacturers Association, 2006 FCA 56

CASE LAW (CONTINUED)

Dunsmuir v. New Brunswick, 2008 SCC 9

El-Helou v. Courts Administration Service,
2012 CanLII 30713 (CA PSDPT)

Germain v. Saskatchewan (Automobile Injury Appeal Commission), 2009 SKQB 106

Lukács v. Canada (Transportation Agency), 2014 FCA 76

Lukács v. Canadian Transportation Agency, 2014 FCA 205

Nova Scotia (Attorney General) v. MacIntyre, [1982] 1 SCR 175

R. v. Canadian Broadcasting Corporation, 2010 ONCA 726

Ruby v. Canada (Solicitor General), 2002 SCC 75

Scott v. Scott, [1913] A.C. 417 (H.L)

Sherman v. Canada (Minister of National Revenue),
2004 FCA 29

Southam Inc. v. Canada (Minister of Employment and Immigration), [1987] 3 F.C. 329

Tenenbaum v. Air Canada, Canadian Transportation Agency,
Decision No. 219-A-2009

Tipple v. Deputy Head (Department of Public Works and Government Services), 2009 PSLRB 110

Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41

Toronto Star Newspapers Ltd. v. Canada, 2007 FC 128