Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

(Application under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7)

APPLICANT/RESPONDING PARTY MOTION RECORD (Agency's motion to quash application for judicial review)

Dated: August 29, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Quebec J8X 4B3

Odette Lalumière

Tel: 819-994-2226
Fax: 819-953-9269

Solicitor for the Respondent,
Canadian Transportation Agency

TABLE OF CONTENTS

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: August 19, 2014)

I, Dr. Gábor Lukács, of the City of Halifax in the Regional Municipality of Halifax, in the Province of Nova Scotia, AFFIRM THAT:

1. On April 22, 2014, I filed an application for judicial review with the Federal Court of Appeal in respect to:

   (a) the practices of the Canadian Transportation 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 me to view unredacted documents in adjudicative File No. M4120-3/13-05726 of the Agency, even though no confidentiality order had been sought or made in that file.

   A copy of the Notice of Application is attached and marked as Exhibit "A".

2. On February 14, 2014, I learned about Decision No. 55-C-A-2014 that the Agency made in File No. M4120-3/13-05726. Later that day, I sent an email to the Agency with the subject line “Request to view file no. M4120-3/13-05726 pursuant to s. 2(b) of the Charter” and the email stated:

> I would like to view the public documents in file no. M4120-3/13-05726.
>
> Due the public interest in the case, in which a final decision has been released today, the present request is urgent.

A copy of my email, dated February 14, 2014, is attached and marked as Exhibit “B”.

3. Since I received no answer to my request, on February 17, 2014, I sent a follow-up email to the Agency, a copy of which is attached and marked as Exhibit “C”.

4. On February 17, 2014, Ms. Odette Lalumière, Senior Counsel of the Agency, advised me by email that “Your request is being processed by Ms Bellerose’s group.” A copy of Ms. Lalumière’s email, dated February 17, 2014, is attached and marked as Exhibit “D”.

5. On February 21, 2014, I sent a second follow-up email to the Agency, a copy of which is attached and marked as Exhibit “E”.

6. On February 24, 2014, Ms. Lalumière wrote me again that “your request is being processed by Ms. Bellerose’s group.” A copy of Ms. Lalumière’s email, dated February 24, 2014, is attached and marked as Exhibit “F”.

7. On February 24, 2014, I expressed concern to Ms. Lalumière about the delay related to my request. A copy of my email to Ms. Lalumière, dated February 24, 2014, is attached and marked as Exhibit “G”.

8. On February 24, 2014, Ms. Patrice Bellerose, the “Information Services, Shared Services Projects & ATIP Coordinator” of the Agency, advised me that:

> As previously mentioned we are working on your requests. We have multiple priorities and I have noted the urgency on the request. We will provide you with the public records as soon as we can. [Emphasis added.]

A copy of Ms. Bellerose’s email, dated February 24, 2014, is attached and marked as Exhibit “H”.

9. On February 24, 2014, I wrote to Ms. Bellerose to express concern over the notion of “processing” a request to view a public file:

> With due respect, I fail to see why scanning documents in a public file would require massive resources or anything but a few minutes to put into a scanner.
>
> I do remain profoundly concerned that you are usurping the authority of Members of the Agency to decide what documents or portions of documents are public, and that you are unlawfully engaging in withholding public documents, in violation of my rights under s. 2(b) of Charter.

A copy of my email to Ms. Bellerose, dated February 24, 2014, is attached and marked as Exhibit “I”.

10. On March 19, 2014, Ms. Bellerose sent me an email stating:

> Please find attached copies of records in response to your “request to view file 4120-3/13-05726”.

The email had as an attachment a PDF file called “AI-2013-00081.PDF” that consisted of 121 numbered pages, and pages 1, 27-39, 41, 45, 53-56, 62-64, 66, 68-77, 81-87, 89, 90-113, and 115 were partially redacted (“Redacted File”). A copy of Ms. Bellerose’s email, dated March 19, 2014, including pages 67-70, 75, and 77-80 of its attachment, is attached and marked as Exhibit “J”.

11. The Redacted File contained no claim for confidentiality as stipulated by section 23 of the Agency’s *General Rules*, nor any decision by the Agency directing that certain documents or portions thereof be treated as confidential. Nevertheless, information that was redacted from the Redacted File included, among other things:

    (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).

12. On March 24, 2014, I demanded in writing that the Agency comply with its obligations under the open court principle and s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and provide me 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. A copy of my March 24, 2014 letter is attached and marked as Exhibit “K”.

13. On March 26, 2014, Mr. Geoffrey C. Hare, Chair and Chief Executive Officer of the Agency, wrote to me, 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 it required under the Act.

A copy of Mr. Hare's letter, dated March 26, 2014, is attached and marked as Exhibit "L".

14. A copy of my letter to Ms. Lalumière, dated July 29, 2014 is attached and marked as Exhibit "M".

AFFIRMED before me at the City of Halifax in the Regional Municipality of Halifax on August 19, 2014.

_____

_____

Dr. Gábor Lukács

Halifax, NS
Tel:
lukacs@AirPassengerRights.ca

This is **Exhibit "A"** to the Affidavit of Dr. Gábor Lukacs

affirmed before me on August 19, 2014

_____

Signature

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at the Federal Court of Appeal in **Halifax, Nova Scotia**.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: April 22, 2014 Issued by: _____

Address of
local office: Federal Court of Appeal
1801 Hollis Street
Halifax, Nova Scotia

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Quebec J8X 4B3

Ms. Cathy Murphy, Secretary
Tel: 819-997-0099
Fax: 819-953-5253

APPLICATION

This is an application for judicial review in respect of:

(a) the practices of the Canadian Transportation 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.

The Applicant makes application for:

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 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)(a) 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 *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;

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.

The grounds for the application are as follows:

1. The Canadian Transportation Agency ("Agency"), established by the *Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*"), has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions:

    (a) as a quasi-judicial tribunal, the Agency resolves commercial and consumer transportation-related disputes; and

    (b) as an economic regulator, the Agency makes determinations and issues licenses and permits to carriers which function within the ambit of Parliament's authority.

2. The present application challenges the failure of the Agency to comply, in practice, with the open-court principle and/or its own *General Rules* and/or Privacy Statement with respect to the open-court principle in the context of the right of the public to view information, including but not limited to documents and submissions, provided to the Agency in the course of adjudicative proceedings.

A. The Agency's *General Rules*

3. The *Canadian Transportation Agency General Rules*, S.O.R./2005-35, contain detailed provisions implementing the open-court principle, and provide for procedures for claiming 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.
>
> **23.** (5) A person making a claim for confidentiality shall indicate
>
> (a) the reasons for the claim, including, if any specific direct harm is asserted, the nature and extent of the harm that would likely result to the person making the claim for confidentiality if the document were disclosed; and
>
> (b) whether the person objects to having a version of the document from which the confidential information has been removed placed on the public record and, if so, shall state the reasons for objecting.
>
> **23.** (6) A claim for confidentiality shall be placed on the public record and a copy shall be provided, on request, to any person.
>
> **24.** (2) The Agency shall place a document in respect of which a claim for confidentiality has been made on the public record if the document is relevant to the proceeding and no specific direct harm would likely result from its disclosure or any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed.

> **24.** (4) If the Agency determines that a document in respect of which a claim for confidentiality has been made is relevant to a proceeding and the specific direct harm likely to result from its disclosure justifies a claim for confidentiality, the Agency may
>
> (a) order that the document not be placed on the public record but that it be maintained in confidence;
>
> (b) order that a version or a part of the document from which the confidential information has been removed be placed on the public record;
>
> (c) order that the document be disclosed at a hearing to be conducted in private;
>
> (d) order that the document or any part of it be provided to the parties to the proceeding, or only to their solicitors, and that the document not be placed on the public record; or
>
> (e) make any other order that it considers appropriate.

B. The Agency's *Privacy Statement*

4. The Agency's *Privacy Statement* states, among other things, that:

> 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.

5. A copy of the Agency's *Privacy Statement* is provided to parties at the commencement of adjudicative proceedings.

C. The Agency's practice

6. On February 14, 2014, the Applicant learned about Decision No. 55-C-A-2014 that the Agency made in File No. M4120-3/13-05726.

7. On February 14, 2014, the Applicant sent an email to the Agency with the subject line "Request to view file no. M4120-3/13-05726 pursuant to s. 2(b) of the Charter" and the email stated:

> I would like to view the public documents in file no. M4120-3/13-05726.
>
> Due the public interest in the case, in which a final decision has been released today, the present request is urgent.

8. On February 17, 2014, the Applicant wrote to the Agency to follow up on his request.

9. On February 17, 2014, Ms. Odette Lalumiere, Senior Counsel of the Agency, advised the Applicant that "Your request is being processed by Ms Bellerose's group."

10. On February 21 2014, the Applicant wrote to the Agency to follow up again on his request.

11. On February 24, 2014, Ms. Lalumiere wrote to the Applicant again that "your request is being processed by Ms. Bellerose's group." Ms. Patrice Bellerose is the "Information Services, Shared Services Projects & ATIP Coordinator" of the Agency.

12. On March 19, 2014, after multiple email exchanges, Ms. Bellerose sent an email to the Applicant stating:

> Please find attached copies of records in response to your "request to view file 4120-3/13-05726".

The email had as an attachment a PDF file called "AI-2013-00081.PDF" that consisted of 121 numbered pages, and pages 1, 27-39, 41, 45, 53-56, 62-64, 66, 68-77, 81-87, 89, 90-113, and 115 were partially redacted ("Redacted File").

13. The Redacted File contained no claim for confidentiality as stipulated by section 23 of the Agency's *General Rules*, nor any decision by the Agency directing that certain documents or portions thereof be treated as confidential.

14. Information that was redacted from the Redacted File included, among other things:

    (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).

15. On March 24, 2014, the Applicant made a written demand to the Agency to be provided 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.

16. On March 26, 2014, Mr. Geoffrey C. Hare, hair and Chief Executive Officer of the Agency, wrote to the Applicant, 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 in-

> surance 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 it required under the Act.

17. Even if the aforementioned interpretation of the *Privacy Act* were correct, which is explicitly denied, it does not explain the sweeping redactions in the Redacted File, which go beyond the types of information mentioned in Mr. Hare's letter.

D. The open-court principle

18. Long before the *Charter*, the doctrine of open court had been well established at common law. In *Scott v. Scott*, [1913] A.C. 419 (H.L.), Lord Shaw held that "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." On the same theme, Justice Brandeis of the American Supreme Court has famously remarked that "Sunlight is the best disinfectant."

19. Openness of proceedings is the rule, and covertness is the exception; sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings (*A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 SCR 175, at p. 185). The open court principle has been described as a "hallmark of a democratic society" and is inextricably tied to freedom of expression guaranteed by s. 2(b) of the *Charter* (*CBC v. New Brunswick (Attorney General)*, [1996] 3 SCR 480, paras. 22-23).

20. Since the adoption of the *Charter*, it is true that the open door doctrine has been applied to certain administrative tribunals. While the bulk of precedents have been in the context of court proceedings, there has been an extension in the application of the doctrine to those proceedings where tribunals exercise quasi-judicial functions, which is to say that, by statute, they have the jurisdiction to determine the rights and duties of the parties before them.

21. The open court principle also applies to quasi-judicial proceedings before tribunals (*Germain v. Automobile Injury Appeal Commission*, 2009 SKQB 106, para. 104).

22. Adjudicative proceedings before the Agency are quasi-judicial proceedings, because the *Canada Transportation Act* confers upon the Agency the jurisdiction to determine the rights and duties of the parties. Thus, the open-court principle applies to such proceedings before the Agency.

23. The Agency itself has recognized that it is bound by the open-court principle (*Tanenbaum v. Air Canada*, Decision No. 219-A-2009). Sections 23-24 of the Agency's *General Rules* reflect this principle: documents provided to the Agency are public, unless the person filing leads evidence and arguments that meet the test for granting a confidentiality order. Such determinations are made in accordance with the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.

24. Thus, the open-court principle dictates that all documents in an adjudicative file of the Agency must be made available for public viewing, unless the Agency made a decision during the proceeding that certain documents or portions thereof be treated confidentially. Public viewing of documents is particularly important in files that have been heard in writing, without an oral hearing.

E. The *Privacy Act* does not trump the open-court principle

25. There can be many privacy-related considerations to granting a confidentiality order, such as protection of the innocent or protection of a vulnerable party to ensure access to justice (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46); however, privacy of the parties in and on its own does not trump the open-court principle (*A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 SCR 175, at p. 185).

26. The *Privacy Act* cannot override the constitutional principles that are interwoven into the open court principle (*El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), paras. 67-80).

27. Due to the open court principle as well as section 23(1) of the Agency's *General Rules*, personal information that the Agency received as part of its quasi-judicial functions, is publicly available.

28. Under subsection 69(2) of the *Privacy Act*, sections 7 and 8 do not apply to personal information that is publicly available. Therefore, personal information that is properly before the Agency in its quasi-judicial functions is not subject to the restrictions of the *Privacy Act*.

29. In the alternative, if section 8 of the *Privacy Act* does apply, then personal information that was provided to the Agency in the course of an adjudicative proceeding may be disclosed pursuant to the exceptions set out in subsections 8(2)(a) and/or 8(2)(b) and/or 8(2)(m) of the *Privacy Act* (*El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), paras. 67-80).

30. In the alternative, if the *Privacy Act* does purport to limit the rights of the public to view information provided to the Agency in the course of adjudicative proceedings, then such limitation is inconsistent with subsection 2(b) of the *Canadian Charter of Right and Freedoms*, and it ought to be read down so as not to be applicable to such information.

F. Authority to determine what to redact

31. According to section 7(2) of the *CTA*, the Agency consists of permanent and temporary Members appointed in accordance with the *CTA*. Only these Members may exercise the quasi-judicial powers of the Agency, and the *Act* contains no provisions that would allow delegation of these powers.

32. Determination of confidentiality of documents provided in the course of an adjudicative proceeding before the Agency, including which portions ought to be redacted, falls squarely within the Agency's quasi-judicial functions. Consequently, these powers can only be exercised by Members of the Agency, and cannot be delegated to Agency Staff, as happened with the Applicant's request in the present case.

G. Statutory provisions

33. The Applicant will also rely on the following statutory provisions:

(a) *Canadian Charter of Rights and Freedoms*, and in particular, subsection 2(b) and section 24(1);

(b) *Canada Transportation Act*, S.C. 1996, c. 10;

(c) *Canadian Transportation Agency General Rules*, S.O.R./2005-35, and in particular, sections 23 and 24;

(d) *Federal Courts Act*, R.S.C. 1985, c. F-7, and in particular, sections 18.1 and 28; and

(e) *Federal Court Rules*, S.O.R./98-106, and in particular, Rule 300.

34. Such further and other grounds as the Applicant may advise and this Honourable Court permits.

This application will be supported by the following material:

1. Affidavit of Dr. Gábor Lukács, to be served.

2. Such further and additional materials as the Applicant may advise and this Honourable Court may allow.

April 22, 2014

DR. GÁBOR LUKÁCS

Halifax, Nova Scotia

lukacs@AirPassengerRights.ca

Applicant

This is **Exhibit "B"** to the Affidavit of Dr. Gábor Lukacs

affirmed before me on August 19, 2014

_____

Signature

From lukacs@AirPassengerRights.ca Fri Feb 14 16:26:02 2014
Date: Fri, 14 Feb 2014 16:25:59 -0400 (AST)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: secretaire-secretary@otc-cta.gc.ca
Cc: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>, Odette Lalumiere <Odette.Lal
umiere@otc-cta.gc.ca>
Subject: Request to view file no. M4120-3/13-05726 pursuant to s. 2(b) of the Charter

Dear Madam Secretary,

I would like to view the public documents in file no. M4120-3/13-05726.

Due the public interest in the case, in which a final decision has been
released today, the present request is urgent.

Sincerely yours,
Dr. Gabor Lukacs

This is **Exhibit "C"** to the Affidavit of Dr. Gábor Lukacs

affirmed before me on August 19, 2014

_____

Signature

From lukacs@AirPassengerRights.ca Mon Feb 17 17:08:22 2014
Date: Mon, 17 Feb 2014 17:08:19 -0400 (AST)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: secretaire-secretary@otc-cta.gc.ca
Cc: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>, Odette Lalumiere <Odette.Lalumiere@otc-cta.gc.ca>
Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s. 2(b) of the Charter

Dear Madam Secretary,

I am writing to follow-up on the matter below, which may be of some public interest, and as such delay in your response may interfere with my rights under s. 2(b) of the Charter.

I look forward to hearing from you.

Sincerely yours,
Dr. Gabor Lukacs

On Fri, 14 Feb 2014, Gabor Lukacs wrote:

> Dear Madam Secretary,
>
> I would like to view the public documents in file no. M4120-3/13-05726.
>
> Due the public interest in the case, in which a final decision has been
> released today, the present request is urgent.
>
> Sincerely yours,
> Dr. Gabor Lukacs
>

This is **Exhibit "D"** to the Affidavit of Dr. Gábor Lukacs

affirmed before me on August 19, 2014

_____

Signature

From Odette.Lalumiere@otc-cta.gc.ca Mon Feb 17 17:36:26 2014
Date: Mon, 17 Feb 2014 16:35:51 -0500
From: Odette Lalumiere <Odette.Lalumiere@otc-cta.gc.ca>
To: lukacs@AirPassengerRights.ca, secretaire-secretary <secretaire-secretary@otc-cta.gc.ca>
Cc: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s. 2 (b) ofthe Charter

Mr Lukacs
Your request is being processed by Ms Bellerose’s group.

Odette Lalumi??re

From: Gabor Lukacs
Sent: Monday, February 17, 2014 4:07 PM
To: secretaire-secretary
Cc: Odette Lalumiere; Patrice Bellerose
Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s. 2(b) of the Charter

Dear Madam Secretary,

I am writing to follow-up on the matter below, which may be of some public interest, and as such delay in your response may interfere with my rights under s. 2(b) of the Charter.

I look forward to hearing from you.

Sincerely yours,
Dr. Gabor Lukacs

On Fri, 14 Feb 2014, Gabor Lukacs wrote:

> Dear Madam Secretary,
>
> I would like to view the public documents in file no. M4120-3/13-05726.
>
> Due the public interest in the case, in which a final decision has been
> released today, the present request is urgent.
>
> Sincerely yours,
> Dr. Gabor Lukacs
>

This is **Exhibit "E"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on August 19, 2014

_____

Signature

From lukacs@AirPassengerRights.ca Fri Feb 21 14:19:58 2014
Date: Fri, 21 Feb 2014 14:19:55 -0400 (AST)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: Odette Lalumiere <Odette.Lalumiere@otc-cta.gc.ca>
Cc: secretaire-secretary <secretaire-secretary@otc-cta.gc.ca>, Patrice Bellerose <Pat
rice.Bellerose@otc-cta.gc.ca>
Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s. 2 (b) of the Ch
arter

Dear Ms. Lalumiere and Ms. Bellerose,

I am writing to follow up on the request below. I am profoundly concerned about what transpires as the Agency attempting to frustrate my rights pursuant to s. 2(b) of the Charter.

Yours very truly,
Dr. Gabor Lukacs

On Mon, 17 Feb 2014, Odette Lalumiere wrote:

> Mr Lukacs
> Your request is being processed by Ms Bellerose’s group.
>
> Odette Lalumi??re
>
>
>
> From: Gabor Lukacs
> Sent: Monday, February 17, 2014 4:07 PM
> To: secretaire-secretary
> Cc: Odette Lalumiere; Patrice Bellerose
> Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s. 2(b)
> of the Charter
>
> Dear Madam Secretary,
>
> I am writing to follow-up on the matter below, which may be of some public
> interest, and as such delay in your response may interfere with my rights
> under s. 2(b) of the Charter.
>
> I look forward to hearing from you.
>
> Sincerely yours,
> Dr. Gabor Lukacs
>
>
> On Fri, 14 Feb 2014, Gabor Lukacs wrote:
>
> > Dear Madam Secretary,
> >
> > I would like to view the public documents in file no. M4120-3/13-05726.
> >
> > Due the public interest in the case, in which a final decision has been
> > released today, the present request is urgent.
> >
> > Sincerely yours,
> > Dr. Gabor Lukacs
> >
>

>

This is **Exhibit "F"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on August 19, 2014

_____

Signature

From Odette.Lalumiere@otc-cta.gc.ca Mon Feb 24 12:44:14 2014
Date: Mon, 24 Feb 2014 11:44:01 -0500
From: Odette Lalumiere <Odette.Lalumiere@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@AirPassengerRights.ca>
Cc: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>, secretaire-secretary secreta
ire-secretary <secretaire-secretary@otc-cta.gc.ca>
Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s. 2 (b) of the Ch
arter

[The following text is in the "Windows-1252" character set.]
[Your display is set for the "ISO-8859-1" character set.]
[Some characters may be displayed incorrectly.]

Mr. Lukacs,
As indicated in my e-mail of February 17, 2014, your request is being processed by Ms. Bellerose’s group.

Odette Lalumière
Avocate principale/Senior Counsel
Direction des services juridiques/Legal Services Directorate
Office des transports du Canada/Canadian Transportation Agency
Tél./Tel.: 819 994-2226

odette.lalumiere@otc-cta.gc.ca

>>> Gabor Lukacs <lukacs@AirPassengerRights.ca> 21/02/2014 1:19 PM >>>
Dear Ms. Lalumiere and Ms. Bellerose,

I am writing to follow up on the request below. I am profoundly concerned
about what transpires as the Agency attempting to frustrate my rights pursuant to s. 2(b) of the Charter.

Yours very truly,
Dr. Gabor Lukacs

On Mon, 17 Feb 2014, Odette Lalumiere wrote:

> Mr Lukacs
> Your request is being processed by Ms Bellerose’s group.
>
> Odette Lalumi??re
>
>
>
> From: Gabor Lukacs
> Sent: Monday, February 17, 2014 4:07 PM
> To: secretaire-secretary
> Cc: Odette Lalumiere; Patrice Bellerose
> Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s. 2(b)
> of the Charter
>
> Dear Madam Secretary,
>
> I am writing to follow-up on the matter below, which may be of some

public
> interest, and as such delay in your response may interfere with my
rights
> under s. 2(b) of the Charter.
>
> I look forward to hearing from you.
>
> Sincerely yours,
> Dr. Gabor Lukacs
>
>
> On Fri, 14 Feb 2014, Gabor Lukacs wrote:
>
> > Dear Madam Secretary,
> >
> > I would like to view the public documents in file no.
M4120-3/13-05726.
> >
> > Due the public interest in the case, in which a final decision has
been
> > released today, the present request is urgent.
> >
> > Sincerely yours,
> > Dr. Gabor Lukacs
> >
>
>

This is **Exhibit "G"** to the Affidavit of Dr. Gábor Lukacs

affirmed before me on August 19, 2014

_____

Signature

From lukacs@AirPassengerRights.ca Mon Feb 24 12:57:22 2014
Date: Mon, 24 Feb 2014 12:57:20 -0400 (AST)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: Odette Lalumiere <Odette.Lalumiere@otc-cta.gc.ca>
Cc: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>, secretaire-secretary secreta
ire-secretary <secretaire-secretary@otc-cta.gc.ca>
Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s. 2 (b) of the Ch
arter

[The following text is in the "Windows-1252" character set.]
[Your display is set for the "ISO-8859-1" character set.]
[Some characters may be displayed incorrectly.]

Ms. Lalumiere,

Although you keep repeating that the request is being processed, I have
received no communication from Ms. Bellerose with respect to my request,
even though the request was made on February 14, 2014.

With due respect, the obligation under s. 2(b) of the Charter is not met
by the Agency by pointing at various employees or groups of employees.

Thus, I reiterate my request that the Agency provide me with a reasonable
opportunity to view file no. M4120-3/13-05726.

Yours very truly,
Dr. Gabor Lukacs

On Mon, 24 Feb 2014, Odette Lalumiere wrote:

> Mr. Lukacs,
> As indicated in my e-mail of February 17, 2014, your request is being
> processed by Ms. Bellerose’s group.
>
>
>
> Odette Lalumière
> Avocate principale/Senior Counsel
> Direction des services juridiques/Legal Services Directorate
> Office des transports du Canada/Canadian Transportation Agency
> Tél./Tel.: 819 994-2226
>
> odette.lalumiere@otc-cta.gc.ca
>
>
>>>> Gabor Lukacs <lukacs@AirPassengerRights.ca> 21/02/2014 1:19 PM >>>
> Dear Ms. Lalumiere and Ms. Bellerose,
>
> I am writing to follow up on the request below. I am profoundly
> concerned
> about what transpires as the Agency attempting to frustrate my rights
> pursuant to s. 2(b) of the Charter.
>
> Yours very truly,
> Dr. Gabor Lukacs
>
>
>
>

> On Mon, 17 Feb 2014, Odette Lalumiere wrote:
>
>> Mr Lukacs
>> Your request is being processed by Ms Bellerose’s group.
>>
>> Odette Lalumi??re
>>
>>
>>
>> From: Gabor Lukacs
>> Sent: Monday, February 17, 2014 4:07 PM
>> To: secretaire-secretary
>> Cc: Odette Lalumiere; Patrice Bellerose
>> Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s.
> 2(b)
>> of the Charter
>>
>> Dear Madam Secretary,
>>
>> I am writing to follow-up on the matter below, which may be of some
> public
>> interest, and as such delay in your response may interfere with my
> rights
>> under s. 2(b) of the Charter.
>>
>> I look forward to hearing from you.
>>
>> Sincerely yours,
>> Dr. Gabor Lukacs
>>
>>
>> On Fri, 14 Feb 2014, Gabor Lukacs wrote:
>>
>>> Dear Madam Secretary,
>>>
>>> I would like to view the public documents in file no.
> M4120-3/13-05726.
>>>
>>> Due the public interest in the case, in which a final decision has
> been
>>> released today, the present request is urgent.
>>>
>>> Sincerely yours,
>>> Dr. Gabor Lukacs
>>>
>>
>>
>

This is **Exhibit "H"** to the Affidavit of Dr. Gábor Lukacs

affirmed before me on August 19, 2014

_____

Signature

From Patrice.Bellerose@otc-cta.gc.ca Mon Feb 24 13:47:16 2014
Date: Mon, 24 Feb 2014 12:46:55 -0500
From: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
To: lukacs@AirPassengerRights.ca, Odette Lalumiere <Odette.Lalumiere@otc-cta.gc.ca>
Cc: secretaire-secretary <secretaire-secretary@otc-cta.gc.ca>
Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s. 2 (b) ofthe Cha
rter

[The following text is in the "UTF-8" character set.]
[Your display is set for the "ISO-8859-1" character set.]
[Some characters may be displayed incorrectly.]

Hello Mr. Lukacs,
As previously mentioned we are working on your requests. We have multiple priorities and I have noted the urgency on the request. We will provide you with the public records as soon as we can.
Thank you.
Patrice Bellerose

From: Gabor Lukacs
Sent: Monday, February 24, 2014 11:56 AM
To: Odette Lalumiere
Cc: Patrice Bellerose; secretaire-secretary
Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s. 2 (b) of the Charter

Ms. Lalumiere,

Although you keep repeating that the request is being processed, I have received no communication from Ms. Bellerose with respect to my request, even though the request was made on February 14, 2014.

With due respect, the obligation under s. 2(b) of the Charter is not met by the Agency by pointing at various employees or groups of employees.

Thus, I reiterate my request that the Agency provide me with a reasonable opportunity to view file no. M4120-3/13-05726.

Yours very truly,
Dr. Gabor Lukacs

On Mon, 24 Feb 2014, Odette Lalumiere wrote:

> Mr. Lukacs,
> As indicated in my e-mail of February 17, 2014, your request is being
> processed by Ms. Bellerose’s group.
>
>
>
> Odette Lalumière
> Avocate principale/Senior Counsel
> Direction des services juridiques/Legal Services Directorate
> Office des transports du Canada/Canadian Transportation Agency
> Tél./Tel.: 819 994-2226

>
> odette.lalumiere@otc-cta.gc.ca
>
>
>>>> Gabor Lukacs <lukacs@AirPassengerRights.ca> 21/02/2014 1:19 PM >>>
> Dear Ms. Lalumiere and Ms. Bellerose,
>
> I am writing to follow up on the request below. I am profoundly
> concerned
> about what transpires as the Agency attempting to frustrate my rights
> pursuant to s. 2(b) of the Charter.
>
> Yours very truly,
> Dr. Gabor Lukacs
>
>
>
>
> On Mon, 17 Feb 2014, Odette Lalumiere wrote:
>
>> Mr Lukacs
>> Your request is being processed by Ms Bellerose’s group.
>>
>> Odette Lalumi??re
>>
>>
>>
>> From: Gabor Lukacs
>> Sent: Monday, February 17, 2014 4:07 PM
>> To: secretaire-secretary
>> Cc: Odette Lalumiere; Patrice Bellerose
>> Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s.
> 2(b)
>> of the Charter
>>
>> Dear Madam Secretary,
>>
>> I am writing to follow-up on the matter below, which may be of some
> public
>> interest, and as such delay in your response may interfere with my
> rights
>> under s. 2(b) of the Charter.
>>
>> I look forward to hearing from you.
>>
>> Sincerely yours,
>> Dr. Gabor Lukacs
>>
>>
>> On Fri, 14 Feb 2014, Gabor Lukacs wrote:
>>
>>> Dear Madam Secretary,
>>>
>>> I would like to view the public documents in file no.
> M4120-3/13-05726.
>>>
>>> Due the public interest in the case, in which a final decision has
> been
>>> released today, the present request is urgent.
>>>
>>> Sincerely yours,
>>> Dr. Gabor Lukacs

```
>>>
>>
>>
>
```

This is **Exhibit "I"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on August 19, 2014

_____

Signature

From lukacs@AirPassengerRights.ca Mon Feb 24 17:22:24 2014
Date: Mon, 24 Feb 2014 17:22:20 -0400 (AST)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
Cc: Odette Lalumiere <Odette.Lalumiere@otc-cta.gc.ca>, secretaire-secretary <secretai
re-secretary@otc-cta.gc.ca>
Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s. 2 (b) ofthe Cha
rter

    [The following text is in the "UTF-8" character set.]
    [Your display is set for the "ISO-8859-1" character set.]
    [Some characters may be displayed incorrectly.]

Ms. Bellerose,

Earlier, I asked you the following question, which you have not answer as
of yet:

> Can you please elaborate on what "processing" means in this context?

> My understanding is that there is a public file, and thus all that needs
> to be done is feed these documents into a scanner.

With due respect, I fail to see why scanning documents in a public file
would require massive resources or anything but a few minutes to put into
a scanner.

I do remain profoundly concerned that you are usurping the authority of
Members of the Agency to decide what documents or portions of documents
are public, and that you are unlawfully engaging in withholding public
documents, in violation of my rights under s. 2(b) of Charter.

I reiterate my request that you provide a clear explanation for the delay
and the meaning of "processing" in this context.

Sincerely yours,
Dr. Gabor Lukacs

On Mon, 24 Feb 2014, Patrice Bellerose wrote:

> Hello Mr. Lukacs,
> As previously mentioned we are working on your requests. We have multiple
> priorities and I have noted the urgency on the request. We will provide you
> with the public records as soon as we can.
> Thank you.
> Patrice Bellerose
>
>
>
>
>
>
> From: Gabor Lukacs
> Sent: Monday, February 24, 2014 11:56 AM
> To: Odette Lalumiere
> Cc: Patrice Bellerose; secretaire-secretary
> Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s. 2 (b)
> of the Charter
>
> Ms. Lalumiere,

>
> Although you keep repeating that the request is being processed, I have
> received no communication from Ms. Bellerose with respect to my request,
> even though the request was made on February 14, 2014.
>
> With due respect, the obligation under s. 2(b) of the Charter is not met
> by the Agency by pointing at various employees or groups of employees.
>
> Thus, I reiterate my request that the Agency provide me with a reasonable
> opportunity to view file no. M4120-3/13-05726.
>
> Yours very truly,
> Dr. Gabor Lukacs
>
>
>
>
> On Mon, 24 Feb 2014, Odette Lalumiere wrote:
>
> > Mr. Lukacs,
> > As indicated in my e-mail of February 17, 2014, your request is being
> > processed by Ms. Bellerose’s group.
> >
> >
> >
> > Odette Lalumière
> > Avocate principale/Senior Counsel
> > Direction des services juridiques/Legal Services Directorate
> > Office des transports du Canada/Canadian Transportation Agency
> > Tél./Tel.: 819 994-2226
> >
> > odette.lalumiere@otc-cta.gc.ca
> >
> >
> >>>> Gabor Lukacs <lukacs@AirPassengerRights.ca> 21/02/2014 1:19 PM >>>
> > Dear Ms. Lalumiere and Ms. Bellerose,
> >
> > I am writing to follow up on the request below. I am profoundly
> > concerned
> > about what transpires as the Agency attempting to frustrate my rights
> > pursuant to s. 2(b) of the Charter.
> >
> > Yours very truly,
> > Dr. Gabor Lukacs
> >
> >
> >
> >
> > On Mon, 17 Feb 2014, Odette Lalumiere wrote:
> >
> >> Mr Lukacs
> >> Your request is being processed by Ms Bellerose’s group.
> >>
> >> Odette Lalumi??re
> >>
> >>
> >>
> >> From: Gabor Lukacs
> >> Sent: Monday, February 17, 2014 4:07 PM
> >> To: secretaire-secretary
> >> Cc: Odette Lalumiere; Patrice Bellerose
> >> Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s.

> > 2(b)
> >> of the Charter
> >>
> >> Dear Madam Secretary,
> >>
> >> I am writing to follow-up on the matter below, which may be of some
> > public
> >> interest, and as such delay in your response may interfere with my
> > rights
> >> under s. 2(b) of the Charter.
> >>
> >> I look forward to hearing from you.
> >>
> >> Sincerely yours,
> >> Dr. Gabor Lukacs
> >>
> >>
> >> On Fri, 14 Feb 2014, Gabor Lukacs wrote:
> >>
> >>> Dear Madam Secretary,
> >>>
> >>> I would like to view the public documents in file no.
> > M4120-3/13-05726.
> >>>
> >>> Due the public interest in the case, in which a final decision has
> > been
> >>> released today, the present request is urgent.
> >>>
> >>> Sincerely yours,
> >>> Dr. Gabor Lukacs
> >>>
> >>
> >>
> > >
>
>

This is **Exhibit "J"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on August 19, 2014

_____

Signature

From Patrice.Bellerose@otc-cta.gc.ca Wed Mar 19 13:59:48 2014
Date: Wed, 19 Mar 2014 12:58:42 -0400
From: Patrice Bellerose <Patrice.Bellerose@otc-cta.gc.ca>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Cc: Cathy Murphy <Cathy.Murphy@otc-cta.gc.ca>, Odette Lalumiere <Odette.Lalumiere@otc
-cta.gc.ca>
Subject: Response to "Request to view file 4120-3/13-05726"

    [The following text is in the "Windows-1252" character set.]
    [Your display is set for the "ISO-8859-1" character set.]
    [Some characters may be displayed incorrectly.]

Hello Mr. Lukacs,
Please find attached copies of records in response to your "request to
view file 4120-3/13-05726".
Thank you.

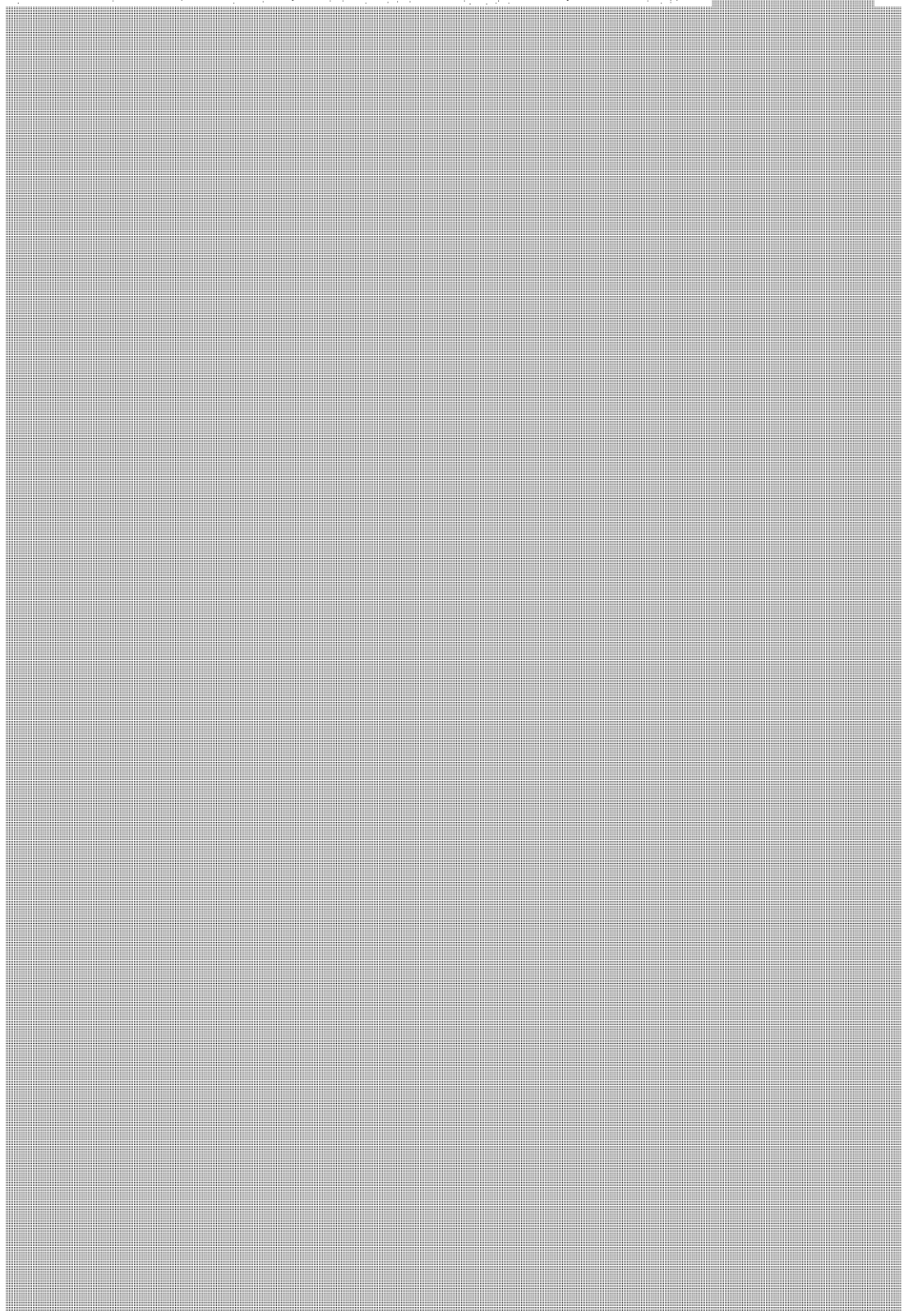
Patrice Bellerose
Gestionnaire principale | Senior Manager
Services d’information, des projets de services partagés et
coordinatrice de l’AIPRP | Information Services, Shared Services
Projects & ATIP Coordinator
Office des transports du Canada | Canadian Transportation Agency
Bureau 1718 | Office 1718
15 rue Eddy, Gatineau (QC) K1A 0N9 | 15 Eddy St., Gatineau, QC K1A
0N9
Téléphone | Telephone 819-994-2564
Télécopieur | Facsimile 819-997-6727
patrice.bellerose@otc-cta.gc.ca

    [Part 2, Application/PDF (Name: "AI-2013-00081.PDF") 15 MB.]
    [Unable to print this part.]

AIR CANADA

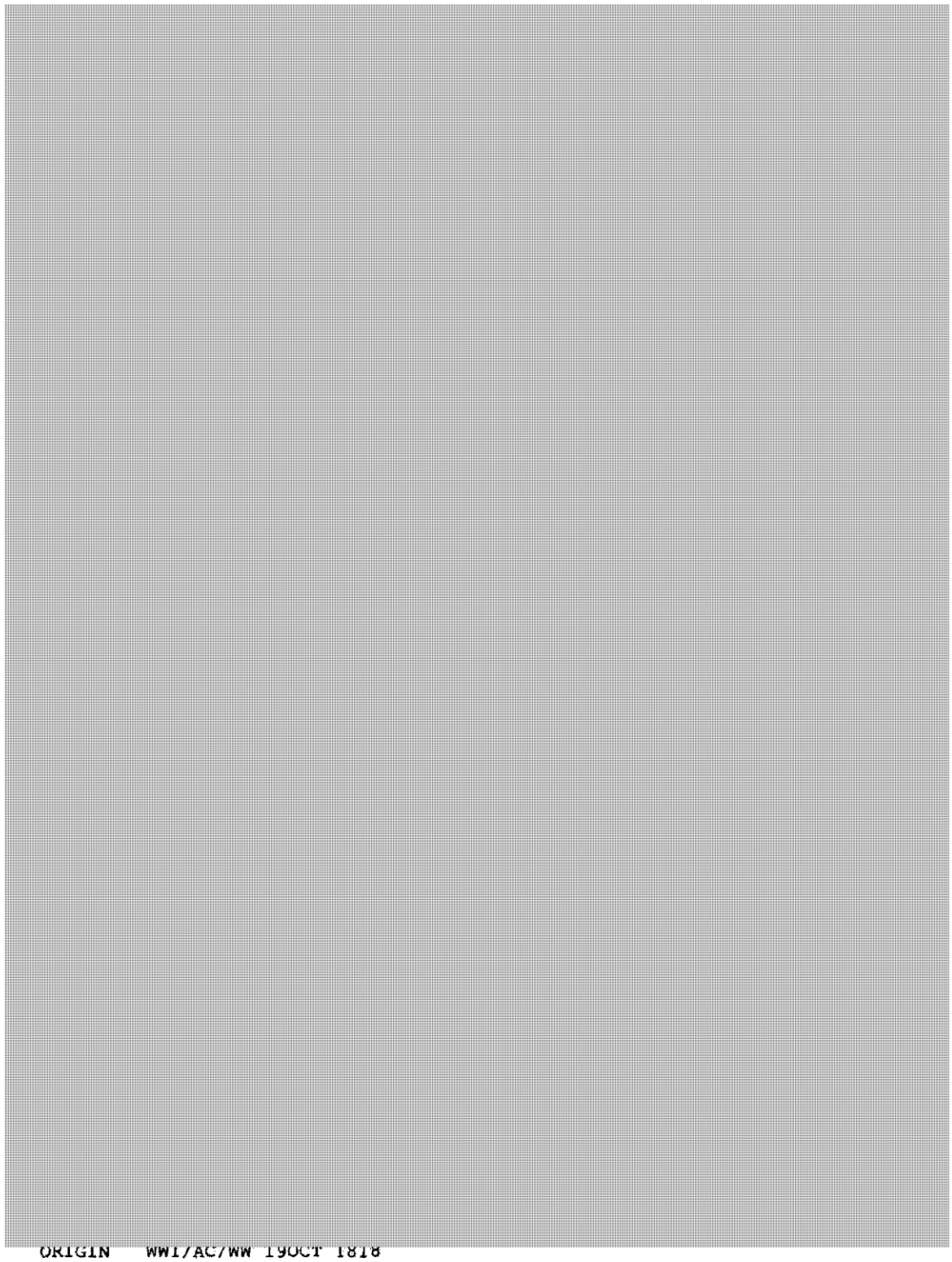
Annex G

PNR Detail -01.***1BRINE/RICHARDMR*** 02.1BRINE/ALLANEMRS



PNR Detail -01.***1BRINE/MICHAELMR***

PA



ORIGIN WW1/AC/WW 19OCT 1818
** UNABLE TO COMPLETE PROCESSING THIS PNR - FORMAT ERROR

AIR CANADA

[redacted] – Regulatory & Litigation
Direct line: [redacted]
Fax: (514) 422-5829
Email: [redacted]@aircanada.ca

Law Branch, Zip 1276
P.O. Box 7000, Station Airport
Dorval, Québec
H4Y 1J2

VIA EMAIL

October 18, 2013

The Secretary
CANADIAN TRANSPORTATION AGENCY
15 Eddy Street, 17th Floor,
Hull / OTTAWA, Canada
K1A 0N9

To the attention of Sylvie Giroux, Analyst

RE: Complaint File no. M4120-3/13-05726
Complaint of Allane L. Brine against Air Canada

We write following the receipt of the Canadian Transportation Agency's letter dated October 4, 2013 (but only transmitted to Air Canada on October 8, 2013), concerning Mrs. Brine's complaint against Air Canada. In said letter, the Agency requests that Air Canada provides its response by October 25, 2013.

Air Canada respectfully requests an additional 14 days to respond to the Agency's letter. Due to the necessity to contact key personnel in order to fully respond to this complaint, and considering that said key personal work on shifts, Air Canada requires additional time to collect relevant information. Furthermore, the undersigned, who is managing the file, will be out of the office for most of the week of October 21st, thereby adding to the reasons for the present extension request. As such, the requested additional 14 days (until October 28, 2013) are necessary in order to allow Air Canada the opportunity to provide a full and complete response to this complaint.

Sincerely,

[redacted]
Regulatory & Litigation

Office
des transports
du Canada

Canadian
Transportation
Agency

October 4, 2013

File No. M4120-3/13-05726

By Email: [redacted]@aircanada.ca
Air Canada – [redacted] Litigation
Law Branch
P.O. Box 7000, Airport Station
Saint-Laurent, Quebec
H4Y 1J2

By Email: [redacted]@shaw.ca
Allane L. Brine
[redacted]

Dear Madames:

Re: Complaint against Air Canada

This refers to the attached complaint by Mrs. Allane L. Brine against Air Canada.

The complainant has requested the Canadian Transportation Agency (Agency) to proceed with the formal adjudication process. The parties can, however, opt for mediation at any point during the adjudication process and while mediation is taking place, the formal adjudication process will be on hold.

This application process is a quasi-judicial one carried out pursuant to the *Canada Transportation Act* (CTA) and the *Canadian Transportation Agency General Rules* (General Rules), which can both be accessed on line at http://www.cta.gc.ca.

The Agency strives to deal with all of its cases within 120 days. However, the Agency may take more than 120 days to issue a decision due to the complexity or the particular circumstances of a case. If any party has concerns that the time it may take to render a decision could exceed 120 days, please advise the undersigned promptly.

Air Canada has until **October 25, 2013** to submit its answer to the Agency and provide a copy to Mrs. Brine and upon receipt of the answer, Mrs. Brine will have 7 days from receipt of Air Canada's answer to file a reply with the Agency, with a copy to Air Canada. **It is the parties' responsibility to ensure that their submissions are filed within the stated time frames.**

.../2

To ensure that Agency proceedings are effective, the Agency will only grant extensions of time in exceptional circumstances. The factors taken into consideration by the Agency for any extension request can be accessed on line at http://www.cta-otc.gc.ca/eng/extensions. Parties must provide clear and convincing evidence for any such request.

Furthermore, should Air Canada wishes to dispute the facts alleged by Mrs. Brine in the application, it should include with its answer:

- a copy of any documents which would support Air Canada's statement of the facts, including reports prepared in relation to the incident, and signed statements from the individual employees and/or contracted personnel who have direct knowledge of the incident and/or who had direct contact with the person(s) involved.

Adjudications are generally completed in writing, although the Agency may decide that a public hearing is necessary. In addition, the Agency may seek further information and/or clarifications from the parties and from third parties (such as travel agents). The Agency may also ask parties to submit witness statements and/or affidavit evidence to complete the pleadings.

It is important to read the attached privacy information.

Should you have any questions regarding your application/complaint, you may contact the undersigned by email at sylvie.giroux@otc-cta.gc.ca.

Sincerely,

Sylvie Giroux
Analyst
Air & Marine Investigation Division
Dispute Resolution Branch
Canadian Transportation Agency
Ottawa, Ontario
K1A 0N9

Attachment

Important privacy information

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.

A copy of the application/complaint is provided to the respondent when the pleadings process begins and all information provided during the pleadings process will be used by the Agency to adjudicate the application/complaint.

In some instances, the Agency may process other applications/complaints together with this application/complaint, where similar issues have been raised. In such circumstances, information provided to the Agency on each of the applications/complaints may be distributed to parties to the other complaints.

An Agency decision will be issued that contains a summary of the application/complaint, a summary of other information provided during the pleadings and an analysis of the case, along with the Agency's determination and any corrective action deemed necessary by the Agency.

The decision will be posted on the Agency's Web site and will include the names of the applicant/complainant, the respondent and witnesses. The decision will also be distributed to a number of organizations and individuals that have subscribed to receive Agency decisions. In its use of names and personal information in decisions and orders, the Agency has adopted the protocol approved by the Canadian Judicial Council in March 2005 for the use of personal information in judgements. This protocol sets out guidelines to assist administrative tribunals when dealing with requests for the non-publication of names.

In an effort to establish a fair balance between public access to its decisions and the individual's right to privacy, the Agency has taken measures to prevent Internet searching of full-text versions of decisions posted on our Web site. This is done by applying instructions using the "web robots exclusion protocol" which is recognized by Internet search engines (e.g. Google and Yahoo).

Therefore, the only decision-related information on the Agency's Web site that will be available to Internet search engines are decision summaries and comments contained in the Agency's annual reports and news releases. The full-text version of decisions is posted on our Web site, but will not be accessible by Internet search engines. As a result, an Internet search of a person's

name mentioned in a decision will not provide any information from the full-text version of decisions posted on the Agency's Web site.

We cannot guarantee that the technological measures taken will always be respected or free of mistakes or malfunctions.

There may be exceptional cases to warrant the omission of certain identifying information from an Agency decision. Such omission may be considered where minor children or innocent third parties will be harmed, where the ends of justice will be undermined by disclosure or the information will be used for an improper purpose. In such situations, the Agency may consider requests, supported by proper evidence, to prevent the use of information which identifies the parties or witnesses involved. Any individual who has concerns with respect to the publication of his/her name should contact the Agency's Secretariat by e-mail at NDN-NPN@otc-cta.gc.ca or by calling 819-997-0099.

Privacy of records

In all cases, the Agency's records relating to the application/complaint will be retained for 10 years. An individual has the right of access to their personal information, on request, in accordance with the *Privacy Act*. Questions or comments regarding your privacy may be directed to the Privacy Co-ordinator by e-mail at Patrice.Bellerose@cta-otc.gc.ca or by telephone at 819-994-2564 or 1-888-222-2592 or TTY at 1-800-669-5575.

This is **Exhibit "K"** to the Affidavit of Dr. Gábor Lukacs

affirmed before me on August 19, 2014

_____

Signature

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

March 24, 2014

VIA EMAIL and FAX

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Dear Madam Secretary:

Re: Request pursuant to the open court principle and s. 2(b) of the *Charter* to view File No. M4120-3/13-05726
Heavily redacted documents received on March 19, 2014

I am writing to make a final request, prior to making an application for judicial review, 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.

1. On February 14, 2014, I made a request to the Agency to "view the public documents in file no. M4120-3/13-05726" pursuant to s. 2(b) of the *Charter*.

2. In subsequent communications dated February 17, 21, and 24, 2014, I have reiterated that my request was based on s. 2(b) of the *Charter*.

3. On March 19, 2014, I received an email from Ms. Bellerose, the Senior Manager of the Information Services, Shared Services Projects & ATIP Coordinator of the Agency, stating that:

> Please find attached copies of records in response to your "request to view file 4120-3/13-05726".

Ms. Bellerose's email had a PDF file named "AI-2013-00081.PDF" attached, which contained heavily redacted copies of documents in File No. M4120-13/13-05726.

It is my position that providing redacted documents does not discharge the Agency's obligations under the open court principle, because the file contains no confidentiality order made by a Member of the Agency pursuant to Rules 23-25 of the *Canadian Transportation Agency General Rules*, S.O.R./2005-35.

My position is consistent with Rule 23(1) of the *Canadian Transportation Agency General Rules*:

> 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.

My position is also consistent with the Agency's Privacy Statement concerning the Agency's complaint process:

> In accordance with the values of the open court principle and pursuant to the Canadian Transportation Agency General Rules, all information filed with the Agency becomes part of the public record and may be made available for public viewing.

Finally, I refer to Decision No. 219-A-2009 of the Agency, concerning the motion of Leslie Tenenbaum for non-publication of his name and certain personal information, where the Agency analyzed in great detail its own obligations under the open court principle.

In light of the foregoing, I trust you agree with me that the documents in question were redacted without lawful authority or authorization to do so, and in breach of the Agency's obligations under the open court principle and s. 2(b) of the *Charter*.

Therefore, I am requesting that:

A. the present letter be brought to the attention of Mr. Geoffrey C. Hare, Chair and CEO of the Agency; and

B. 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.

Kindly please confirm the receipt of this letter.

Yours very truly,

Dr. Gábor Lukács

This is **Exhibit "L"** to the Affidavit of Dr. Gábor Lukacs

affirmed before me on August 19, 2014

_____

Signature

Office
des transports
du Canada

Canadian
Transportation
Agency

Bureau du
Président

Office of the
Chairman

March 26, 2014

Mr. Gábor Lukács

Halifax, NS

lukacs@AirPassengerRights.ca

Mr. Lukács,

Re: Your letter of March 24, 2014 in regards to your request to view
File No. M4120-3/13-05726

The Canadian Transportation Agency (Agency) is a government institution which was included in the schedule to the *Privacy Act* (Act) in 1982. When Parliament adds a government institution to the schedule of the Act, either through legislation or regulation, it reflects a decision to subject the institution to the full application of the Act. For the Agency, that decision was maintained throughout successive legislation modifications.

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 to not 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 Info Source. This is all consistent with the directions of the Treasury Board of 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 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.

Sincerely,

Geoffrey C. Hare
Chair and Chief Executive Officer

This is **Exhibit "M"** to the Affidavit of Dr. Gábor Lukacs

affirmed before me on August 19, 2014

_____

Signature

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

July 29, 2014

VIA EMAIL AND FAX: 819-953-9269

Odette Lalumière
Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec J8X 4B3

Dear Ms. Lalumière:

Re: Dr. Gábor Lukács v. Canadian Transportation Agency
Federal Court of Appeal File No.: A-218-14
The Agency's motion to strike out the application for lack of jurisdiction

I am in receipt of your email dated July 28, 2014, informing me about your intention to bring a motion to strike out the above-noted application for judicial review for lack of jurisdiction.

Please be advised that a motion to strike an application is not an appropriate vehicle to challenge the Court's jurisdiction (*Coffey v. Canada (Minister of Justice)*, 2004 FC 1694, para. 21). The proper procedure is to raise the issue of jurisdiction in the Agency's factum and oral arguments at the hearing of the application on its merits.

Thus, I am requesting that you confirm that the Agency will not bring such an unnecessary motion to strike out the application. Please be advised that should you proceed with the motion in spite of being cautioned about its impropriety, I will be seeking costs on a full indemnity basis, and I may be seeking costs against you personally, pursuant to Rule 404 of the *Federal Court Rules*.

Yours very truly,

Dr. Gábor Lukács

Examination No. 14-0775 Court File No. A-218-14

FEDERAL COURT OF APPEAL

B E T W E E N:

DR. GABOR LUKACS

APPLICANT

- and –

CANADIAN TRANSPORTATION AGENCY

RESPONDENT

****

CROSS-EXAMINATION OF PATRICE BELLEROSE ON HER AFFIDAVIT SWORN JULY 29, 2014, pursuant to an appointment made on consent of the parties, to be reported by Gillespie Reporting Services, on the 21st day of August, 2014, commencing at the hour of 10:29 in the forenoon.

****

APPEARANCES:

Dr. Gabor Lukacs, for the Applicant

Mr. Simon-Pierre Lessard, for the Respondent

This Cross-Examination was digitally recorded by Gillespie Reporting Services at Ottawa, Ontario, having been duly appointed for the purpose.

(i)

INDEX

NAME OF WITNESS: PATRICE BELLEROSE

CROSS-EXAMINATION BY: DR. GABOR LUKACS

NUMBER OF PAGES: 2 THROUGH TO AND INCLUDING 27

ADVISEMENTS, OBJECTIONS & UNDERTAKINGS

EXHIBITS

DATE TRANSCRIPT ORDERED: August 21, 2014

DATE TRANSCRIPT COMPLETED: August 25, 2014

PATRICE BELLEROSE, SWORN:

CROSS-EXAMINATION BY DR. GABOR LUKACS:

1. Q. Ms. Bellerose, I understand that on July 29, 2014, you swore an affidavit.

A. Yes.

DR. LUKACS: Let's mark that Affidavit as Exhibit 1.

EXHIBIT NO. 1: Affidavit of Patrice Bellerose dated July 29, 2014

DR. LUKACS:

2. Q. And I understand that you received the Direction to Attend dated August 8, 2014.

A. That is correct.

DR. LUKACS: Let's mark it as Exhibit 2.

EXHIBIT NO. 2: Direction to Attend dated August 8, 2014

DR. LUKACS:

3. Q. For how long have you been working with the Canadian Transportation Agency and in what roles?

A. I have been working with the Canadian Transportation Agency for just about six years and my initial position was the manager of record services and access to information and privacy co-ordinator for the Agency initially for the first one to two years. I was the acting director of the information services

directorate for three and a half years and I have recently been changed to a slightly different position as the senior manager of information services but that again is supposed to be changing shortly. There is going to be another reorganization of the Agency.

4. Q. In your current role what are your responsibilities?

A. I am responsible for all records, record keeping at the Agency, retention, dispositions, keeping the files, so information management, access to information and mail services.

5. Q. So when you say “records” can you elaborate what you mean by records in that context?

A. All records relating to the Agency, both transitory and official records.

6. Q. So for example, when the Agency orders paper would that also be a record that you would be handling?

A. If we -- the order for the paper?

7. Q. Yes, the invoice and all those things, are those records in this sense?

A. It depends. Probably for a period of time we have to have a record of an invoice, sure.

8. Q. And also submissions of parties and proceedings before the Agency are records?

A. Case files are records of the Agency, yes.

9. Q. Okay. In your current position can you describe to me the chain of command, who is your immediate supervisor, superior or whom do you report?

A. Right now I report to the director of information services who the current acting is Christine Guérette. She reports to the acting director of communications and information services branch which is Jacqueline Bannister who reports directly to the chairman.

10. Q. Just to confirm, are you currently or have you ever been a member of the Canadian Transportation Agency?

A. Of the which?

11. Q. Of the Canadian Transportation Agency. Have you been a member?

A. No.

12. Q. In carrying out your duties as manager of record services and access to information and privacy are you required to follow the decisions, rules and policies made by the Agency?

A. Yes.

13. Q. Now let’s look at Exhibit A to your Affidavit. Do you have it in front of you?

A. Exhibit A to my Affidavit?

14. Q. Yes.

A. Yes.

15. Q. This is an email dated February 14th, 2014

from myself to the secretary of the Agency, correct?

A. Yes.

16. Q. Were you aware when you received this that it explicitly makes reference to the fact that the request is made pursuant to section 2(b) of the Charter?

A. Yes.

17. Q. Did you understand the meaning of a request pursuant to section 2(b) of the Charter?

A. Yes.

18. Q. What does it mean?

A. It means that you were making a request under the Charter, under your Charter rights, and any requests for information at the Agency are treated as in -- those types of requests are treated as informal requests for information.

19. Q. What does section 2(b) of the Charter mean to you?

MR. LESSARD: For the record, I will object to the question because -- well there is an issue of relevance but also because you are asking the opinion to the witness. However Madam Bellerose will answer subject to the right to have the propriety of the question determined by the court at a later date. *O*

DR. LUKACS: Sure.

THE WITNESS: Okay so my understanding is that you

were making a request under the Charter which you were saying your Charter rights allowed you to request the documents as they were part of the open court principle and were subject -- it was under your Charter rights as opposed to making a formal access to information request.

DR. LUKACS:

20. Q. Did you make any inquiry to anybody at the Agency as to the meaning of a request pursuant to section 2(b) of the Charter?

A. Well, we discussed your request with the secretary and legal services.

MR. LESSARD: I will object because it is solicitor/client privilege with respect to discussions with legal services and -- like for the rest of the question I don't really have a problem with it. *O*

THE WITNESS: So we discussed the request and it was determined that we would proceed, even though you had indicated that it was under section 2(b) of the Charter, that we would proceed as a normal request for information as we normally receive for other case files throughout the Agency. We regularly receive them from other applicants on a daily basis.

DR. LUKACS:

21. Q. Did you receive any instructions from your superiors about how to process such a request pursuant to

section 2(b) of the Charter?

A. All requests for information are processed through our office in a standard fashion; either they are formal requests under the Access to Information Act or they are informal. Generally anybody asking for information regarding a case file that is ongoing at the Agency is considered an informal request because the documents are part of the public record.

22. Q. So do you agree with me that Exhibit A to your Affidavit was not a request made pursuant to the Access to Information Act?

MR. LESSARD: I will object for the record again because in this case it is not appropriate in this type of examination to ask for admissions from a witness. She is here as a witness and not as a party. However Madame Bellerose will answer subject to the right to have the propriety of the question determined by the court at a later date. *O*

THE WITNESS: It was not considered a formal request under the Access to Information Act, no. It did not meet the requirements.

DR. LUKACS:

23. Q. So at section 3 of your affidavit you say that the request was treated as an informal access request.

A. Yes.

24. Q. Can you please explain exactly what an informal access request means?

A. It means any requests for government records that are not completed formally under the Access to Information Act, meaning it must require the $5 fee. It must have the formal form that has been completed and signed.

25. Q. So in the case of this request you'd agree that no fee was paid.

A. No fee was paid nor was the form filled out.

26. Q. So there are two types of requests. There is a formal request where the fee is paid and the form is completed and --

A. Correct.

27. Q. -- those are treated as formal requests under the Act.

A. Correct.

28. Q. And then there are the informal requests which are everything else which are not treated under the Act, correct?

A. That's correct.

29. Q. In paragraph 3 of your Affidavit you say that this request was treated and I am quoting, "in conformity with the directive on the administration of the Access to Information Act".

A. Yes.

30. Q. Is Exhibit B to your Affidavit the directive that you are referring to?

A. Yes.

31. Q. Can you point to specific provisions of the directive to which treating the request as an informal access request conforms?

A. Section 7.4.5.

32. Q. Would you mind reading it into the record just for clarity?

A. “Informal processing

7.4.5 Determining whether it is appropriate to process the request on an informal basis. If so, offering the requester the possibility of treating the request informally and explaining that only formal requests are subject to provisions of the Act”.

33. Q. So just for clarity, according to this directive an informal request for access is not subject to the provisions of the Act. Is that correct?

A. An informal?

34. Q. Yes.

A. That is correct.

35. Q. And did you consult this directive when you were deciding how to treat my request?

A. No, because any request that we receive for information at the Agency other than formal requests are treated as informal access to information requests.

36. Q. Let's move on. I asked you to bring the attachment to your March 19, 2014 email which was referenced in paragraph 4 of your Affidavit.

A. Yes.

37. Q. I believe it consists of 121 pages.

A. That is correct.

DR. LUKACS: Let's mark it as Exhibit 3.

EXHIBIT NO. 3: Attachment to the email dated March 19, 2014 12:58 PM, from Patrice Bellerose to Dr. Gabor Lukacs, attachment 121 pages.

DR. LUKACS:

38. Q. Do you agree that the file contains no claim for confidentiality by any of the parties?

A. Yes.

39. Q. Do you agree that the file contains no determination by the Agency concerning confidential treatment of any of the documents or portions of documents in the file?

A. Sorry. Can you repeat that?

40. Q. Do you agree that the file contains no determination by the Agency concerning confidential treatment of any of the documents or portions of

documents?

A. No.

41. Q. You don't agree or...?

A. No. There is personal information that is contained in the documents that the Agency determines as confidential.

42. Q. Can you refer me to -- My question is: Is there -- in the file is there a decision, order or any other decision by the Agency stating that certain documents or portions of document will be treated confidentially?

A. The Privacy Act requires that we remove personal information from Agency records.

43. Q. I am sorry. I didn't ask you about the Privacy Act. I asked you about those 121 pages.

A. Yes there contains personal information in those 121 pages.

44. Q. That is not my question.

MR. LESSARD: Can you please reformulate Dr. Lukacs?

DR. LUKACS: Sure.

45. Q. Among those 121 pages is there any document, any directive, decision, order made by a member or members of the Agency directing that any of these documents be treated confidentially?

A. No.

46. Q. Thank you. Do you agree with me that some of the pages were partially blacked out?

A. Yes.

47. Q. Who decided which parts to black out?

A. Myself in collaboration with various staff members of the Agency.

48. Q. How was it decided which parts to black out?

A. Personal information was removed. That's all.

49. Q. All personal information?

A. No, only personal information that was not divulged in the decision.

50. Q. Under what legal authority was the blackened outs performed?

A. The Privacy Act.

51. Q. So under the Privacy Act are you telling me that you have the authority to decide which parts of an Agency adjudicative document will be released?

A. Under the Privacy Act we are obligated to remove personal information from government records prior to releasing them.

52. Q. Now let’s look at page 75. It was a letter from Air Canada to the secretary of the Agency dated October 18th, 2013, correct?

A. Correct.

53. Q. Do you agree that the name, that the business email address and the signature of Air Canada's counsel were blacked out on page 75?

A. Yes.

54. Q. Do you agree that the name, the business email address and the signature of Air Canada's counsel were blacked out throughout the file?

A. I would have to look through the pages --

55. Q. Take your time.

A. -- through the 121 pages to verify that but they should be. It's possible we made an error but generally yes they should be.

56. Q. So you say that those things should have been blacked out in your opinion?

A. Their contact information as well as their emails.

57. Q. Even though we are talking about work email address, not home ones?

A. We have had various consultations with air industry and different industries at the Agency and depending on whether a number is published, a work number is published or not, determines whether sometimes the information is public or not. Sometimes information is available publically; sometimes it's not. So in those cases more often than not we err on the side of caution

and if the number isn't published -- sometimes it is a general number, for example. If it is a general line obviously we include that type of information.

58. Q. So just to be clear, you made this decision or decided what things to redact in consultation also with the airline industry. Is that correct, what you just earlier said?

A. On previous files. That's not just air but different transportation modes. They have indicated that there are certain numbers that are purposely not published for people that work in businesses and that they keep those -- that information protected for various reasons and that they would like it not to be divulged.

59. Q. So in the case of Air Canada, Air Canada's lawyers, the counsel acting on the file, the name of the counsel, the business email address were blacked out pursuant to this request from the industry, from Air Canada specifically?

A. Based on consultations we have previously had with industry this was --

60. Q. But in this specific file was there any request from Air Canada to have their information redacted in this specific file?

A. We didn't consult them on this specific file because it was informal and we just went with according to

the usual personal information exemptions that we had so that we could get you the file in a timely fashion.

61. Q. Let's go also to page 68 of this file, actually 67, Annex G. This was an exhibit filed by Air Canada, correct?

A. That is correct.

62. Q. What I am seeing here on pages 68, 69 and 70 is that virtually the entire pages were blacked out, correct?

A. Correct.

63. Q. Why is that?

A. Because they contained PNR details which have personal information contained within them.

64. Q. All PNR information is personal information?

A. Pardon me?

65. Q. All PNR information is personal information?

A. Not necessarily. Certain parts are. It contains all of the information relating to the passenger air travel.

66. Q. Isn't that the issue before the Agency, the passengers' travel?

A. Sure, but the details of their travel aren't really relevant. If they are they have been included in the decision and the information is released.

67. Q. Are you familiar with the notion of open court

principle?

A. I am.

68. Q. Did you receive any training concerning the notion of open court principle?

A. Yes.

69. Q. Are you aware of any relationship between the open court principle and section 2(b) of the Charter?

MR. LESSARD: For the record, I will object to the question because of relevance and the fact again that you are asking an opinion from a witness who is not a party in this case. However Madame Bellerose will answer subject to the right to have the propriety of the question determined by the court at a later date. *O*

THE WITNESS: Sorry. Can you repeat the question?

DR. LUKACS:

70. Q. My question was: Are you aware of any relationship between the open court principle and section 2(b) of the Charter?

A. Yes.

71. Q. Do you know if the Agency is subject to the open court principle?

A. Yes.

72. Q. Are you aware of any policies or rules of the CTA that are in place for the purpose of compliance with the open court principle?

A. Our General Rules state that documents filed in relation to a complaint -- or actually there is a specific term for it. I don't have the General Rules in front of me -- but a proceeding, sorry, will be on the public record.

73. Q. How many requests pursuant to the open court principle have you handled in, say, the past 12 months?

A. In the past 12 months? I don't have the numbers with me but we --

74. Q. Approximately?

A. Twenty to 25.

75. Q. And they were all pursuant to the open court principle?

A. They were all requests for -- I am taking the liberty of trying to figure out what you are talking about but essentially any requests for case files, documents that were filed in relation to a decision that was issued by the Agency, where the documents were placed on the public record I would say we had about 20 to 25 of those in the past 12 months.

76. Q. In each case, in each of those cases, what you provided to the public was redacted documents?

A. Just personal information removed from each of them, yes.

77. Q. And all requests that were made pursuant to

the open court principle were handled as informal access requests?

A. That's correct. And actually I should elaborate on my previous answer. There were some requests for information where claims for confidentiality had been made on certain cases, so that information was also removed in those cases.

78. Q. That is obvious. That is not an issue in this case. All right; let’s look at page 79 of the same document. Just for clarity would you care to read into the record the two titles and the first two paragraphs, please?

A. “Important privacy information and Open Court Principle"

79. Q. And the first two paragraph?

A. “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”.

80. Q. Okay, so what does “public record” mean here?

A. It means it's available for public viewing. It's available to the public.

81. Q. So any document placed on public record the public can access. Would it be fair to say that?

A. As long as it is filed with the Agency and in respect to a proceeding.

82. Q. So are you telling me that if somebody walks in the door of the Agency and says hi, I want to see file number so-and-so then they can look at all documents on the public record?

A. Well they have to be -- we have to remove personal information from them prior to viewing.

83. Q. But I don’t understand really. You say that all documents are placed on public record. You just said that all documents on public record can be viewed. Then where does this Act of removal fit into that notion of public record?

A. I am sorry. Can you repeat that?

84. Q. You just said that documents filed with the Agency are placed on public record, correct?

A. Correct.

85. Q. You also said that documents on public record can be viewed by the public.

A. Correct.

86. Q. Where does redaction come into this whole

procedure then? The Agency's own information sheet just says that those things may be viewed by the public.

A. They may be viewed by the public but the personal information that is contained within those documents is removed prior to viewing.

87. Q. So let's back-trace. What do you mean then by the notion "public record", because my understanding of public record is that public record is a document that the public can view? Do you agree with that?

A. Yes.

88. Q. So what you are telling me here is that you go and remove personal information from documents which are already on public record?

A. We remove personal information from Agency records prior to disclosing them to the public, yes.

89. Q. Doesn't public record mean that the public can access those documents?

A. They are accessing the documents. They are just not accessing the personal information that is contained within them. The public has a right to transparency which is the purpose of what we are doing because of the open court principle but the individual also has a right to privacy.

DR. LUKACS: Let's mark as Exhibit 4 Rule 23 of the Agency, of the General Rules.

THE WITNESS: Sorry, Rule 23? Okay, we don't have the General Rules with us but I believe you are talking --

DR. LUKACS: I believe it was printed out.

THE WITNESS: It is the part where it talks about the confidentiality of records and that all documents will be placed on the public record unless a claim for confidentiality is made?

DR. LUKACS: That's right.

THE WITNESS: Okay.

EXHIBT NO. 4: Canadian Transportation Agency General Rules, Rule No. 23.

DR. LUKACS:

90. Q. So you have already referred to it and I would prefer to have it in front of you.

MR. LESSARD: I just gave it to her.

THE WITNESS: This is only a portion of the General Rules. There are other things that come into play. We only have a portion here to talk about but okay let's --

DR. LUKACS:

91. Q. Which portion do you have there because my understanding is that Rule 23 in its entirety should be before you?

A. Rule 23 is here.

92. Q. Yes. Is there any other Rule in the General

Rules that govern confidentiality?

A. Yes, there is another rule further that talks about the Agency can deem certain records confidential. Unfortunately I don't have the rules with me to identify that for you. I apologize.

93. Q. You are referring to financial or corporate information. Is that the Rule that you are referring to?

A. Yes.

94. Q. But we are talking here about personal information not --

A. That's right.

95. Q. So can you explain to me something?

A. Sure.

96. Q. Rule 23 has an elaborate confidentiality procedure.

A. That is correct.

97. Q. A party who doesn't want some information to be released to the public can request confidentiality, correct?

A. That is correct.

98. Q. And if the request is granted then a redacted copy of the document is placed on the public record.

A. That's correct.

99. Q. So deciding what to redact and what isn't, isn't that the job of the members of the Agency according

to Rule 23?

MR. LESSARD: For the record, I will object to the question because again it is a question of relevance and you are asking for an opinion or an admission from the witness. However Madame Bellerose will answer subject to the right to have the propriety of the question determined by the court at a later date. *O*

THE WITNESS: The Agency is subject to the Privacy Act and so for that reason that is why the personal information is redacted.

DR. LUKACS:

100. Q. You are not answering my question. My question was: Isn't it the duty of members and the responsibility of members hearing the case to determine pursuant to Rule 23 what portions will be redacted and what portions won't?

A. In a claim for confidentiality, yes.

101. Q. So if no claim for confidentiality is made all documents are placed on the public record, correct?

A. With the personal information removed.

102. Q. Can you point to me at anything in the General Rules that requires the removal of personal information?

A. The Agency is subject to the Privacy Act. That's what requires us to remove the personal information.

103. Q. My question was: Can you point to me at something in the General Rules that requires the removal of personal information, in the General Rules?

A. In the General Rules, no.

104. Q. No. The General Rules require that all documents with respect to which confidentiality has not been claimed be placed on public record, correct?

A. This is correct.

105. Q. And what you are telling me is that after a document is placed on public record you go in and redact things from it.

A. We don’t redact things. We redact personal information that is required under the Privacy Act which is another legislation to which we are required to comply.

106. Q. I am sorry. I am asking you now about the facts, not about the law, for the law will be for the court to decide. My question is: When you have a file which contains no claim for confidentiality which we have agreed is placed on public record, correct?

A. Correct.

107. Q. And then when the public wants to access the file you go in and redact a portion of it. Is that correct?

A. We remove -- no, not a portion. We remove personal information.

108. Q. Is personal information not a portion of the document?

A. I guess vaguely, yes.

109. Q. It is contained in the document. So to summarize even when a document is placed on public record pursuant to Rule 23 you redact further portions from it before releasing it to the public, correct?

A. Correct. I think it is important to clarify that it is personal information that is removed. "Portions" isn't really clear. It is important to distinguish that it is personal information only that is removed.

110. Q. Things that you deem to be personal information.

A. Things that are defined in the Act as personal information.

111. Q. But you purport to making those decisions what to redact or not, we just heard earlier, correct?

A. I interpret the Act, is that what you are asking?

112. Q. What I am asking is: Once the document is placed on public record and the Agency -- as a member of the Agency did not see a reason to grant confidentiality--

A. Or if there was no request.

113. Q. Or if there was no request.

A. That's right.

114. Q. Then you go and make some decisions as to what to redact from the file before it is released to the public, correct?

A. Personal information is removed, that is correct.

115. Q. And you decide what will be removed and what not?

A. I personally decide or --

116. Q. Yes.

A. –- is there an approval process?

117. Q. What can you tell me about that approval process?

A. Sure. Generally speaking it depends on -- with informal requests generally we take care of them in our office. Sometimes we consult with legal services and depending on the file it is possible that it can go to the chair who is the delegated head for access to information and privacy at the Agency.

DR. LUKACS: I guess I have no more questions. Thank you.

--THIS CROSS-EXAMINATION ADJOURNED AT 11:07 A.M. ON THE 21ST DAY OF AUGUST, 2014.

WE HEREBY CERTIFY THAT the foregoing was transcribed to the best of our skill and ability, from digitally recorded proceedings.

.....

~~LG~~ R S / B M P

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

WRITTEN REPRESENTATIONS OF THE APPLICANT

OVERVIEW

(i) The application for judicial review (main proceeding)

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 files of quasi-judicial proceedings before the Canadian Transportation Agency (the "Agency"), including submissions of the parties and exhibits.

2. The Applicant submits that pursuant to s. 2(b) of the *Charter*, the public is entitled to view files of proceedings 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.

3. The Applicant challenges the practice of the Agency that the public can view only redacted files of quasi-judicial proceedings (under the pretext of compliance with the *Privacy Act*), even in cases where a confidentiality order was neither sought by the parties nor made by Member(s) of the Agency.

Lukács Affidavit, Ex. "A" **[Tab 1A, P9]**

(ii) The Agency's motion to quash the application (present motion)

4. In the present motion, the Agency attempts to sidestep the issue of the open court principle and *Charter* 2(b) rights, and frame the case as a refusal to grant access to records under the *Access to Information Act* (the "*ATIA*").

5. The Agency's motion must fail, because:

(a) the basis for the application is the open court principle and s. 2(b) of the *Charter*, and no remedies are sought pursuant to the *ATIA*;

(b) the Applicant was not required to make a request under the *ATIA* to exercise his open court principle rights (s. 2(2) of *ATIA*), nor did he make such a request under the *ATIA*;

(c) sections 19 and 41 of the *ATIA* apply only to requests made under the *ATIA*, but they do not apply to other requests;

(d) compliance with the open court principle, which is inextricably tied to freedom of expression guaranteed by s. 2(b) of the *Charter*, is a statutory obligation of the Agency as a quasi-judicial tribunal;

(e) subsection 28(1)(k) of the *Federal Courts Act* provides for judicial review of matters "in respect of" the Agency that fall outside the statutory right of appeal under section 41 of the *Canada Transportation Act*, such as the present application.

6. The Applicant objects to the disposition of the present motion in writing because the matter is complex, raises questions of public interest, and affects fundamental rights and freedoms protected by the *Charter*.

PART I – STATEMENT OF FACTS

A. THE AGENCY AND THE OPEN COURT PRINCIPLE

7. The Agency, established by the *Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*"), has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions:

(a) as a quasi-judicial tribunal, the Agency resolves commercial and consumer transportation-related disputes; and

(b) as an economic regulator, the Agency makes determinations and issues licenses and permits to carriers that function within the ambit of Parliament's authority.

8. It is common ground that the Agency is subject to the open court principle when it acts as a quasi-judicial tribunal to adjudicate dispute proceedings. The Agency's "Important privacy information" notice, provided by the Agency to parties in dispute proceedings, confirms the same:

> 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. "J" **[Tab 1J, P51]**

9. 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)**	**[Tab 6, P117-P118]**
***Canadian Transportation Agency General Rules*, S.O.R./2005-35 ("Old Rules"), ss. 23(1), 23(6)**	**[Tab 7, P122, P124]**

B. THE APPLICANT'S REQUEST TO VIEW TRIBUNAL RECORDS

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

10. On February 14, 2014, the Applicant, Dr. Gábor 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*, from which the open court principle is derived.

Lukács Affidavit, para. 2, Ex. "B" **[Tab 1B, P19]**

11. 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. 3-9, Ex. "C"-"I" **[Tab 1C-1I, P21-P38]**

(ii) Agency staff understood the nature of the request

12. 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. 8, Ex. "H" **[Tab 1H, P34]**
Bellerose Cross-Examination, Q16-Q18 **[Tab 2, P66]**

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

13. 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 2, P67, P69]**

14. 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 Affidavit, para. 3 **Agency's Motion Record, p. 6**
Bellerose Cross-Examination, Q25 **[Tab 2, P69]**

(iv) Redacted file

15. On March 19, 2014, the Agency provided Lukács with 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) evidence filed by Air Canada (Annex G, almost in its entirety); and

(b) the name and work email address of counsel for Air Canada.

Lukács Affidavit, para. 10, Ex. "J" **[Tab 1J, P42]**
Bellerose Cross-Examination, Q53-Q57, Q61-Q62 **[Tab 2, P74, P76]**

(v) Confidentiality was never sought nor granted

16. 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, para. 11 **[Tab 1, P1]**
Bellerose Cross-Examination, Q38, Q45 **[Tab 2, P71, P72]**

(vi) Final demand

17. 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. "K" **[Tab 1K, P53]**

18. 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. "L" **[Tab 1L, P56]**

C. THE APPLICATION FOR JUDICIAL REVIEW

19. On April 22, 2014, Lukács filed the present application for judicial review to enforce his open court principle and s. 2(b) *Charter* rights to view files of quasi-judicial proceedings before the Agency, including submissions of the parties and exhibits, that is, to view tribunal files (the equivalent of court files).

Lukács Affidavit, Ex. "A" **[Tab 1A, P9]**

20. Without delving into the merits of the application, which are beyond the scope of the present motion, it is to be noted that Lukács argues that tribunal files of the Agency fall within one or more of the exemptions of the *Privacy Act*, and in the alternative, the *Privacy Act* is inapplicable to the extent that it purports to limit open court principle and s. 2(b) *Charter* rights.

PART II – STATEMENT OF THE POINTS IN ISSUE

21. The question to be decided on this motion is whether this application should be quashed on the grounds that this Honourable Court lacks jurisdiction. Two *Charter*-related questions are underpinning this question:

(i) Are members of the public required to make a request under the *Access to Information Act* in order to exercise their open court and s. 2(b) *Charter* rights or to seek remedies for violations of same?

(ii) What is the "court of competent jurisdiction" within the meaning of s. 24(1) of the *Charter* with respect to alleged infringement or denial of s. 2(b) rights by the Canadian Transportation Agency?

22. Lukács submits that question (i) ought to be answered in the negative.

23. With respect to question (ii), Lukács submits that as a result of the amendments to the *Federal Courts Act* (Bill C-38) that were introduced on September 28, 1989 and proclaimed in force on February 1, 1992, the Federal Court of Appeal is a "court of competent jurisdiction" to hear and determine the present application.

PART III – STATEMENT OF SUBMISSIONS

24. A motion to dismiss is a very exceptional step in an application for judicial review, which can succeed only if the application is "bereft of any possibility of success." The reason for such a high threshold is that an application for judicial review is determined much in the same way as the application itself: based on affidavit evidence and arguments. Consequently, such a motion tends to delay the final resolution of the substantive issues, and saves no resources.

***David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 FC 588, paras. 10, 15** **[Tab 11, P172, P175]**

25. Therefore, in order to succeed, the Agency must demonstrate that it is plain and clear that this Honourable Court lacks jurisdiction. If it is arguable that the Court has jurisdiction, then the Agency's motion should be dismissed, and the application should be allowed to run its course to a hearing on its merits.

***Mahjoub v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 218, para. 14** **[Tab 12, P183]**

A. THE RIGHTS ASSERTED: ACCESS TO TRIBUNAL FILES PURSUANT TO THE OPEN COURT PRINCIPLE AND S. 2(B) OF THE CHARTER

26. The Agency's argument, that s. 2(b) of the *Charter* does not entail a general right to access all information under the control of government, is improper:

(a) it is a straw man argument, because Lukács did not claim that the *Charter* entails a right to view all information held by the Agency, he only claims the right to view tribunal files (akin to court files);

(b) it concerns the merits of the case, rather than the question of jurisdiction raised by the Agency on the present motion.

Written Representations, paras. 7-9 **Agency's Record, pp. 34-35**

27. 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 Brunsiwck (Attorney General)*, [1996] 3 S.C.R. 480, para. 23** **[Tab 10, P150]**

28. 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 13, P193]**

29. In *Tenenbaum v. Air Canada*, the Agency correctly concluded after a very thorough analysis that, being a quasi-judicial tribunal, it was 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, P221]**

30. The within application relies on the open court principle and s. 2(b) of the *Charter* precisely to the extent that these were found to apply to the Agency in *Tenenbaum*: in the absence of a confidentiality order, the Agency's files containing the parties' submissions and exhibits (evidence) must be accessible to the public in their entirety.

31. Thus, the Agency's first argument mischaracterizes the rights asserted by Lukács, and is woefully misguided.

B. NO REQUEST UNDER *ATIA* IS REQUIRED TO EXERCISE OPEN COURT PRINCIPLE AND S. 2(B) CHARTER RIGHTS

32. The Agency's second argument appears to be that the procedures set out in the *Access to Information Act* (*ATIA*) replace, limit, or affect access to the Agency's tribunal files pursuant to the open court principle. If this was indeed the thrust of the Agency's argument (which is unclear), then it is flawed.

Written Representations, para. 10 **Agency's Record, p. 35**

33. Subsection 2(2) leaves no doubt that the *ATIA* does not replace, limit, or affect in any way the rights of the public to access tribunal files (the equivalent of court files) pursuant to the open court principle and section 2(b) of the *Charter*:

> This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

***Access to Information Act*, R.S.C. 1985, c. A-1, s. 2(2)** **[Tab 4, P111]**

34. In particular, members of the public are not required to make a request pursuant to the *ATIA* to exercise their open court principle and s. 2(b) *Charter* rights or to seek remedies for violations of same.

C. SECTIONS 19 & 41 OF THE ATIA DO NOT APPLY TO THE CASE AT BAR

35. The Agency's third group of arguments is that:

(a) the "refusal" to disclose documents is always the "refusal" of the head of the institute; and

(b) the proper procedure to challenge such a "refusal" is by way of an application for judicial review pursuant to section 41 of the *ATIA*.

Written Representations, paras. 12-13 **Agency's Record, p. 36**

36. The Agency's argument is premised on the erroneous assumption that sections 19 and 41 of the *ATIA* apply to the request that Lukács made pursuant to the open court principle and s. 2(b) of the *Charter*. Sections 19 and 41 of the *ATIA*, however, state that:

> 19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.
>
> (2) The head of a government institution may disclose any record requested under this Act that contains personal information if [...]
>
> 41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.
>
> [Emphasis added.]

***Access to Information Act*, R.S.C. 1985, c. A-1, ss. 19 and 41** **[Tab 4, P112 and P113]**

37. The words chosen by Parliament clearly convey the legislative intent to confine the scope of sections 19 and 41 of the *ATIA* to access requests made under the *ATIA*, and not under some other statute or procedure.

38. Therefore, sections 19 and 41 of the *ATIA* do not apply to the request of Lukács, because the record is clear that:

(a) Lukács's request was made pursuant to s. 2(b) of the *Charter* and the open court principle, and not under the *ATIA*; and

(b) the Agency treated Lukács's request as an "informal request," made outside the framework of the *ATIA*.

Bellerose Cross-Examination, Q21, Q25-Q28 **[Tab 2, P67, P69]**

39. It is worth noting that, although its authoritive value is unclear, the "Directive on the Administration of the *Access to Information Act*" of the Treasury Board also confirms that provisions of the *ATIA* do not apply to "informal requests":

> **Informal processing**
>
> 7.4.5 Determining whether it is appropriate to process the request on an informal basis. If so, offering the requester the possibility of treating the request informally and explaining that only formal requests are subject to the provisions of the Act.
>
> [Emphasis added.]

Bellerose Affidavit, Ex. "B" **Agency's Motion Rec'd, p. 13**
Bellerose Cross-Examination, Q31-Q32 **[Tab 2, P70]**

40. Hence, the Agency's arguments based on sections 19 and 41 of the *ATIA* are not only meritless, but also vexatious and/or frivolous.

D. WHAT IS THE "COURT OF COMPETENT JURISDICTION" IN THIS CASE?

41. Lukács alleges in the Notice of Application that the Agency's current practices (and interpretation of the *Privacy Act*) are unlawful, and they violate the open court principle and s. 2(b) of the *Charter*. Section 24(1) of the *Charter* provides that:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

42. Thus, the correct question to be asked is what is the "court of competent jurisdiction" in the case at bar. Since the Agency is a federal tribunal, there is no doubt that the Federal Court or the Federal Court of Appeal are candidates.

(i) Preliminary matter: The Agency misstates s. 28(1)(k)

43. The Agency misstates and/or misinterprets subparagraph 28(1)(k) of the *Federal Courts Act* by claiming that:

> Subparagraph 28(1)(k) of the *Federal Courts Act*, provides that the Federal Court of Appeal has jurisdiction to hear applications for judicial review made in respect of decisions of the Agency.
>
> [Emphasis added.]
>
> **Written Representations, para. 11** **Agency's Record, p. 335**

44. Contrary to the Agency's submission, a person seeking relief against a board or tribunal enumerated under subsection 28(1) in a matter that does not involve a challenge to a decision or order of the board or tribunal may do so by means of an application for judicial review to the Federal Court of Appeal.

> ***Standing Buffalo Dakota First Nation v. Canada (Attorney General)*, 2008 FCA 222, para. 25** **[Tab 14, P209]**

45. Indeed, the word “decisions” no longer appears in subsection 28(1) of the *Federal Courts Act*; instead, the Act uses a far broader language and speaks of “judicial review made in respect of any of the following federal boards, commissions or other tribunals,” which reflects the 1992 reform of the Act.

***Federal Courts Act*, R.S.C. 1985, c. F-7, s. 28(1)** **[Tab 8, P132]**

(ii) The 1992 reform of the *Federal Court Act*

46. Before the reform of the *Federal Court Act* was proclaimed (effective February 1, 1992), the Trial Division and the Court of Appeal used to have divided jurisdiction in relation to federal boards, commissions, and other tribunals:

(a) the Trial Division had jurisdiction to issue an injunction, *certiorari*, prohibition, *mandamus*, *quo warrant*, and declaratory relief; and

(b) the Court of Appeal had jurisdiction to review and set aside judicial and quasi-judicial decisions or orders on enumerated grounds.

***Federal Court Act* (pre-1992 version), ss. 18, 28** **[Tab 9, P136, P137]**

47. The 1992 reform ended this distribution of jurisdictions. The power to review decisions and orders was integrated into the powers to hear and determine applications for judicial review; as a general rule, these powers were assigned to the Federal Court (Trial Division). With respect to certain enumerated federal boards and tribunals, however, all judicial review powers were removed from the Federal Court, and assigned to the Federal Court of Appeal.

***Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 18(1), 18.1(3)(b), 28(1), 28(2)** **[Tab 8, P128, P129, P132, P134]**

(iii) Jurisdiction in the present case

48. The Agency is a federal tribunal enumerated under section 28(1) of the *Federal Courts Act*. As such, all applications for judicial review in respect of the Agency are to be brought to the Federal Court of Appeal.

> ***Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 28(1), 28(1)(k)** **[Tab 8, P132, P133]**

49. Applications for judicial review brought in the Federal Court of Appeal are subject to sections 18 to 18.5 of the *Federal Courts Act*, with the exception of converting an application into an action (s. 18.4(2)).

> ***Federal Courts Act*, R.S.C. 1985, c. F-7, s. 28(2)** **[Tab 8, P134]**

50. The present application falls squarely within the scope of s. 18.1(3) of the *Federal Courts Act*: Lukács alleges that the Agency has been acting unlawfully, and is seeking various declarations and an order of *mandamus* as a remedy.

> ***Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(3)** **[Tab 8, P129]**

51. Therefore, it is submitted that pursuant to sections 18.1 and 28 of the *Federal Courts Act*, this Honourable Court has jurisdiction to hear and determine the present application, and is a “court of competent jurisdiction” within the meaning of s. 24(1) of the *Charter*.

E. REQUEST FOR AN ORAL HEARING

52. Lukács is asking the Honourable Court to hear oral arguments, and not dispose of the present motion in writing, because the matter is not only complex, but also raises a number of questions of public interest that affect fundamental rights and freedoms protected by the *Charter*, including:

(i) Are members of the public required to make a request under the *Access to Information Act* in order to exercise their open court and s. 2(b) *Charter* rights or to seek remedies for violations of same?

(ii) What is the "court of competent jurisdiction" within the meaning of s. 24(1) of the *Charter* with respect to alleged infringement or denial of s. 2(b) rights by federal boards and tribunals, and those enumerated under s. 28 of the *Federal Courts Act* in particular?

53. Since the Federal Court of Appeal sits in Halifax infrequently, Lukács proposes that the present motion be heard together with the application.

F. COSTS

54. Lukács asks the Honourable Court that he be awarded his disbursements related to the present motion, including the fees incurred for the preparation of the cross-examination transcript. Lukács, who is a self-represented litigant, is also asking that he be awarded a moderate allowance for the time and effort he devoted to responding to the present motion.

***Sherman v. Canada (Minister of National Revenue)*, 2004 FCA 29** **[Tab 15]**

55. Lukács disagrees with the Agency's submission that making a motion in good faith relieves the Agency from paying costs and/or disbursements. The Agency has provided no authority in support of this proposition.

56. Lukács also disputes that the Agency's motion to quash the application was brought in good faith, and submits that the Agency's submissions with respect to the present motion were frivolous and/or vexatious:

(a) the Agency mischaracterized the rights asserted by Lukács even though it was clear that Lukács was asserting open court principle and s. 2(b) *Charter* rights;

(b) the Agency made self-contradictory legal submissions: on the one hand, it cited sections 19 and 41 of the *Access to Information Act*, while on the other hand, it argued that the request of Lukács was an "informal request" to which the Act does not apply; and

(c) Lukács advised the Agency that the issue of jurisdiction should be raised as part of the responding factum and at the hearing of the application on its merits, but the Agency chose to follow an improper procedure that unnecessarily delays the proceeding.

Lukács Affidavit, Ex. "M" **[Tab 1M, P59]**

57. Lukács submits that these circumstances warrant awarding costs payable forthwith and in any event of the cause by the Agency.

PART IV – ORDER SOUGHT

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

(a) directing that the present motion not be disposed of in writing, and that oral arguments be heard in open court;

(b) setting a schedule for the remaining steps in the application, including the filing of the applicant's and the respondent's records;

(c) dismissing the Agency's motion to quash the within application for judicial review;

(d) directing the Agency to pay Dr. Lukács forthwith and in any event of the cause:

i. all disbursements related to the present motion; and

ii. moderate allowance for the time and effort Lukács devoted to responding to the present motion;

(e) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

August 29, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant

PART V – LIST OF AUTHORITIES

CASES

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

David Bull Laboratories (Canada) Inc. v. Pharmacia Inc., [1995] 1 FC 58

Mahjoub v. Canada (Minister of Citizenship and Immigration), 2012 FCA 218

R. v. Canadian Broadcasting Corporation, 2010 ONCA 726

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

Standing Buffalo Dakota First Nation v. Canada (Attorney General), 2008 FCA 222

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

STATUTES AND REGULATIONS

Access to Information Act, R.S.C. 1985, c. A-1, ss. 2, 19, 41

Canada Transportation Act, S.C. 1996, c. 10, s. 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)

STATUTES AND REGULATIONS (CONTINUED)

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

Federal Court Act, pre-1992 version
ss. 18, 28

CANADA

CONSOLIDATION

CODIFICATION

Access to Information Act

Loi sur l’accès à l’information

R.S.C., 1985, c. A-1

L.R.C. (1985), ch. A-1

Current to June 23, 2014

À jour au 23 juin 2014

Last amended on April 1, 2014

Dernière modification le 1 avril 2014

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l’adresse suivante :
http://lois-laws.justice.gc.ca

R.S.C., 1985, c. A-1 L.R.C., 1985, ch. A-1

An Act to extend the present laws of Canada that provide access to information under the control of the Government of Canada

Loi visant à compléter la législation canadienne en matière d'accès à l'information relevant de l'administration fédérale

SHORT TITLE

Short title

1. This Act may be cited as the *Access to Information Act*.

1980-81-82-83, c. 111, Sch. I "1".

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur l'accès à l'information*.

1980-81-82-83, ch. 111, ann. I « 1 ».

PURPOSE OF ACT

Purpose

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

OBJET DE LA LOI

Objet

2. (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

Complementary procedures

(2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

1980-81-82-83, c. 111, Sch. I "2"; 1984, c. 40, s. 79(F).

Étoffement des modalités d'accès

(2) La présente loi vise à compléter les modalités d'accès aux documents de l'administration fédérale; elle ne vise pas à restreindre l'accès aux renseignements que les institutions fédérales mettent normalement à la disposition du grand public.

1980-81-82-83, ch. 111, ann. I « 2 »; 1984, ch. 40, art. 79(F).

INTERPRETATION

Definitions

3. In this Act,

"alternative format" « *support de substitution* »

"alternative format", with respect to a record, means a format that allows a person with a sensory disability to read or listen to that record;

"Court" « *Cour* »

"Court" means the Federal Court;

"designated Minister" « *ministre désigné* »

"designated Minister" means a person who is designated as the Minister under subsection 3.2(1);

DÉFINITIONS

Définitions

3. Les définitions qui suivent s'appliquent à la présente loi.

« Commissaire à l'information » "*Information Commissioner*"

« Commissaire à l'information » Le commissaire nommé conformément à l'article 54.

« Cour » "*Court*"

« Cour » La Cour fédérale.

« déficience sensorielle » "*sensory disability*"

« déficience sensorielle » Toute déficience liée à la vue ou à l'ouïe.

(*c*) the Public Sector Pension Investment Board; or

(*d*) VIA Rail Canada Inc.

Exceptions

(2) However, the head of a government institution shall not refuse under subsection (1) to disclose a part of a record that contains information that relates to

(*a*) the general administration of an institution referred to in any of paragraphs (1)(*a*) to (*d*); or

(*b*) any activity of the Canada Post Corporation that is fully funded out of moneys appropriated by Parliament.

2006, c. 9, s. 147.

PERSONAL INFORMATION

Personal information

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

Where disclosure authorized

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

(*a*) the individual to whom it relates consents to the disclosure;

(*b*) the information is publicly available; or

(*c*) the disclosure is in accordance with section 8 of the *Privacy Act*.

1980-81-82-83, c. 111, Sch. I "19".

THIRD PARTY INFORMATION

Third party information

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(*a*) trade secrets of a third party;

(*b*) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(*b.1*) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, test-

c) l'Office d'investissement des régimes de pensions du secteur public;

d) VIA Rail Canada Inc.

Exception

(2) Toutefois, il ne peut s'autoriser du paragraphe (1) pour refuser de communiquer toute partie d'un document qui contient des renseignements se rapportant :

a) soit à l'administration de l'institution visée à l'un ou l'autre des alinéas (1)*a*) à *d*);

b) soit à toute activité de la Société canadienne des postes entièrement financée sur des crédits votés par le Parlement.

2006, ch. 9, art. 147.

RENSEIGNEMENTS PERSONNELS

Renseignements personnels

19. (1) Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.

Cas où la divulgation est autorisée

(2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :

a) l'individu qu'ils concernent y consent;

b) le public y a accès;

c) la communication est conforme à l'article 8 de la *Loi sur la protection des renseignements personnels*.

1980-81-82-83, ch. 111, ann. I « 19 ».

RENSEIGNEMENTS DE TIERS

Renseignements de tiers

20. (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

a) des secrets industriels de tiers;

b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

b.1) des renseignements qui, d'une part, sont fournis à titre confidentiel à une institution fédérale par un tiers en vue de l'élaboration,

Special reports

39. (1) The Information Commissioner may, at any time, make a special report to Parliament referring to and commenting on any matter within the scope of the powers, duties and functions of the Commissioner where, in the opinion of the Commissioner, the matter is of such urgency or importance that a report thereon should not be deferred until the time provided for transmission of the next annual report of the Commissioner under section 38.

Rapports spéciaux

39. (1) Le Commissaire à l'information peut, à toute époque de l'année, présenter au Parlement un rapport spécial sur toute question relevant de ses pouvoirs et fonctions et dont l'urgence ou l'importance sont telles, selon lui, qu'il serait contre-indiqué d'en différer le compte rendu jusqu'à l'époque du rapport annuel suivant.

Where investigation made

(2) Any report made pursuant to subsection (1) that relates to an investigation under this Act shall be made only after the procedures set out in section 37 have been followed in respect of the investigation.

1980-81-82-83, c. 111, Sch. I "39".

Cas des enquêtes

(2) Le Commissaire à l'information ne peut présenter de rapport spécial sur des enquêtes qu'après observation des formalités prévues à leur sujet à l'article 37.

1980-81-82-83, ch. 111, ann. I « 39 ».

Transmission of reports

40. (1) Every report to Parliament made by the Information Commissioner under section 38 or 39 shall be made by being transmitted to the Speaker of the Senate and to the Speaker of the House of Commons for tabling in those Houses.

Remise des rapports

40. (1) La présentation des rapports du Commissaire à l'information au Parlement s'effectue par remise au président du Sénat et à celui de la Chambre des communes pour dépôt devant leurs chambres respectives.

Reference to Parliamentary committee

(2) Every report referred to in subsection (1) shall, after it is transmitted for tabling pursuant to that subsection, be referred to the committee designated or established by Parliament for the purpose of subsection 75(1).

1980-81-82-83, c. 111, Sch. I "40".

Renvoi en comité

(2) Les rapports visés au paragraphe (1) sont, après leur dépôt, renvoyés devant le comité désigné ou constitué par le Parlement en application du paragraphe 75(1).

1980-81-82-83, ch. 111, ann. I « 40 ».

REVIEW BY THE FEDERAL COURT

RÉVISION PAR LA COUR FÉDÉRALE

Review by Federal Court

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

1980-81-82-83, c. 111, Sch. I "41".

Révision par la Cour fédérale

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

1980-81-82-83, ch. 111, ann. I « 41 ».

Information Commissioner may apply or appear

42. (1) The Information Commissioner may

(*a*) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commis-

Exercice du recours par le Commissaire, etc.

42. (1) Le Commissaire à l'information a qualité pour :

a) exercer lui-même, à l'issue de son enquête et dans les délais prévus à l'article 41, le recours en révision pour refus de communication totale ou partielle d'un document,

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to November 26, 2013

À jour au 26 novembre 2013

Last amended on June 26, 2013

Dernière modification le 26 juin 2013

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Appeal from Agency

41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

Appel

41. (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

Time for making appeal

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

Délai

(2) Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.

Powers of Court

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

Pouvoirs de la cour

(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.

Agency may be heard

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

Plaidoirie de l'Office

(4) L'Office peut plaider sa cause à l'appel par procureur ou autrement.

Report of Agency

Rapport de l'Office

Agency's report

42. (1) Each year the Agency shall, before the end of July, make a report on its activities for the preceding year and submit it, through the Minister, to the Governor in Council describing briefly, in respect of that year,

(*a*) applications to the Agency and the findings on them; and

(*b*) the findings of the Agency in regard to any matter or thing respecting which the Agency has acted on the request of the Minister.

Rapport de l'Office

42. (1) Chaque année, avant la fin du mois de juillet, l'Office présente au gouverneur en conseil, par l'intermédiaire du ministre, un rapport de ses activités de l'année précédente résumant :

a) les demandes qui lui ont été présentées et ses conclusions à leur égard;

b) ses conclusions concernant les questions ou les objets à l'égard desquels il a agi à la demande du ministre.

Assessment of Act

(2) The Agency shall include in every report referred to in subsection (1) the Agency's assessment of the operation of this Act and any difficulties observed in the administration of this Act.

Évaluation de la loi

(2) L'Office joint à ce rapport son évaluation de l'effet de la présente loi et des difficultés rencontrées dans l'application de celle-ci.

Tabling of report

(3) The Minister shall have a copy of each report made under this section laid before each House of Parliament on any of the first thirty

Dépôt

(3) Dans les trente jours de séance de chaque chambre du Parlement suivant la réception du rapport par le ministre, celui-ci le fait déposer devant elle.

1996, ch. 10, art. 42; 2013, ch. 31, art. 2.

CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)

Règles de l’Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances)

SOR/2014-104

DORS/2014-104

Current to June 12, 2014

À jour au 12 juin 2014

Last amended on June 4, 2014

Dernière modification le 4 juin 2014

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l’adresse suivante :
http://lois-laws.justice.gc.ca

réparation, avec ou sans conditions, en vue du règlement équitable des questions.

Filing of Documents and Sending of Copy to Parties

Dépôt de documents et envoi de copies aux autres parties

Filing

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

Dépôt

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

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.

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.

Copy to parties

8. A person that files a document must, on the same day, send a copy of the document to each party or, if a party is represented, to the party's representative, except if the document is

(*a*) a confidential version of a document in respect of which a request for confidentiality is filed under section 31;

(*b*) an application; or

(*c*) a position statement.

Copie aux autres parties

8. La personne qui dépose un document envoie le même jour une copie du document à chaque partie ou à son représentant, le cas échéant, sauf s'il s'agit :

a) d'une version confidentielle d'un document à l'égard duquel une requête de confidentialité a été déposée en vertu de l'article 31;

b) d'une demande;

c) d'un énoncé de position.

Means of transmission

9. Documents may be filed with the Agency and copies may be sent to the other parties by courrier, personal delivery, email, facsimile or other electronic means specified by the Agency.

Modes de transmission

9. Le dépôt de documents et l'envoi de copies aux autres parties peut se faire par remise en mains propres, par service de messagerie, par courriel, par télécopieur ou par tout autre moyen électronique que précise l'Office.

Facsimile — cover page

10. A person that files or sends a document by facsimile must include a cover page indicating the total number of pages transmitted, including the cover page, and the name and telephone number of a contact person if problems occur in the transmission of the document.

Télécopieur — page couverture

10. La personne qui dépose ou transmet un document par télécopieur indique sur une page couverture le nombre total de pages transmises, y compris la page couverture, ainsi que le nom et le numéro de téléphone d'une personne à joindre en cas de difficultés de transmission.

Electronic transmission

11. (1) A document that is sent by email, facsimile or other electronic means

Transmission électronique

11. (1) Le document transmis par courriel, télécopieur ou tout autre moyen élec-

the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

No new issues

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

après la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 15.

Nouvelles questions

(4) La réplique ne peut soulever des questions ou arguments qui ne sont abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Request for Confidentiality

Requête de confidentialité

Confidential treatment

31. (1) A person may file a request for confidentiality in respect of a document that they are filing. The request must include the information referred to in Schedule 17 and must be accompanied by, for each document identified as containing confidential information,

(*a*) one public version of the document from which the confidential information has been redacted; and

(*b*) one confidential version of the document that identifies the confidential information that has been redacted from the public version of the document and that includes, at the top of each page, the words: "CONTAINS CONFIDENTIAL INFORMATION" in capital letters.

Traitement confidentiel

31. (1) Toute personne peut déposer une requête de confidentialité portant sur un document qu'elle dépose. La requête comporte les éléments visés à l'annexe 17 et, pour chaque document désigné comme étant confidentiel :

a) une version publique du document, de laquelle les renseignements confidentiels ont été supprimés;

b) une version confidentielle du document, qui indique les passages qui ont été supprimés de la version publique du document et qui porte la mention « CONTIENT DES RENSEIGNEMENTS CONFIDENTIELS » en lettres majuscules au haut de chaque page.

Agency's record

(2) The request for confidentiality and the public version of the document from which the confidential information has been redacted are placed on the Agency's public record. The confidential version of the document is placed on the Agency's confidential record pending a decision of the Agency on the request for confidentiality.

Archives de l'Office

(2) La requête de confidentialité et la version publique du document de laquelle les renseignements confidentiels ont été supprimés sont versées aux archives publiques de l'Office. La version confidentielle du document est versée aux archives confidentielles de l'Office en attendant que celui-ci statue sur la requête.

Request for disclosure

(3) Any party may oppose a request for confidentiality by filing a request for disclosure. The request must be filed within five business days after the day on which they receive a copy of the request for con-

Requête de communication

(3) La partie qui souhaite s'opposer à une requête de confidentialité dépose une requête de communication dans les cinq jours ouvrables suivant la date de réception de la copie de la requête de confidentialité.

fidentiality and must include the information referred to in Schedule 18.

Response to request for disclosure

(4) The person that filed the request for confidentiality may file a response to a request for disclosure. The response must be filed within three business days after the day on which they receive a copy of the request for disclosure and must include the information referred to in Schedule 14.

Agency's decision

(5) The Agency may

(*a*) if the Agency determines that the document is not relevant to the dispute proceeding, decide to not place the document on the Agency's record;

(*b*) if the Agency determines that the document is relevant to the dispute proceeding and that no specific direct harm would likely result from its disclosure or that any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed, decide to place the document on the Agency's public record; or

(*c*) if the Agency determines that the document is relevant to the dispute proceeding and that the specific direct harm likely to result from its disclosure justifies confidentiality,

(i) decide to confirm the confidentiality of the document or any part of it and keep the document or part of the document on the Agency's confidential record,

(ii) decide to place a version of the document or any part of it from which the confidential information has been redacted on the Agency's public record,

(iii) decide to keep the document or any part of it on the Agency's confi-

La requête de communication comporte les éléments visés à l'annexe 18.

Réponse à la requête de communication

(4) La personne ayant déposé la requête de confidentialité et qui souhaite déposer une réponse à une requête de communication le fait dans les trois jours ouvrables suivant la date de réception de copie de la requête de communication. La réponse comporte les éléments visés à l'annexe 14.

Décision de l'Office

(5) L'Office peut :

a) s'il conclut que le document n'est pas pertinent au regard de l'instance de règlement des différends, décider de ne pas le verser aux archives de l'Office;

b) s'il conclut que le document est pertinent au regard de l'instance de règlement des différends et que sa communication ne causerait vraisemblablement pas de préjudice direct précis ou que l'intérêt du public à ce qu'il soit communiqué l'emporte sur le préjudice direct précis qui pourrait en résulter, décider de le verser aux archives publiques de l'Office;

c) s'il conclut que le document est pertinent au regard de l'instance de règlement des différends et que le préjudice direct précis que pourrait causer sa communication justifie le traitement confidentiel :

(i) décider de confirmer le caractère confidentiel du document ou d'une partie de celui-ci et garder le document ou une partie de celui-ci dans ses archives confidentielles,

(ii) décider qu'une version ou une partie du document, de laquelle les renseignements confidentiels ont été supprimés, soit versée à ses archives publiques,

dential record but require that the person requesting confidentiality provide a copy of the document or part of the document in confidence to any party to the dispute proceeding, or to certain of their advisors, experts and representatives, as specified by the Agency, after the person requesting confidentiality has received a signed undertaking of confidentiality from the person to which the copy is to be provided, or

(iv) make any other decision that it considers just and reasonable.

(iii) décider de garder le document ou une partie de celui-ci dans ses archives confidentielles, mais exiger que la personne qui demande la confidentialité fournisse une copie du document ou une partie de celui-ci de façon confidentielle à une partie à l'instance, à certains de ses conseillers, experts ou représentants, tel qu'il le précise, après que la personne qui demande la confidentialité ait reçu un engagement de non-divulgation signé de chaque personne à qui le document devra être envoyé,

(iv) rendre toute autre décision qu'il estime juste et raisonnable.

Filing of undertaking of confidentiality

(6) The original copy of the undertaking of confidentiality must be filed with the Agency.

(6) L'original de l'engagement de non-divulgation est déposé auprès de l'Office.

Dépôt de l'engagement de non-divulgation

Request to Require Party to Provide Complete Response

Requête visant à obliger une partie à fournir une réponse complète à l'avis

Requirement to respond

32. (1) A party that has given notice under subsection 24(1) may, if they are not satisfied with the response to the notice or if they wish to contest an objection to their request, file a request to require the party to which the notice was directed to provide a complete response. The request must be filed within two business days after the day on which they receive a copy of the response to the notice or the objection, as the case may be, and must include the information referred to in Schedule 13.

32. (1) La partie qui a donné un avis en vertu du paragraphe 24(1) et qui est insatisfaite des réponses à l'avis ou qui souhaite contester l'opposition à sa demande peut déposer une requête pour demander que la partie à qui l'avis a été donné fournisse une réponse complète. La requête est déposée dans les deux jours ouvrables suivant la date de réception de la copie des réponses à l'avis ou de l'opposition et comporte les éléments visés à l'annexe 13.

Obligation de répondre

Agency's decision

(2) The Agency may do any of the following:

(*a*) require that a question be answered in full or in part;

(*b*) require that a document be provided;

(2) L'Office peut :

a) exiger qu'il soit répondu à la question en tout ou en partie;

b) exiger la production d'un document;

Décisions de l'Office

CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency General Rules

Règles générales de l’Office des transports du Canada

SOR/2005-35

DORS/2005-35

Current to May 27, 2014

À jour au 27 mai 2014

Last amended on June 13, 2013

Dernière modification le 13 juin 2013

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l’adresse suivante :
http://lois-laws.justice.gc.ca

able information that the party considers would be of assistance to the party who directed the questions.

Request for Agency order

(3) If a party who directed questions is not satisfied that the response is complete or adequate, the party may request the Agency to order that the questions be answered in full, and the Agency may order that the questions be answered in full or in part, or not at all.

renseignement disponible qui, à son avis, serait utile à la partie qui lui a adressé les questions.

Arrêté de l'Office sur demande

(3) La partie insatisfaite des réponses à ses questions peut demander à l'Office d'ordonner qu'il y soit répondu de manière complète et satisfaisante et l'Office peut ordonner qu'il soit répondu aux questions en tout ou en partie ou qu'il n'y soit pas répondu du tout.

Formulation of Issues

Reasons for formulation of issues

21. The Agency may formulate the issues to be considered in any proceeding or direct the parties to propose the issues for its consideration if

(*a*) the documents filed do not sufficiently raise or disclose the issues;

(*b*) the formulation would assist the Agency in the conduct of the proceeding; or

(*c*) the formulation would assist the parties to participate more effectively in the proceeding.

Formulation des questions

Raisons de la formulation des questions

21. L'Office peut formuler les questions qu'il examinera au cours d'une instance ou ordonner aux parties de lui en proposer pour examen, si, selon le cas :

a) les documents déposés n'établissent pas assez clairement les questions en litige;

b) une telle démarche l'aiderait à mener l'instance;

c) une telle démarche contribuerait à la participation plus efficace des parties à l'instance.

Determination of Issues

Determination prior to continuing a proceeding

22. (1) If the Agency determines that an issue should be decided before continuing a proceeding, or if a party requests it, the Agency may direct that the issue be decided in any manner that it considers appropriate.

Postponement of proceeding

(2) The Agency may, pending its decision on the issue, postpone the whole or any part of the proceeding.

Règlement des questions

Décision avant de poursuivre l'instance

22. (1) Si l'Office l'estime nécessaire ou si une partie lui en fait la demande, il peut ordonner qu'une question soit tranchée avant de poursuivre l'instance, de la manière qu'il juge indiquée.

Suspension de l'instance

(2) L'Office peut, en attente de sa décision sur la question, suspendre tout ou partie de l'instance.

Confidentiality

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

Confidentialité

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

filing the document makes a claim for its confidentiality in accordance with this section.

Prohibition

(2) No person shall refuse to file a document on the basis of a claim for confidentiality alone.

Form of claim

(3) A claim for confidentiality in respect of a document shall be made in accordance with subsections (4) to (9).

What to file

(4) A person making a claim for confidentiality shall file

(*a*) one version of the document from which the confidential information has been deleted, whether or not an objection has been made under paragraph (5)(*b*); and

(*b*) one version of the document that contains the confidential information marked "contains confidential information" on the top of each page and that identifies the portions that have been deleted from the version of the document referred to in paragraph (*a*).

Content of claim

(5) A person making a claim for confidentiality shall indicate

(*a*) the reasons for the claim, including, if any specific direct harm is asserted, the nature and extent of the harm that would likely result to the person making the claim for confidentiality if the document were disclosed; and

(*b*) whether the person objects to having a version of the document from which the confidential information has been removed placed on the public record and, if so, shall state the reasons for objecting.

moins que la personne qui les dépose ne présente une demande de traitement confidentiel conformément au présent article.

Interdiction

(2) Nul ne peut refuser de déposer un document en se fondant uniquement sur le fait qu'une demande de traitement confidentiel a été présentée à son égard.

Forme de la demande

(3) La demande de traitement confidentiel à l'égard d'un document doit être faite conformément aux paragraphes (4) à (9).

Documents à déposer

(4) Quiconque présente une demande de traitement confidentiel doit déposer :

a) une version des documents desquels les renseignements confidentiels ont été retirés, qu'une opposition ait été présentée ou non aux termes de l'alinéa (5)*b*);

b) une version des documents qui porte la mention « contient des renseignements confidentiels » au haut de chaque page et qui indique les passages qui ont été retirés de la version visée à l'alinéa *a*).

Contenu de la demande

(5) La personne qui demande le traitement confidentiel doit indiquer :

a) les raisons de sa demande et, le cas échéant, la nature et l'ampleur du préjudice direct que lui causerait vraisemblablement la divulgation du document;

b) les raisons qu'elle a, le cas échéant, de s'opposer à ce que soit versée dans les archives publiques la version des documents desquels les renseignements confidentiels ont été retirés.

Claim on public record

(6) A claim for confidentiality shall be placed on the public record and a copy shall be provided, on request, to any person.

Demande versée dans les archives publiques

(6) La demande de traitement confidentiel est versée dans les archives publiques, et une copie en est remise à toute personne qui en fait la demande.

Request for disclosure and filing

(7) A person contesting a claim for confidentiality shall file with the Agency

(*a*) a request for the disclosure of the document, setting out the relevance of the document, the public interest in its disclosure and any other reason in support of the request; and

(*b*) any material that may be useful in explaining or supporting those reasons.

Demande de divulgation et dépôt

(7) Quiconque conteste la demande de traitement confidentiel d'un document dépose auprès de l'Office :

a) une demande de divulgation du document exposant sa pertinence au regard de l'instance, l'intérêt du public dans sa divulgation ainsi que tout autre motif à l'appui de la demande;

b) tout document de nature à éclairer ou à renforcer ces motifs.

Service of request for disclosure

(8) A person contesting a claim for confidentiality shall serve a copy of the request for disclosure on the person making the claim.

Signification de la demande de divulgation

(8) Quiconque conteste la demande de traitement confidentiel signifie une copie de la demande de divulgation à la personne qui a demandé le traitement confidentiel.

Reply to request for disclosure

(9) The person making a claim for confidentiality may, within five days after being served with a request for disclosure, file a reply with the Agency and serve a copy of the reply on the person who made the request for disclosure.

Réplique

(9) Quiconque a demandé le traitement confidentiel dépose une réplique dans les cinq jours suivant la date de la signification de la demande de divulgation et en signifie une copie à la personne qui a demandé la divulgation.

Disposition of Claim for Confidentiality

Décision sur la demande de traitement confidentiel

Agency's powers

24. (1) The Agency may dispose of a claim for confidentiality on the basis of

(*a*) documents filed with the Agency or oral evidence heard by it;

(*b*) documents or evidence obtained at a conference if the matter has been referred to a conference under section 35; or

(*c*) documents or evidence obtained through depositions taken before a member or officer of the Agency or any other person appointed by the Agency.

Pouvoirs de l'Office

24. (1) L'Office peut trancher la demande de traitement confidentiel sur la foi :

a) des documents déposés auprès de lui ou des témoignages qu'il a entendus;

b) des documents ou des éléments de preuve obtenus lors de la conférence, si la question a été soumise à une conférence en vertu de l'article 35;

c) des documents ou des éléments de preuve tirés des dépositions recueillies par un membre ou un agent de l'Office

ou toute autre personne nommée à cette fin par l'Office.

Placing of document on public record

(2) The Agency shall place a document in respect of which a claim for confidentiality has been made on the public record if the document is relevant to the proceeding and no specific direct harm would likely result from its disclosure or any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed.

Versement du document dans les archives publiques

(2) L'Office verse dans ses archives publiques le document faisant l'objet d'une demande de traitement confidentiel s'il estime que le document est pertinent au regard de l'instance et que sa divulgation ne causerait vraisemblablement pas de préjudice direct, ou que l'intérêt du public à le divulguer l'emporte sur le préjudice direct qui pourrait en résulter.

Order for Withdrawal

(3) If the Agency determines that a document in respect of which a claim for confidentiality has been made is not relevant to a proceeding, the Agency may order that the document be withdrawn.

Arrêté de retrait

(3) Si l'Office conclut que le document faisant l'objet de la demande de traitement confidentiel n'est pas pertinent au regard de l'instance, il peut ordonner que le document soit retiré.

Document confidential and relevant

(4) If the Agency determines that a document in respect of which a claim for confidentiality has been made is relevant to a proceeding and the specific direct harm likely to result from its disclosure justifies a claim for confidentiality, the Agency may

(*a*) order that the document not be placed on the public record but that it be maintained in confidence;

(*b*) order that a version or a part of the document from which the confidential information has been removed be placed on the public record;

(*c*) order that the document be disclosed at a hearing to be conducted in private;

(*d*) order that the document or any part of it be provided to the parties to the proceeding, or only to their solicitors, and that the document not be placed on the public record; or

(*e*) make any other order that it considers appropriate.

Document confidentiel et pertinent

(4) Si l'Office juge que le document faisant l'objet de la demande de traitement confidentiel est pertinent au regard de l'instance et qu'une telle demande est justifiée en raison du préjudice direct que pourrait causer sa divulgation, il peut, selon le cas :

a) ordonner que le document ne soit pas versé dans ses archives publiques mais qu'il soit conservé de façon à en préserver la confidentialité;

b) ordonner qu'une version ou une partie du document ne contenant pas de renseignements confidentiels soit versée dans les archives publiques;

c) ordonner que le document soit divulgué au cours d'une audience à huis clos;

d) ordonner que tout ou partie du document soit fourni aux parties ou à leurs avocats seulement, et que le document ne soit pas versé dans les archives publiques;

e) prendre tout autre arrêté qu'il juge indiqué.

Agency Determination of Confidentiality

Procedure

25. The Agency may make a determination of confidentiality on its own initiative after giving the other parties to the proceeding an opportunity to comment on the issue of confidentiality, in accordance with the procedure set out in section 23, with such modifications as the circumstances or the Agency requires.

Documents Containing Financial or Corporate Information

Confidential Documents

26. If financial or corporate information is filed with the Agency, the Agency shall treat the information as confidential unless the person who provides it agrees in writing that the Agency need not treat it as confidential.

Postponements and Adjournments

Request

27. Subject to section 66, a party may request in writing a postponement or an adjournment of a proceeding.

Agency's powers

28. (1) The Agency may allow a postponement or an adjournment

(*a*) if a delay of the proceedings would be appropriate until a decision is rendered in another proceeding before the Agency or before any court in Canada in which the issue is the same or substantially the same as the issue to be raised in the proceeding;

(*b*) if a party to a proceeding has not complied with any requirement of these Rules, or with any direction on procedure issued by the Agency, which postponement or adjournment shall continue until the Agency is satisfied that the requirement or direction has been complied with; or

Décision de l'Office sur le caractère confidentiel

Procédure

25. L'Office peut, de sa propre initiative, se prononcer sur le caractère confidentiel d'un document en donnant aux autres parties la possibilité de formuler des commentaires sur la question conformément à la procédure prévue à l'article 23, avec les adaptations dictées par les circonstances ou par l'Office.

Documents contenant des renseignements financiers ou d'entreprise

Documents réputés confidentiels

26. Si des renseignements financiers ou d'entreprise sont déposés auprès de l'Office, il les traite de manière confidentielle à moins que la personne qui les a fournis renonce par écrit à leur caractère confidentiel.

Ajournement et suspension

Demande

27. Sous réserve de l'article 66, une partie peut demander par écrit l'ajournement ou la suspension de l'instance.

Pouvoirs de l'Office

28. (1) L'Office peut autoriser l'ajournement ou la suspension de l'instance dans l'un ou l'autre des cas suivants :

a) il juge qu'il serait indiqué de retarder l'instance jusqu'à ce que lui-même ou un autre tribunal canadien ait rendu la décision sur une question identique ou similaire à celle qui est soulevée dans l'instance;

b) une partie à l'instance ne s'est pas conformée à une exigence des présentes règles ou à une directive sur la procédure qu'il lui a donnée, auquel cas il maintient l'ajournement ou la suspension jusqu'à ce qu'il soit convaincu que l'exigence ou la directive a été respectée;

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Act

Loi sur les Cours fédérales

R.S.C., 1985, c. F-7

L.R.C. (1985), ch. F-7

Current to June 23, 2014

À jour au 23 juin 2014

Last amended on May 1, 2014

Dernière modification le 1 mai 2014

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

eral Court — Trial Division or the Exchequer Court of Canada; and

(*b*) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.

tion de première instance de la Cour fédérale;

b) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale.

Conflicting claims against Crown

(4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.

(4) Elle a compétence concurrente, en première instance, dans les procédures visant à régler les différends mettant en cause la Couronne à propos d'une obligation réelle ou éventuelle pouvant faire l'objet de demandes contradictoires.

Demandes contradictoires contre la Couronne

Relief in favour of Crown or against officer

(5) The Federal Court has concurrent original jurisdiction

(*a*) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

(*b*) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

(5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées :

a) au civil par la Couronne ou le procureur général du Canada;

b) contre un fonctionnaire, préposé ou mandataire de la Couronne pour des faits — actes ou omissions — survenus dans le cadre de ses fonctions.

Actions en réparation

Federal Court has no jurisdiction

(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

R.S., 1985, c. F-7, s. 17; 1990, c. 8, s. 3; 2002, c. 8, s. 25.

(6) Elle n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

L.R. (1985), ch. F-7, art. 17; 1990, ch. 8, art. 3; 2002, ch. 8, art. 25.

Incompétence de la Cour fédérale

Extraordinary remedies, federal tribunals

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Recours extraordinaires : offices fédéraux

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

Recours extraordinaires : Forces canadiennes

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

R.S., 1985, c. F-7, s. 18; 1990, c. 8, s. 4; 2002, c. 8, s. 26.

L.R. (1985), ch. F-7, art. 18; 1990, ch. 8, art. 4; 2002, ch. 8, art. 26.

Application for judicial review

18.1 (1) 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.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or

(*f*) acted in any other way that was contrary to law.

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(*a*) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(*b*) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

1990, c. 8, s. 5; 2002, c. 8, s. 27.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

1990, ch. 8, art. 5; 2002, ch. 8, art. 27.

Interim orders

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Mesures provisoires

18.2 La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Reference by federal tribunal

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

Renvoi d'un office fédéral

18.3 (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

Reference by Attorney General of Canada

(2) The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Renvoi du procureur général

(2) Le procureur général du Canada peut, à tout stade des procédures d'un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, renvoyer devant la Cour fédérale pour audition et jugement toute question portant sur la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une loi fédérale ou de ses textes d'application.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Hearings in summary way

18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and

Procédure sommaire d'audition

18.4 (1) Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les

determined without delay and in a summary way.

Exception

(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.

Exception

(2) Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Exception to sections 18 and 18.1

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Dérogation aux art. 18 et 18.1

18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Intergovernmental disputes

19. If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, or between that province and any other province or provinces that have passed a like Act, the Federal Court has jurisdiction to determine the controversies.

R.S., 1985, c. F-7, s. 19; 2002, c. 8, s. 28.

Différends entre gouvernements

19. Lorsqu'une loi d'une province reconnaît sa compétence en l'espèce, — qu'elle y soit désignée sous le nom de Cour fédérale, Cour fédérale du Canada ou Cour de l'Échiquier du Canada — la Cour fédérale est compétente pour juger les cas de litige entre le Canada et cette province ou entre cette province et une ou plusieurs autres provinces ayant adopté une loi semblable.

L.R. (1985), ch. F-7, art. 19; 2002, ch. 8, art. 28.

Industrial property, exclusive jurisdiction

20. (1) The Federal Court has exclusive original jurisdiction, between subject and subject as well as otherwise,

(*a*) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade-mark, industrial design or topography within the meaning of the *Integrated Circuit Topography Act*; and

(*b*) in all cases in which it is sought to impeach or annul any patent of invention or to have any entry in any register of copyrights, trade-marks, industrial designs or topographies referred to in paragraph (*a*) made, expunged, varied or rectified.

Propriété industrielle : compétence exclusive

20. (1) La Cour fédérale a compétence exclusive, en première instance, dans les cas suivants opposant notamment des administrés :

a) conflit des demandes de brevet d'invention ou d'enregistrement d'un droit d'auteur, d'une marque de commerce, d'un dessin industriel ou d'une topographie au sens de la *Loi sur les topographies de circuits intégrés*;

b) tentative d'invalidation ou d'annulation d'un brevet d'invention, ou d'inscription, de radiation ou de modification dans un registre de droits d'auteur, de marques de commerce, de dessins industriels ou de topographies visées à l'alinéa *a*).

(*f*) acted in any other way that was contrary to law.

e) elle a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) elle a agi de toute autre façon contraire à la loi.

Hearing in summary way

(1.4) An appeal under subsection (1.2) shall be heard and determined without delay and in a summary way.

Procédure sommaire

(1.4) L'appel interjeté en vertu du paragraphe (1.2) est entendu et tranché immédiatement et selon une procédure sommaire.

Notice of appeal

(2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal

(*a*) in the case of an interlocutory judgment, within 10 days after the pronouncement of the judgment or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 10 days; and

(*b*) in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.

Avis d'appel

(2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour d'appel fédérale, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire qu'un juge de la Cour d'appel fédérale peut, soit avant soit après l'expiration de celui-ci, accorder. Le délai imparti est de :

a) dix jours, dans le cas d'un jugement interlocutoire;

b) trente jours, compte non tenu de juillet et août, dans le cas des autres jugements.

Service

(3) All parties directly affected by an appeal under this section shall be served without delay with a true copy of the notice of appeal, and evidence of the service shall be filed in the Registry of the Federal Court of Appeal.

Signification

(3) L'appel est signifié sans délai à toutes les parties directement concernées par une copie certifiée conforme de l'avis. La preuve de la signification doit être déposée au greffe de la Cour d'appel fédérale.

Final judgment

(4) For the purposes of this section, a final judgment includes a judgment that determines a substantive right except as to any question to be determined by a referee pursuant to the judgment.

Jugement définitif

(4) Pour l'application du présent article, est assimilé au jugement définitif le jugement qui statue au fond sur un droit, à l'exception des questions renvoyées à l'arbitrage par le jugement.

R.S., 1985, c. F-7, s. 27; R.S., 1985, c. 51 (4th Supp.), s. 11; 1990, c. 8, ss. 7, 78(E); 1993, c. 27, s. 214; 2002, c. 8, s. 34.

L.R. (1985), ch. F-7, art. 27; L.R. (1985), ch. 51 (4e suppl.), art. 11; 1990, ch. 8, art. 7 et 78(A); 1993, ch. 27, art. 214; 2002, ch. 8, art. 34.

Judicial review

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:

(*a*) the Board of Arbitration established by the *Canada Agricultural Products Act*;

(*b*) the Review Tribunal established by the *Canada Agricultural Products Act*;

(*b.1*) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*;

Contrôle judiciaire

28. (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

a) le conseil d'arbitrage constitué par la *Loi sur les produits agricoles au Canada*;

b) la commission de révision constituée par cette loi;

b.1) le commissaire aux conflits d'intérêts et à l'éthique nommé en vertu de l'article 81 de la *Loi sur le Parlement du Canada*;

c) le Conseil de la radiodiffusion et des télécommunications canadiennes constitué par la

(*c*) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

(*d*) [Repealed, 2012, c. 19, s. 272]

(*e*) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

(*f*) the National Energy Board established by the *National Energy Board Act*;

(*g*) the Governor in Council, when the Governor in Council makes an order under subsection 54(1) of the *National Energy Board Act*;

(*g*) the Appeal Division of the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, unless the decision is made under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the *Canada Pension Plan*, section 27.1 of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;

(*h*) the Canada Industrial Relations Board established by the *Canada Labour Code*;

(*i*) the Public Service Labour Relations Board established by the *Public Service Labour Relations Act*;

(*j*) the Copyright Board established by the *Copyright Act*;

(*k*) the Canadian Transportation Agency established by the *Canada Transportation Act*;

(*l*) [Repealed, 2002, c. 8, s. 35]

(*m*) [Repealed, 2012, c. 19, s. 272]

(*n*) the Competition Tribunal established by the *Competition Tribunal Act*;

(*o*) assessors appointed under the *Canada Deposit Insurance Corporation Act*;

(*p*) [Repealed, 2012, c. 19, s. 572]

(*q*) the Public Servants Disclosure Protection Tribunal established by the *Public Servants Disclosure Protection Act*; and

Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes;

d) [Abrogé, 2012, ch. 19, art. 272]

e) le Tribunal canadien du commerce extérieur constitué par la *Loi sur le Tribunal canadien du commerce extérieur*;

f) l'Office national de l'énergie constitué par la *Loi sur l'Office national de l'énergie*;

g) le gouverneur en conseil, quand il prend un décret en vertu du paragraphe 54(1) de la *Loi sur l'Office national de l'énergie*;

g) la division d'appel du Tribunal de la sécurité sociale, constitué par l'article 44 de la *Loi sur le ministère de l'Emploi et du Développement social*, sauf dans le cas d'une décision qui est rendue au titre du paragraphe 57(2) ou de l'article 58 de cette loi ou qui vise soit un appel interjeté au titre du paragraphe 53(3) de cette loi, soit un appel concernant une décision relative au délai supplémentaire visée au paragraphe 52(2) de cette loi, à l'article 81 du *Régime de pensions du Canada*, à l'article 27.1 de la *Loi sur la sécurité de la vieillesse* ou à l'article 112 de la *Loi sur l'assurance-emploi*;

h) le Conseil canadien des relations industrielles au sens du *Code canadien du travail*;

i) la Commission des relations de travail dans la fonction publique constituée par la *Loi sur les relations de travail dans la fonction publique*;

j) la Commission du droit d'auteur constituée par la *Loi sur le droit d'auteur*;

k) l'Office des transports du Canada constitué par la *Loi sur les transports au Canada*;

l) [Abrogé, 2002, ch. 8, art. 35]

m) [Abrogé, 2012, ch. 19, art. 272]

n) le Tribunal de la concurrence constitué par la *Loi sur le Tribunal de la concurrence*;

o) les évaluateurs nommés en application de la *Loi sur la Société d'assurance-dépôts du Canada*;

p) [Abrogé, 2012, ch. 19, art. 572]

q) le Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles constitué par la *Loi sur la protection des*

(*r*) the Specific Claims Tribunal established by the *Specific Claims Tribunal Act*.

fonctionnaires divulgateurs d'actes répréhensibles;

r) le Tribunal des revendications particulières constitué par la *Loi sur le Tribunal des revendications particulières*.

Sections apply

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

Dispositions applicables

(2) Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

Federal Court deprived of jurisdiction

(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

Incompétence de la Cour fédérale

(3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

R.S., 1985, c. F-7, s. 28; R.S., 1985, c. 30 (2nd Supp.), s. 61; 1990, c. 8, s. 8; 1992, c. 26, s. 17, c. 33, s. 69, c. 49, s. 128; 1993, c. 34, s. 70; 1996, c. 10, s. 229, c. 23, s. 187; 1998, c. 26, s. 73; 1999, c. 31, s. 92(E); 2002, c. 8, s. 35; 2003, c. 22, ss. 167(E), 262; 2005, c. 46, s. 56.1; 2006, c. 9, ss. 6, 222; 2008, c. 22, s. 46; 2012, c. 19, ss. 110, 272, 572; 2013, c. 40, s. 236.

L.R. (1985), ch. F-7, art. 28; L.R. (1985), ch. 30 (2e suppl.), art. 61; 1990, ch. 8, art. 8; 1992, ch. 26, art. 17, ch. 33, art. 69, ch. 49, art. 128; 1993, ch. 34, art. 70; 1996, ch. 10, art. 229, ch. 23, art. 187; 1998, ch. 26, art. 73; 1999, ch. 31, art. 92(A); 2002, ch. 8, art. 35; 2003, ch. 22, art. 167(A) et 262; 2005, ch. 46, art. 56.1; 2006, ch. 9, art. 6 et 222; 2008, ch. 22, art. 46; 2012, ch. 19, art. 110, 272 et 572; 2013, ch. 40, art. 236.

29. to 35. [Repealed, 1990, c. 8, s. 8]

29. à 35. [Abrogés, 1990, ch. 8, art. 8]

SUBSTANTIVE PROVISIONS

DISPOSITIONS DE FOND

Prejudgment interest — cause of action within province

36. (1) Except as otherwise provided in any other Act of Parliament, and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

Intérêt avant jugement — Fait survenu dans une province

36. (1) Sauf disposition contraire de toute autre loi fédérale, et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt avant jugement qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province.

Prejudgment interest — cause of action outside province

(2) A person who is entitled to an order for the payment of money in respect of a cause of action arising outside a province or in respect of causes of action arising in more than one province is entitled to claim and have included in the order an award of interest on the payment at any rate that the Federal Court of Appeal or the Federal Court considers reasonable in the circumstances, calculated

(*a*) where the order is made on a liquidated claim, from the date or dates the cause of action or causes of action arose to the date of the order; or

(*b*) where the order is made on an unliquidated claim, from the date the person entitled

Intérêt avant jugement — Fait non survenu dans une seule province

(2) Dans toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur n'est pas survenu dans une province ou dont les faits générateurs sont survenus dans plusieurs provinces, les intérêts avant jugement sont calculés au taux que la Cour d'appel fédérale ou la Cour fédérale, selon le cas, estime raisonnable dans les circonstances et :

a) s'il s'agit d'une créance d'une somme déterminée, depuis la ou les dates du ou des faits générateurs jusqu'à la date de l'ordonnance de paiement;

b) si la somme n'est pas déterminée, depuis la date à laquelle le créancier a avisé par écrit le débiteur de sa demande jusqu'à la date de l'ordonnance de paiement.

CHAPTER F-7

An Act respecting the Federal Court of Canada

SHORT TITLE

Short title

1. This Act may be cited as the *Federal Court Act*. R.S., c. 10(2nd Supp.), s. 1.

INTERPRETATION

Definitions

2. In this Act,

"action for collision" *«action...»*

"action for collision" includes an action for damage caused by one or more ships to another ship or ships or to property or persons on board another ship or ships as a result of carrying out or omitting to carry out a manoeuvre, or as a result of non-compliance with law, even though there has been no actual collision;

"Associate Chief Justice" *«juge en chef adjoint»*

"Associate Chief Justice" means the Associate Chief Justice of the Court;

"Canadian maritime law" *«droit maritime...»*

"Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament;

"Chief Justice" *«juge en chef»*

"Chief Justice" means the Chief Justice of the Court;

"Court" *«Cour»*

"Court" means the Federal Court of Canada continued by section 3;

"Court of Appeal" *«Cour d'appel»...*

"Court of Appeal" means that division of the Court referred to in section 4 as the Federal Court—Appeal Division;

CHAPITRE F-7

Loi concernant la Cour fédérale du Canada

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur la Cour fédérale*. S.R., ch. 10(2e suppl.), art. 1.

DÉFINITIONS

Définitions

2. Les définitions qui suivent s'appliquent à la présente loi.

«action pour collision» *"action..."*

«action pour collision» S'entend notamment d'une action pour dommages causés par un ou plusieurs navires à un ou plusieurs autres navires ou à des biens ou personnes à bord d'un ou plusieurs autres navires par suite de l'exécution ou de l'inexécution d'une manœuvre, ou par suite de l'inobservation du droit, même s'il n'y a pas eu effectivement collision.

«biens» *"property"*

«biens» Biens de toute nature, meubles ou immeubles, corporels ou incorporels, notamment les droits et les parts ou actions.

«Cour» *"Court"*

«Cour» La Cour fédérale du Canada maintenue aux termes de l'article 3.

«Cour d'appel» ou «Cour d'appel fédérale» *"Court of..."*

«Cour d'appel» ou «Cour d'appel fédérale» La Section d'appel de la Cour mentionnée à l'article 4.

«Couronne» *"Crown"*

«Couronne» Sa Majesté du chef du Canada.

«Cour suprême» *"Supreme..."*

«Cour suprême» La Cour suprême du Canada.

«droit canadien» *"laws..."*

«droit canadien» S'entend au sens de l'expression «lois du Canada» à l'article 101 de la *Loi constitutionnelle de 1867*.

«droit maritime canadien» *"Canadian..."*

«droit maritime canadien» Droit — compte tenu des modifications y apportées par la présente loi ou par toute autre loi fédérale — dont l'application relevait de la Cour de

Conflicting claims against Crown

(4) The Trial Division has exclusive original jurisdiction to hear and determine proceedings to determine disputes where the Crown is or may be under an obligation, in respect of which there are or may be conflicting claims.

Demandes contradictoires contre la Couronne

(4) La Section de première instance a compétence exclusive, en première instance, dans les procédures visant à régler les différends mettant en cause la Couronne à propos d'une obligation réelle ou éventuelle pouvant faire l'objet de demandes contradictoires.

Relief in favour of Crown or against officer

(5) The Trial Division has concurrent original jurisdiction

(*a*) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

(*b*) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of his duties as an officer or servant of the Crown.

Actions en réparation

(5) La Section de première instance a compétence concurrente, en première instance, dans les actions en réparation intentées :

a) au civil par la Couronne ou le procureur général du Canada;

b) contre un fonctionnaire ou préposé de la Couronne pour des faits — actes ou omissions — survenus dans le cadre de ses fonctions.

Extraordinary remedies, members of Canadian Forces

(6) The Trial Division has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada. R.S., c. 10(2nd Supp.), s. 17.

Recours extraordinaires : Forces canadiennes

(6) La Section de première instance a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*. S.R., ch. 10(2e suppl.), art. 17.

Extraordinary remedies, tribunals

18. The Trial Division has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal. R.S., c. 10(2nd Supp.), s. 18.

Recours extraordinaires : offices fédéraux

18. La Section de première instance a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral. S.R., ch. 10(2e suppl.), art. 18.

Inter-governmental disputes

19. Where the legislature of a province has passed an Act agreeing that the Court, whether referred to in that Act by its present name or by its former name of the Exchequer Court of Canada, has jurisdiction in cases of controversies

(*a*) between Canada and that province, or

(*b*) between that province and any other province or provinces that have passed a like Act,

the Court has jurisdiction to determine the controversies and the Trial Division shall deal with any such matter in the first instance. R.S., c. 10(2nd Supp.), s. 19.

Différends entre gouvernements

19. Lorsque l'assemblée législative d'une province a adopté une loi reconnaissant sa compétence en l'espèce, qu'elle y soit désignée sous son nouveau nom ou celui de Cour de l'Échiquier du Canada, la Cour fédérale est saisie des cas de litige :

a) entre le Canada et cette province;

b) entre cette province et une ou plusieurs autres provinces ayant adopté une loi semblable.

C'est la Section de première instance qui connaît de ces affaires. S.R., ch. 10(2e suppl.), art. 19.

specified class of matter to which that subsection applies. R.S., c. 10(2nd Supp.), s. 26.

tance, de certaines questions ressortissant normalement à la Section de première instance. S.R., ch. 10(2e suppl.), art. 26.

JURISDICTION OF FEDERAL COURT OF APPEAL

COMPÉTENCE DE LA COUR D'APPEL FÉDÉRALE

Appeals from Trial Division

27. (1) An appeal lies to the Federal Court of Appeal from any

(*a*) final judgment,

(*b*) judgment on a question of law determined before trial, or

(*c*) interlocutory judgment,

of the Trial Division.

27. (1) Il peut être interjeté appel, devant la Cour d'appel fédérale, des décisions suivantes de la Section de première instance :

a) jugement définitif;

b) jugement sur une question de droit rendu avant l'instruction;

c) jugement interlocutoire.

Appels des jugements de la Section de première instance

Notice of appeal

(2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Court,

(*a*) in the case of an interlocutory judgment, within ten days, and

(*b*) in the case of any other judgment, within thirty days, in the calculation of which July and August shall be excluded,

from the pronouncement of the judgment appealed from or within such further time as the Trial Division may, either before or after the expiration of those ten or thirty days, as the case may be, fix or allow.

(2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire que la Section de première instance peut, soit avant soit après l'expiration de celui-ci, fixer ou accorder. Le délai imparti est de :

a) dix jours, dans le cas d'un jugement interlocutoire;

b) trente jours, compte non tenu de juillet et août, dans le cas des autres jugements.

Avis d'appel

Service

(3) All parties directly affected by an appeal under this section shall be served forthwith with a true copy of the notice of appeal and evidence of service thereof shall be filed in the Registry of the Court.

(3) L'appel est signifié sans délai à toutes les parties directement concernées par une copie certifiée conforme de l'avis. La preuve de la signification doit être déposée au greffe de la Cour.

Signification

Final judgment

(4) For the purposes of this section, a final judgment includes a judgment that determines a substantive right except as to any question to be determined by a referee pursuant to the judgment. R.S., c. 10(2nd Supp.), s. 27.

(4) Pour l'application du présent article, est assimilé au jugement définitif le jugement qui statue au fond sur un droit, à l'exception des questions renvoyées à l'arbitrage par le jugement. S.R., ch. 10(2e suppl.), art. 27.

Jugement définitif

Review of decisions of federal board, commission or other tribunal

28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, on the ground that the board, commission or tribunal

(*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

28. (1) Malgré l'article 18 ou les dispositions de toute autre loi, la Cour d'appel est compétente pour les demandes de révision et d'annulation d'une décision ou ordonnance — exception faite de celles de nature administrative résultant d'un processus n'ayant légalement aucun caractère judiciaire ou quasi judiciaire — rendue par un office fédéral ou à l'occasion de procédures en cours devant cet office au motif que celui-ci, selon le cas :

a) n'a pas observé un principe de justice naturelle ou a de quelque autre manière outrepassé sa compétence ou refusé de l'exercer;

Révision des décisions d'un office fédéral

(*b*) erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(*c*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

b) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

c) a fondé sa décision ou son ordonnance sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose.

When application may be made

(2) Any application under subsection (1) may be made by the Attorney General of Canada or any party directly affected by the decision or order by filing a notice of the application in the Court within ten days from the time the decision or order was first communicated to the office of the Deputy Attorney General of Canada or to that party by the board, commission or other tribunal, or within such further time as the Court of Appeal or a judge thereof may, either before or after the expiration of those ten days, fix or allow.

Délai de présentation

(2) Le procureur général du Canada ou toute partie directement intéressée par la décision ou l'ordonnance peut présenter la demande visée au paragraphe (1) en déposant à la Cour un avis en ce sens dans les dix jours qui suivent la première communication, par l'office fédéral, de la décision ou ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire que la Cour d'appel ou un de ses juges peut, avant ou après l'expiration de ces dix jours, fixer ou accorder.

Trial Division deprived of jurisdiction

(3) Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

Cas d'incompétence de la Section de première instance

(3) La Section de première instance ne peut connaître des demandes de révision et d'annulation de décisions ou d'ordonnances qui, aux termes du présent article, ressortissent à la Cour d'appel.

Reference to Court of Appeal

(4) A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

Renvoi à la Cour d'appel

(4) L'office visé par le paragraphe (1) peut, à tout stade de ses procédures, renvoyer devant la Cour d'appel pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

Hearing in summary way

(5) An application or reference to the Court of Appeal made under this section shall be heard and determined without delay and in a summary way.

Procédure sommaire d'audition

(5) La Cour d'appel statue à bref délai et selon une procédure sommaire sur les demandes et renvois qui lui sont faits dans le cadre du présent article.

Limitation on proceedings against certain decisions or orders

(6) Notwithstanding subsection (1), no proceeding shall be taken thereunder in respect of a decision or order of the Governor in Council, the Treasury Board, a superior court or the Pension Appeals Board or in respect of a proceeding for a service offence under the *National Defence Act*. R.S., c. 10(2nd Supp.), s. 28.

Restriction relative aux procédures d'opposition

(6) Le paragraphe (1) ne s'applique pas aux décisions ou ordonnances du gouverneur en conseil, du Conseil du Trésor, d'une cour supérieure ou de la Commission d'appel des pensions ni aux procédures intentées pour une infraction d'ordre militaire en vertu de la *Loi sur la défense nationale*. S.R., ch. 10(2e suppl.), art. 28.

Where decision not to be restrained

29. Notwithstanding sections 18 and 28, where provision is expressly made by an Act of Parliament for an appeal as such to the Federal Court, to the Supreme Court, to the Governor in Council or to the Treasury Board from a decision or order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission

Dérogation aux art. 18 et 28

29. Par dérogation aux articles 18 et 28, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour suprême, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou ordonnance d'un office fédéral rendue à tout stade des procédures, cette décision ou ordonnance ne peut, dans la mesure où elle est

Indexed as:

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (Re R. v. Carson)

Canadian Broadcasting Corporation, appellant;
v.
The Attorney General for New Brunswick, His Honour Douglas Rice and Gerald Carson, respondents, and The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Saskatchewan and the Attorney General for Alberta, interveners.

[1996] 3 S.C.R. 480

[1996] S.C.J. No. 38

File No.: 24305.

Supreme Court of Canada

1996: March 29 / 1996: October 31.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Constitutional law -- Charter of Rights -- Freedom of expression -- Freedom of the press -- Trial judge excluding public and media from courtroom during part of accused's sentencing proceedings -- Whether s. 486(1) of Criminal Code infringes freedoms of expression and of the press -- If so, whether s. 486(1) justifiable in a free and democratic society -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b) -- Criminal Code, R.S.C., 1985, c. C-46, s. 486(1).

Criminal law -- Exclusion of public from court -- Trial judge excluding public and media from courtroom during part of accused's sentencing proceedings -- Whether trial judge exceeded his jurisdiction in making such order -- Criminal Code, R.S.C., 1985, c. C-46, s. 486(1).

The accused pleaded guilty to two charges of sexual assault and two charges of sexual interference involving young female persons. On a motion by the Crown, consented to by defence counsel, the trial judge ordered the exclusion of the public and the media from those parts of the sentencing proceedings dealing with the specific acts committed by the accused, pursuant to s. 486(1) of the Criminal Code. The order was sought on the basis of the nature of the evidence, which the court had not yet heard and which purportedly established that the offence was of a "very delicate" nature. The exclusion order remained in effect for approximately 20 minutes. Afterwards, following a request by the CBC, the trial judge gave reasons for making the exclusion order, stating that it had been rendered in the interests of the "proper administration of justice"; it would avoid "undue hardship on the persons involved, both the victims and the accused". The CBC challenged the constitutionality of s. 486(1) before the Court of Queen's Bench. The court held that s. 486(1) constituted an infringement on the freedom of the press protected by s. 2(b) of the Canadian Charter of Rights and Freedoms but that the infringement was justifiable under s. 1 of the Charter. The court also held that the trial judge had not exceeded his jurisdiction in making the exclusion order. The Court of Appeal affirmed the judgment.

Held: The appeal should be allowed.

(1) Constitutional law issue

The open court principle is one of the hallmarks of a democratic society, fostering public confidence in the integrity of the court system and understanding of the administration of justice. This principle is inextricably tied to the rights guaranteed by s. 2(b) of the Charter. The freedom to express ideas and opinions about the operation of the courts and the right of members of the public to obtain information about them are clearly within the ambit of s. 2(b). As well, s. 2(b) protects the freedom of the press to gather and disseminate this information. Members of the public in general rely and depend on the media to inform them and, as a vehicle through which information pertaining to courts is transmitted, the press must be guaranteed access to the courts in order to gather information. Measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press guaranteed by s. 2(b). To the extent that such measures prohibit public access to the courts and to information about the courts, they may also be said to restrict freedom of expression in so far as it encompasses the freedom of listeners to obtain information that fosters public criticism of the courts. The recognition of the importance of public access to the courts as a fundamental aspect of our democratic society should not be understood, however, as affirming a right to be physically present in the courtroom; there may be a shortage of space. Nor should it be seen as extending public access to all venues within which the criminal law is administered. By its facial purpose, s. 486(1) of the Code restricts expressive activity, in particular the free flow of ideas and information, in providing a discretionary bar on public and media access to the courts. This is sufficient to ground a violation of s. 2(b).

The exclusion of the public under s. 486(1) of the Code is a means by which the court may control the publicity of its proceedings with a view to protecting the innocent and safeguarding privacy interests and thereby afford a remedy to the underreporting of sexual offences. This provision constitutes a reasonable limit on the freedoms guaranteed by s. 2(b) of the Charter. Section 486(1) is aimed at preserving the general principle of openness in criminal proceedings to the extent that openness is consistent with and advances the proper administration of justice. In situations where openness conflicts with the proper administration of justice, s. 486(1) purports to further the proper administration of justice by permitting covertness where necessary. This objective is of sufficient importance to warrant overriding a constitutional freedom. Section 486(1) is also proportionate to the legislative objective. First, the means adopted -- a discretionary power in the trial judge to exclude the public where it is in the interests of the proper administration of justice -- is rationally connected to the objective. The trial judge must exercise his discretion in conformity with the Charter and the grant of this judicial discretion necessarily ensures that any order made under s. 486(1) will serve the objective of furthering the administration of justice. If it is not rationally connected to the objective, then the order will constitute an error of law. Second, s. 486(1) impairs the rights under s. 2(b) as little as reasonably possible in order to achieve the objective. The discretion conferred on trial judges by s. 486(1) is not overbroad. Section 486(1) provides an intelligible and workable standard -- the proper administration of justice -- according to which the judiciary can exercise the discretion conferred. It also arms the judiciary with a useful and flexible interpretative tool to accomplish its goal of preserving the openness principle, subject to what is required by the proper administration of justice. Again, since the discretion must be exercised in a manner that conforms with the Charter, the discretionary aspect of s. 486(1) guarantees that the impairment is minimal. An order that fails to impair the rights at stake as little as possible will constitute an error. Third, the salutary effects of s. 486(1) outweigh the deleterious effects. Parliament has attempted to balance the different interests affected by s. 486(1) by ensuring a degree of flexibility in the form of judicial discretion, and by making openness the general rule and permitting exclusion of the public only when public accessibility would not serve the proper administration of justice. The discretion necessarily requires that the trial judge weigh the importance of the interests the order seeks to protect against the importance of openness and specifically the particular expression that is limited. In this way, proportionality is guaranteed by the nature of the judicial discretion. In deciding whether to order exclusion of the public pursuant to s. 486(1), a trial judge should bear in mind whether the type of expression that may be impaired by the order infringes upon the core values sought to be protected.

(2) Criminal law issue

In applying s. 486(1) to order the exclusion of the public, the trial judge must exercise his discretion in conformity with the Charter. He must (a) consider available options and whether there are any other reasonable and effective alternatives available; (b) consider whether the order is limited as much as possible; and (c) weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

Additionally, the burden of displacing the general rule of openness lies on the party making the application. The applicant bears the burden of proving: that the particular order is necessary, in terms of relating to the proper administration of justice; that the order is as limited as possible; and that the salutary effects of the order are proportionate to its deleterious effects. In relation to the proportionality issue, if the order is sought to protect a constitutional right, this must be considered. There must also be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he may exercise his discretion judicially. In some cases in which the facts are not in dispute the statement of counsel will suffice. If there is insufficient evidence placed before the trial judge, or there is a dispute as to the relevant facts, the applicant should seek to have the evidence heard in camera.

Since the trial judge considering an application to exclude the public is usually in the best position to assess the demands in a given situation, where the record discloses facts that may support the trial judge's exercise of discretion, it should not lightly be interfered with. In this case, however, the trial judge erred in excluding the public from any part of the proceedings. There was insufficient evidence to support a concern for undue hardship to the complainants or to the accused. The order was unnecessary to further the proper administration of justice and its deleterious effects were not outweighed by its salutary effects. The mere fact that the victims are young females is not, in itself, sufficient to warrant exclusion. The victims' privacy was already protected by a publication ban and there was no evidence that their privacy interests required more protection. While the criminal justice system must be ever vigilant in protecting victims of sexual assault from further victimization, the record before the trial judge did not establish that undue hardship would befall the victims in the absence of a s. 486(1) order. Nor did the record reveal that there were any other reasons to justify an exception to the general rule of openness. Finally, barring exceptional cases, there is no issue of hardship to the accused arising from prejudicial publicity once the accused has pleaded guilty.

Cases Cited

Applied: Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; referred to: Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; Scott v. Scott, [1913] A.C. 419; Re Southam Inc. and The Queen (No.1) (1983), 41 O.R. (2d) 113; Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175; Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421; Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1991] 3 S.C.R. 459; Canadian Newspapers Co. v. Canada (Attorney General), [1988] 2 S.C.R. 122; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; R. v. Keegstra, [1990] 3 S.C.R. 697; Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825; R. v. Oakes, [1986] 1 S.C.R. 103; United Nurses of Alberta v. Alberta (Attorney General), [1992] 1 S.C.R. 901; B.C.G.E.U. v. British Columbia (Attorney General),[1988] 2 S.C.R. 214; Morris v. Crown Office, [1970] 1 All E.R. 1079; R. v. O'Connor, [1995] 4 S.C.R. 411; R. v. L. (D.O.), [1993] 4 S.C.R. 419; RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199; R. v. Beare, [1988] 2 S.C.R. 387; R. v. Nova Scotia

Pharmaceutical Society, [1992] 2 S.C.R. 606; Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69; R. v. Brint (1979), 45 C.C.C. (2d) 560; R. v. Lefebvre (1984), 17 C.C.C. (3d) 277, [1984] C.A. 370; R. v. McArthur (1984), 13 C.C.C. (3d) 152; R. v. Vandevelde (1994), 89 C.C.C. (3d) 161; R. v. Quesnel and Quesnel (1979), 51 C.C.C. (2d) 270.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 11(d).
Criminal Code, R.S.C., 1985, c. C-46, ss. 151 [rep. & sub. c. 19 (3rd Supp.), s. 1], 271(1)(a), 486(1) [am. c. 27 (1st Supp.), s. 203], (3) [rep. & sub. c. 23 (4th Supp.), s. 1].

Authors Cited

Lepofsky, M. David. Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings. Toronto: Butterworths, 1985.
Mill, James. "Liberty of the Press". In Essays on Government, Jurisprudence, Liberty of the Press, and Law of Nations. Reprints of Economic Classics. New York: Augustus M. Kelley, 1967.

APPEAL from a judgment of the New Brunswick Court of Appeal (1994), 148 N.B.R. (2d) 161, 378 A.P.R. 161, 116 D.L.R. (4th) 506, 91 C.C.C. (3d) 560, 32 C.R. (4th) 334, dismissing the appellant's appeal from a judgment of Landry J. (1993), 143 N.B.R. (2d) 174, 366 A.P.R. 174, dismissing its application to quash an order of Rice Prov. Ct. J. excluding the public and media from part of the sentencing proceedings. Appeal allowed.

André G. Richard, Marie-Claude Bélanger-Richard and Jacques McLaren, for the appellant.
Graham J. Sleeth, Q.C., for the respondents.
Graham Garton, Q.C., and Barbara Kothe, for the intervener the Attorney General of Canada.
M. David Lepofsky and James K. Stewart, for the intervener the Attorney General for Ontario.
Deborah Carlson, for the intervener the Attorney General of Manitoba.
Galvin C. Deedman, for the intervener the Attorney General of British Columbia.
Graeme G. Mitchell, for the intervener the Attorney General for Saskatchewan.
Written submissions only by Jack Watson, Q.C., for the intervener the Attorney General for Alberta.

Solicitors for the appellant: Stewart McKelvey Stirling Scales, Moncton.
Solicitor for the respondents: The Office of the Attorney General, Fredericton.
Solicitor for the intervener the Attorney General of Canada: George Thomson, Ottawa.
Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.
Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Vancouver.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.
Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.
Solicitor for the intervener the Attorney General for Alberta: Jack Watson, Edmonton.

The judgment of the Court was delivered by

1 LA FOREST J.:-- This appeal is brought by the Canadian Broadcasting Corporation ("CBC") from the judgment of the New Brunswick Court of Appeal dismissing an appeal from a decision of Landry J. who had refused to quash an order of Rice Prov. Ct. J. restricting public access to the courtroom. The order in question was made pursuant to s. 486(1) of the Criminal Code, R.S.C., 1985, c. C-46, which reads:

> 486. (1) Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room for all or part of the proceedings, he may so order.

The order mandated the exclusion of the public and the media from the courtroom during part of the sentencing proceedings of the respondent, Gerald Carson. A pre-existing non-identification order, made pursuant to s. 486(3) of the Code, was already in effect. The CBC now seeks a declaration that s. 486(1) is of no force or effect as infringing s. 2(b) of the Canadian Charter of Rights and Freedoms and cannot be justified under s. 1 of the Charter. In the alternative, if the provision is held to be constitutionally valid, the CBC seeks a declaration that Rice Prov. Ct. J. exceeded his jurisdiction in making the exclusion order. If such a declaration is made, it further seeks an order quashing the exclusion order and a mandatory order granting access to the media and the public to a transcript of the proceedings held in camera.

I. Facts

2 The facts are straightforward. The respondent, Gerald Carson, a prominent Moncton resident, pleaded guilty to two charges of sexual assault, contrary to s. 271(1)(a) of the Code, and two charges of sexual interference, contrary to s. 151 of the Code. On motion by Crown counsel, consented to by defence counsel, Rice Prov. Ct. J. ordered the exclusion of the public and the media, with the exception of the accused, the victims, their immediate families and a victim services coordinator, from those parts of the sentencing proceedings dealing with the specific acts committed by Carson. The exclusion order remained in effect for approximately 20 minutes. The order was sought on the basis of the nature of the evidence, which the court had not yet heard, and which

purportedly established that the offence was of a "very delicate" nature. Crown counsel further pointed to the fact that the case involved young, female persons.

3 André Veniot, a CBC reporter, was excluded from the court along with the other members of the media and the public. Shortly after the public had been invited to reattend the proceedings, a lawyer retained by Veniot was granted permission to address the court. She requested that Rice Prov. Ct. J. give reasons for making the exclusion order. In maintaining his order, Rice Prov. Ct. J. stated that it had been rendered in the interests of the proper administration of justice; it would avoid undue hardship to the victims and the accused.

II. Judicial History

Court of Queen's Bench (1993), 143 N.B.R. (2d) 174

4 A constitutional challenge to s. 486(1) of the Code was then made before the Court of Queen's Bench of New Brunswick on the basis of s. 2(b) of the Charter. Landry J., who heard the matter, held that since s. 486(1) limits or prohibits the right of the public and the press to gather and publish information in court proceedings in certain instances, it constitutes an infringement on the freedom of the press protected by s. 2(b).

5 Landry J. then considered whether the infringement could be saved by s. 1 of the Charter as being reasonable and demonstrably justified in a free and democratic society. He found that s. 486(1) addressed a pressing and substantial objective since it was a mechanism to ensure the "proper administration of justice" (p. 179). He also determined that the infringement is proportionate to that objective. He stated: "There exists a rational connection between the section and the objective, the section impairs the freedom as little as possible and there is some balance between the importance of the objective and the injurious effect of the section" (p. 179). He, therefore, concluded that s. 486(1) is saved by s. 1 of the Charter.

6 In deciding whether the trial judge had exceeded his jurisdiction in ordering the exclusion of the public, Landry J. noted that the test was not whether he would have excluded the public in the same circumstances. The proper administration of justice, which Rice Prov. Ct. J. relied on, was an appropriate reason for the exercise of his discretion in this case. Landry J. further noted that the public and the press were excluded for a short period of time only and as such he found no injustice had been done to the parties involved in the proceedings. Finally, he stated (at pp. 181-82):

> It is important for the proper administration of justice to preserve the discretion provided by s. 486(1) and a Court of Appeal should not substitute its judgment for that of a judge who felt compelled to exercise a discretion as did the judge in the present case. Although this is a borderline case I find that the judge acted within his jurisdiction by excluding the public. It would, however, have been preferable if the judge had elaborated more on his reasons for excluding the public and the press.

Court of Appeal (1994), 148 N.B.R. (2d) 161

Hoyt C.J.N.B. (for the majority)

7 In the Court of Appeal, Hoyt C.J.N.B. (speaking for himself and Turnbull J.A.) expressed the view that freedom of expression, as protected by s. 2(b) of the Charter, includes the right of the media, as well as any member of the public, to attend criminal trials. He agreed with Landry J.'s finding that s. 486(1) limits freedom of expression and is, therefore, contrary to s. 2(b), but he also agreed that the provision could be saved by s. 1 of the Charter. The case, he found, illustrates why s. 486(1) can be justified; the failure to have made the order would likely have resulted in the further victimization of the complainants, by permitting details of the offences to be published and the possible identification of the complainants. And this was so notwithstanding that a non-publication order was already in effect.

8 As to the particular exercise of discretion by Rice Prov. Ct. J., he agreed with Landry J. that it was not for him to say whether he would have exercised the discretion in the same fashion. He found it was Rice Prov. Ct. J.'s belief that the young complainants in this case deserved protection. That being so, he concluded: "For this reason alone, I cannot say that he was wrong in making the order, even though, in my view, he may have taken an irrelevant factor into consideration, namely, the protection of the accused from undue hardship" (p. 169). He did not rule out the protection of the accused as a factor in other cases; however, he concluded that Rice Prov. Ct. J.'s other reasons were sufficient.

Angers J.A.

9 Angers J.A. concurred, but for different reasons. He first observed that most of the issues raised by the appellant were moot since the trial was over and the sentence had been imposed. He further noted that it would be wrong for a non-party to the proceedings to succeed in having an interlocutory order quashed or altered when the parties themselves could not appeal. He next discussed the right to a public trial as a means of protecting the accused. The right was prescribed in s. 486(1) of the Code and guaranteed by s. 11(d) of the Charter. He noted, however, that there was no express right in any legislation, including the Charter, giving the public access to trials; rather, in criminal law the right of the public to be present in court is merely a corollary of the right of the accused to a public trial. As such, it is a subordinate to, and cannot prevail over the principal right. In his view, s. 486(1) provides the necessary guidelines to permit the presiding judge to exercise his or her discretion in a judicial manner. Given the respondent Carson's consent to the order, he found that a possible infringement of the respondent's s. 11(d) right did not arise.

10 Angers J.A. stated that he could not accept that s. 2(b) of the Charter gives the media better access to court proceedings than members of the public. He added (at p. 174):

> The principle of a public trial goes beyond a particular accused and must be approached while keeping in mind the reasons that led to the right: that no

> person be convicted of a criminal offence behind closed doors or on secret and unknown evidence. It is the duty of all those involved in the administration of the criminal justice system to see that the principle is upheld. While the public, through the Attorney General, is involved in the administration of criminal justice, the media per se is not. Its interests are different. Its duty is to inform, its temptation to entertain. It was given and it should have the constitutional freedom to perform its duty to inform, but the gathering of information involves different considerations such as individual privacy, defamation, due process of law, fair trial. . . .

11 Angers J.A. concluded that s. 486(1) involves a balancing between the constitutional rights of an accused to a public trial and the protection of a certain class of witnesses or potential witnesses. It had nothing to do with, and does not infringe on any freedom of the press to publish what is legally permissible. The argument of the media that freedom to publish necessarily includes freedom to gather information was, in his view, really "misleading and fallacious" (p. 175).

III. Issues

12 The CBC then sought and was granted leave to appeal to this Court. Two major issues arise in this appeal. The first relates to the constitutionality of s. 486(1) of the Code and is conveniently set forth in the constitutional questions stated by the Chief Justice on September 18, 1995:

1. Does s. 486(1) of the Criminal Code, R.S.C., 1985, c. C-46, limit the freedom of expression of the press in whole or in part as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms?
2. If so, is the limit one that can be justified in accordance with s. 1 of the Charter?

The second issue is whether Rice Prov. Ct. J. exceeded his jurisdiction in making the order excluding members of the media and the public from a part of the sentencing proceedings, thereby committing reversible error.

13 Before turning to these issues, I propose to address some preliminary matters raised by the interveners. The first of these matters, brought to our attention by the Attorney General for Ontario, relates to the sequence in which the Court should deal with the issues. He argued that the constitutionality of the provision should not be considered until it has been determined whether Rice Prov. Ct. J. properly exercised his discretion. If he did not, then he acted without jurisdiction, and the constitutional question need not, and should not, be considered. Such an approach may certainly be appropriate in some situations, but in the present case, I am disposed to deal with the constitutional question with a view to providing guidance to courts faced with the issue in the future.

14 A second preliminary matter, raised by the Attorney General of Canada, concerns the

appropriate scope of constitutional review to be undertaken in relation to s. 486(1). Rice Prov. Ct. J. granted the order of exclusion solely on the basis of the "proper administration of justice". The Attorney General of Canada contends that the Court should not go beyond the circumstances of this case and review the constitutionality on each of the three grounds for exclusion set forth in s. 486(1).

15 This Court has in the past exhibited a reluctance to consider the constitutionality of legislative provisions in the absence of a proper factual foundation; see Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086. To accede to the appellant's contention that the other grounds be constitutionally reviewed would require us to conduct such review in the absence of a factual framework, contrary to this Court's practice. Moreover, it would be dangerous to make a determination of the constitutionality of the other two grounds for exclusion under s. 486(1) by extrapolation from the constitutional review of the proper administration of justice ground; the values and interests invoked may differ depending upon the specific legislative context. It is best, then, to leave to another day the constitutionality of the other two statutory grounds for exclusion, and to focus solely on the ground relied upon by Rice Prov. Ct. J., i.e., the proper administration of justice.

16 I come then to an analysis of the major issues, beginning with the constitutional issue.

IV. The Constitutional Issue

A. Section 2(b) of the Charter

17 This appeal engages two essential issues in relation to s. 2(b). The first is integrally linked to the concept of representative democracy and the corresponding importance of public scrutiny of the criminal courts. It involves the scope of public entitlement to have access to these courts and to obtain information pertaining to court proceedings. Any such entitlement raises the further question: the extent to which protection is afforded to listeners in addition to speakers by freedom of expression. The second issue relates to the first, in so far as it recognizes that not all members of the public have the opportunity to attend court proceedings and will, therefore, rely on the media to inform them. Thus, the second issue is whether freedom of the press protects the gathering and dissemination of information about the courts by members of the media. In particular, it involves recognition of the integral role played by the media in the process of informing the public. Both of these issues invoke the democratic function of public criticism of the courts, which depends upon an informed public; in turn, both relate to the principle of openness of the criminal courts.

18 The freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to any notion of democratic rule. The liberty to criticize and express dissentient views has long been thought to be a safeguard against state tyranny and corruption. James Mill put it this way:

> So true it is, however, that the discontent of the people is the only means of removing the defects of vicious governments, that the freedom of the press, the main instrument of creating discontent, is, in all civilized countries, among all but the advocates of misgovernment, regarded as an indispensable security, and the greatest safeguard of the interests of mankind.
>
> ("Liberty of the Press", in Essays on Government, Jurisprudence, Liberty of the Press, and Law of Nations (1825 (reprint ed. 1967)), at p. 18.)

19 This Court has had occasion to discuss the freedom to criticize encompassed in freedom of expression and its relation to the democratic process in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, where Cory J. stated that it is difficult to think of a guaranteed right more important to a democratic society than freedom of expression. At page 1336, he declared:

> Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

20 It cannot be disputed that the courts, and particularly the criminal courts, play a critical role in any democracy. It is in this forum that the rights of the powerful state are tested against those of the individual. As noted by Cory J. in Edmonton Journal, courts represent the forum for the resolution of disputes between the citizens and the state, and so must be open to public scrutiny and to public criticism of their operations.

21 The concept of open courts is deeply embedded in the common law tradition. The principle was described in the early English case of Scott v. Scott, [1913] A.C. 419 (H.L.). A passage from the reasons given by Lord Shaw of Dunfermline is worthy of reproduction for its precise articulation of what underlies the principle. He stated at p. 477:

> It moves Bentham over and over again. "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." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into,

> and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

22 The importance of ensuring that justice be done openly has not only survived: it has now become "one of the hallmarks of a democratic society"; see Re Southam Inc. and The Queen (No.1) (1983), 41 O.R. (2d) 113 (C.A.), at p. 119. The open court principle, seen as "the very soul of justice" and the "security of securities", acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. In Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175, openness was held to be the rule, covertness the exception, thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice.

23 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. Cory J. in Edmonton Journal described the equally important aspect of freedom of expression that protects listeners as well as speakers and ensures that this right to information about the courts is real and not illusory. At pages 1339-40, he states:

> That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings -- the nature of the evidence that was called, the arguments presented, the comments made by the trial judge -- in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media. [Emphasis added.]

That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this

information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the raison d'être of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. The public's entitlement to be informed imposes on the media the responsibility to inform fairly and accurately. This responsibility is especially grave given that the freedom of the press is, and must be, largely unfettered. The significance of the freedom and its attendant responsibility lead me to the second issue relating to s. 2(b).

24 Essential to the freedom of the press to provide information to the public is the ability of the press to have access to this information. In Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421, I noted that freedom of the press not only encompassed the right to transmit news and other information, but also the right to gather this information. At pp. 429-30, I stated:

> There can be no doubt, of course, that it comprises the right to disseminate news, information and beliefs. This was the manner in which the right was originally expressed, in the first draft of s. 2(b) of the Canadian Charter of Rights and Freedoms before its expansion to its present form. However, the freedom to disseminate information would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue governmental interference. [Emphasis added.]

25 It is by ensuring the press access to the courts that it is enabled to comment on court proceedings and thus inform the public of what is transpiring in the courts. To this end, Cory J. stated in Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1991] 3 S.C.R. 459, at p. 475:

> The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being.

26 From the foregoing, it is evident that s. 2(b) protects the freedom of the press to comment on the courts as an essential aspect of our democratic society. It thereby guarantees the further freedom of members of the public to develop and to put forward informed opinions about the courts. As a vehicle through which information pertaining to these courts is transmitted, the press must be guaranteed access to the courts in order to gather information. As noted by Lamer J., as he then was, in Canadian Newspapers Co. v. Canada (Attorney General), [1988] 2 S.C.R. 122, at p. 129: "Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom." Similarly, it may be said that measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press. To the extent that such measures prohibit public access to the courts and to information about the

courts, they may also be said to restrict freedom of expression in so far as it encompasses the freedom of listeners to obtain information that fosters public criticism of the courts.

27 At this point, however, I should like to make a number of caveats to the recognition of the importance of public access to the courts as a fundamental aspect of our democratic society. First of all, this recognition is not to be confused with, nor do I wish to be understood as affirming a right to be physically present in the courtroom. Circumstances may produce a shortage of physical space, such that individual members of the media and the public may be denied physical access to the courts. In such circumstances, those excluded may have to rely on those present to relay information about the proceedings.

28 To this I would add a further caveat. I do not accept that the necessary consequence of recognizing the importance of public access to the courts is the recognition of public access to all facets of public institutions. The intervener, Attorney General for Saskatchewan argues that if an open court system is to be protected under s. 2(b) of the Charter on the basis that the public has an entitlement to information about proceedings in the criminal courts, then all venues within which the criminal law is administered will have to be accessible to the public, including jury rooms, a trial judge's chambers and the conference rooms of appellate courts. The fallacy with this argument is that it ignores the fundamental distinction between the criminal courts, the subject of this appeal, and the other venues mentioned by the intervener. Courts are and have, since time immemorial, been public arenas. The same cannot be said of these other venues. Thus, to argue that constitutional protection should be extended to public access to these private places, on the basis that public access to the courts is constitutionally protected, is untenable.

29 Furthermore, this Court has noted on previous occasions that public access to certain judicial processes would render the administration of justice unworkable; see MacIntyre, supra. The importance of ensuring that the administration of justice is not rendered unworkable provides a palpable reason for prohibiting public access to many of the other types of processes of which the intervener makes mention. Indeed, as we have seen in this case, the open court principle itself must yield to circumstances that would render the proper administration of justice unworkable.

B. Does Section 486(1) of the Criminal Code Infringe Section 2(b)?

30 At common law, the rule of public access to the courts was subject to certain exceptions, primarily where it was deemed necessary for the administration of justice. In Scott, supra, Earl Loreburn, at pp. 445-46, described the basis for exclusion of the public from the courts in these terms:

> Again, the Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general. Or witnesses may be ordered to withdraw, lest they trim their evidence

by hearing the evidence of others.

31 The common law is effectively reflected in the current Canadian statutory form of the rule, s. 486(1) of the Code, which begins with "[a]ny proceedings against an accused shall be held in open court", thereby preserving and giving statutory effect to the general rule of openness. It then vests in a trial judge the discretion to make an exclusionary order for, among other reasons, the furtherance of the proper administration of justice.

32 The appellant submits that s. 486(1) infringes s. 2(b) of the Charter. Having said that s. 2(b) protects the freedom of the press to gather and disseminate information relating to court proceedings, and protects the freedom of the public to comment upon our criminal courts as an essential attribute of our democratic society, a provision that excludes the public and the media from the courtroom must infringe s. 2(b).

33 By its facial purpose, s. 486(1) restricts expressive activity, in particular the free flow of ideas and information, in providing a discretionary bar on public and media access to the courts. This is sufficient to ground a violation; any provision that has as its purpose the restriction of expression will necessarily violate s. 2(b); see Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at p. 974.

34 Admittedly, s. 486(1) only permits such restriction on freedom of expression and freedom of the press where values of superordinate importance so require. To this end, the respondents argue that s. 486(1) supports, as opposed to violates, the values of the Charter, in that it permits the courts to maintain control over their own processes, as well as advancing core values including the protection of victims and witnesses, privacy interests and inherent limitations on freedom of expression such as public order and decency. In answer to the respondents' submissions, however, it is to be noted that this Court has repeatedly favoured a balancing of competing interests at the s. 1 stage of analysis. Specifically, Dickson C.J. stated in R. v. Keegstra, [1990] 3 S.C.R. 697, that "s. 1 of the Charter is especially well suited to the task of balancing" and found that freedom of expression jurisprudence supported that view. He continued, at p. 734:

> It is, in my opinion, inappropriate to attenuate the s. 2(b) freedom on the grounds that a particular context requires such; the large and liberal interpretation given the freedom of expression in Irwin Toy indicates that the preferable course is to weigh the various contextual values and factors in s. 1. [Emphasis in original.]

35 This approach was again adopted in the recent case of Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825, where the broad, purposive interpretation to be favoured in relation to s. 2(b) is discussed. At para. 75, it is stated that "[t]he important thing is that the competing values of a free and democratic society have to be adequately weighed in the appropriate context." Thus, I conclude that s. 486(1) of the Code infringes s. 2(b) of the Charter and leave to s. 1 an assessment of the competing interests and factors tending to justify restrictions on the guaranteed freedom.

C. Section 1 Analysis

36 I turn now to an examination of whether s. 486(1) is reasonable and demonstrably justified in a free and democratic society within the meaning of s. 1 of the Charter following the analytical framework developed by this Court in R. v. Oakes, [1986] 1 S.C.R. 103. But in undertaking this task, it must be remembered, a formalistic approach must be avoided. Regard must be had to all circumstances. The Court thus described the proper approach to be taken in Ross, supra, at para. 78:

> . . . the Oakes test should be applied flexibly, so as to achieve a proper balance between individual rights and community needs. In undertaking this task, courts must take into account both the nature of the infringed right and the specific values the state relies on to justify the infringement. This involves a close attention to context. McLachlin J. in RJR-MacDonald, supra, reiterated her statement in Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232, at pp. 246-47, that conflicting values must be placed in their factual and social context when undertaking a s. 1 analysis. [Emphasis added.]

Having affirmed the flexible and contextual approach to be taken, it is apposite to examine the context within which this appeal arises in light of the specific values engaged.

37 The first such value is the power vested in courts of criminal jurisdiction to control their own process in furtherance of the rule of law. This was recognized in United Nurses of Alberta v. Alberta (Attorney General), [1992] 1 S.C.R. 901, where McLachlin J. noted that "[t]he rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect" (p. 931). Similarly, in B.C.G.E.U. v. British Columbia (Attorney General), [1988] 2 S.C.R. 214, this Court referred to the English decision of Morris v. Crown Office, [1970] 1 All E.R. 1079 (C.A.), where, at p. 1081, it was said:

> The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it.

In B.C.G.E.U., supra, Dickson C.J. affirmed the power of courts to act in furtherance of the proper administration of justice. While said in the context of discussing contempt of court, the principle of permitting a court to control its own process may be said to extend to situations, such as the one at bar, where the court is granted a discretion to act in the interests of the proper administration of justice to exclude the public from criminal proceedings.

38 Related to a court's power to control its own process is the power to regulate the publicity associated with its proceedings. As such, it has been held that a legislative provision mandating a publication ban upon request by the complainant or prosecutor in sexual assault cases is constitutional; see Canadian Newspapers, supra. This Court has also recognized a common law

discretion on the part of courts to order a publication ban; see Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835.

39 The court's power to regulate the publicity of its proceedings serves, among other things, to protect privacy interests, especially those of witnesses and victims. In MacIntyre, supra, Dickson J., as he then was, noted that "[m]any times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings" (p. 185) and in the course of weighing this interest against the interest of public access to court proceedings held that the protection of the innocent from unnecessary harm "is a valid and important policy consideration" (p. 187). Stating that the "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance" (pp. 186-87), he identified the protection of the innocent as among these values.

40 While the social interest in protecting privacy is long standing, its importance has only recently been recognized by Canadian courts. Privacy does not appear to have been a significant factor in the earlier cases which established the strong presumption in favour of open courts. That approach has generally continued to this day, and this appears inherent to the nature of a criminal trial. It must be remembered that a criminal trial often involves the production of highly offensive evidence, whether salacious, violent or grotesque. Its aim is to uncover the truth, not to provide a sanitized account of facts that will be palatable to even the most sensitive of human spirits. The criminal court is an innately tough arena.

41 Bearing this in mind, mere offence or embarrassment will not likely suffice for the exclusion of the public from the courtroom. As noted by M. D. Lepofsky in Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings (1985), at p. 35: "Proceedings cannot be closed only because the subject of the charges relates to purportedly morality-tinged topics such as sex." In the course of the balancing exercise under s. 1, the exigencies and realities of criminal proceedings must be weighed in the analysis.

42 Nonetheless, the right to privacy is beginning to be seen as more significant. Thus Cory J. in Edmonton Journal, supra, considered that the protection accorded the privacy of individuals in a legislative enactment related to a pressing and substantial concern and underlined its importance in Canadian law. In this area of the law, however, privacy interests are more likely to be protected where it affects some other social interest or where failure to protect it will cause significant harm to the victim or to witnesses. This is particularly so of sexual assault cases. As L'Heureux-Dubé J. recently put it in R. v. O'Connor, [1995] 4 S.C.R. 411, a case involving the production of complainants' medical records in relation to charges of sexual offences (at para. 158):

> This Court has already recognized that society has a legitimate interest in encouraging the reporting of sexual assault and that this social interest is furthered by protecting the privacy of complainants: [R. v. Seaboyer, [1991] 2 S.C.R. 577], at pp. 605-6. Parliament, too, has recognized this important interest

in s. 276(3)(b) of the Criminal Code.

Similar views had earlier been expressed by Lamer J., in Canadian Newspapers, supra; see also L'Heureux-Dubé J. in R. v. L. (D.O.), [1993] 4 S.C.R. 419, at pp. 441-42.

43 So far as s. 486(1) of the Code is concerned, then, exclusion of the public is a means by which the court may control the publicity of its proceedings with a view to protecting the innocent and safeguarding privacy interests and thereby afford a remedy to the underreporting of sexual offences.

44 Having set forth the relevant context, the s. 1 analysis developed in Oakes, supra, may now be undertaken. This approach requires two things to be established: the impugned state action must have an objective of pressing and substantial concern in a free and democratic society; and there must be proportionality between the objective and the impugned measure.

(1) Legislative Objective

45 To constitute a justifiable limit on a right or freedom, Oakes tells us, the objective of the impugned legislation must advance concerns that are pressing and substantial in a free and democratic society. The appellant CBC maintains that the legislative objective of s. 486(1) is "to allow the exclusion of the public in criminal proceedings if it is in the interests of: (1) the safeguard of public morals; (2) the maintenance of order; or (3) the proper administration of justice". I have already indicated my intention to confine this appeal to consideration of the third branch for exclusion, the "proper administration of justice". As to this branch, the CBC concedes its pressing and substantial nature, but notes its imprecision.

46 I would characterize the objective somewhat differently. Section 486(1) aims at preserving the general principle of openness in criminal proceedings to the extent that openness is consistent with and advances the proper administration of justice. There are situations where openness conflicts with the proper administration of justice. The provision purports to further the proper administration of justice by permitting covertness where necessary. This recharacterization of the objective leaves intact that which the appellant conceded was of a pressing and substantial nature: the exclusion of the public from criminal proceedings in three specific cases. In light of the appellant's concession, I do not intend to say more than that this objective clearly passes the first step of the s. 1 analysis.

47 The second step, or the proportionality inquiry, is broken down into three further requirements that must be established, namely: the legislative measure must be rationally connected to the objective; it must impair the guaranteed right or freedom as little as possible; and there must be proportionality between the deleterious effects of the measures and their salutary effects; see RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para. 60.

(2) Proportionality

(a) Rational Connection

48 In an attempt to discern whether the legislative means are rationally connected to the legislative objective, McLachlin J., in RJR-MacDonald, supra, at para. 154, noted that in some cases, the relationship between the infringement of the rights and the benefit sought to be achieved may not be "scientifically measurable". In such cases, she continued, "this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective". It was also my view in RJR-MacDonald, supra, that a common-sense analysis was sufficient to satisfy the rational connection branch. In the present case, where the benefit sought to be realized by the operation of s. 486(1) is the furtherance of the administration of justice, the benefit is not scientifically measurable; nor is the relationship between the benefit and the infringement. As such, it is appropriate to proceed under the rational connection inquiry on the basis of logic and reason.

49 Whether s. 486(1) is rationally connected to the legislative objective requires a determination of whether the particular legislative means adopted -- a discretionary power in the trial judge to exclude the public where it is in the interests of the proper administration of justice -- serves the legislative objective.

50 The discretionary element of s. 486(1) is crucial to the analysis. In this respect, the Court has held discretion to be an essential feature of the criminal justice system. As was noted in R. v. Beare, [1988] 2 S.C.R. 387, at p. 410, a "system that attempted to eliminate discretion would be unworkably complex and rigid". In some cases, the Criminal Code provides no guidelines for the exercise of discretion, and yet, as was stated in Beare, supra, "[t]he day to day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion" (p. 411).

51 In Dagenais, supra, Lamer C.J. discussed the common law discretion to order a publication ban and held that a discretionary power cannot confer the power to infringe the Charter. The discretion must be exercised within boundaries set by the Charter; an exercise of discretion exceeding these boundaries would result in reversible error. The Chief Justice further held that a publication ban should only be ordered when two things are established: (1) that the ban is necessary to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (2) that the salutary effects of the ban outweigh the deleterious effects to the free expression of those affected by it. This standard, he noted, "clearly reflects the substance of the Oakes test applicable when assessing legislation under s. 1 of the Charter" (p. 878). Accordingly when a judge orders a ban that contravenes this standard, the judge commits an error of law, and the order is reviewable on that basis.

52 In applying s. 486(1), then, a court must exercise its discretion in conformity with the Charter. In this way, the judicial discretion guarantees that any order made pursuant to s. 486(1) will be rationally connected to the legislative objective of furthering the proper administration of justice. Once we accept the importance of discretion as an integral aspect of our criminal justice system,

then the case for discretion in the hands of the courts is perhaps the strongest. In R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, Gonthier J. discussed the need for limitations on law enforcement discretion. This need is met where the discretion is vested in the courts, because the exercise of discretion is reviewable.

53 Thus, the grant of judicial discretion in s. 486(1) necessarily ensures that any order made will be rationally connected to the legislative objective. If it is not, then the order will constitute an error of law; the proper course in such a case is to review the particular exercise of discretion and provide an appropriate remedy. Section 486(1) sets up a means, logically connected to the legislative objective of furthering the proper administration of justice, which permits a court to order the exclusion of the public where an open court would impede this objective.

54 The appellant contends that vesting in inferior courts the discretion to make a s. 486(1) order on the ground of the proper administration of justice is to provide insufficient guidance to courts in the exercise of their discretion. This contention is essentially an allegation that the legislation is vague or overbroad. I find it more appropriate to deal with the vagueness argument under the minimum impairment branch of the analysis. It is to this that I now turn.

(b) Minimal Impairment

55 In examining whether s. 486(1) impairs the rights under s. 2(b) as little as reasonably possible in order to achieve its objective, I begin by referring to McLachlin J.'s articulation of this requirement in RJR-MacDonald, supra, at para. 160: "The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary." However, she qualified this somewhat by noting that the tailoring process will rarely admit of perfection and thus, if the law "falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement".

56 I have noted the appellant's submission that the discretion conferred on trial judges by s. 486(1), to exclude the public from the courts in the interests of the proper administration of justice, is vague. In Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69, Sopinka J. discussed the concept of vagueness and the ways in which it could arise (at pp. 94-95):

> Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which

> passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a Charter right within reasonable limits. In this sense vagueness is an aspect of overbreadth. [Emphasis added.]

57 Allegations of overbreadth, of which allegations of vagueness are said to be an aspect, are more appropriately dealt with in relation to minimal impairment; see Osborne, supra, at p. 95. In the present case, the appellant's submission as to vagueness relates more to imprecision and generality, than to an allegation that s. 486(1) is incapable of interpretation with any degree of precision and thus not a limit prescribed by law. (I note that Gonthier J. writing in Nova Scotia Pharmaceutical Society, supra, preferred to reserve the term "vagueness" for the most serious degree of vagueness where the law could not be said to constitute a "limit prescribed by law" and to use overbreadth for the other aspect of vagueness. My use of "vagueness" in this case should be construed as meaning "overbreadth".)

58 In Osborne, Sopinka J. discussed vagueness in relation to the granting of wide discretionary powers and held that "[m]uch of the activity of government is carried on under the aegis of laws which of necessity leave a broad discretion to government officials" (p. 95). He then cited a passage from Irwin Toy, supra, at p. 983, in which this Court held that the law is rarely an exercise in absolute precision and that the question is whether there is an intelligible standard to guide the judiciary in doing its work.

59 Section 486(1) provides an intelligible standard -- the proper administration of justice -- according to which the judiciary can exercise the discretion conferred. The phrase "administration of justice" appears throughout legislation in Canada, including the Charter. Thus, "proper administration of justice", which of necessity has been the subject of judicial interpretation, provides the judiciary with a workable standard.

60 Section 486(1) arms the judiciary with a useful and flexible interpretative tool to accomplish its goal of preserving the openness principle, subject to what is required by the proper administration of justice, and the discretionary aspect of s. 486(1) guarantees that the impairment is minimal. Again relying upon the fact that the discretion must be exercised in a manner that conforms with the Charter, the discretion bestowed upon the court by s. 486(1) ensures that a particular exclusionary order accomplishes just what is necessary to advance the interests of the proper administration of justice and no more. An order may be made to exclude certain members of the public, from part or all of the proceedings, and for specific periods of time. As such, an order that fails to impair the rights at stake as little as possible will constitute an error. This is exemplified by R. v. Brint (1979), 45 C.C.C. (2d) 560 (Alta. S.C., App. Div.), where a new trial was ordered when it was found that a trial judge had ordered the entire trial to be held in camera when the facts established that the proper administration of justice only required the complainant's evidence to be taken in camera. The case illustrates that the public should only be excluded from the part of the proceedings where public access would offend against the proper administration of justice.

61 The order should be limited as much as possible. In Dagenais, supra, Lamer C.J. stated that a publication ban should only be ordered where it is necessary, and where reasonably available alternatives would not accomplish the same result. The same is true of the discretion accorded by s. 486(1) of the Code.

(c) Proportional Effects

62 The "proportional effects" stage of the analysis requires a consideration of whether the deleterious effects of s. 486(1) outweigh the salutary effects of excluding the public from the courts where it is required by the proper administration of justice. Parliament has attempted to balance the different interests affected by s. 486(1) by ensuring a degree of flexibility in the form of judicial discretion, and by making openness the general rule and permitting exclusion of the public only when public accessibility would not serve the proper administration of justice. The discretion necessarily requires that the trial judge weigh the importance of the interests the order seeks to protect against the importance of openness and specifically the particular expression that is limited. In this way, proportionality is guaranteed by the nature of the judicial discretion.

63 It is important to stress that the particular expression that is limited in a given case may impact upon the s. 1 balancing. In RJR-MacDonald, supra, I noted that the evidentiary requirements of a s. 1 analysis will vary substantially with the nature of the right infringed. In the case of freedom of expression, this Court has consistently held that the level of constitutional protection to which expression will be entitled varies with the nature of the expression. More specifically, the protection afforded freedom of expression is related to the relationship between the expression and the fundamental values this Court has identified as being the "core" values underlying s. 2(b). I put the matter this way in RJR-MacDonald, at para. 72:

> Although freedom of expression is undoubtedly a fundamental value, there are other fundamental values that are also deserving of protection and consideration by the courts. When these values come into conflict, as they often do, it is necessary for the courts to make choices based not upon an abstract, platonic analysis, but upon a concrete weighing of the relative significance of each of the relevant values in our community in the specific context. This the Court has done by weighing freedom of expression claims in light of their relative connection to a set of even more fundamental values. In Keegstra, supra, at pp. 762-63, Dickson C.J. identified these fundamental or "core" values as including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process. [Emphasis added.]

This Court has subjected state action that jeopardizes these "core" values to a "searching degree of scrutiny". Where, on the other hand, the expression in question lies far from the "centre core of the spirit" of s. 2(b), state action restricting such expression is less difficult to justify.

64 In the case of s. 486(1), the type of expression impaired will vary from case to case. This makes it difficult to consider the extent to which the expression restricted by s. 486(1) relates to the "core" values under a s. 1 analysis, in light of the fact that the expression will not always be of the same type. For example, some expression that is restricted by s. 486(1) may be connected to the "core" values. The expression may relate to the ability of the public to participate in and contribute to the democratic system. By restricting public access to the expressive content of court proceedings, s. 486(1) inhibits informed public criticism of the court system, thereby directly impeding public participation in our democratic institutions, one of the "core" values protected by s. 2(b) of the Charter. However, in other cases, s. 486(1) may be used to exclude the public from proceedings where the presence of the public would impede a witness's ability to testify, thereby impairing the attainment of truth, another "core" value; see R. v. Lefebvre (1984), 17 C.C.C. (3d) 277, [1984] C.A. 370; R. v. McArthur (1984), 13 C.C.C. (3d) 152 (Ont. H.C.). On the other hand, exclusion may be ordered from that part of the proceedings where the most lurid or violent details of the offence are recounted, such that the restricted expression would lie far from the core of s. 2(b). In the end, the important point is that in deciding whether to order exclusion of the public pursuant to s. 486(1), a trial judge should bear in mind whether the type of expression that may be impaired by the order infringes upon the core values sought to be protected.

65 In sum, it is my view that the means enacted pursuant to s. 486(1) are proportionate to the legislative objective. It must be recalled that the appropriate means of remedying a particular exclusionary order having deleterious effects outweighing its salutary effects is through judicial review of the given order.

66 From the foregoing analysis, I conclude that s. 486(1) constitutes a justifiable limit on the freedom of expression guaranteed by s. 2(b) of the Charter and is thereby saved by s. 1.

V. The Discretion

A. Manner of Exercise

67 Much of my s. 1 analysis has turned on the fact that s. 486(1) vests a discretion in the trial judge. In view of the reliance I have placed on discretion in assessing constitutional validity, I think the manner in which this discretion is to be exercised warrants some discussion beyond the simple assertion that it must comply with the Charter. In doing so, I will restrict my comments to exclusion in the interest of the "proper administration of justice".

68 In Dagenais, supra, this Court reviewed the constitutionality of a publication ban ordered pursuant to the common law rule. As I have already mentioned, Lamer C.J. stated that the common law rule governing the issuance of publication bans must comply with the principles of the Charter. As he put it: "Since the common law rule does not authorize publication bans that limit Charter rights in an unjustifiable manner, an order implementing such a publication ban is an error of law on the face of the record" (p. 865). Holding that the exercise of discretion must be consistent with the

Charter, Lamer C.J. set out a list of general guidelines for future cases. These guidelines essentially impose on the trial judge the requirements of a s. 1 balancing at the stage of determining whether or not to order a ban. These include three directives which echo the three steps of the proportionality analysis of the Oakes test.

69 The same directives are equally useful in assisting the trial judge in exercising his or her discretion within the boundaries of the Charter when exercising the judicial discretion to order exclusion of the public under s. 486(1). Stated in the context of such an order, the trial judge should, therefore, be guided by the following:

(a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
(b) the judge must consider whether the order is limited as much as possible; and
(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

70 Additionally, I provide the following for guidance on the procedure to be undertaken upon an application for a s. 486(1) order.

71 The burden of displacing the general rule of openness lies on the party making the application. As in Dagenais, supra, the applicant bears the burden of proving: that the particular order is necessary, in terms of relating to the proper administration of justice; that the order is as limited as possible; and, that the salutary effects of the order are proportionate to its deleterious effects. In relation to the proportionality issue, if the order is sought to protect a constitutional right, this must be considered.

72 There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially. In some cases in which the facts are not in dispute the statement of counsel will suffice. If there is insufficient evidence placed before the trial judge, or there is a dispute as to the relevant facts, the applicant should seek to have the evidence heard in camera. This may be done by way of a voir dire, from which the public is excluded. For example, in the present case, a voir dire could have been held to permit the Crown to disclose the facts not known to Rice Prov. Ct. J. in an effort to provide him with a more complete record from which to make his decision. The decision to hold a voir dire will be a function of what is necessary in a given case to ensure that the trial judge has a sufficient evidentiary basis upon which to act judicially.

73 A sufficient evidentiary basis permits a reviewing court to determine whether the evidence is capable of supporting the decision. In this regard, in R. v. Vandevelde (1994), 89 C.C.C. (3d) 161 (Sask. C.A.), Vancise J.A., at p. 171, referred to the concurring reasons of Kaufman J.A. in

Lefebvre, supra, at pp. 282-83 C.C.C., who stated:

> . . . public trials are the order . . . and any exceptions (as provided for in s. 442) [now s. 486(1)] must be substantiated on a case by case basis. In my respectful view, it is not good enough to say "the nature of this case is sexual", and an in camera hearing should, therefore, be imposed. Nor, with respect, is it sufficient for a judge to say that he or she would follow the "current practice".
>
> Discretion is an important element of our law. But, it can only be exercised judiciously when all the facts are known . . . . [Emphasis added by Kaufman J.A.]

74 Similarly, in the Alberta Court of Appeal's decision in Brint, supra, McGillivray C.J.A., noting that a trial in open court is "fundamental to the administration of justice in this country", stated that exclusion could only be ordered where "there are real and weighty reasons". A sufficient evidentiary basis allows the judge to determine whether such reasons exist; see R. v. Quesnel and Quesnel (1979), 51 C.C.C. (2d) 270 (Ont. C.A.), where the court found there was insufficient information before the trial judge to enable him to order any part of the Crown's case held in camera; see also Vandevelde, supra, where the court held that the party seeking the order must place sufficient evidence before the trial judge to permit a judicious exercise of discretion.

75 The information available to the trial judge must also allow a determination as to whether the order is necessary in light of reasonable and effective alternatives, whether the order has been limited as much as possible and whether the positive and negative effects of the order are proportionate.

76 Finally, I must address the exercise of judicial discretion in this case and, specifically, the order made by Rice Prov. Ct. J. In doing this, it is only fair to say that Rice Prov. Ct. J. made his order prior to this Court's decision in Dagenais, supra. He did not, therefore, have the benefit of the three-part inquiry that I have discussed above and adapted to the particular s. 486(1) context.

B. Review of Judicial Discretion

77 In reviewing the trial judge's decision to exclude the public from part of the proceedings, it must be remembered that the trial judge is usually in the best position to assess the demands of the given situation. In Lefebvre, supra, the Quebec Court of Appeal found that the trial judge had acted judicially in excluding the public where a witness might have suffered stress from the circumstances of the case rendering her incapable of testifying. It continued (at p. 280 C.C.C.):

> [Translation] [The trial judge] saw the witness and he could appreciate the stress which she was affected by. Sitting in appeal, and not having had the benefit of seeing and hearing the witness, I am of the opinion that it is not appropriate for this court to question the decision of the trial judge.

The court stated that where a victim of sexual assault does not want to give evidence because of the stress created by the presence of too many people, this could adversely affect the proper administration of justice. It concluded that the trial judge was in the best position to consider the victim's nervousness and was aware of the facts that would be revealed by that witness.

78 Where the record discloses facts that may support the trial judge's exercise of discretion, it should not lightly be interfered with. The trial judge is in a better position to draw conclusions from the facts he or she sees and hears, and upon which he or she may exercise the judicial discretion. This, however, presupposes that the trial judge has a sufficient evidentiary or factual basis to support the exercise of discretion and that the evidence is not misconstrued or overlooked.

79 In the present case, Rice Prov. Ct. J. had this to say in support of his decision to exclude the public from part of the sentencing proceedings:

> The application made under 486(1) and the ban -- I granted the order on the third ground that is for the proper administration of justice. The reason for that is that I am privy, due to documentation which I have before me, and did have before me prior to the application being made before -- by request -- I had it delivered to me prior to today's hearing which is normal. On the opinion that the proper administration of justice -- in order for the court to have at least on the court record the exact nature of the events including some of the details with regard to those events -- in order for justice to properly be done, it was necessary to do these, to -- sorry, to have these facts presented to me in the manner in which they subsequently were and that was the basis of the order. I quite often make orders in this regard. This is the first time that I have been challenged, but that's alright, you are entitled to challenge it. . . . But, however, if these facts were to be presented for the exposure to the public, it would cause I think a great undue hardship on the persons involved, both the victims and the accused, although no representations were made on behalf of the accused other than Mr. Letcher's consent to Mr. Wood's application for the exclusion, and that is the reason. I think that the important thing is that the court know what the facts -- they were presented to me in the manner in which I think would have embarrassed unnecessarily other people but I think that it was important for me to know. Thus, I think that the ground was, for the proper administration of justice, I say some of the facts I knew beforehand or some I had some idea, I didn't know exactly what the facts were thus the Order.

80 The appellant focuses upon the judge's finding that public access would have embarrassed some people, and submits that this is not a sufficient ground upon which to exclude the public, citing Quesnel, supra, in support of this submission. In Quesnel, the Ontario Court of Appeal held that the embarrassment of witnesses "alone is not reason to suppose that truth is more difficult or unlikely or that the witness will be so frightened as to be unable to testify" (p. 275). While it is true

that this would not suffice if it were the only ground for exclusion, the decision to exclude was not solely based upon a finding that a public presence would embarrass the witnesses. Rice Prov. Ct. J. also mentioned "great undue hardship on the persons involved, both the victims and the accused" among his reasons for making the order.

81 With respect to concerns relating to undue hardship, it is my view that where the circumstances and evidence support such concerns, "undue hardship on the persons involved" may, in the interests of the proper administration of justice, amount to a legitimate reason to order exclusion. The question is whether this reason is valid in the circumstances here. My conclusion with respect to this question is that the validity of these concerns is fatally impaired both in relation to the victims and to the accused.

82 I will deal first with the concerns of undue hardship to the victims. Neither the record nor the reasons provided by the Crown support a finding that the proper administration of justice required the exclusion of the public from part of the sentencing proceedings. In making his order, Rice Prov. Ct. J. had the benefit of victim impact statements and a pre-sentence report. The latter, however, was not included in the record before this Court. The victim impact statements did not disclose evidence of undue hardship that would ensue as a result of public attendance during the sentencing proceedings, nor did they disclose the circumstances of the sexual offences that were ultimately divulged during sentencing. Indeed, Rice Prov. Ct. J. expressly stated that he did not have all the facts before him in making the order: "I say some of the facts I knew beforehand or some I had some idea, I didn't know exactly what the facts were thus the Order."

83 In its submission, the Crown gave the following in support of his application for a s. 486(1) order:

> The nature of the evidence, of which the court hasn't heard, that constitutes the offence is very delicate. It involves young persons, female persons, and I would just ask maybe the court would consider invoking [s. 486(1)] for purposes of --

Most sexual assault cases involve evidence that may be characterized as "very delicate". The evidence did not establish that this case is elevated above other sexual assaults. This point was conceded by the Crown during oral submissions.

84 The mere fact that the victims are young females is not, in itself, sufficient to warrant exclusion. There were other effective means to protect them. Indeed, the privacy of the victims was already protected by a non-publication order by which their identities were withheld from the public. There was no evidence that their privacy interests required more protection. The victims were not witnesses in the proceedings, the evidence of particulars of the offences having been read in by the Crown. As such, no stress could be said to emanate from their having to testify, and the protection of witnesses was in no way jeopardized. While the criminal justice system must be ever vigilant in protecting victims of sexual assault from further victimization, it is my view that the record before Rice Prov. Ct. J. did not establish that undue hardship would befall the victims in the

absence of a s. 486(1) order. Nor did the record reveal that there were any other reasons to justify an exception to the general rule of openness.

85 The importance of a sufficient factual foundation upon which the discretion in s. 486(1) is exercised cannot be overstated, particularly where the reasons given by the trial judge in support of an exclusion order are scant. In this case, the record does not reveal that such a foundation existed or that the facts known to Rice Prov. Ct. J. established that the proper administration of justice required exclusion of the public in the interests of the victims.

86 At this point, I would pause to sympathize with the position in which the trial judge found himself. His sensitivity to the complainants cannot be overlooked, nor should it be. And where the record discloses sufficient information to legitimate concerns for undue hardship to the complainants, then exclusion of the public may be necessary for the proper administration of justice. However, in this case, exclusion cannot be justified on this ground in the absence of more than is disclosed by the record.

87 As to the concern expressed for undue hardship to the accused, barring exceptional cases, I cannot think there is any issue of hardship to the accused arising from prejudicial publicity once the accused has pleaded guilty. The publicity associated with a public trial will in almost every case cause some prejudice to the accused. The criminal justice system has addressed much of the potential for prejudice with procedural safeguards to ensure that trials do not proceed in the absence of reasonable and probable grounds, and that fairness is protected. Once an accused has pleaded guilty, however, prejudice is greatly diminished as the risk of having wrongly accused the person being tried is eliminated.

88 The fact that closure of the court was only ordered during the sentencing proceedings bears considerably upon my determination that the accused was not likely to suffer undue hardship in this case. As alleged by the intervener Attorney General for Ontario, the deterrence and public denunciation functions of sentencing are not to be undervalued. Public scrutiny of criminal sentencing advances both these functions by subjecting the process to the public gaze and its attendant condemnation. The type of expression restricted in this case, expression relating to the sentencing process, weighs in favour of maintaining open court. In any criminal case, the sentencing process serves the critically important social function of permitting the public to determine what punishment fits a given crime, and whether sentences reflect consistency and proportionality. In sexual assault cases, the importance of subjecting sentencing to public scrutiny is especially strong. "Sexual assault" in law encompasses a wide array of different types of activities, with varying penalties. It is, therefore, essential to inform the public as to what is encompassed in the term "sexual assault" and the range of punishment it may attract.

89 In this case, there was insufficient evidence to support a concern for undue hardship to the accused or to the complainants. The order was not necessary to further the proper administration of justice and the deleterious effects of the order were not outweighed by its salutary effects. On the

whole, and with some reluctance in light of the proper deference to be accorded the exercise of discretion in these types of cases, I conclude that Rice Prov. Ct. J. erred in excluding the public from any part of the proceedings.

VI. Disposition

90 Following oral argument for the appellant on the constitutional issue, the Chief Justice gave judgment for the Court that s. 486(1) of the Code was constitutionally valid. On this aspect, then, all that requires to be done is to respond to the constitutional questions.

91 On the exclusion order of Rice Prov. Ct. J., I find that he improperly exercised his discretion in the circumstances of this case.

92 Accordingly, the appeal is allowed and the judgment of the Court of Appeal on this point is reversed. I would quash the exclusion order and order access to the media and the public to the transcript of that part of the proceedings held in camera. Both constitutional questions are answered in the affirmative.

cp/d/hbb/DRS/DRS

Indexed as:

Pharmacia Inc. v. Canada (Minister of National Health and Welfare) (F.C.A.)

Between
David Bull Laboratories (Canada) Inc., appellant, and
Pharmacia Inc., Farmitalia Carlo Erba S.R.L. and the Minister of National Health and Welfare, respondents

[1994] F.C.J. No. 1629

[1995] 1 F.C. 588

[1995] 1 C.F. 588

176 N.R. 48

58 C.P.R. (3d) 209

51 A.C.W.S. (3d) 799

Appeal No. A-332-94

Federal Court of Appeal
Ottawa, Ontario

Stone, Strayer and Robertson JJ.

Heard: October 18, 1994
Judgment: November 1, 1994

(11 pp.)

Patents of invention -- Practice, proceedings under the Patented Medicines Regulations -- Originating notice of motion for prohibition of issue of compulsory licence -- Contents of, mandatory requirements -- Striking out of, when available.

Appeal. Following the filing by the appellant of a notice of allegation pursuant to subsection 5(1) of

the Patented Medicines Regulations seeking a compulsory licence in respect of a medicine for which the respondents held a patent, the respondents filed an originating notice of motion seeking an order prohibiting the Minister of National Health and Welfare from granting the appellant's request. The notice of motion simply alleged that the respondents were the owner and licensee of a patent which included claims for the subject medicine and recited the fact that the appellant had filed the said notice of allegation. The only evidence supporting the originating notice was a short affidavit attesting essentially to the same facts as was set out in the notice. At the cross-examination of the deponent, he refused to answer several questions put to him by the appellant's counsel. The appellant then moved for an order striking out the originating notice under Rule 5 or Rule 419 of the Rules of Court or compelling the deponent to re-attend in order to provide answers to the questions he had refused to answer. The trial judge dismissed the appellant's motion taking the view that there was no basis for striking out the motion on any of the Rule 419 grounds.

HELD: Appeal dismissed. The court should not interfere with the exercise of discretion by a trial judge unless the trial judge had proceeded on an erroneous principle of law or on a misapprehension of the facts, or unless the decision would cause some injustice. None of those criteria were met by the appellant. Although there was jurisdiction in the court, either inherent or through Rule 5 by analogy to other rules, to dismiss in a summary manner, a notice of motion which was so clearly improper as to be bereft of any possibility of success, the cases in which such jurisdiction were properly exercised were very exceptional and could not include cases such as the present where there was simply a debatable issue as to the adequacy of the allegations in the notice of motion.

Statutes, Regulations and Rules Cited:

Patented Medicines (Notice of Compliance) Regulations, S.O.R./93- 133, ss. 5, 6(1), 7(1), 7(5).
Rules of the Federal Court of Canada, Rules 2, 5, 319(1), 419, 1602(2).

Susan Beaubien, for the appellant.
Gunars A. Gaikis and Peter R. Wilcox, for the respondents, Pharmacia Inc. and Farmitalia Carlo Erba S.R.L.
No one appearing, for the respondent, Minister of National Health and Welfare).

The judgment of the Court was delivered by

STRAYER J.:--

Relief Requested

1 This is an appeal from the decision of Noël J. of July 4, 1994. In that decision he dismissed the

application of the appellant David Bull Laboratories (Canada) Inc. (the respondent in Trial Division proceeding T-2991-93) to strike out the originating notice of motion for prohibition filed by Pharmacia Inc. ("Pharmacia") and Farmitalia Carlo Erba S.R.L. ("Farmitalia") in that Trial Division proceeding. He also refused the alternative request of the appellant that he order Robert J. Little, deponent of an affidavit filed by Pharmacia and Farmitalia in support of their originating notice of motion, to re-attend for cross-examination and to answer certain questions.

2 This appeal was heard together with A-410-94, an appeal by Pharmacia and Farmitalia against another interlocutory order in the same proceeding. That appeal was dismissed for reasons issued on October 18 and October 19, 1994.

Facts

3 The respondents Pharmacia and Farmitalia assert an interest in Canadian patents 1,248,453 (hereafter '453) and 1,291,037 (hereafter '037), included in patent lists dated April 7, 1993 in respect of Doxorubicin Hydrochloride (known as "Doxorubicin"), which lists were filed with the Minister of National Health and Welfare pursuant to the Patented Medicines (Notice of Compliance) Regulations.[1] On November 4, 1993 the appellant filed and served a notice of allegation pursuant to section 5 of those Regulations with respect to patent number '453 as referred to above. That notice of allegation alleged that the product for which the appellant was seeking a notice of compliance would not infringe any of the claims of this patent. On December 21, 1993 the respondents Pharmacia and Farmitalia filed a notice of motion pursuant to subsection 6(1) of the Regulations seeking an order prohibiting the Minister of National Health and Welfare from issuing a notice of compliance to the appellants in respect of the medicine Doxorubicin until after the expiration of both patents '453 and '037. That notice of motion simply alleged that the appellant Farmitalia is the owner of these patents each of which includes claims for the medicine Doxorubicin itself as well as claims for the use of the medicine, and that Pharmacia is a licensee under those patents and sells that medicine in Canada. The notice of motion recited the fact that Pharmacia had filed the patent lists and that the appellant (respondent in that originating notice of motion) had filed the notice of allegation as referred to previously. The only evidence ever produced in support of this originating notice of motion was a short affidavit by Robert J. Little, President of Pharmacia, attesting to essentially the same facts as set out in the originating notice of motion.

4 The appellant filed its evidence in response to the originating notice of motion on February 21, 1994. The deponents of affidavits from both sides were cross-examined on their affidavits, Mr. Little being cross-examined on June 15, 1994 and refusing to answer many of the questions put to him. On June 27, 1994 the appellants filed a notice of motion seeking to have the originating notice of motion struck out or in the alternative to have Mr. Little ordered to re-attend for further cross-examination to answer questions he refused to answer. This motion was heard by Noël J. on June 30, 1994 and on July 4, 1994 he issued the judgment from which this appeal has been brought.

5 Any further facts necessary for the disposition of this appeal will be referred to in connection

with the conclusions on each issue.

Conclusions

Motion to Strike

6 Before Noël J. the appellant appears to have based its case for striking out the originating notice of motion on Rule 419 or in the alternative the "gap" Rule, Rule 5. Noël J. expressed doubt that either Rule 419 or Rule 5 would support striking a notice of motion. He concluded that in any event there was no basis for striking out the originating notice of motion on any of the grounds stated in Rule 419. Before this Court on appeal counsel submitted a further alternative in support of the jurisdiction to strike out: either that this is part of the inherent jurisdiction of the Court or that there is a power of "summary dismissal" where an affidavit filed in judicial review proceedings does not meet the requirements of the Rules. (The latter argument may have been made to Noël J. in some form as he observes in his reasons that the affidavit filed in support of the motion is sufficient to verify the facts asserted).

7 This Court should not of course interfere with a trial judge's exercise of discretion, such as in a refusal to strike, unless he or she has proceeded on some wrong principle of law or has seriously misapprehended the facts, or unless an obvious injustice would otherwise result.[2] We can see no such error in the decision of the trial judge here. We need go no farther than to confirm that the remedy of striking out a notice of motion was not available in these circumstances. Given the extensive argument on this subject, however, it may be well to explain why in our view the learned judge was right in principle to doubt the applicability of Rule 419 or the gap rule.

8 It is clear that Rule 419 does not directly authorize the striking out of a notice of motion. The opening words of Rule 419(1) are:

> The Court may at any stage of an action order any pleading or anything in any pleading to be struck out . . . . (Emphasis added).

Rule 2 defines "action" as a proceeding in the Trial Division

> other than an appeal, an application or an originating motion . . . .

and it defines "pleading" as

> any document whereby an action in the Trial Division was initiated . . . .

Thus an application for prohibition commenced by notice of motion is not an "action" and the notice of motion is not a "pleading". It is argued, however, that by means of the "gap" Rule, Rule 5, the Court can resort to the law of either Ontario or Quebec. Rule 5 provides as follows:

> 5. In any proceeding in the Court where any matter arises not otherwise provided

> for by any provision in any Act of the Parliament of Canada or by any general rule or order of the Court (except this Rule), the practice and procedure shall be determined by the Court (either on a preliminary motion for directions, or after the event if no such motion has been made) for the particular matter by analogy
>
> (a) to the other provisions of these Rules, or (b) to the practice and procedure in force for similar proceedings in the courts of that province to which the subject matter of the proceedings most particularly relates,
>
> whichever is, in the opinion of the Court, most appropriate in the circumstances.

It was argued that as there are parties herein domiciled in both Ontario and Quebec the Court could have resort by analogy to the laws of those provinces which, unlike the Federal Court Rules provide a procedure for striking out originating documents other than pleadings.[3] The appellant also appears to argue that pursuant to Rule 5(a) the Court can apply Rule 419, by analogy, to originating notices of motion.

9 For Rule 5 to apply there must be a "gap" in the Federal Court Rules. Simply because those Rules do not contain every provision found in provincial court rules does not necessarily mean that there is a gap. If the absence of such a provision can be readily explained by the general scheme of the Federal Court Rules then that absence must be considered intentional and any application by analogy of provincial court rules or other provisions of the Federal Court Rules which are on their face inapplicable would amount to an amendment of the Federal Court Rules.

10 The basic explanation for the lack of a provision in the Federal Court Rules for striking out notices of motion can be found in the differences between actions and other proceedings. 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. Even though it is important both to the parties and the Court that futile claims or defences not be carried forward to trial, it is still the rare case where a judge is prepared to strike out a pleading under Rule 419. Further, the process of striking out is much more feasible in the case of actions because there are numerous rules which require precise pleadings as to the nature of the claim or the defence and the facts upon which it is based. There are no comparable rules with respect to notices of motion. Both Rule 319(1), the general provision with respect to applications to the Court, and Rule 1602(2), the relevant Rule in the present case which involves an application for judicial review, merely require that the notice of motion identify "the precise relief" being sought, and "the grounds intended to be argued". The lack of requirements for precise allegations of fact in notices of motion would make it far more risky for a court to strike such documents. 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 respondent thinks to be without merit is to appear and argue at the hearing of the motion itself. This case well illustrates the waste of resources and time in adding on to what is supposed to be a summary judicial review proceeding the process of an interlocutory motion to strike. This motion to strike has involved a hearing before a trial judge and over one half day before the Court of Appeal, the latter involving the filing of several hundred pages of material, all to no avail. The originating notice of motion itself can and will be dealt with definitively on its merits at a hearing before a judge of the Trial Division now fixed for January 17, 1995.

11 The contrast between actions and motions in this Court is even more marked where the motion involved is for judicial review, as these applications for prohibition under subsection 6(1) of the Patent Medicine (Notice of Compliance) Regulations have been held to be.[4] Unlike the Rules pertaining to actions, the 1600 Rules pertaining to judicial review provide a strict timetable for preparation for hearing and a role for the Court in ensuring there is no undue delay. Time limits fixed by the rules can only be extended by a judge, not by consent.[5] The Court can of its own motion dismiss applications due to delay[6] and can also take the initiative in correcting originating documents.[7] This all reinforces the view that the focus in judicial review is on moving the application along to the hearing stage as quickly as possible. This ensures that objections to the originating notice can be dealt with promptly in the context of consideration of the merits of the case.

12 The Patented Medicines (Notice of Compliance) Regulations further indicate an intention that this particular kind of application for judicial review should be disposed of expeditiously. Subsection 7(1) of the Regulations provides that normally a notice of compliance should not be issued until thirty months have elapsed from the filing of the application for prohibition, unless the Court has in the meantime dismissed that application. Subsection 7(5) however, authorizes the Court to abbreviate or extend that thirty month period where it has not yet reached a decision on the application but where it finds that a party to the application "failed to reasonably cooperate in expediting the application". Thus if, for example, the applicant unduly delays in bringing the matter on for a hearing on the merits, the respondent can move to have the Court shorten the time limit for the issue of a notice of compliance.

13 Given the multitude of interlocutory proceedings now outstanding in the Trial Division of this nature, it is apparent that in many cases the parties have indeed tried to treat such proceedings as actions for infringement or declarations of validity of patents. As a result they have tried to have the Court strike out or order amendments to notices of allegation.[8] Parties have as in the present case sought to strike out originating notices of motion and have sought the equivalent of discovery of the opposing party. However this Court made clear in Merck Frosst v. Canada[9] that these proceedings

are not actions for determining validity or infringement: rather they are proceedings to determine whether the Minister may issue a notice of compliance. That decision must turn on whether there are allegations by the generic company sufficiently substantiated to support a conclusion for administrative purposes (the issue of a notice of compliance) that the applicant's patent would not be infringed if the generic's product is put on the market. It is useful to reiterate what the Court said in the Merck case.

> The proceedings are not an action and their object is solely to prohibit the issuance of a notice of compliance under the Food and Drug Regulations. Manifestly, they do not constitute "an action for infringement of a patent" . . . .
>
> Furthermore, since the regulations clearly allow the Minister, absent a timely application under s.6, to issue a notice of compliance on the basis of the allegations in the notice of allegation, it would seem that on the hearing of such an application, at least where the notice has alleged non-infringement, the court should start from the proposition that the allegations of fact in the notice of allegation are true except to the extent that the contrary has been shown by the applicant. In determining whether or not the allegations are "justified" (s.6(2)), the court must then decide whether, on the basis of such facts as have been assumed or proven, the allegations would give rise in law to the conclusion that the patent would not be infringed by the respondent.
>
> In this connection, it may be noted that, while s.7(2)(b) seems to envisage the court making a declaration of invalidity or non-infringement, it is clear to me that such declaration could not be given in the course of the s.6 proceedings themselves. Those proceedings, after all, are instituted by the patentee and seek a prohibition against the Minister, since they take the form of a summary application for judicial review, it is impossible to conceive of them giving rise to a counterclaim by the respondent seeking such a declaration. Patent invalidity, like patent infringement cannot be litigated in this kind of proceeding. I can only think that the draftsperson had in mind the possibility of there being parallel proceedings instituted by the second person which might give rise to such a declaration and be binding on the parties. It is, in any event, evident that the declaration referred to in s.7(2)(b) is not a precondition to the ultimate dismissal of the s.6 application, the consequences of which are separately dealt with in s.7(4).

It will be noted that the Regulations nowhere create or abolish any rights of action between the parties: instead they confer a right on the patentee to bring an application for prohibition against the Minister of National Health and Welfare. That is, the regulations pertain to public law, not private

rights of action. Of course the real adversary in such a prohibition proceeding is the generic company which served the notice of allegation.

14 If the Governor in Council had intended by these regulations to provide for a final determination of the issues of validity or infringement, a determination which would be binding on all private parties and preclude future litigation of the same issues, it surely would have said so. This Court is not prepared to accept that patentees and generic companies alike have been forced to make their sole assertion of their private rights through the summary procedure of a judicial review application. As the regulations direct that such issues as may be adjudicated at this time must be addressed through such a process, this is a fairly clear indication that these issues must be of a limited or preliminary nature. If a full trial of validity or infringement issues is required this can be obtained in the usual way by commencing an action.

15 For these reasons we are satisfied that the trial judge properly declined to make an order striking out, under Rule 419 or by means of the gap rule, as if this were an action. This is not to say that there is no jurisdiction in this Court either inherent or through Rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success.[10] Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion.

16 Having come to this conclusion on the availability of striking out in such circumstances, I will not deal with the other finding of the learned trial judge that the originating notice of motion does in fact disclose a reasonable cause of action. I would not wish it to be thought, in not dealing with that issue, that this Court expresses any views on the conclusions of the learned trial judge in this respect. The ultimate adequacy of the respondents' allegations and evidence must be addressed by the judge hearing the application for prohibition on its merits.

Compelling Answers on Cross-Examination

17 In the proceedings before Noël J. the appellant had also requested that he order Robert J. Little, the deponent for the respondents Pharmacia and Farmitalia, to re-attend for further cross-examination on his affidavit and to reply to questions which he previously refused to answer. Noël J. declined to order such answers on the grounds that certain questions were not relevant to the issues to be addressed in the application for prohibition. In the case of certain questions allegedly related to credibility he examined the document supposedly creating an inconsistency in Mr. Little's position and decided that it did not.

18 I have examined these questions carefully and have concluded that there is no basis upon which this Court should interfere with the exercise of the trial judge's discretion. As indicated earlier, the Court should not interfere unless the trial judge has proceeded on an erroneous principle of law or on a misapprehension of the facts, or unless the decision would cause some injustice. None of these criteria have been met by the appellant in the present case. This is not to suggest of

course that the appellant cannot make some of the same arguments in support of the proposition that the applicants for prohibition have not adequately proven their case. That is a matter to be argued before the judge of the Trial Division hearing the application for prohibition.

Disposition

19 This appeal should therefore be dismissed with costs.

STRAYER J.
STONE J.:-- I agree
ROBERTSON J.:-- I agree

1 S.O.R./93-133.

2 See e.g. Nabisco Brands Ltd. - Nabisco Brands Ltée v. Procter & Gamble Co. et al (1985) 5 C.P.R.(3d) 417 at 418 (F.C.A.).

3 Quebec Code of Civil Procedure, chapter III.1, section 75.1; Ontario Rules of Civil Procedure, Rule 14.09.

4 Bayer A.G. v. Canada (1993) 51 C.P.R.(3d) 329 (F.C.A.); Merck Frosst Canada Inc. et al v. Canada (1994) 55 C.P.R.(3d) 302 (F.C.A.).

5 Rule 1614(2).

6 Rule 1617.

7 Rule 1605.

8 In the associated appeal involving the same parties heard at the same time as the present appeal, A-410-94, reasons dated October 18, 1994 [Please see [1994] F.C.J. No. 1549], this Court held that "the notice of allegation is beyond the reach of the Court's jurisdiction in a judicial review proceeding" on the basis that such a document is a document filed with the Minister and not with the Court.

9 Supra note 4.

10 See e.g. Cyanamid Agricultural de Puerto Rico Inc. v. Commissioner of Patents (1983) 74 C.P.R.(2d) 133 (F.C.T.D.); and the discussion in Vancouver Island Peace Society v. Canada

(1994) 1 F.C. 102 at 120-21 (F.C.T.D.).

Case Name:

Mahjoub v. Canada (Minister of Citizenship and Immigration)

Between
Mohamed Zeki Mahjoub, Appellant, and
The Minister of Immigration and Citizenship, the Minister of Public Safety, Respondents

[2012] F.C.J. No. 1037

[2012] A.C.F. no 1037

2012 FCA 218

2012 CAF 218

2012 CarswellNat 2869

2012 CarswellNat 4383

219 A.C.W.S. (3d) 424

12 Imm. L.R. (4th) 41

265 C.R.R. (2d) 259

434 N.R. 67

Docket A-313-12

Federal Court of Appeal
Ottawa, Ontario

Dawson J.A.

Heard: In writing.
Judgment: August 3, 2012.

(20 paras.)

Civil litigation -- Civil procedure -- Courts -- Jurisdiction -- Federal courts -- Motion by respondent Ministers to quash appeal from decision refusing to stay proceedings to determine reasonableness of security certificate issued against appellant dismissed -- It was not plain and obvious that court was without jurisdiction to hear appeal -- It was arguable that decision of Federal Court refusing stay of security certificate proceeding was neither determination of whether security certificate was reasonable nor interlocutory decision made in proceeding -- Federal Court's jurisdiction would thus not be ousted under s. 79 of Immigration and Refugee Protection Act.

Immigration law -- Removal and deportation -- Removal from Canada -- Security certificate -- Motion by respondent Ministers to quash appeal from decision refusing to stay proceedings to determine reasonableness of security certificate issued against appellant dismissed -- It was not plain and obvious that court was without jurisdiction to hear appeal -- It was arguable that decision of Federal Court refusing stay of security certificate proceeding was neither determination of whether security certificate was reasonable nor interlocutory decision made in proceeding -- Federal Court's jurisdiction would thus not be ousted under s. 79 of Immigration and Refugee Protection Act.

Motion by the respondent Ministers for an order quashing the appeal. The appellant was named in a security certificate signed by the respondents pursuant to s. 77(1) of the Immigration and Refugee Protection Act. The reasonableness of the certificate was presently before the Federal Court. The appellant brought a motion to permanently stay the proceedings and for other relief. The judge granted the order in part by permanently removing a number of members from the respondents' litigation team. The appellant now appealed from that order. The respondents argued that the appeal from the order denying the appellant's motion to stay the reasonableness hearing should be quashed for want of jurisdiction. The respondents argued that the appeal was an attempt to appeal an interlocutory order made in the course of the s. 77 proceedings and thus was precluded by s. 79.

HELD: Motion dismissed. It was not plain and obvious that the court was without jurisdiction to hear the appeal. It was fairly arguable that the decision of the Federal Court either to refuse or grant a stay of the security certificate proceeding was neither a determination of whether the security certificate was reasonable nor an interlocutory decision made in the proceeding. It was, therefore, not plain and obvious that s. 79 applied to this appeal so as to oust the jurisdiction of the court under s. 27(1) of the Federal Courts Act.

Statutes, Regulations and Rules Cited:

Citizenship Act, R.S.C. 1985, c. C-29, s. 14(6)

Federal Courts Act, R.S.C. 1985, c. F-7, s. 27(1), s. 27(1)(a), s. 27(1)(c)

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 52(a), s. 77(1), s. 78, s. 79

Counsel:

Written representations by:

Johanne Doyon and Paul Slansky, for the Appellant.

Donald MacIntosh, Ian Hicks and Kevin Doyle, for the Respondent.

REASONS FOR ORDER

1 DAWSON J.A.:-- The appellant, Mohamed Zeki Mahjoub, is named in a security certificate signed by the respondent Ministers pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act). The certificate has been referred to the Federal Court, which is in the process of determining whether the certificate is reasonable.

2 By notice of motion dated September 16, 2011, Mr. Mahjoub sought the following relief in the Federal Court:

a. A permanent stay of proceedings in conformity with sections 7, 8 and 24(1) of the *Canadian Charter of Rights and Freedoms*, [Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11] (hereinafter the *Charter*) and section 50 of the *Federal Courts Act* [R.S.C. 1985, c. F-7];
b. An order for the release without conditions of the Applicant;
c. An order reserving the right of the parties to present further submissions for the retrieval, sealing or destruction of the commingled material;
d. In the alternative, such further and other remedy as this Honourable Court considers appropriate and just in the circumstances including the removal of Department of Justice counsel and legal staff on record and Canadian Border Services Agency and Canadian Security Intelligence Service staff.

3 On May 31, 2012, a designated judge of the Federal Court (Judge) granted the motion in part. The Judge permanently removed a number of members of the respondent Ministers' litigation team from the file. All other relief sought on the motion was denied.

4 On June 29, 2012, Mr. Mahjoub filed a notice of appeal in this Court from the order of the Judge.

5 The Ministers now move in writing for an order quashing the appeal pursuant to subsection 52(*a*) of the *Federal Courts Act*. Subsection 52(*a*) allows the Court to "quash proceedings in cases

brought before it in which it has no jurisdiction".

Statutory Provisions

6 As this Court observed in *Mahjoub v. Canada (Minister of Citizenship and Immigration),* 2011 FCA 294, 426 N.R. 49 (Mahjoub #1) at paragraph 7 and following, paragraphs 27(1)(*a*) and (*c*) of the *Federal Courts Act* generally provided an appeal to this Court from any final or interlocutory judgment of the Federal Court. This right may, however, be barred by other statutes.

7 The relevant legislative provision in this case is section 79 of the Act. Section 79 provides:

> 79. An appeal from the determination may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding.
>
> * * *
>
> 79. La décision n'est susceptible d'appel devant la Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci; toutefois, les décisions interlocutoires ne sont pas susceptibles d'appel.

The Positions of the Parties

8 The Ministers assert that the appeal of the Judge's order:

> [...] denying his motion to stay the reasonableness hearing should be quashed for want of jurisdiction. It is an attempted appeal of an interlocutory decision made in the course of a proceeding under section 77 of the *IRPA*. Such an appeal is explicitly barred by the privative clause in section 79 of the *IRPA*. This Court has recognized that this privative clause has a broad scope and precludes appeal of decisions made in the course of a section 77 proceeding. The Appellant has no right of appeal in these circumstances.

9 The Ministers place considerable reliance upon this Court's decision in Mahjoub #1. As the Court explained in those reasons, at paragraphs 14 and 15, the order then under appeal was made in the following circumstances:

> 14 In the course of the section 77 proceedings, the Crown came into possession of documents belonging to counsel for Mr. Mahjoub which contain information that Mr. Mahjoub says is subject to solicitor and client privilege and litigation privilege. The documents in issue became commingled with documents belonging to the Crown. Mr. Mahjoub brought a motion before Justice Blanchard for a permanent stay of the proceedings on the basis of sections 7, 8 and 24(1) of

> the Canadian Charter of Rights and Freedoms. The Crown opposed the motion.
>
> 15 Justice Blanchard heard the motion on October 3, 2011 and reserved his decision. It appears that in the course of the hearing, Justice Blanchard concluded that in order to determine the remedy, if any, that would be appropriate in the circumstances, it would be necessary to have the commingled documents separated and returned to the respective parties so that they would be in a position to make specific submissions on the nature and extent of the alleged prejudice. In that context, Justice Blanchard made the order under appeal on October 4, 2011. [...]

10 The order then under appeal established a process for the commingled documents to be separated and returned to the respective parties. This Court quashed the appeal from such order for want of jurisdiction.

11 The Ministers argue that in Mahjoub #1 this Court found that the order then under appeal was rendered in the course of the section 77 proceedings. They assert that "[g]iven that finding, the decision on the stay motion itself must also have been rendered in the course of the section 77 proceedings and is similarly covered by the privative clause in section 79."

12 For his part, Mr. Mahjoub argues that:

> [...] s. 79 of the *IRPA* has no application to this appeal and [...] this appeal is governed by section 27 of the [*Federal Courts Act]*. While the application arose in the context of a hearing under the *IRPA*, the nature of the application had nothing to do with the determination of the reasonableness of the certificate or of the Appellant's release conditions and it is not judicial review covered by section 72 of the *IRPA*. The application was an application for a stay based on government seizure of privileged documents of an adverse party. Section 79 of the *IRPA* only requires certifications for appeals of decisions on the reasonableness of a security certificate and only bar appeals from interlocutory decisions related to the certificate. A final order on an application for a stay under s. 50 of the [*Federal Courts Act*] or under section 7 or 24 of the *Charter* is clearly not an interlocutory decision related to the reasonableness of the certificate. Finally, where, as here, the refusal of a stay goes to jurisdiction, the decision is not under s. 79 of the *IRPA* and the section does not apply.

The standard to be met on a motion to quash

13 In *Arif v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 157, 405 N.R. 381 a panel of Judges of this Court considered whether the Court possessed jurisdiction to hear an appeal from the Federal Court or whether the jurisdiction was ousted by subsection 14(6) of the *Citizenship*

Act, R.S.C. 1985, c. C-29. A judge of this Court, sitting alone, had previously denied a motion to quash the notice of appeal on jurisdictional grounds. At paragraph 9 of its reasons, this Court characterized the issue before the single judge on the motion to quash to be "whether it was 'plain and obvious' that the appeal [...] had no chance of success (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959)." The decision of the single judge denying the motion to quash "[a]t most" indicated "that he was not convinced at that juncture that the Court was without jurisdiction to hear the appeal".

14 The test I will apply to this motion, therefore, is whether it is plain and obvious that the Court is without jurisdiction to hear the appeal.

Discussion

15 I am unable to conclude that it is plain and obvious that this Court is without jurisdiction to hear the appeal. Therefore, the motion to quash will be dismissed and the judges of this Court appointed to hear this appeal will determine whether this Court has jurisdiction.

16 Because the panel appointed to hear this appeal will decide the issue of jurisdiction, my reasons are brief and should be seen as relevant only to the application of the plain and obvious test.

17 The privative provision relied upon by the Ministers, section 79 of the Act, must be read in the context of section 78 of the Act. Together they read:

> 78. The judge shall determine whether the certificate is reasonable and shall quash the certificate if he or she determines that it is not.
> 79. An appeal from the determination may be made to the Federal Court of Appeal only if the judge certifies that a serious question of general importance is involved and states the question. However, no appeal may be made from an interlocutory decision in the proceeding. [emphasis added]
>
> * * *
>
> 78. Le juge décide du caractère raisonnable du certificat et l'annule s'il ne peut conclure qu'il est raisonnable.
> 79. La décision n'est susceptible d'appel devant la Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci; toutefois, les décisions interlocutoires ne sont pas susceptibles d'appel. [Non souligné dans l'original.]

18 In my view, relying upon the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, particularly at paragraphs 44 to 66, it is fairly arguable that the decision of the Federal Court either to refuse or grant a stay of the security certificate proceeding was neither a determination whether the security certificate is reasonable, nor

an interlocutory decision made in the proceeding. It is, therefore, not plain and obvious that section 79 applies to this appeal so as to oust the jurisdiction of the Court under subsection 27(1) of the *Federal Courts Act*.

19 To the extent that the Ministers rely upon Mahjoub #1, it is, in my view, fairly arguable that the decision can be distinguished on the ground that it turned on this Court's characterization of the order then under appeal to be an interlocutory decision rendered in the course of proceedings under section 77 of the Act that fell squarely within section 79 of the Act.

Conclusion

20 For these reasons, the motion to quash the appeal will be dismissed.

DAWSON J.A.

cp/e/qlaim/qlpmg/qlced/qlecl/qlced/qlwxy

Case Name:

R. v. Canadian Broadcasting Corp.

Between
Canadian Broadcasting Corporation, Applicant (Appellant in Appeal), (Respondent in Cross-Appeal), and
Her Majesty the Queen, Respondent (Respondent in Appeal), and
Valentino Burnett, Karen Eves, Blaine Phibbs and Travis MacDonald, Respondents (Respondents in Appeal), and
Waterloo Regional Police Service and The Office of the Chief Coroner, Respondents (Respondents in Appeal), and
Correctional Service of Canada, Respondent (Respondent in Appeal), (Appellant in Cross-Appeal)

[2010] O.J. No. 4615

2010 ONCA 726

221 C.R.R. (2d) 242

271 O.A.C. 7

102 O.R. (3d) 673

262 C.C.C. (3d) 455

327 D.L.R. (4th) 470

Dockets: C51613, C51617

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, R.J. Sharpe and G.J. Epstein JJ.A.

Heard: September 15, 2010.
Judgment: November 1, 2010.

(55 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Fundamental freedoms -- Freedom of thought, belief, opinion and expression -- Freedom of expression -- Appeal by CBC from order imposing limitations on its right to access and copy preliminary inquiry exhibits for documentary allowed -- Cross-appeal by Correctional Service of Canada ("CSC") from order granting CBC any right to copy exhibits dismissed -- Absent finding of potential harm or injury to legally protected interest, there was nothing permitting a judge to impose his or her opinion about what did not need to be broadcast to general public -- Such an order would be inconsistent with constitutionally protected freedoms of expression and the press.

Criminal law -- Preliminary inquiry -- Publication bans and confidentiality orders -- Appeal by CBC from order imposing limitations on its right to access and copy preliminary inquiry exhibits for documentary allowed -- Cross-appeal by Correctional Service of Canada ("CSC") from order granting CBC any right to copy exhibits dismissed -- Absent finding of potential harm or injury to legally protected interest, there was nothing permitting a judge to impose his or her opinion about what did not need to be broadcast to general public -- Such an order would be inconsistent with constitutionally protected freedoms of expression and the press.

Criminal law -- Coroner's inquest or inquiry -- Procedure -- Appeal by CBC from order imposing limitations on its right to access and copy preliminary inquiry exhibits for documentary allowed -- Cross-appeal by Correctional Service of Canada ("CSC") from order granting CBC any right to copy exhibits dismissed -- Absent finding of potential harm or injury to legally protected interest, there was nothing permitting a judge to impose his or her opinion about what did not need to be broadcast to general public -- Such an order would be inconsistent with constitutionally protected freedoms of expression and the press.

Media and Communications law -- Legislative framework -- Legislation -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Appeal by CBC from order imposing limitations on its right to access and copy preliminary inquiry exhibits for documentary allowed -- Cross-appeal by Correctional Service of Canada ("CSC") from order granting CBC any right to copy exhibits dismissed -- Absent finding of potential harm or injury to legally protected interest, there was nothing permitting a judge to impose his or her opinion about what did not need to be broadcast to general public -- Such an order would be inconsistent with constitutionally protected freedoms of expression and the press.

Media and Communications law -- Broadcasting -- Television -- Canadian Broadcasting Corporation -- Content -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Freedom of expression -- Appeal by CBC from order imposing limitations on its right to access and copy preliminary inquiry exhibits for documentary allowed -- Cross-appeal by Correctional Service of Canada ("CSC") from order granting CBC any right to copy exhibits dismissed -- Absent finding of potential harm or injury to legally protected interest, there was nothing permitting a judge to impose his or her opinion about what did not need to be broadcast to general public -- Such an order would be inconsistent with constitutionally protected freedoms of expression and the press.

Appeal by CBC from an order imposing limitations on its right to access and copy preliminary inquiry exhibits. Cross-appeal by the Correctional Service of Canada ("CSC") from the order granting CBC any right to copy the exhibits. Ashley Smith, a 19-year-old from Moncton, New Brunswick, was serving a six-year sentence at the Grand Valley Institution for Women. On October 19, 2007, while under observation in an isolation cell, she strangled herself with a strip of cloth. Four correctional officers were charged with criminal negligence causing death. Those charges proceeded to a preliminary inquiry where certain exhibits were introduced into evidence. The exhibits included video recordings, one of which captured the actual circumstances of Ashley Smith's death. Part way through the preliminary inquiry, the Crown decided not to proceed with the charges and the four correctional officers were discharged. A coroner's warrant was subsequently issued for the seizure of all documents related to Ashley Smith's death, including the preliminary inquiry exhibits. CBC decided to produce an investigative documentary on Ashley Smith's life. CBC sought access to and copies of the preliminary inquiry exhibits. The preliminary inquiry judge refused CBC's request on the ground that he should not interfere with the process of the coroner's inquest. CBC sought certiorari to quash the preliminary inquiry judge's decision and an order pursuant to s. 24(1) of the Charter granting it access to and the right to copy the exhibits. The application judge found that the preliminary inquiry judge erred by refusing to deal with CBC's application on the merits, and that CBC was entitled to access the exhibits. However, he held that CBC was entitled to view and copy only those portions of the video evidence that were actually played at the preliminary inquiry, and that CBC was entitled to view but not copy the portion of the video that was played showing Ashley Smith's death.

HELD: Appeal allowed and cross-appeal dismissed. The application judge erred by limiting CBC's right of access to only those portions of the exhibits that were played in open court. Absent some countervailing consideration, the open court principle and the media's right of access to judicial proceedings extended to anything that had been made part of the record, subject to any specific order to the contrary. The application judge did not give extensive reasons for refusing CBC the right to copy the portion of the video showing the circumstances of the death of Ashley Smith, and there was nothing in the record that could be invoked to justify the limitation imposed by the application judge. The application judge's perception that the image of a person dying was not something that needed to be broadcast to the general public was not based upon a finding of potential harm or injury to a recognized legal interest. Ashley Smith's mother, who was willing to have the circumstances of her daughter's death publicly considered, asserted no claim to privacy and agreed that CBC should have access. Absent any finding of potential harm or injury to a legally protected interest, there was nothing that permitted a judge to impose his or her opinion about what did not need to be broadcast to the general public. Such an order would be inconsistent with the constitutionally protected freedoms of expression and the press. Privacy interests and the protection of the innocent did not automatically trump the public's right to access. The right to access exhibits included the right to make copies.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 2(b), s. 24(1)

Coroners Act, R.S.O. 1990, c. C.37, s. 31

Criminal Code, R.S.C. 1985, c. C-46, s. 539(1)(c)

Appeal From:

On appeal from the judgment of Justice G.E. Taylor of the Superior Court of Justice dated January 5, 2010, with reasons reported at (2010), 251 C.C.C. (3d) 414.

Counsel:

Patricia M. Latimer, for Canadian Broadcasting Corporation.

Joel Robichaud and Nancy Noble, for Correctional Service of Canada.

Lorenzo D. Policelli, for the Office of the Chief Coroner.

Gary Melanson, for Waterloo Regional Police Service.

The judgment of the Court was delivered by

1 R.J. SHARPE J.A.:-- This appeal involves consideration of the media's right to access and copy exhibits filed at a preliminary inquiry. In October 2007, Ashley Smith died in custody at the Grand Valley Institution for Women. Four correctional officers were charged with criminal negligence causing death. Those charges proceeded to a preliminary inquiry where certain exhibits were introduced into evidence. The exhibits included video recordings, one of which captured the actual circumstances of Ashley Smith's death. Part way through the preliminary inquiry, the Crown decided not to proceed with the charges and the four correctional officers were discharged. A coroner's warrant was subsequently issued for the seizure of all documents related to Ashley Smith's death including the preliminary inquiry exhibits.

2 The appellant Canadian Broadcasting Corporation ("CBC") decided to produce an investigative documentary on Ashley Smith's tragic life. CBC sought access to and copies of the preliminary inquiry exhibits. The preliminary inquiry judge refused CBC's request on the ground that he should not interfere with the process of the coroner's inquest. The application judge granted certiorari to review that order and held that CBC was entitled to access the exhibits, but he limited CBC's rights in certain respects. In particular, he held that CBC was entitled to view and copy only those portions

of the video evidence that were actually played at the preliminary inquiry, and that CBC was entitled to view but not copy the portion of the video that was played showing Ashley Smith's death.

3 CBC appeals the limitations imposed on its right to access and copy the exhibits. The Correctional Service of Canada ("CSC") cross-appeals arguing that the application judge erred by applying the *Dagenais/Mentuck* test and granting CBC any right to copy the exhibits.

FACTS

4 Ashley Smith, a 19-year-old from Moncton, New Brunswick, was serving a six-year sentence at the Grand Valley Institution for Women in Kitchener. On October 19, 2007, while under observation in an isolation cell, she strangled herself with a strip of cloth. Four correctional officers employed by CSC were charged with criminal negligence causing death. Those charges proceeded to a preliminary inquiry in November 2008. A publication ban was imposed pursuant to s. 539 of the *Criminal Code*. The exhibits entered into evidence included photographs, documents and audio and video recordings relating to CSC's management of Ashley Smith. Although these recordings were marked as exhibits in their entirety, only portions were actually played in open court. The portion of one of the video recordings showing the actual circumstances of Ashley Smith's death was played in open court.

5 Several days into the preliminary inquiry, the Crown determined that there was no reasonable prospect of any of the accused being convicted and decided not to proceed with the charges. All four accused were discharged. As the preliminary inquiry had concluded, the publication ban expired pursuant to s. 539(1)(c) of the *Criminal Code*. The exhibits were returned to the investigating police force, the Waterloo Region Police Service ("WRPS"), and then given to the Office of the Chief Coroner ("OCC") pursuant to a coroner's warrant for the purpose of a coroner's inquest into Ashley Smith's death.

6 Several CSC employees were disciplined and grievances were filed. The estate and members of Ashley Smith's family commenced a civil action against CSC.

PROCEEDINGS IN THE ONTARIO COURT OF JUSTICE AND SUPERIOR COURT OF JUSTICE

7 In July 2009, some seven months after the conclusion of the preliminary inquiry, CBC applied to the Ontario Court of Justice for access to the preliminary inquiry exhibits. CBC wanted copies of the exhibits to use in a proposed documentary on Ashley Smith's life for the series *the fifth estate*. The preliminary inquiry judge held that he retained jurisdiction over the exhibits but he refused to deal with CBC's request on the ground that he should not interfere with the process of the coroner's inquest.

8 CBC sought certiorari in the Superior Court of Justice to quash the decision of the preliminary inquiry judge and an order pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*

granting it access to and the right to copy the exhibits. The application judge found that the preliminary inquiry judge erred by refusing to deal with CBC's application on the merits, and then turned to CBC's application for a s. 24(1) *Charter* remedy.

9 The application judge held that the principles enunciated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, [2001] 3 S.C.R. 442, generally know as the "*Dagenais/Mentuck*" test, applied to CBC's request. The *Dagenais/Mentuck* test requires the party opposing media access to demonstrate that the order is necessary to prevent a serious risk to the proper administration of justice and that the salutary effects of the order sought outweigh the deleterious effects on the rights and interests of the parties and the public.

10 The application judge concluded that the respondents could not satisfy that onus and that CBC was entitled to access the preliminary inquiry exhibits subject to a number of exceptions and limitations. CBC takes no issue with the following exceptions and limitations imposed by the application judge:

* the faces of any CSC officer or any other individual who did not consent to their faces being shown was to be digitally obscured;
* the audio recordings were to be edited to remove the names of any corrections officers or other person who did not consent to their name being broadcast;
* the copying and editing of the video and audio recordings was to be done so as to maintain the integrity of the original recordings;
* the exhibits are to be used solely for use in a documentary by *the fifth estate*;
* no copies are to be made of the exhibits other than for that use;
* copies of the exhibits are not to be posted on any internet site except as part of a documentary by *the fifth estate*.

11 CBC appeals the following exceptions and limitations imposed by the application judge, namely, that it:

* is entitled to access and copy only the portions of the video recordings that were played in open court;
* is entitled to view but not copy the portion of the video showing Ashley Smith's death that was played in open court;
* is entitled to view but not to copy the portion of one video recording showing four correctional officers entering the segregation unit;
* where it is uncertain what portion of an exhibit was actually played in open court CBC was denied any access to that exhibit.

12 The application judge denied the OCC's request for an order delaying release of the exhibits until completion of the coroner's inquest.

13 On January 8, 2010, CBC aired *the fifth estate* documentary on the life of Ashley Smith which incorporated some video footage from the exhibits copied in accordance with the application judge's order.

ISSUES

14 CBC appeals the restrictions imposed by the application judge on its right to access and copy the exhibits that I have identified in para. 11 of these reasons. The respondent CSC cross-appeals the order granting CBC the right to access and copy the exhibits. The respondent OCC takes the position that the application judge should have deferred CBC's request to the coroner presiding at the coroner's inquest into Ashley Smith's death. The respondent WRPS essentially supports the order of the application judge.

15 As the cross-appeal raises the fundamental issue of whether CBC was entitled to any access to the exhibits, I will deal with that issue first. I will then turn to the issues raised by CBC's appeal as to the limitations imposed on its right to access and copy the exhibits.

16 The issues may be summarized as follows:

1. Did the application judge err by applying the *Dagenais/Mentuck* test to CBC's request?
2. Did the application judge err by limiting CBC's right to access and copy the exhibits?
3. Did the application judge err by failing to give adequate consideration to the coordinate jurisdiction of the OCC?

ANALYSIS

1. Did the application judge err by applying the Dagenais/Mentuck test to CBC's request?

17 CSC submits that the application judge erred by applying the *Dagenais/Mentuck* test to CBC's request to access and obtain copies of exhibits. CSC argues that *Vickery v. Nova Scotia Supreme Court (Prothonotary),* [1991] 1 S.C.R. 671, governs such requests and required that CBC satisfy the onus of demonstrating why it was entitled to copies of the exhibits. CSC argues that the open court principle allows the public and the media to attend court and to listen to and observe the evidence as it is given, but does not stand for the proposition that the media is entitled to obtain copies of the exhibits and to publish or broadcast the copies.

18 *Vickery* involved a media request for access to an accused's alleged confession that had been excluded at a murder trial. The accused was acquitted and a journalist sought access to the alleged confession. By a 6-3 majority, the Supreme Court denied access, essentially on the ground that the acquitted accused's privacy interest and the need to protect the innocent outweighed the public's right of access.

19 *Vickery* preceded *Dagenais* and *Mentuck.* In *Vickery*, the Supreme Court of Canada expressly refused to consider the *Charter* as the journalist seeking access had not raised the *Charter* at first instance. As *Dagenais* and *Mentuck* make clear, the *Charter* has fundamentally altered the legal landscape in relation to court orders limiting freedom of the press in relation to court proceedings. *Vickery* plainly did not take into account that fundamental legal change. And, as the application judge rightly observed at para. 14, *Vickery* did not purport "to formulate a general rule for regulating access to audio and video recordings which were made court exhibits."

20 For the Supreme Court's post-*Charter* test that applies to all discretionary decisions limiting freedom of the press in relation to court proceedings, it is to *Dagenais* and *Mentuck* that one must turn. The *Dagenais/Mentuck* test, as restated in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 at para. 26, reflects the importance of the open court principle and the rights of freedom of expression and freedom of the press in relation to judicial proceedings. Restrictions on the open court principle and freedom of the press in relation to judicial proceedings can only be ordered where the party seeking such a restriction establishes through convincing evidence that:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> (b) the salutary effects of the restriction outweigh the deleterious effects on the rights and interest 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.

21 While the *Dagenais/Mentuck* test was developed in the context of publication bans, the Supreme Court has stated that it applies any time s. 2(b) freedom of expression and freedom of the press rights are engaged in relation to judicial proceedings: "[T]he *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings": *Toronto Star* at para. 7 (emphasis in original). See also *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at paras. 30-31.

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*: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 at p. 184. As Dickson J. stated at pp. 186-187: "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."

23 Now recognized as a fundamental aspect of the rights guaranteed by s. 2(b) of the *Charter*, the open court principle has taken on added force as "one of the hallmarks of a democratic society" that deserves constitutional protection: *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, [1996]

3 S.C.R. 480 at para. 22.

24 The open court principle and the rights conferred by s. 2(b) of the *Charter* embrace not only the media's right to publish or broadcast information about court proceedings, but also the media's right to gather that information, and the rights of listeners to receive the information. "[T]he press must be guaranteed access to the courts in order to gather information" and "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press.": *CBC v. New Brunswick* at paras. 23-26. In *Vancouver Sun (Re)* at para. 25, the Supreme Court of Canada described the openness of the courts and judicial processes as being "necessary to maintain the independence and impartiality of courts", "integral to public confidence in the justice system" and "a principal component of the legitimacy of the judicial process".

25 I am unable to accept CSC's submission that the *Dagenais/Mentuck* test does not apply to media requests for access to exhibits. That argument has been properly and firmly rejected by two provincial appellate courts. In *R. v. Fry* (2010), 254 C.C.C. (3d) 394 at para. 65 (B.C.C.A.), a majority of the British Columbia Court of Appeal held that "the principles enunciated by the Supreme Court of Canada" in *Dagenais* and *Mentuck* "are fully applicable" to a media request for access to and the right to copy an exhibit after the conclusion of a trial. *R. v. Hogg* (2006), 208 Man. R. (2d) 244 (C.A.) is to the same effect. The Manitoba Court of Appeal applied the *Dagenais/Mentuck* test to assess the media's right to access a video recording of a statement made by an accused person that had been entered as an exhibit at a preliminary inquiry.

26 To paraphrase Fish J. in *Toronto Star* at para 30, CSC's argument that the *Dagenais/Mentuck* test does not apply to CBC's right to access and copy exhibits "is doomed to failure by more than two decades of unwavering decisions" from the Supreme Court and from provincial courts of appeal.

27 In my view, the authority of *Vickery*, post *Dagenais* and *Mentuck,* is limited. The case still stands as authority for the proposition that concern for the protection of the privacy and reputation of innocent persons are among the factors to be considered and weighed by the judge applying the *Dagenais/Mentuck* test, although under *Dagenais/Mentuck*, privacy interests and the protection of the innocent no longer automatically trump the public's right to access: *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry* (2007), 278 D.L.R. (4th) 550 at para. 42 (Ont. C.A.).

(i) Are the media's rights limited to attending court and observing and reporting on what transpires in the courtroom?

28 I do not agree with CSC's submission that the open court principle and the media's s. 2(b) *Charter* rights are limited to attending court and observing and reporting on what actually transpires in the courtroom. Even before the *Charter*, access to exhibits that were used to make a judicial determination, even ones introduced in the course of pre-trial proceedings and not at trial, was a well-recognized aspect of the open court principle: *MacIntyre.* That approach was endorsed in

Vancouver Sun at para. 27:

> [T]he principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy considerations upon which openness is predicated are the same as in the trial stage. ... [In *MacIntyre*,] Dickson J. found "it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy".

29 Likewise, in *Toronto Star*, the Supreme Court applied the *Dangenais/Mentuck* test to a Crown application to seal search warrant materials, thereby underlining that *Dagenais/Mentuck* applies to ensure the "openness of the judicial process", not only what actually transpires in open court. CSC's argument was implicitly rejected by this court in *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18, where the court held that the jurisdiction to order access to exhibits does not vanish simply because the exhibits were filed in open court.

30 In *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743 at para. 72, the Supreme Court defined the media's right to access to court records and exhibits very broadly and in terms that are inconsistent with notion of a bare right to report on what actually transpires in open court:

> [O]nce the trial begins, and except for the limited number of cases held *in camera* or subject to a publication ban, *the media will have broad access to the court records, exhibits and documents filed by the parties, as well as to the court sittings*. They have a *firm guarantee of access*, to protect the public's right to information about the civil or criminal justice systems and freedom of the press and freedom of expression. [Emphasis added.]

(ii) Does the right to access exhibits include the right to make copies?

31 In my view, absent the proof of some countervailing interest sufficient to satisfy the *Dagenais/Mentuck* test, the right to access exhibits includes the right to make copies.

32 While the Supreme Court of Canada appears not to have directly ruled on this point, there are *dicta* in at least two Supreme Court decisions supporting the proposition that the right to access exhibits includes the right to make copies.

33 In *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253 at para. 33, the court reaffirmed the holding in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at p. 1338, that the right to access exhibits includes the right to make copies as "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'."

34 We were referred to a long list of first instance decisions dealing with the right to make copies. While those decisions are not entirely consistent, the clear preponderance of authority applies the *Dagenais/Mentuck* test to such requests and allows for copies to be made.

35 Most, if not all, of the decisions cited by CSC in support of the argument that there is no right to copy exhibits are readily distinguishable. *R. v. Pilarinos* (2001), 158 C.C.C. (3d) 1 (B.C.S.C.), dealt with the British Columbia Supreme Court's policy banning cameras from the courtroom. Likewise, *Société Radio-Canada c. Québec (A.G.)*, 2008 QCCA 1910, dealt with restrictions on holding interviews and recording images within the courthouse and the prohibition of broadcasts of court hearings. The debate over cameras in the courtroom and the right to broadcast court proceedings raises very different issues that do not concern us in this appeal.

36 Three cases cited by CSC dealt with the impact of allowing access on fair trial rights in ongoing criminal trials. In *R. v. Sylvester* (2007), 222 C.C.C. (3d) 106 (Ont. S.C.), the trial judge refused to allow a media request to copy an exhibit, but he did so because he was satisfied (at para. 86) that "to permit dissemination to occur ... would pose a real and substantial risk to [the accused's] right to a fair trial." *R. v. Cairn-Duff* (2008), 237 C.C.C. (3d) 181 (Alta. Q.B.), also dealt with a mid-trial request to copy an exhibit. While there are certainly some statements in that case that could be taken to support CSC's position, the trial judge also referred to the need to protect the accused's right to a fair trial and the failure of the media to give notice to all persons who might be affected by allowing copies to be made.

37 *R. c. Dufour*, 2008 CarswellQue 14365 (S.C.), leave to appeal granted, [2009] S.C.C.A. No. 84, also dealt with a mid-trial application for access to a video recording of a statement made by the accused. The trial judge denied that request on the ground that Rules of Practice of the Superior Court prohibit the broadcast of the proceedings of the court.

38 In my view, the cases cited by CSC do not establish anything approaching a general rule or practice that the media are not entitled to copies of exhibits filed in judicial proceedings. In the present case, there is no fair trial interest to protect, as all four accused were discharged at the preliminary inquiry, and no suggestion that the ban on cameras in the courtroom applies.

39 On the other side of the ledger, there is a very long line of cases that permit the media to make copies of exhibits. In *R. v. Hogg*, the media sought access to a video recording of an accused that had been introduced at a preliminary inquiry. The accused pleaded guilty at trial and received a conditional sentence. The Crown successfully appealed the sentence and a custodial term was imposed. At that point, the media sought access to the video recording of the statement and the right to make a copy for purposes of broadcast. The Manitoba Court of Appeal held at para. 47 that the media were "entitled to have access to and copy the videotape subject to any condition the court officers may impose to preserve the integrity of the exhibit." For other cases allowing the right to access and copy exhibits, see e.g.: *R. v. Fry*; *R. v. Baltovich* (2008), 232 C.C.C. (3d) 445 (Ont. S.C.); *R. v. Côté* (2007), 213 Man. R. (2d) 233 (Q.B.); *R. v. Hilderman* (2006), 395 A.R. 218

(Q.B.); *R. v. Black*, 2006 BCSC 2040; *R. v. Arenburg* (1997), 38 O.T.C. 91 (Gen. Div.); *R. v. Van Seters* (1996), 31 O.R. (3d) 19 (Gen. Div.); *R. v. Stark*, [1995] B.C.J. No. 3064 (S.C.).

(iii) Conclusion: application of the Dagenais/Mentuck test.

40 I conclude that the trial judge was correct in applying the *Dagenais/Mentuck* test to CBC's request for access to and copies of the exhibits at issue in this case. If CBC is to be denied access, or to have its access limited, it is for the party seeking to assert or uphold that denial to demonstrate through convincing evidence that the two-part *Dagenais/Mentuck* test has been satisfied.

41 Accordingly, I would dismiss the cross-appeal.

2. Did the application judge err by limiting CBCs right to access and copy the exhibits?

(a) Is access and the right to copy limited to only those portions of the videos played in open court?

42 In my view, the application judge erred by limiting CBC's right of access to only those portions of the exhibits that were played in open court. While this result follows from much of what I have already said about the application of the *Dagenais/Mentuck* test, I add the following considerations.

43 When an exhibit is introduced as evidence to be used without restriction in a judicial proceeding, the entire exhibit becomes a part of the record in the case. While a party may choose to read or play only portions of the exhibit in open court, the trier of fact, whether judge or jury, is not limited to considering only those portions when deciding the case. A party who introduces an exhibit without restriction cannot limit the attention of the trier of fact to only portions of the exhibit that favour that party and that the party chooses to read out or play in open court.

44 As the entire exhibit is evidence to be used in deciding the case, I can see no principled reason to restrict access to only those portions played or read out in open court. When Dickson J. articulated and applied the open court principle to accord a journalist access to an affidavit filed in support of a search warrant application in *MacIntrye*, he was plainly confronted with material that had not been read out in open court. Yet he did not hesitate to order access. Absent some countervailing consideration sufficient to satisfy the *Dagenais/Mentuck* test, the open court principle and the media's right of access to judicial proceedings must extend to anything that has been made part of the record, subject to any specific order to the contrary.

45 Accordingly, it is my view that the application judge erred by limiting CBC's access to only those portions of the exhibits that were played in open court.

(b) Did the application judge err by refusing CBC the right to copy the portion of the video exhibit showing the actual circumstances of the death of Ashley Smith?

46 The application judge did not give extensive reasons for refusing CBC the right to copy the

portion of the video showing the circumstances of the death of Ashley Smith. He stated at para. 49:

> I have decided that the CBC should be entitled to access to the video recording of Ashley Smith's death but not to have a copy of the recording. The gruesome image of a person dying is not something that I feel needs to be broadcast to the general public. By allowing the CBC access to the recording, will permit a verbal description to be broadcast, which in my view is sufficient.

47 We have viewed the contested portion of the video and it is certainly disturbing. However, I am not persuaded that there is anything in the record before us that can be invoked to justify the limitation imposed by the application judge, whether under the *Dagenais/Mentuck* test or under any other legal rule or principle.

48 The circumstances of this case are distinguishable from *R. v. Bernardo*, [1995] O.J. No. 1472 (Gen. Div.), leave to appeal refused, [1995] S.C.C.A. No. 250, further appeal dismissed for lack of jurisdiction, 122 C.C.C. (3d) 475 (Ont. C.A.), where the trial judge made an order relating to the treatment at trial of video tape evidence depicting in explicit detail the sexual assaults and rapes of four young girls, three of who were murder victims. LeSage A.C.J.O.C. applied the *Dagenais* test and, after a careful review of the evidence and the competing *Charter* arguments, concluded that the case for restricting access had been made out. He ruled that when the evidence was played, it should be visible only to the judge, the jury, counsel, the accused and to the extent necessary, court staff. No limit was imposed on the access to the audio portion of the exhibit. LeSage A.C.J.O.C. stated at para. 121 that the evidence established that "the harm that flows from the public display of this videotape evidence far exceeds any benefit that will flow from the public exposure of sexual assault and child pornography." LeSage A.C.J.O.C. found, again at para. 121, that the families of the victims would

> ... suffer tremendous psychological, emotional and mental injury if the evidence, as the Crown has described it in the opening statement, that is rape; anal and vaginal, the forced fellatio, cunnilingus, anilingus, forcing of the neck of a wine bottle in both the vagina and anus of one of these young women, is publicly displayed.

49 There are no comparable findings in this case. The application judge's perception that "[t]he gruesome image of a person dying is not something that I feel needs to be broadcast to the general public" is not based upon a finding of potential harm or injury to a recognized legal interest. Ashley Smith's mother, willing to have the circumstances of her daughter's death publicly considered, asserts no claim to privacy and agrees that CBC should have access and no other member of Ashley Smith's family has objected.

50 With respect, absent any finding of potential harm or injury to a legally protected interest, there is nothing in the law that permits a judge to impose his or her opinion about what does not need to be broadcast to the general public. That would be inconsistent with the constitutional

protection our legal order accords freedom of expression and freedom of the press. In this case, there is no finding of harm or injury capable of overriding a constitutional guarantee, and I would set aside that part of the application judge's order.

(c) Other limitations

51 CBC also raises the issue of the propriety of the restriction the application judge imposed on copying a portion of exhibit 41 because it "is something about which the Correction Service of Canada has security concerns". The evidence in support of that contention is limited to a bald assertion and, having viewed the exhibit, it is very difficult to discern what the security concern would be. In my view, the evidence led to support this restriction on access falls well short of the "convincing evidence" required to satisfy the *Dagenais/Mentuck* test. Accordingly, I would set aside that part of the application judge's order.

3. Did the application judge err by failing to give adequate consideration to the coordinate jurisdiction of the OCC?

52 The OCC takes the position that the presiding coroner is in the best position to decide the impact of publication or broadcast of exhibits on a pending inquest and that the application judge failed to take that into account. The OCC submits that the issue of the right to access and copy the exhibits should be left to the coroner presiding at the inquest into the death of Ashley Smith.

53 I am unable to accept that submission. As specified by s. 31 of the *Coroners Act*, R.S.O. 1990, c. C.37, the coroner's jury will be prohibited from making any findings of legal responsibility in relation to Ashley Smith's death, but will be asked to make recommendations "directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest." There is nothing in this record to show that the order sought by CBC would interfere with the successful accomplishment of that mandate. In my view, the application judge quite properly concluded that there was no risk to the administration of justice arising from the pending coroner's inquest that would justify restricting CBC's access to the exhibits.

54 Nor, in the context of this case, does any possessory interest of the CSC, OCC or WRPS constitute a factor capable of precluding the court from exercising its jurisdiction over the exhibits and making an order in favour of CBC: see *CTV Television Inc.* at paras. 24-27.

DISPOSITION

55 For these reasons, I would allow CBC's appeal and dismiss CSC's cross-appeal. The order of the application judge should be amended in accordance with these reasons.

R.J. SHARPE J.A.
J.I. LASKIN J.A.:-- I agree.
G.J. EPSTEIN J.A.:-- I agree.

cp/e/ln/qllxr/qlhcs/qljyw/qlced

Case Name:

Standing Buffalo Dakota First Nation v. Canada (Attorney General)

Between
Standing Buffalo Dakota First Nation, and Chief Rodger Redman, Councillor Wayne Goodwill, Councillor Dion Yuzicappi, Councillor Clifton Isnana, Council Curtis Whiteman and Councillor Donald Wajunta as representatives of the Members of Standing Buffalo Dakota First Nation, Applicants, and Attorney General for Canada, Enbridge Pipelines (Westspur) Inc., Encana Corporation, Respondents

[2008] F.C.J. No. 1124

2008 FCA 222

93 Admin. L.R. (4th) 1

2008 CarswellNat 2616

Docket A-349-07

Federal Court of Appeal
Regina, Saskatchewan

Sharlow, Pelletier and Ryer JJ.A.

Heard: June 3, 2008.
Judgment: June 23, 2008.

(28 paras.)

Counsel:

M. Rasmussen Q.C. and M. Phillips, for the Applicants.

R. Newfeld Q.C., for the Respondents.

The judgment of the Court was delivered by

1 SHARLOW J.A.:-- This is an application for judicial review of a decision of the National Energy Board (OH-2-2007) communicated to the applicants on June 28, 2007. That decision approved the application of the respondent Enbridge Pipelines (Westspur) Inc. ("Enbridge") for a certificate of public convenience and necessity under section 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-6, for a project called the "Alida to Cromer Capacity Expansion Project" (the "Project"). The applicants, Standing Buffalo Dakota First Nation and its members (collectively, "Standing Buffalo"), intervened in the proceedings before the NEB to oppose the Enbridge application, but without success. Standing Buffalo argues that this Court should quash the NEB decision because Standing Buffalo has a credible claim of Aboriginal title to the land on which the Project is located and the NEB decision was made in breach of their right to be consulted and accommodated in respect of their interest in that land, and because the NEB erred in failing to compel the Government of Canada to appear at the hearing to address the issue of consultation.

2 Enbridge disputes these arguments, and further argues that this Court is without jurisdiction to consider Standing Buffalo's application for judicial review. For the reasons that follow, I have concluded that Enbridge is correct on the question of jurisdiction, and I would dismiss this application on that basis.

Statutory scheme

3 The decision of the NEB was made under section 52 of the *National Energy Board Act*, which reads in relevant part as follows:

> **52.** The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant [...].
>
> * * *
>
> **52.** Sous réserve de l'agrément du gouverneur en conseil, l'Office peut, s'il est convaincu de son caractère d'utilité publique, tant pour le présent que pour le futur, délivrer un certificat à l'égard d'un pipeline; ce faisant, il tient compte de tous les facteurs qu'il estime pertinents [...].

Facts

4 Enbridge owns and operates the Enbridge Westspur pipeline system. That pipeline system transports crude oil received from gathering systems and from truck terminals. It also transports natural gas liquids from a gas processing plant in Steelman, Saskatchewan to the Enbridge Pipelines Inc. terminal at Cromer, Manitoba, which interconnects to the Enbridge Pipeline Inc. mainline.

5 This case deals with the 60 kilometre portion of the Enbridge Westspur pipeline located between Alida, Saskatchewan and Cromer, Manitoba. The purpose of the Project was to increase the annual crude oil transportation capacity over those 60 kilometres from 25,000 cubic metres per day to 29,900 cubic meters per day. The right of way for the original Enbridge pipeline between Alida and Cromer was 15 meters wide. Beginning in 1956, there were two Enbridge pipelines operating within that right of way, a 12 inch pipeline for natural gas liquids and a 16 inch pipeline for crude oil. The Project would widen the right of way by a further 20 meters, add a new 6 inch pipeline for liquid natural gas, and convert the existing 12 inch liquid natural gas pipeline so that it would be used for the transportation of crude oil.

6 In January of 2007, Enbridge applied for a certificate of public convenience and necessity under section 52 of the *National Energy Board Act* authorizing the construction and operation of the Project. The Board decided to proceed by way of oral hearing. Enbridge informed a number of Aboriginal groups about the Project and invited them to participate in discussions and ask questions.

7 In determining the scope of what has been referred to as Enbridge's "Aboriginal consultation program", Enbridge considered the fact that the Project involved 60 kilometres of new pipeline adjacent to an existing right of way, the fact that 94% of the additional right of way is freehold land, and the fact that during the 50 years of the operation of the pipelines on the existing pipeline right of way, it had never been made aware of any Aboriginal claim, interest or uses on or along the right of way. Based on those guidelines, Enbridge contacted First Nations and Métis groups within a 160 kilometre corridor centered on the existing right of way, including the Assembly of Manitoba Chiefs, the Manitoba Métis Federation, the Federation of Saskatchewan Indian Nations, the Métis Nation -- Eastern Region, Zone III, the Canupawakpa Dakota First Nation, the Sioux Valley Dakota Nation, the Birdtail Sioux First Nation and the White Bear First Nation. Enbridge also contacted the Manitoba and Saskatchewan Regional Offices of Indian and Northern Affairs Canada, and was informed that there are no current land claims negotiations going on in the area of the Project.

8 During this process Enbridge did not contact Standing Buffalo. Based on the facts summarized above, I assume that was because Standing Buffalo's current home community, which is a reserve near Fort Qu'Appelle, Saskatchewan, was outside the 160 kilometre corridor centred on the existing right of way, and because Enbridge was not aware that Standing Buffalo had asserted a claim of Aboriginal title that included the land on which the Project was located. It appears that the Standing Buffalo reserve is approximately 200 kilometres from the Project area.

9 On February 22, 2007, Standing Buffalo filed an application for intervener status in the NEB

proceedings to oppose the Enbridge application on the basis of Standing Buffalo's allegation of a credible claim to Aboriginal title to lands in the relevant area, and its allegation that the Crown had failed to consult with Standing Buffalo in relation to the Enbridge application. This was the first indication to Enbridge that Standing Buffalo had an interest in the Project. Enbridge provided Standing Buffalo with a copy of its application and tried without success to meet with the Chief and Council of Standing Buffalo before the hearing.

10 Standing Buffalo was granted intervener status and was permitted to submit evidence in the NEB proceedings, partly in the form of affidavits and partly in the form of the oral history evidence of Standing Buffalo elders. Standing Buffalo asserts that its evidence establishes the following facts:

(A) The Dakota people, including Standing Buffalo, have a credible Aboriginal land claim to the area that included the land on which the Project was located.
(B) The Dakota people, including Standing Buffalo, have never entered into a treaty with the Crown like the numbered treaties relied upon by the Crown in other cases to establish the extinguishment of Aboriginal title.
(C) The Crown and the Dakota people, including Standing Buffalo, negotiated for seven years with a view to entering into a treaty, but Canada had broken off the negotiations in bad faith, failing to provide an explanation of its position.
(D) The Crown failed to consult with or even inform Standing Buffalo about the Project.

11 The submissions of Standing Buffalo in the NEB proceedings also expressed a specific concern about the potential of archaeological finds or disturbances in the area of the Project, as earlier finds of burial sites, pottery, pipes and other objects in the general geographic area of the Project had been identified as Dakota.

12 The Government of Canada was not represented at the hearing, did not present evidence and made no submissions. Standing Buffalo argued that the NEB should compel Canada to present evidence and explain why it had failed to consult with Stand Buffalo. The NEB did not compel the Government to present evidence and did not address this point in its reasons.

13 The NEB rejected the opposition of Standing Buffalo and concluded that the Project is and will be required by the present and future public interest and necessity. The NEB issued a certificate of public convenience and necessity subject to certain conditions, and recommended to the Governor in Council that the certificate of public convenience and necessity be approved. The approval of the Governor in Council was obtained on September 5, 2007 (PC 2007-1234).

14 One of the conditions to the certificate was intended to address the concern expressed by Standing Buffalo in relation to the discovery of archaeological or heritage resources prior to or

during construction. If there was such a discovery, Enbridge was required to cease work immediately at the location of the discovery, notify the responsible provincial authorities, and resume work only with the approval of those provincial authorities.

15 I summarize as follows the reasons given by the NEB for not accepting the submission of Standing Buffalo that the Enbridge application should not proceed before the Crown had entered into appropriate consultations with Standing Buffalo:

> (A) The steps taken in this case were sufficient to provide Standing Buffalo with relevant information about the Project, and to accommodate and facilitate their participation in the NEB hearing.
> (B) Most of the evidence provided by Standing Buffalo was of little relevance to the issues before the NEB. It is not part of the mandate of the NEB to determine contested issues of Aboriginal title (a point which all parties conceded).
> (C) With respect to Standing Buffalo's objection to Enbridge's application, the NEB took into consideration the following facts:
>
> i) The Project is located on a right of way adjacent to a right of way that has been in existence for fifty years.
> ii) During that fifty year period, Enbridge had not been informed of any First Nation claim over any portion of the right of way.
> iii) Standing Buffalo provided no evidence of any current traditional use of property in the vicinity of the Project.
> iv) Standing Buffalo "has no legally proven rights in the area and their claim is not recognized by the Government of Canada", and even if that were not so, it provided no evidence of the specific impacts the Project could have on its interests, except for possible archaeological discoveries. Standing Buffalo's concern about the possibility of archaeological discoveries would be accommodated by an appropriate condition.

16 On July 20, 2007, Standing Buffalo applied to the NEB for a review of its decision to issue the section 52 certificate to Enbridge. The NEB dismissed that application on December 6, 2007. On July 26, 2007, Standing Buffalo filed this application for judicial review pursuant to paragraph 28(1)(*f*) of the *Federal Courts Act*, seeking a judgment of this Court quashing the decision of the NEB to issue the section 52 certificate to Enbridge. On the same day, Standing Buffalo applied to the NEB for a stay of its decision. The NEB dismissed the stay motion on September 11, 2007.

17 On July 27, 2007, Standing Buffalo filed a motion under subsection 22(1) of the *National Energy Board Act* for leave to appeal the NEB's decision. The material filed in the leave application

did not mention that this application for judicial review was pending in respect of the same decision. The grounds of appeal in the leave application are substantially the same as the grounds of judicial review in this case, except that they are stated in a different order. Leave to appeal was denied on September 21, 2007. No written reasons were given.

Issues

18 In my view, this application raises three principal issues:

(A) Does this Court have jurisdiction to consider this application, in light of subsection 22(1) of the *National Energy Board Act* and section 18.5 and subsection 18(2) of the *Federal Courts Act*?

(B) If this Court has jurisdiction, should it dismiss Standing Buffalo's application for judicial review on the basis of the doctrines of *res judicata* or issue estoppel because the issues raised are substantially the same as the issues raised in Standing Buffalo's unsuccessful application for leave to appeal?

(C) If this Court considers this application on the merits, should the decision of the NEB to issue the section 52 certificate be quashed because the NEB failed to compel the attendance of the Crown, or because there was a breach of the Crown's obligation to consult Standing Buffalo and to accommodate their interests?

Discussion

19 Enbridge argues that this Court has no jurisdiction to consider this application for judicial review, given section 18.5 and subsection 28(2) the *Federal Courts Act* and subsection 22(1) of the *National Energy Board Act*. Standing Buffalo argues that this application falls squarely within this Court's jurisdiction by virtue of paragraph 28(1)(*f*) and is not barred by the provisions relied upon by Enbridge.

20 The NEB is subject to judicial review by this Court rather than the Federal Court. That is the result of the combined operation of section 18, paragraph 28(1)(*f*) and subsection 28(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Those provisions read as follows:

> 18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> (*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[...]

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:

[...]

(*f*) the National Energy Board established by the *National Energy Board Act*

[...]

28. (3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

* * *

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

[...]

28. (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

[...]

f) l'Office national de l'énergie constitué par la *Loi sur l'Office national de l'énergie* [...].

[...]

28. (3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

21 However, the jurisdiction of this Court in applications for judicial review is limited in certain circumstances by the combined operation of section 18.5 and subsection 28(2) of the *Federal Courts Act*, which read in relevant part as follows:

> 18.5. Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to [...] the Federal Court of Appeal [...] from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.
>
> **[...]**
>
> 28. (2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

* * *

> 18.5. Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant [...] la Cour d'appel fédérale [...] d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.
>
> **[...]**
>
> 28. (2) Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

22 Subsection 22(1) of the *National Energy Board Act* provides that a decision or order of the NEB may be appealed to this Court, with leave of this Court, on a question of law or jurisdiction. Subsection 22(1) reads as follows:

> 22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.
>
> * * *
>
> 22. (1) Il peut être interjeté appel devant la Cour d'appel fédérale, avec l'autorisation de celle-ci, d'une décision ou ordonnance de l'Office, sur une question de droit ou de compétence.

23 Enbridge argued, primarily on the basis of *Leroux v. Transcanada Pipelines Ltd.* (1996), 198 N.R. 316, [1996] F.C.J. No. 622 (F.C.A.), that because of section 18.5 and subsection 28(2) of the *Federal Courts Act*, the only way Standing Buffalo can challenge the decision of the NEB to issue the section 52 certificate to Enbridge is by an appeal under subsection 22(1) of the *National Energy Board Act*. Standing Buffalo argued that this interpretation cannot be correct because it would deprive paragraph 28(1)(*f*) of the *Federal Courts Act* of any meaning. Standing Buffalo also suggested that subsection 22(1) of the *National Energy Board Act* is intended to permit appeals on issues that are within the statutory mandate and special expertise of the NEB (such as the regulation of pipelines) and section 18.5 of the *Federal Courts Act* is intended to bar applications for judicial review on issues of that kind, but it is not intended to bar applications for judicial review based on general public law principles or, as in this case, principles of Aboriginal law.

24 I agree with Enbridge that this Court has no jurisdiction to entertain this application for judicial review. In my view, this conclusion is compelled by section 18.5 and subsection 28(2) of the *Federal Courts Act*. Standing Buffalo, as an intervener in the NEB proceedings, was entitled to have recourse to subsection 22(1) of the *National Energy Board Act* to challenge the decision of the NEB. Despite the requirement for leave and the limitation of the grounds of appeal to questions of law or jurisdiction, the existence of the statutory right of appeal deprives this Court of jurisdiction to consider Standing Buffalo's application for judicial review of the NEB's decision.

25 I do not accept the submission of Standing Buffalo that this interpretation leaves no scope for the operation of paragraph 28(1)(*f*) of the *Federal Courts Act*. A person who is directly affected by a decision of the NEB but does not have the right to appeal may bring an application for judicial review (see, for example, *Union of Nova Scotia Indians v. Maritimes and Northeast Pipeline Management Ltd.* (1999), 243 N.R. 205, [1999] F.C.J. No. 242 (F.C.A.), and *Arthur v. Canada (Attorney General)* (1999), 254 N.R. 136, [1999] F.C.J. No. 1917 (F.C.A.)). Also, a person seeking relief against the NEB in a matter that does not involve a challenge to a decision or order of the NEB may do so by means of an application for judicial review.

26 Nor do I accept that subsection 22(1) of the *National Energy Board Act* is not broad enough to include appeals based on the principles of public law or Aboriginal law. In my view, the right of appeal in subsection 22(1) of the *National Energy Board Act* may be based on any question of law or jurisdiction, and is not limited to legal issues relating to the regulation of pipelines or other technical matters within the NEB's mandate.

27 I conclude that this Court has no jurisdiction to consider Standing Buffalo's application for judicial review. That is a sufficient basis for dismissing this application. I express no opinion on the issues of *res judicata* or issue estoppel raised by Enbridge, or on the substantive issues raised by Standing Buffalo.

Conclusion

28 I would dismiss this application with costs.

SHARLOW J.A.
PELLETIER J.A.:-- I agree.
RYER J.A.:-- I agree.

cp/e/qlaim/qlclg/qlhcs

Case Name:

Sherman v. Canada (Minister of National Revenue - M.N.R.)

Between
David M. Sherman, appellant, and
The Minister of National Revenue, respondent

[2004] F.C.J. No. 136

[2004] A.C.F. no 136

2004 FCA 29

2004 CAF 29

236 D.L.R. (4th) 546

317 N.R. 84

30 C.P.R. (4th) 149

2004 D.T.C. 6591

[2004] G.S.T.C. 6

129 A.C.W.S. (3d) 258

Docket A-387-02

Federal Court of Appeal
Ottawa, Ontario

Desjardins, Létourneau and Evans JJ.A.

Heard: In writing.
Judgment: January 23, 2004.

(17 paras.)

Civil Procedure -- Parties -- Representation of -- Self-representation -- Costs -- Assessment or fixing of costs -- Considerations -- Tariffs

Motion brought by appellant taxpayer for costs awarded on an appeal which was successful against the respondent federal government.The respondent contended that the bill of costs tendered ought not to have exceeded an award for party and party costs. The appellant had been awarded a moderate allowance to recognize the time and effort he spent representing himself at trial and on the appeal.

Motion allowed in part. The taxpayer was a reputable tax expert. His award for costs should not have exceeded the amount to which he would have been entitled if he had been represented by counsel. A moderate allowance only permitted partial, not full, indemnity of the taxpayer's cost.

Statutes, Regulations and Rules Cited:

Federal Court Rules, Tariff B, Tariff B Column III, Rules 369, 397, 403.

Counsel:

Written representations by:
David M. Sherman, the appellant, on his own behalf.
Sointula Kirkpatrick and Louis L'Heureux, for the respondent.

The judgment of the Court was delivered by

1 **LÉTOURNEAU J.A.**:-- In a judgment dated May 6, 2003, this Court concluded in part:

> The appellant is entitled to disbursements and a moderate allowance for the time and effort he devoted to preparing and presenting his case before the Trial and the Appeal Divisions of this Court on proof that, in so doing, he incurred an opportunity cost by foregoing remunerative activity.

2 By motion made under Rule 369, the appellant requests that this Court fix the award of costs at $30,528.00 for his time spent and $684.18 for disbursements plus costs of his motion in the amount of $5,760.00 plus disbursements for the twelve hours he spent to prepare and file his motion for costs. The appellant filed an affidavit to his motion detailing his costs. He submits that he worked 66.1 hours on the trial and the appeal. He calculates one half of the opportunity costs of his time at the rate of $550.00 an hour, the other half at $600.00 per hour. He discounted the total figure by 20% in order to meet the requirement that the allowance be moderate.

3 The respondent does not dispute the appellant's request for $684.08 in disbursements but otherwise opposes both his other requests. I should add that the appellant kept a detailed account of the time spent and effort devoted to the preparation and defence of his case. I do not think that the number of hours is unreasonable or subject to argument.

4 The objection is based on two grounds. Firstly, the respondent says that the appellant did not indicate the provisions on which the motion is based, except for Rule 369, which is procedural. The appellant is long out of time to bring his motion either under Rule 397 or under Rule 403 and has not asked for an extension.

5 Secondly, the respondent claims that it is implicit in this Court's judgment and reasons for judgment that the appellant was awarded party and party costs to be calculated according to Tariff B, the applicable tariff under the Rules.

6 This Court's decision, issued on May 6, 2003, was based on case law on which the Court relied to award to the appellant "a moderate allowance for the time and effort devoted to preparing and presenting the case". Rule 397 does not apply as there are no grounds for reconsideration.

7 The appellant could have sought an extension of time and brought a motion under Rule 403 for directions to the taxation officer. In the part of its order dealing with costs, this Court intended not to fix the actual quantum of the costs awarded, but to leave it to a taxation officer to determine such quantum within the parameters of the reasons for the costs order. However, since the Court is now seized with the issue, which is novel, and in view of the wide gap separating the parties with respect to the meaning of a "moderate allowance", it would be better for this Court to rule on it than merely to issue directions. Consequently, the appellant's bill of costs was appropriately brought under Rule 369.

8 The purpose of the costs rules is not to reimburse all the expenses and disbursements incurred by a party in the pursuit of litigation, but to provide partial compensation. The costs awarded, as a matter of principle, are party-and-party costs. Unless the Court orders otherwise, Rule 407 requires that they be assessed in accordance with column III of the table to Tariff B. As the Federal Court properly said in Apotex Inc. v. Wellcome Foundation Ltd. (1998), 159 F.T.R. 233, Tariff B represents a compromise between compensating the successful party and burdening the unsuccessful party.

9 Column III of the table to Tariff B is intended to address a case of average complexity: Apotex Inc. v. Syntex Pharmaceuticals International Ltd., [2001] F.C.J. No. 727, 2001 FCA 137. The Tariff includes counsel fees among the judicial costs. Since it applies uniformly across Canada, it obviously does not reflect a counsel's actual fees as lawyers' hourly rates vary considerably from province to province, from city to city and between urban and rural areas.

10 There is no doubt that the appellant, who was unrepresented, expended time and effort in the pursuit of his claims. However, as the Alberta Court of Appeal pointed out in Dechant v. Law

Society of Alberta, [2001] A.J. No. 373, 2001 ABCA 81, "represented litigants also sacrifice a considerable amount of their own time and effort for which no compensation is paid". Furthermore, their lawyers' fees are not fully reimbursed. I agree that "applying an identical cost schedule to both represented and unrepresented litigants will work an inequity against the represented litigant who, even with an award of costs, will be left with some legal fees to pay and no compensation for a personal investment of time": ibid, paragraph 16. It could also promote self-litigation as an occupation: ibid, paragraph 17; see also Lee v. Anderson Resources Ltd., 2002 ABQB 536, (2002) 307 A.R. 303 (Alta Q.B.).

11 In the present instance, if the appellant had been represented, he would have been awarded party and party costs according to column III of the table to Tariff B. I believe that his award of costs as an unrepresented litigant can, at best, equal, but should not exceed, what would have otherwise been paid to him if he had been represented by counsel. I should add that the unrepresented litigant enjoys no automatic right to the full amount contemplated by the tariff. The amount of the award is in the discretion of the Court. The concept of a "moderate allowance" is an indication of a partial indemnity although, as previously mentioned, I accept that, in appropriate but rare cases, the amount of that indemnity could be equal to what the tariff would grant to a represented litigant.

12 Like Registrar Doolan in City Club Development (Middlegate) Corp. v. Cutts (1996) 26 B.C.L.R. (3d) 39, Registrar Roland of the Supreme Court of Canada concluded in Metzner v. Metzner, [2000] S.C.C.A. No. 527, that the "reasonably competent solicitor approach was unworkable when assessing special costs awarded to a lay litigant": S.C.C. Bulletin 2001, p. 1158. She endorsed the conclusion that the only reasonable approach was to make an award on a quantum meruit basis.

13 In Clark v. Taylor [2003] N.W.T.J. No. 67, Vertes J. of the Northwest Territories Supreme Court was called upon to assess costs for an unrepresented female litigant. At paragraph 12 of the decision, he wrote:

> In considering what would be a "reasonable" allowance for the applicant's loss of time in preparing and presenting her case, I am not convinced that it is at all appropriate to simply apply what she herself would charge for her hourly fees to a client. The reality is that any litigation will eat up time and expenses whether one is represented or not.

14 He went on to add that the tariff can provide useful benchmarks, even if costs are not assessed on the tariff basis. I agree. The hourly rate claimed by the appellant in the present case is not the benchmark to be used in determining the quantum of a moderate allowance. It is much in excess of the allocation rate contemplated by the tariff.

15 In the present case, this Court was of the view that the appellant, who is a reputable tax expert, raised new issues of public interest as regards the interpretation of an international tax convention

and the right to access the information obtained and exchanged pursuant to that Convention: see paragraph 44 of the decision. The work submitted by the appellant was of good quality . The submissions to the Court were well documented and helpful. There is no doubt that his attendance at the hearing before the Federal Court and our Court was necessary and caused him to lose time from work. Furthermore, the appellant behaved with great propriety throughout the litigation.

16 Bearing all these factors in mind, including the legitimate purpose pursued by the appellant and the fact that costs under Tariff B would have amounted to some $7,200.00, I would fix the moderate allowance at $6,000.00 plus disbursements in the undisputed amount of $684.08. As for the costs and disbursements of bringing this motion, I would allow the sum of $350.00.

17 It would have been useful if the parties, or at least the respondent who was opposing the bill of costs, had given us some of the existing jurisprudence relating to the interpretation and application of the "moderate allowance" notion.

LÉTOURNEAU J.A.
DESJARDINS J.A.:-- I concur.
EVANS J.A.:-- I agree.

cp/e/qw/qlaim/qlhcs

Canada

Canadian Transportation Agency | Office des transports du Canada

Canadian Transportation Agency
www.cta.gc.ca

Decision No. 219-A-2009

May 28, 2009

MOTION by Leslie Tenenbaum for non-publication of his name and certain personal information in a decision of the Canadian Transportation Agency.

File No. U3570/08-32

Background

[1] Leslie Tenenbaum (applicant) is seeking redress from Air Canada (respondent) with respect to a travel issue. Facilitation efforts were unsuccessful. Prior to the opening of the pleadings on that issue, the applicant asked for an order that his name and certain personal information not be disclosed publicly by the Canadian Transportation Agency (Agency) or the respondent and that his initials be used in place of his name in any final Agency decision.

[2] In Decision No. LET-AT-A-145-2008, the Agency asked for further information and invited the applicant to indicate the reasons for his claim and, if any specific direct harm is asserted, the nature and extent of the harm that would likely result to him if his name and certain information were disclosed in the decision. The applicant provided no argument regarding the harm that would result.

[3] In February 2009, the Agency amended its privacy policy. The amended policy is consistent with the Agency's original policy; however, it provides more clarity as to the Agency's position on the open court principle. Therefore, to ensure the fairness of the process, the Agency, in Decision No. LET-AT-A-41-2009, provided the applicant with the opportunity to make further representations in light of the amended policy. In that Decision, the Agency also advised the applicant of the test the Agency would apply when dealing with the motion.

[4] The applicant asserts, only, a positive right to privacy under the *Privacy Act*, R.S.C., 1985, c. P-21. However, he clarified his request and asked the Agency for an order that, if his name is disclosed, there be no reference to certain personal information, or if there is reference to certain personal information, his name be substituted by his initials.

[5] The respondent opposes this request.

[6] As indicated in the reasons that follow, the Agency finds that the applicant failed to meet his burden of proof. Consequently, the applicant's motion is denied.

Issue

[7] This application raises the question of whether the applicant is entitled to have the protection requested. Specifically, the issue to be addressed is whether the applicant has met the burden of proving that an order is necessary to prevent a serious risk to an important interest, and that its salutary effects outweigh the deleterious effects on the freedom of expression of those affected by the order.

Positions of the parties

Applicant

[8] The applicant states that he is not making a claim for confidentiality pursuant to section 23 of the *Canadian Transportation Agency General Rules*, SOR/2005-35 (General Rules). Rather, he requests that the Agency not publicly disclose personally identifiable information, because it is unnecessary, would violate the applicant's right to privacy, and would be contrary to the Agency's obligations under the *Privacy Act*.

[9] The applicant argues that the "Open Court Principle is not absolute. It is merely a presumption, in favour of the public, that provides for public access to and/or disclosure to the public of judicial and quasi-judicial proceedings and findings."

[10] The applicant states that the Agency is governed by the *Privacy Act* and must comply with its obligations and protect the privacy of personal information gathered by the Agency as part of its complaints process.

[11] The applicant addresses subsection 8(2) of the *Privacy Act*, which describes the circumstances under which he claims the Agency is permitted to publicly disclose personal information.

[12] The applicant asserts that the public disclosure of his personal information by the Agency is not permitted under paragraph 8(2)(*a*) as this is not the purpose for which the Agency obtained or compiled the personal information of the applicant, and under paragraph 8(2)(*b*), such disclosure is not explicitly authorized by an Act of Parliament or a regulation. Furthermore the applicant maintains that under subparagraph 8(2)(*m*)(i), public disclosure of his personal information by the Agency is not permitted until it has been established by the Agency that there might be a compelling public interest in disclosure of such information which outweighs the complainant's right of privacy.

[13] The applicant states that the public disclosure of his personal information was not a precondition to the filing of a complaint, was not consented to by him, is not required in order for the Agency to accomplish its mandate, and that the Agency can successfully discharge its mandate without public disclosure of his personal information. The applicant claims that the Agency can maintain the interests of its mandate, the public, the spirit of the open court principle, and the applicant's right to privacy, if it:

- depersonalizes publication of its findings and decisions by assigning random initials in place of the applicant's name; or
- publishes only a summary of its findings and decisions without any personal information of the applicant.

[14] Finally, the applicant provided two documents which, according to him, illustrate an example of the practices of other Government of Canada agencies that do not disclose information in certain cases where the publication of matters of a private nature is at issue. The first document is a letter from the

Office of the Privacy Commissioner of Canada in which the findings of an investigation into privacy matters with a branch of Service Canada are revealed. The second document is a circulated notice from Service Canada that addresses changes to the manner in which decisions will be posted on the Internet.

[15] The applicant argues that these documents demonstrate that an appropriate balance must be struck between the open court principle and an individual's right to privacy under the *Privacy Act*, and that the determination in the latter is relevant to the applicant's complaint.

[16] The applicant emphasizes that he is not requesting an outright prohibition on the release of personal information and that he has no objection to the Agency identifying him as a complainant by name without reference to some other personal information, or identifying him as a complainant by his initials and referring to other personal information.

[17] The applicant states that most people probably regard the privacy of the type of information referred to in his application as the most important privacy right that they have, and that no one should have to relinquish the right to keep that information private when filing an application with the Agency.

Air Canada

[18] Air Canada opposes the applicant's request. It states that, as evidenced by the General Rules, the granting of a request for confidentiality is within the power of the Agency. However, what the applicant is asking for in this particular case is to render a depersonalized decision or publish a decision without any personal information on the applicant being publicly disclosed.

[19] Air Canada submits that in the absence of specific regulations, as in the applicant's case, the various decisions of the Agency are the only tools to be used by air carriers and other service providers as guidance to see how each case is determined based on its particular facts.

[20] Air Canada notes that the documents presented by the applicant refer to a recommendation of the Privacy Commissioner of Canada, which is not an adjudicative body. Air Canada points out that a recent decision by the Supreme Court of Canada (Supreme Court) analyzed the powers of the Privacy Commissioner of Canada and concluded that it was not a court.

[21] Air Canada maintains that the personal information compiled by the Agency is for a use that is consistent with the purpose and mandate of the Agency. Air Canada submits that the purpose for the publication of the decision, namely the educational and precedent components, could not be accomplished if the specifics for which a party seeks recognition are not analyzed and described in detail.

[22] According to Air Canada, the open court principle is at the core of a transparent and accessible justice system. It further states that privacy rights are to be granted equally to all parties, and the Agency's mandate would not be accomplished without full disclosure and identification of the claimant and the air carrier. Air Canada submits that the "public interest in disclosure of the identification of both parties is outweighed by any invasion of privacy that would result from this disclosure."

[23] Air Canada states that it is the practice of other tribunals to publish their decisions and to make them accessible online without any depersonalization or removal of details. Air Canada cites as examples the Canadian Human Rights Tribunal, the Quebec Commission des lésions professionnelles, and the Ontario Workplace Safety and Insurance Appeals Tribunal, all of which publish decisions that are made available and are public.

Analysis and findings

[24] The applicant is asking for an order that, if his name is disclosed, there be no reference to certain personal information, or if there is reference to certain personal information, his name be substituted by his initials. Both of these requests depart from the presumptive openness of judicial proceedings known as the "open court principle".

[25] Before considering the applicant's entitlement to the relief sought, the Agency will set out the rules of law and well-established principles governing this type of motion as developed by the courts as well as their application to administrative tribunals.

Canada's judicial system

[26] The *Constitution Act, 1867*, amended in 1982, is the supreme law of Canada. It recognizes that Canada's system of justice is rooted in a tradition of rule of law and democratic principle. The amended Act entrenches the *Canadian Charter of Rights and Freedoms*, R.S.C., 1985, Appendix II, No. 44, Schedule B (Charter) which guarantees individuals fundamental rights and freedoms.

[27] The judicial system is one of the pillars of our society. It is the instrument by which individuals' fundamental rights are preserved. As such, it must provide for a democratic environment and promote impartiality, transparency and accountability where each person has the knowledge and expectation that they will be treated fairly. That is why independence and transparency of the judiciary are fundamental elements of our democratic system. Linked to this concept of democracy is the importance of public scrutiny of courts. Public access to judicial proceedings and judicial records is indispensable to ensure public confidence in the system and concomitant judicial accountability.

[28] The Supreme Court has recognized that openness of the courts in Canada is an intrinsic component of the fundamental right of freedom of expression guaranteed by section 2 of the Charter, which provides that "everyone has the following fundamental freedoms: *a*) freedom of conscience and religion; *b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; *c*) freedom of peaceful assembly; and *d*) freedom of association."

[29] The following sets out the Supreme Court's interpretation and application of the "open court principle."

Freedom of Expression: the "open court principle"

[30] As indicated, openness is an intrinsic component of our judicial system. In *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, the Supreme Court indicated that the "open court principle" is a "hallmark of a democratic society". It is a principle that "has long been recognized as a cornerstone of the common law" and "necessary to maintain the independence and impartiality of courts [...] Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts." For the public to understand the judicial system, it must have access to it in order to be better informed. "Where there is no publicity there is no justice." (*Scott v. Scott* [1913] A.C. 417).

[31] On this point, the Supreme Court has linked the open court principle to the fundamental values it supports such as the public confidence in the justice system, the public's understanding of the administration of justice, and the accountability of courts and judges. "The principle of open courts is inextricably tied to the rights guaranteed by section 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." (*Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, [1996] 3 S.C.R. 480). It permits the public to see that justice is administered in a non-arbitrary manner according to the rule of law.

[32] Under the "open court principle," parties cannot expect, as a right, that the details of their dispute remain private. However, the Supreme Court has acknowledged that in particular situations, the principle of openness must yield when the integrity of the administration of justice is at stake. The approach adopted by the Supreme Court establishes that the principle of openness is not absolute (*R. v. Mentuck*, [2001] 3 S.C.R. 442 (Mentuck decision)) and sometimes must concede to the need to protect other fundamental rights. As Bastarache J. said in *Named person v. Vancouver Sun*, [2007] 3 S.C.R. 252, "In Canada, as in any truly democratic society, the courts are expected to be open, and information is expected to be available to the public. However, from time to time, the safety or privacy interests of individuals or groups and the preservation of the legal system as a whole require that some information be kept secret."

[33] Where sensitive privacy concerns arise, courts have established that these must be contextually balanced with a view to preserving the integrity of the administration of justice. In *Toronto Star Newspapers Ltd v. Ontario*, [2005] 2 S.C.R. 188, the Supreme Court explained that "under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice."

[34] The "open court principle" is therefore not absolute. For the administration of justice to properly work it will sometimes be necessary to protect social values. A balancing exercise must be done.

Limiting the openness: A balancing exercise

[35] Since 1994, it has been held that the judicial discretion to permit a departure from the strong presumption of openness must be exercised within the general framework of a test developed by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and later adapted in the Mentuck decision, referred to as the Dagenais/Mentuck test:

> A publication ban should only be ordered when such an order is necessary to prevent a serious risk to the proper administration of justice, because reasonable alternative measures will not prevent the risk, and when the salutary effects of the publication ban 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.

[36] This test, developed in the context of a criminal matter, was later adapted for the issuance of confidentiality orders in a civil matter, *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522:

> A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[37] The Supreme Court then indicated that "three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial [?] Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question."

[38] The onus is on the applicant to establish, on a balance of probabilities, the need for the protective

order. As a general rule, embarrassment is not enough to overcome the public policy favouring openness of the court system. As was stated by Dickson J. (as he then was) in *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175:

> 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.

[39] It is clear that those well-established principles are binding on judicial courts. This was noted again very recently in *A.B. v. Minister of Citizenship and Immigration*, 2009 F.C., 325. The question is, however, to which extent they apply to administrative tribunals.

Whether the rules governing openness are equally applicable to administrative tribunals

[40] Judicial tribunals are created as per the Constitution, and administrative tribunals are created by the Government for the purpose of implementing a policy. Whether the decision of an administrative tribunal is one required by law to be made on a quasi-judicial or non-quasi-judicial basis will depend upon the legislative intention. If Parliament has made it clear that the person or body is required to act judicially, in the sense of being required to afford an opportunity to be heard, the courts must give effect to that intention.

[41] There is no doubt that public scrutiny is important for both judicial and quasi-judicial decisions. In *Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, the Federal Court wrote that "[...] it is not at all unreasonable to extend to proceedings of such decision-makers the application of this principle of public accessibility. After all, statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the ‘administration of justice'."

[42] The legitimacy of any tribunal's authority requires that confidence in its integrity and understanding of its operations be maintained, and this can only occur if proceedings are open to the public. This was reaffirmed more recently by the Saskatchewan Court of Queen's Bench in *Germain v. Automobile Injury Appeal Commission*, [2009] S.J. No. 169 (Germain decision), when it concluded that "[t]he publication of the decisions is in my view incidental and necessary to the proper functioning of this tribunal as it is to many other tribunals with an adjudicative function [?] Moreover the Commission is part of the administration of justice and the open courts principle referred to later in this decision mandates openness and accessibility to the decisions of the Commission."

[43] Reviewing Courts have upheld the position that the "open court principle" applies to quasi-judicial tribunals. As noted in the Germain decision, "[t]his is so despite the fact that it is not a court. The principle is not restricted to courts only, but is a theme running through the administration of justice in this country." (See also *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration) (C.A.)*, [1991] 2 F.C. 327; *Travers v. Canada (Chief of Defence Staff) (T.D.)*, [1993] 3 F.C. 528.)

Application of the rules to the Agency

[44] The Agency is created pursuant to an act of Parliament, the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA). The Agency's purpose is to implement the national transportation policy, which is found in section 5 of the CTA. More specifically, the mandate of the Agency is to administer economic regulatory provisions of Acts of Parliament affecting modes of transport under federal jurisdiction as well as removing undue obstacles to the mobility of persons with disabilities within the federal transportation network. In its role as a quasi-judicial administrative tribunal with

court-like powers, the Agency ensures that processes are responsive, fair and transparent, and considers the interests of all parties in the national transportation system.

[45] While being subject to specific rules laid down by statutes or regulations, the Agency is also the master of its own procedures. For example, section 40 of the General Rules provides that an application to the Agency shall be made in writing and be commenced by filing with the Agency the full name, address, and telephone number of the applicant or the applicant's representative. The Agency may therefore conclude that an application is not properly filed if it lacks that information. As well, 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. Section 22 of the CTA provides that the Secretary of the Agency must, on the application of any person, issue to the applicant a certified copy of a decision issued by the Agency.

[46] The Agency, being a quasi-judicial tribunal, is bound by the rules governing the "open court principle". Consequently, in order to address the motion of the applicant, it must apply the Dagenais/Mentuck test described above.

Agency's applicable policies

[47] The Agency recognizes the importance of privacy as a fundamental value in our society. In an effort to establish a fair balance between public access to its decisions and an individual's right to privacy, the Agency applies the following policies.

Canadian Judicial Council Protocol

[48] The Agency has adopted the protocol approved by the Canadian Judicial Council in March 2005 regarding the use of personal information in judgments.

Web Robot Exclusion

[49] The Agency protects personal information contained in its decisions posted on its Web site by applying instructions using the *web robots exclusion protocol* recognized by Internet search engines (e.g., Google and Yahoo), and which prevents Internet searching of full-text versions of decisions. This enables the Agency to fully achieve its statutory mandate and, at the same time, prevents unnecessary invasion into the privacy of individuals.

Privacy statement - Agency's complaint process

[50] The information regarding the Agency's privacy policy can be found on its Web site. Each applicant is also made aware at the outset that the Agency applies the open court principle and that its proceedings are public.

Application to this case

[51] In this case, the Agency required the applicant to support his motion by providing well-grounded evidence in order to meet the Dagenais/Mentuck test. The applicant, however, chose not to provide evidence. The applicant's only stated explanation for his request is premised on his positive right to privacy.

[52] The applicant has acknowledged the nature of the open court principle but is arguing that it must be juxtaposed against his corresponding rights of privacy. His main argument rests in the contention

that the public disclosure of personally-identifiable information is not necessary, would violate his right to privacy, and would be contrary to the Agency's obligations under the *Privacy Act*.

[53] The Agency must ask first whether an order is necessary to prevent a serious risk to an important interest, and second, whether the salutary effects outweigh the deleterious effects on the freedom of expression of those affected by the order. In other words, is an order necessary to prevent a serious risk to the applicant's interest? And, in the affirmative, is it so important that the right to freedom of expression and more specifically, the "open court principle" should be disregarded?

[54] The first element under the first branch of the test that the applicant must show is that the risk in question must be real and substantial. Second, the important interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the Agency is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the interest in question.

[55] As indicated before, the applicant alleges that his right to privacy is in accordance with the *Privacy Act*. He argues that the public disclosure of his personal information in the Agency's decision is not permitted under paragraphs 8(2)(*a*), (*b*) and (*m*) of the *Privacy Act* and that public disclosure is not the purpose for which the Agency obtained or compiled his personal information.

[56] The applicant notes, in particular, that there is no Act of Parliament or regulation authorizing the Agency to disclose personal information. The applicant asserts that it is up to the Agency to show a compelling public interest in disclosure that will outweigh his right to privacy. The applicant also argues that the Agency's mandate can be discharged without public disclosure of personal information.

[57] Section 3 of the *Privacy Act* broadly defines personal information under subsection (1) as "information about an identifiable individual that is recorded in any form". Paragraphs 3(*j*) through (*m*) provide exceptions to what is included in the definition of "personal information".

[58] Subsection 8(2) of the *Privacy Act* provides for situations where personal information may be disclosed. Of particular relevance to the present application is:

> (*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.

[59] The applicant's interpretation of this scheme of the *Privacy Act* cannot stand as is. In deciding a case and explaining the reasons for the decision, the Agency is using personal information in a way that is consistent with the purpose for which it was obtained. More importantly, the Agency associates names with personal identifiers only when it is necessary for a proper and complete understanding of the issues at stake. The Agency concludes that the right to privacy alleged by the applicant is not found in the *Privacy Act*.

[60] However, as indicated above, during judicial proceedings, the rule of openness may come into conflict with other competing rights, such as the right to privacy. The privacy argument has been tested many times by the courts. In fact, the Supreme Court has interpreted privacy rights as being constitutionally protected under sections 7 and 8 of the Charter.

Liberty interests: Right to privacy

[61] Although the Charter does not explicitly attribute a right to privacy, the Supreme Court has developed the concept of privacy and recognized the right to privacy as a fundamental right enshrined in the Charter. For example, in *Hunter v. Southam Inc.*, [1984] 2 S.C.R 145, the Supreme Court has interpreted sections 7 and 8 of the Charter as protecting against unreasonable invasion of privacy. Also, in addressing the liberty interest under section 7, the Supreme Court said that the "respect for individual privacy is an essential component of what it means to be free." (*R. v. O'Connor*, [1995] 4 S.C.R. 411) The right to privacy would be violated in situations where individuals have an expectation of privacy unless the intrusion is reasonable in the circumstances, minimally intrusive and authorized by law (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393).

[62] While the applicant has not argued a right to privacy as per sections 7 and 8 of the Charter, the Agency finds it necessary to address these two sections.

[63] Section 7 of the Charter provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." As indicated by the Supreme Court in *R. v. White*, [1999] 2 S.C.R. 417, to find an infringement of section 7 of the Charter, there must be a real or imminent deprivation of life, liberty and security of the person that is contrary to the relevant principles of fundamental justice. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, the Supreme Court indicated that:

> [s]tate interference with bodily integrity and serious state-imposed psychological stress constitute a breach of an individual's security of the person [...] The words ‘serious state-imposed psychological stress' delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations.

[64] With that in mind, can the Agency conclude that the level of stress associated with publishing the decision with the applicant's name is "serious"? As indicated in the Germain decision, to qualify under section 7 of the Charter, the stress suffered must be more than the "ordinary stresses and anxieties that a person of reasonable sensitivity would suffer as a result of being involved in open adjudicative process." The applicant was made aware right from the beginning of these proceedings that the process was a public one. This practice and the applicant's case do not resemble in any way the kind of proceedings in which rights were held to be violated under section 7 of the Charter.

[65] As for section 8 of the Charter, it provides that "[e]veryone has the right to be secure against unreasonable search or seizure." It applies to how the information is gathered. "In order to trigger s. 8, the state must have engaged in either a search or seizure." (Germain decision, at para. 78) As there was no search or seizure done in the present case, the Agency finds that there is no section 8 Charter violation.

[66] As indicated before, for the Agency to permit a departure from the "open court principle," the applicant must meet the following test, supported by well-grounded evidence:

- whether the order is necessary to prevent a serious risk to the important interest sought to be protected; and
- whether that interest is so important that the right to freedom of expression and more specifically, the open court principle should be disregarded.

[67] As indicated by the Supreme Court, in order to satisfy the first part of the test, the applicant must show that the risk in question is real and substantial. Second, the applicant must show that the important interest is one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the Agency is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the interest in question.

[68] Even though the applicant was provided with opportunities, he did not provide any evidence that there is a real and substantive risk, nor did he provide evidence that there is an important interest which can be expressed in terms of a public interest in the order sought. Therefore, the Agency does not have to determine whether there is a need to preserve the interest in question.

[69] As the applicant did not provide evidence to justify a derogation from the principle of open and accessible court proceedings, the Agency cannot grant the applicant's motion.

Conclusion

[70] The motion is denied.

Members

- Geoffrey C. Hare
- Raymon J. Kaduck