Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

- and -

THE PRIVACY COMMISSIONER OF CANADA

Intervener

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, THE PRIVACY COMMISSIONER OF CANADA

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OVERVIEW

1. This application concerns a decision made by the Canadian Transportation Agency (the "CTA") not to disclose certain third party personal information to the Applicant in response to the Applicant's request to view documents filed with the CTA in a particular adjudicative proceeding.

2. Among other things, the Applicant challenges the CTA's reliance on the *Privacy Act* (R.S.C., 1985, c. P-21) to refuse to disclose the information at issue. He also challenges the constitutionality of the *Privacy Act* if it interferes with the open court principle. In this regard, this application engages the *Privacy Act* and the open court principle as they may apply in the context of public access to the CTA's public record.

3. The Privacy Commissioner of Canada (the "Privacy Commissioner") submits that there is no conflict between the open court principle and the *Privacy Act* and that it is not necessary to address the constitutional issue raised by the Applicant.

4. The Privacy Commissioner further submits that a reasonable interpretation of the open court principle does not require unqualified public access to personal information that is not relevant to an understanding of the CTA's decision or decision-making process.

PART I - STATEMENT OF FACTS

5. The Privacy Commissioner takes no position on the facts in issue and relies on the evidentiary record filed by the other parties.

PART II - ISSUES

6. The Privacy Commissioner's submissions will address the following issues:

(i) The application of the *Privacy Act* to the present case.

(ii) Whether the *Privacy Act* conflicts with the open court principle.

PART III – SUBMISSIONS

A. Application of the *Privacy Act*

7. The *Privacy Act* regulates, among other things, the disclosure of personal information by government institutions. The CTA is expressly identified as being a "government institution", in the Schedule to the *Privacy Act*.

> *Privacy Act*, R.S.C. 1985, c. P-21, ss. 2 and 3; Schedule (Section 3) Government Institutions, **Respondent's Record, Volume 1, Appendix A, Tabs 1-A and 2-A, pp. 8 and 127**.

8. The *Privacy Act* is "fundamental in the Canadian legal system." Its major objectives are, "first, to protect personal information held by government institutions, and second, to provide individuals with a right of access to personal information about themselves". This application engages the first objective.

> *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, para. 24, **Intervener's Book of Authorities ("Intervener's Authorities"), Tab 1**.

9. The Supreme Court of Canada has recognized the *Privacy Act* to be "quasi-constitutional" legislation because of the role privacy plays in maintaining a free and democratic society. Like other quasi-constitutional legislation, rights granted under the *Privacy Act* should be interpreted broadly and purposively, while exceptions to such rights should be interpreted narrowly.

> *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, *supra*, at paras. 24-25, **Intervener's Authorities, Tab 1**; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665, paras. 27-30, **Intervener's Authorities, Tab 2**.

10. The open court principle sets out a presumption of public access to judicial proceedings. The open court principle allows the public to access courts in order to see "that justice is administered in a non-arbitrary manner, according to the rule of law".

> *Named Person v. Vancouver Sun*, 2007 SCC 43 at paras. 31-32, **Intervener's Authorities, Tab 3**.

11. The open court principle is neither limitless nor absolute. It is a presumption in favour of access that is rebuttable by certain overriding factors.

> *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41, paras.1-4, **Applicant's Record, Volume 2, Appendix B, Tab 18, p. 725**.

12. It is widely held that privacy is not inherently in conflict with the open court principle, although there is a tension between the two concepts. Privacy and the open court principle must be appropriately balanced.

> See cases cited at paras. 54-55 below; see also: Chief Justice Beverley McLachlin, "Openness and the Rule of Law", Remarks at the Annual International Rule of Law Lecture (London, U.K., Jan. 8, 2014), Online: www.barcouncil.org.uk/media/270848/jan_8__2014_-_12_pt._rule_of_law_-_annual_international_rule_of_law_lecture.pdf, **Intervener's Authorities, Tab 14.**

13. The Privacy Commissioner takes no position on the extent to which the open court principle applies to quasi-judicial administrative bodies like the CTA, as compared with courts of law. However, as a body subject to the *Privacy Act*, the CTA must assess any obligation it has under the open court principle to maintain open and accessible

proceedings with the quasi-constitutional privacy rights of individuals involved in its proceedings.

14. Section 8 of the *Privacy Act* creates a general prohibition on the disclosure of personal information by government institutions without the consent of the individual. Subsection 8(1) states:

> Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.
>
> *Privacy Act*, R.S.C. 1985, c. P-21, s.8(1), **Respondent's Record, Volume 1, Appendix A, Tab 2-A, p. 127**.

15. Subsection 8(2) of the *Privacy Act* lists a limited number of exceptions to the general prohibition on the non-consensual disclosure of personal information whereby government institutions may, at their discretion, disclose personal information if one of the enumerated exceptions applies.

> *Privacy Act*, R.S.C. 1985, c. P-21, s.8(2), **Respondent's Record, Volume 1, Appendix A, Tab 2-A, p. 127**.

B. The *Privacy Act* is not a bar to disclosing personal information in accordance with the open court principle

16. The Privacy Commissioner submits that the *Privacy Act* is not a bar to the CTA disclosing personal information that would be considered necessary to meet the demands of the open court principle.

17. Adjudicative bodies subject to the open court principle and the *Privacy Act* can be transparent and open while still respecting privacy; the framework for balancing privacy and openness is built into the *Privacy Act* itself.

18. While the general rule is that personal information must not be disclosed without consent, various provisions in the *Privacy Act*, as set out below, provide institutions with the flexibility necessary to permit, in appropriate cases, the disclosure of personal information necessary to meet the open court principle.

19. The exceptions highlighted below are generally discretionary and depending on the circumstances, could allow institutions subject to the *Privacy Act* to disclose personal information in accordance with the open court principle. An unreasonable exercise of that discretion can be reviewed by the Privacy Commissioner or the Courts.

(1) <u>Permissible disclosures under subsection 8(2) of the *Privacy Act*</u>

- **8(2)(a) – Consistent use**

20. First, an institution may at its discretion disclose personal information for "the purpose for which it was obtained or compiled by the institution or for a use consistent with that purpose". To qualify as a "consistent use" under s. 8(2)(a), a use need not be identical to the purpose for which information was obtained. However, there need be a sufficiently direct connection between the purpose for obtaining the information and the proposed use, such that an individual could reasonably expect that the information could be used in the manner proposed.

> *Privacy Act*, R.S.C. 1985, c. P-21, s. 8(2)(a), **Respondent's Record, Volume 1, Appendix A, Tab 2-A, p. 127**; *Bernard v. Canada (Attorney General)*, 2014 SCC 13, at para. 31, **Intervener's Authorities, Tab 4.**

21. Disclosures under this provision should nonetheless be limited and proportionate and each case should be dealt with on its own facts.

> *Canada (Public Safety and Emergency Preparedness) v. Lin*, 2011 FC 431, para. 36, **Intervener's Authorities, Tab 5**; *A.B. v. Canada (Minister of Citizenship and Immigration)*, [2003] 1 F.C. 3, para. 52, **Respondent's Record, Volume 2, Appendix B, Tab 1, p. 142**.

22. The application of paragraph 8(2)(a) requires some forethought. Institutions relying on this provision must also respect other related provisions of the *Privacy Act*. For example, sections 9-11 of the *Privacy Act* require government institutions to retain a record of any use made by an institution in a "personal information bank" ("PIB") held by the institution and to publish an annual index of all PIBs in a publication maintained by the Treasury Board of Canada Secretariat (known as "Info Source"). Among other information, a PIB must include a statement of the "consistent uses" for which the personal information may be used or disclosed. Any new consistent uses must be

communicated to the Privacy Commissioner and subsequently added to the relevant PIB in Info Source.

> *Privacy Act*, R.S.C. 1985, c. P-21, ss 9-11, **Respondent's Record, Volume 1, Appendix A, Tab 2-A, p. 127**.

23. If the CTA collected personal information for the purpose of establishing the basis upon which to render a decision or order that would affect the rights of the parties involved, then, to the extent that the subsequent disclosure of that personal information was necessary to support or explain that decision or order, such a disclosure could be considered a consistent use under paragraph 8(2)(a). For example, the parties involved in the CTA's proceedings could reasonably expect that their personal information which is clearly relevant to the adjudication of their claims might be disclosed by the CTA to the extent necessary to establish the basis for reaching its decision. Such a disclosure would be in accordance with the open court principle.

24. It is important to note however, that not all personal information before the CTA will be relevant to the disposition of a given matter or necessary to honour the open court principle. For example, personal information collected by the CTA to contact individual complainants may appear in the CTA's adjudication files but may be completely irrelevant to the disposition of the dispute.

25. In addition, the reasonable expectations of the individual may vary depending on the context. For example, in its adjudicative function the CTA may be presented with personal information about third parties who are not a party to proceedings before the CTA, or even aware that there is a proceeding that implicates their personal information. In these cases, the third party may not reasonably expect his or her personal information to be disclosed by the CTA, and certainly less so where the information is not necessary to establish or explain the basis of the decision.

- **8(2)(b) – Act of Parliament or regulation that authorizes its disclosure**

26. Second, an institution may disclose personal information at its discretion "for any purpose in accordance with any Act of Parliament or any regulation made thereunder

that authorizes its disclosure". This provision allows Parliament and bodies with delegated regulation-making authority to authorize disclosures of personal information to the extent necessary to meet the demands of the open court principle.

> *Privacy Act*, R.S.C. 1985, c. P-21, s.8(2)(b), **Respondent's Record, Volume 1, Appendix A, Tab 2-A, p. 127**.

27. The Privacy Commissioner takes the view that, in order to give effect to the quasi-constitutional protection of privacy rights set out in the *Privacy Act,* the exception at paragraph 8(2)(b) should be construed narrowly to require clear and explicit authority by law or regulation. It is not enough if the law or regulation merely does not prohibit the disclosure or is silent on the matter. The application of paragraph 8(2)(b) is therefore a question of statutory interpretation to be assessed on the facts of each case.

28. At the time the Applicant requested access to the CTA's adjudication file at issue in this application, there was a regulation in place setting out certain rules pertaining to the CTA's case files. One specific rule (the "*Rule*") states that the CTA "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…".

> *Canadian Transportation Agency General Rules*, S.O.R./2005-35 (repealed since 2014-06-01), s. 23(1), **Applicant's Record, Volume 1, p. 256**.

29. This *Rule* makes the distinction between documents on the public record and documents not placed on the public record because they are covered by a claim for confidentiality; it does not define what is intended by "public record" nor does it expressly authorize the CTA to provide unrestricted access to personal information contained in that public record.

30. The Privacy Commissioner acknowledges that the reference to "public record" is suggestive of an intent to provide some form of public access to the CTA's public record. However, the *Rule* is silent as to the nature and scope of such access

31. In terms of deciphering the intent behind this *Rule*, it is instructive that the CTA, as the very body with delegated authority to make the *Rule*, has asserted that no Act of

Parliament or regulation exists to support a permissible disclosure under paragraph 8(2)(b) of the *Privacy Act*.

> Respondent's Memorandum of Fact and Law, at para. 41, **Respondent's Record, Volume 1, Tab 2, p.112**.

32. If this Court concludes that the *Rule* should be interpreted as authorizing the disclosure of personal information in order to meet the demands of the open court principle, this does not mean that complete and unqualified disclosure would in every case be required by the open court principle and therefore authorized under paragraph 8(2)(b). In particular, as explained further below, the open court principle does not require public access to personal information that is not relevant to an understanding of the CTA's decisions and decision-making process.

- **8(2)(m)(i) – Disclosure in the public interest**

33. Finally, personal information can be disclosed without the consent of the individual to whom it relates "for any purpose where, in the opinion of the head of the institution, the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure".

> *Privacy Act*, R.S.C. 1985, c. P-21, s. 8(2)(m)(i), **Respondent's Record, Volume 1, Appendix A, Tab 2-A, p. 127**.

34. This provision provides support for a disclosure of personal information where the public interest in achieving values underlying the open court principle clearly outweighs any infringement of an individual's privacy.

35. Reliance on this provision requires the head of the institution to examine the specific facts in each case and make a determination on those facts about whether the public interest in disclosure will outweigh the invasion of an affected individual's privacy.

36. There is a corresponding obligation to notify the Privacy Commissioner in writing of any disclosure made under paragraph 8(2)(m). This suggests that this provision was not intended to authorize bulk disclosures, but rather should be applied only on a case-by-case basis.

> *Privacy Act*, R.S.C. 1985, c. P-21, s. 8(5), **Respondent's Record, Volume 1, Appendix A, Tab 2-A, p. 127**.

37. The CTA could have relied on this provision to disclose personal information necessary to meet the open court principle, after having conducted the balancing exercise required by this provision and concluded that the public interest in disclosure outweighed any competing privacy interest in this specific case.

38. In this respect, paragraph 8(2)(m)(i) of the *Privacy Act* allows for a balancing of important interests in openness and privacy similar to that which is undertaken by the courts in considering reasonable limits on the open court principle.

> *Toronto Star Newspapers Ltd. v. Ontario, supra*, at para. 26, **Applicant's Record, Volume 2, Appendix B, Tab 18, p. 725**.

39. The Privacy Commissioner submits that the *Privacy Act* would not necessarily have prohibited the CTA from disclosing personal information at issue in this matter to the Applicant. However, the extent to which the CTA considered any of the above provisions when it decided to withhold access to certain personal information from the Applicant is not apparent from the Court record in this application.

(2) <u>Exclusion for "publicly available" personal information</u>

40. Subsection 69(2) of the *Privacy Act* provides that restrictions on the use and disclosure of personal information by government institutions set out in sections 7 and 8 of the Act "do not apply to personal information that is publicly available".

> *Privacy Act*, R.S.C. 1985, c. P-21, ss. 69(2), **Respondent's Record, Volume 1, Appendix A, Tab 2-A, p. 127**.

41. The Treasury Board of Canada Secretariat, which is responsible for providing guidance concerning the operation of the *Privacy Act*, has described subsection 69(2) as follows:

> This provision applies to information which has been published in any form or which constitutes or is part of a public record obtainable from another source. This provision is intended to cover situations where a government institution wishes to obtain information which is in the public domain from another government institution.

> Treasury Board Secretariat *Privacy and Data Protection Guidelines - Use and Disclosure of Personal Information*, section 6.15, online: http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25498&section=HTML (last modified: 1993-12-01), **Intervener's Authorities, Tab 15**.

42. Examples of publicly available information intended to be covered by this provision include information that is "easily available" or "readily available" such as newspaper clippings, magazine clippings, or information in a court registry.

> *House of Commons Debates*, 32nd Parl., 1st session, No. 94 (8 June 1982) at 2205 (Hon. Francis Fox), **Intervener's Authorities, Tab 16**.

43. The Federal Court has ruled that "for information to be in the public domain, it must be available on an ongoing basis for use by the 'public'".

> *Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board)*, [2005] F.C.J. No. 489 at para. 47, reversed on other grounds on appeal, *Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board),* [2006] F.C.J. No. 704, **Intervener's Authorities, Tab 6**.

44. In accordance with subsection 69(2), a government institution does not have to obtain consent for uses and disclosures of personal information that is readily accessible in the public domain. Logically, this requires that the personal information must already be in the public domain before an institution can avail itself of this provision.

45. Whether personal information is publicly available within the meaning of subsection 69(2) is a question of fact.

46. In the instant case, the personal information sought by the Applicant and held by the CTA would not be "publicly available" simply because the CTA is subject to the open court principle. In order for it to be considered publicly available, the personal information would have had to have been in the public domain on an ongoing basis for use by the public at the time the Applicant made his request to access the documents.

47. The Privacy Commissioner submits that subsection 69(2) in itself would not have provided the originating authority under the *Privacy Act* for the CTA to disclose the personal information at issue to the Applicant. This provision is meant to apply to a

government institution's use and disclosure of personal information that is already publicly available. It is not meant to be a source of authority for a government institution to make information publicly available in the first place. To invoke subsection 69(2) as the legal justification for disclosing the personal information in the circumstances would deprive section 8 of the *Privacy Act* of its meaning.

48. This position is consistent with the way the courts have interpreted exceptions to the consent requirement under private sector privacy legislation in other contexts. In essence, an exception to non-consensual disclosure of personal information assumes that the pre-conditions for disclosure already exist; it does not itself create the necessary conditions. To interpret otherwise would be circular.

> See, for example: *R. v. Spencer*, 2014 SCC 43, paras. 61-63, **Intervener's Authorities, Tab 7**; *Royal Bank of Canada v. Trang*, 2014 ONCA 883 (CanLII), para. 82, **Intervener's Authorities, Tab 8**.

C. Even if the *Privacy Act* did serve to limit disclosure of the personal information at issue, it would not necessarily result in a conflict with the open court principle

49. In this case, the CTA provided the Applicant with access to the CTA's case file. In so doing, the CTA disclosed some personal information (for example, names of the complainants and certain details about their travel) and withheld other personal information (for example, email addresses and telephone numbers of the complainants and other individuals).

50. The Privacy Commissioner takes no position on the appropriateness of the CTA's redactions in this particular case. The Privacy Commissioner's argument rather is that the CTA had the authority to make redactions it considered necessary to reconcile both the open court principle and its statutory obligations under the *Privacy Act*.

51. In considering whether the CTA should have provided the personal information that it withheld, the Privacy Commissioner submits that the open court principle does not require that individuals be given access to each and every piece of personal information that may be contained in the CTA's adjudication files.

52. The policy goals motivating the open court principle, which include ensuring the effectiveness of the evidentiary process, encouraging fair and transparent decision-making, promoting the integrity of the justice system and informing the public about its operation, can be accomplished through less privacy invasive methods in which public access to the CTA's files is provided, while redacting extraneous personal information that is not necessary to the understanding of the decision making process.

53. The Supreme Court of Canada has held that s. 2(b) of the *Canadian Charter of Rights and Freedoms* does not necessarily guarantee access to all government documents; rather the scope of s. 2(b) protection includes a right to access documents "only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints."

> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 SCR 815, paras. 30-40, **Respondent's Record, Volume 2, Appendix B, Tab 9, p. 337**.

54. The Supreme Court of Canada has frequently upheld limitations to access to the courts in the form of publication bans, confidentiality orders, redactions to court documents and/or the use of pseudonyms in a variety of proceedings.

> See, for example: *A.B. v. Bragg Communications Inc.*, [2012] 2 SCR 567, **Applicant's Record, Volume 2, Appendix B, Tab 1, p. 279**; *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 SCR 122, **Intervener's Authorities, Tab 9** ; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41, **Intervener's Authorities, Tab 10.**

55. The privacy rights of litigants, victims and third parties have been found to constitute a justifiable limit on the right of open access in judicial proceedings. In particular, the Supreme Court of Canada has held that limiting the disclosure of the identity of certain parties in proceedings does not necessarily offend the principle openness.

> See, for example: *F.N. (Re)*, 2000 SCC 35, **Intervener's Authorities, Tab 11**; *A.B. v. Bragg Communications Inc., supra,* **Applicant's Record, Volume 2, Appendix B, Tab 1, p. 279**; *Canadian Newspapers Co. v. Canada (Attorney General)*, *supra,* **Intervener's Authorities, Tab 9** ; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* [1996] 3 S.C.R. 480, **Applicant's Record, Volume 2, Appendix B, Tab 3, p. 339.**

56. The Canadian Judicial Council (the "CJC") recognizes the particular privacy issues that can stem from public access to personal information held in court records. In its *Model Policy for Access to Court Records in Canada* (the "*Model Policy*"), the CJC notes that court records can contain numerous "personal data identifiers" such as day and month of birth, addresses (e.g. civic, postal or e-mail), unique numbers (e.g. phone, social insurance, financial accounts), and biometrical information (e.g. fingerprints, facial image) which, when combined together or with the name of an individual, enables the direct identification of the individual so as to pose a serious threat to the individual's personal security. As indicated in the *Model Policy*:

> Unrestricted public access to this type of personal information would entail serious threats to personal security, such as identity theft, stalking and harassment, and the foreseeable uses of this information are not likely to be connected with the purposes for which court records are made public.
>
> *Model Policy for Access to Court Records in Canada*, September 2005, online: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf , **Intervener's Authorities, Tab 17.**

57. In its *Model Policy*, the CJC acknowledges that public access to court files is essential for ensuring the openness of court proceedings. However, it notes that personal data identifiers in court records are often related more to filing requirements than to the actual disposition of the case and thus may provide little assistance to the public's understanding of the judicial process. Accordingly, the CJC advocates for an access policy to court records that limits the personal information found in court records to that required for the disposition of a case.

58. The CJC has also developed the *Use of Personal Information in Judgments and Recommended Protocol* which recognizes that in some cases, it may be appropriate to remove personal identifying information from court judgments.

> Canadian Judicial Council, *Use of Personal Information in Judgments and Recommended Protocol*" (March 2005) online: https://cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_UseProtocol_2005_en.pdf, **Intervener's Authorities, Tab 18.**

59. In the context of publishing tribunal decisions on the Internet, the Office of the Privacy Commissioner has issued guidance instructing administrative and quasi-judicial bodies that openness and privacy can be achieved through reasonable measures such as depersonalizing decisions and limiting disclosures of personal information to that which is truly necessary.

> *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals* (2010), online: https://www.priv.gc.ca/information/pub/gd_trib_201002_e.asp, **Intervener's Authorities, Tab 19.**

60. The courts themselves have recognized that public access to personal information in court records can pose certain risks. For example, the Nova Scotia Court of Appeal held that public access to a range of personal information could assist with identity theft:

> [47] I also accept that access to (1) unique personal identifier numbers, namely passport or Social Insurance Numbers, Health Insurance Card or driver's licence numbers, (2) credit or debit card numbers, (3) unique property identifier numbers, namely numbers for bank accounts or other investment assets or for debt instruments or insurance policies, and serial or registration numbers for vehicles, may assist the use of identity theft to fraudulently access property.
>
> [48] I also accept that (4) dates of birth, (5) names of parents, (6) personal addresses, (7) email addresses and (8) telephone numbers sometimes may not already be in the public domain, and therefore access to that information in a court file possibly could assist with identity theft […].
>
> *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83 (CanLII), paras. 47-48, **Intervener's Authorities, Tab 12.**

61. In concluding that it would be appropriate to redact the personal information noted above from the court record, the Court in *Coltsfoot* concluded that "it is not uncommon that access to a court file be on condition that either redacts or bans the publication of items that I have mentioned in paras 47-48". It further held that "neither the media nor the public would be deleteriously affected, to any material degree, by not having access to the information I have listed in paras 47-48".

> *Coltsfoot Publishing Ltd. v. Foster-Jacques*, *supra*, at paras. 51 and 53, **Intervener's Authorities, Tab 12**.

62. This approach is consistent with this Court's decision in *Singer v. The Attorney General of Canada* that sensitive personal information that is not relevant to the matters in issue ought to be redacted from the evidentiary record to protect litigants from unnecessary public access to sensitive personal information.

> *Singer v. The Attorney General of Canada*, 2001 FCA 3 at para. 9, **Intervener's Authorities, Tab 13.**

63. In the Privacy Commissioner's submission, while the applicable provisions of the *Privacy Act* must be interpreted contextually with a view to respecting the open court principle, so too must the application of the open court principle be assessed with a view to furthering the objectives of the *Privacy Act*.

64. The Privacy Commissioner submits that the open court principle is not absolute; it exists as a presumption in favour of openness and public access to proceedings, not as a freestanding and unfettered discretion to disclose any and all personal information. The *Privacy Act* gives rise to compelling privacy rights that must be weighed in the balance to protect personal information which need not be disclosed to accommodate the open court principle.

PART IV – ORDER SOUGHT

65. The Privacy Commissioner takes no position on the disposition of this application. The Privacy Commissioner does not seek costs and asks that no cost be awarded against the Privacy Commissioner.

All of which is respectfully submitted this 12th day of February, 2015.

Jennifer Seligy

JENNIFER SELIGY
Legal Counsel for the Intervener,
Privacy Commissioner of Canada

PART V – LIST OF STATUTES AND AUTHORITIES

APPENDIX A – STATUTES and REGULATIONS

Privacy Act, R.S.C. 1985, c. P-21, ss. 2, 3, 8, 9-11, 69(2) (**Respondent's Record, Volume 1, Appendix A, Tab 2-A p. 127)** and Schedule to the *Privacy Act* **(Respondent's Record, Volume 1, Tab 1-A p. 8)**
Canadian Transportation Agency General Rules, S.O.R./2005-35 (repealed since 2014-06-01), s. 23(1) **(Applicant's Record, Volume 1, p. 256)**

APPENDIX B – AUTHORITIES

CASES

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773.
Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2000] 1 S.C.R. 665.
Named Person v. Vancouver Sun, 2007 SCC 43.
Toronto Star Newspapers Ltd. v. Ontario, [2005] 2 S.C.R. 188, 2005 SCC 41. **(Applicant's Record, Volume 2, Appendix B, Tab 18, p. 725)**
Bernard v. Canada (Attorney General), 2014 SCC 13.
Canada (Public Safety and Emergency Preparedness) v. Lin, 2011 FC 431.
A.B. v. Canada (Minister of Citizenship and Immigration), [2003] 1 F.C. 3. **(Respondent's Record, Volume 2, Appendix B, Tab 1, p. 142)**
Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board), [2005] F.C.J. No. 489 reversed on other grounds on appeal, *Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board),* [2006] F.C.J. No. 704.
R. v. Spencer, 2014 SCC 43.
Royal Bank of Canada v. Trang, 2014 ONCA 883 (CanLII).
Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 SCR 815. **(Respondent's Record, Volume 2, Appendix B, Tab 9, p. 337)**
A.B. v. Bragg Communications Inc., [2012] 2 SCR 567. **(Applicant's Record, Volume 2, Appendix B, Tab 1, p. 279)**
Canadian Newspapers Co. v. Canada (Attorney General), [1988] 2 SCR 122.

Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522, 2002 SCC 41.
F.N. (Re), 2000 SCC 35.
Canadian Broadcasting Corp. v. New Brunswick (Attorney General) [1996] 3 S.C.R. 480. **(Applicant's Record, Volume 2, Appendix B, Tab 3, p. 339)**
Coltsfoot Publishing Ltd. v. Foster-Jacques, 2012 NSCA 83 (CanLII).
Singer v. The Attorney General of Canada, 2011 FCA 3.

OTHER AUTHORITIES

Chief Justice Beverley McLachlin, "Openness and the Rule of Law", Remarks at the Annual International Rule of Law Lecture (London, U.K., Jan. 8, 2014), Online: www.barcouncil.org.uk/media/270848/jan_8__2014_-_12_pt._rule_of_law_-_annual_international_rule_of_law_lecture.pdf
Treasury Board of Canada Secretariat *Privacy and Data Protection Guidelines - Use and Disclosure of Personal Information*, section 6.15, online: http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25498&section=HTML (last modified: 1993-12-01)
House of Commons Debates, 32nd Parl., 1st session, No. 94 (8 June 1982) at 2205 (Hon. Francis Fox).
Canadian Judicial Council, *Model Policy for Access to Court Records in Canada* (September 2005), online: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf
Canadian Judicial Council, *Use of Personal Information in Judgments and Recommended Protocol* (March 2005), online: https://cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_UseProtocol_2005_en.pdf
Office of the Privacy Commissioner of Canada, *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals* (2010), online: https://www.priv.gc.ca/information/pub/gd_trib_201002_e.asp