Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF CONSTITUTIONAL QUESTION

The Applicant intends to question the constitutional applicability of provisions of the *Privacy Act*, R.S.C. 1985, c. P-21 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*.

The question is to be argued at a time and on a date to be set by the Federal Court of Appeal, at Halifax, Nova Scotia.

The following are the material facts giving rise to the constitutional question:

1. The Respondent, the Canadian Transportation Agency ("Agency"), established by the *Canada Transportation Act*, S.C. 1996, c. 10, has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. One of the Agency's key functions is to adjudicate commercial and consumer transportation-related disputes as a quasi-judicial tribunal.

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

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

3. The open court principle is incorporated in both the Agency's old and current procedural rules (*Canadian Transportation Agency General Rules*, S.O.R./2005-35 and *Canadian Transportation Agency Rules (Dispute Proceedings)*, S.O.R./2014-104), 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.

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

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

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

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

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

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

(a) the name and/or work email address of counsel acting for Air Canada in the proceeding;

(b) the names of Air Canada employees involved; and

(c) substantial portions of submissions and evidence.

10. 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.

11. 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.

12. 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.

The following is the legal basis for the constitutional question:

1. Since the *Canadian Charter of Rights and Freedoms* came into force, the open court principle has become a constitutionally protected right. The rights guaranteed by s. 2(b) of the *Charter* do entail the open court principle and the right of the public to obtain information about the courts, including court proceedings (*CBC v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480).

2. 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 transpires in the courtroom (*R. v. CBC*, 2010 ONCA 726).

3. The "open court principle" is not a mere principle, but rather it confers enforceable rights on members of the public (and the media), and a public duty on those controlling documents that are subject to the open court principle (*Southam Inc. v. Canada*, [1987] 3 F.C. 329 and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41).

4. The open court principle applies to statutory tribunals exercising judicial or quasi-judicial functions, because they constitute part of the administration of justice, and legitimacy of their authority requires that public confidence in their integrity be maintained. Tribunals must exercise their discretion to control their own procedures within the boundaries set by the *Charter*. Determining whether a tribunal exercises judicial or quasi-judicial functions requires considering a number of factors, including whether it involves adversarial-type processes, and whether the decision or order directly or indirectly affects the rights and obligations of a person. (*Southam Inc. v. Canada*, [1987] 3 F.C. 329; *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 110; *Germain v. Saskatchewan*, 2009 SKQB 106; *El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT).)

5. When the Agency adjudicates complaints, it acts as a quasi-judicial tribunal, and as such, it is bound by the open court principle (*Tenenbaum v. Air Canada*, Canadian Transportation Agency Decision No. 219-A-2009). The conclusion that adjudicative proceedings before the Agency are presumptively open is further supported by the observation that subsection 17(b) of the *Canada Transportation Act* allows the Agency to make rules with respect to the circumstances in which hearings may be held in private.

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

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

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

7. The *Dagenais/Mentuck* test is an adaptation of the *Oakes* test for the context of infringements of open court principle and s. 2(b) rights. The two tests are equivalent: the *Dagenais/Mentuck* test requires neither more nor less than the *Oakes* test (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46). Consequently, there is essentially only one test, the *Dagenais/Mentuck* test, which applies to all discretionary decisions that limit freedom of expression and freedom of the press in relation to legal proceedings (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41). In particular, any decision with respect to limiting public access to tribunal files of the Agency must be made in accordance with the *Dagenais/Mentuck* test.

8. Protection of the innocent or a vulnerable party and preventing revictimization by publication of identifying details may justify departure from the rule of openness of proceedings. Such decisions are to be made using the *Dagenais/Mentuck* test. Protection of privacy may be the means by which "serious risk" can be prevented; however, privacy is not an end in itself that trumps the open court principle (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46).

9. If the *Privacy Act* does purport to limit the rights of the public, pursuant to the open court principle, to view documents in the tribunal files of the Agency that are not subject to a confidentiality order, then these provisions of the *Privacy Act* infringe subsection 2(b) of the *Charter*.

10. The legal test for saving an infringing provision under s. 1 of the *Charter* is the *Oakes* test, which is equivalent to the *Dagenais/Mentuck* test (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46). Thus, if a document (or personal information contained in a document) does not meet the *Dagenais/Mentuck* test for a confidentiality order, then restricting public access to the document cannot be justified pursuant to the *Oakes* test either.

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

November 21, 2014

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