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 ATTORNEY GENERAL OF CANADA

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OVERVIEW

1. There is no conflict between the operation of the *Privacy Act* and the open court principle in the context of an administrative tribunal. The application of one does not oust or trump the other. Rather, the principles of privacy and access to adjudicative proceedings co-exist.

2. The open court principle presumes public access to judicial proceedings. Whether it applies to a particular administrative tribunal will depend on the public importance of the subject matter dealt with by the tribunal and the statutory regime. Even if the open court principle applies to an administrative tribunal, this does not result in an automatic entitlement to every piece of information before the tribunal. The open court principle is not absolute and there is room for it to work with the *Privacy Act*.

3. Although the *Privacy Act* prevents the release of personal information, there are exceptions under which the decision-maker has the discretion to authorize the release of personal information. The open court principle comes into play when determining whether or not to exercise this discretion, as the decision-maker must balance the statutory objective of the legislation with any applicable *Canadian Charter of Rights and Freedoms* ("the *Charter*") values.

4. In this way, the provisions of the *Privacy Act* and the open court principle co-exist; through a careful and considered balancing by the decision-maker in arriving at a decision on whether to release personal information. There is no conflict.

5. The Attorney General of Canada takes no position on the disposition of this matter

but intervenes only to make submissions with respect to the interplay of the *Privacy Act* and the constitutionally based open court principle.

PART I – FACTS

6. The Attorney General of Canada relies on the following facts presented by the applicant and the respondent.

7. The applicant made a request to the Canadian Transportation Agency ("the Agency") for documents in one of its case files.[1] This case file was in relation to a hearing conducted by the Agency, to which the applicant was not a party.[2]

8. In response to the request, the Agency provided redacted copies of the requested documents.[3]

9. The applicant made a further request for the unredacted copies of the documents.[4] On March 26, 2014, the Agency refused access to the unredacted information, citing certain provision of the *Privacy Act*.[5]

10. On April 22, 2014, the applicant filed the Notice of Application seeking judicial

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1 *Memorandum of fact and law of the applicant*, at para 11; *Memorandum of fact and law of the respondent*, at para 1

2 *Memorandum of fact and law of the applicant*, at para 11; *Memorandum of fact and law of the respondent*, at para 1; *CTA decision no. 55-C-A-2014*

3 *Memorandum of fact and law of the applicant*, at para 16; *Memorandum of fact and law of the respondent*, at para 4

4 *Memorandum of fact and law of the applicant*, at para 18; *Memorandum of fact and law of the respondent*, at para 5

5 *Memorandum of fact and law of the applicant*, at para 19; *Memorandum of fact and law of the respondent*, at para 6

review of the Agency's decision of March 26, 2014.[6] On November 21, 2014, the Notice of Constitutional Question was filed, which questions whether a conflict exists between the open court principle and the provisions of the *Privacy Act.*[7]

PART II – ISSUES

11. The only issue the Attorney General of Canada wishes to raise in this intervention is:

    i) There is no conflict between the open court principle and the *Privacy Act.*

PART III – LAW AND ARGUMENT

There is no conflict between the open court principle and the *Privacy Act*

<u>The open court principle applies to some, but not all, administrative tribunals</u>

12. The open court principle is protected under s. 2(b) of the *Charter* and refers to the broad notion that judicial proceedings and decisions are to be transparent and public. In discussing the open court principle, the Supreme Court has held that "the state must not interfere with an individual's ability to 'inspect and copy public records and documents, including judicial records and documents."[8]

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6 *Notice of Application, dated April 22, 2014*
7 *Notice of Constitutional Question, dated November 21, 2014*
8 *Named Person v. Vancouver Sun,* 2007 SCC 43 at para 33

13. Although a version of the open court principle has been applied to certain administrative tribunals, this only occurs where the processes are court-like and where the public is considered to have a strong interest in the subject-matter of the proceedings.[9] In *Southam v. Canada (Attorney General)*, the Ontario Superior Court applied the open court principle to a RCMP adjudication board on the basis that the subject of the hearings – police conduct – involved matters of such public importance that s. 2(b) of the *Charter* was clearly implicated.[10]

14. This will not necessarily be the case for every administrative tribunal. A case-by-case consideration should be conducted in order to determine whether the nature of the proceedings and the level of the public importance of the subject matter is sufficient to engage s. 2(b) values. Further, consideration must be given to the intent and purpose of Parliament in creating the tribunal and establishing its role. As a result, a general finding that the open court principle applies to all administrative tribunals is not possible.

<u>The open court principle is not absolute and does not oust the *Privacy Act*</u>

15. Even when the open court principle applies to an administrative tribunal, there is no resulting automatic entitlement to access all of the information held by the tribunal.

16. Freedom of expression under s. 2(b) of the *Charter* has not been extended to include a

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9 *Southam v. Canada (Attorney General)*, [1997] 36 O.R. (3d) 721; also see: *Canadian Broadcasting Corp. v. Summerside* (1999), 170 D.L.R. (4th) 731, at paras 23 and 31-34

10 *Southam v. Canada (Attorney General)*, *supra*

guarantee of access to all government documents,[11] or even to all documents that are part of judicial proceedings.[12] As noted by the Supreme Court, access to information is a "derivative right" which may arise where it is a necessary precondition of meaningful expression on the functioning of government:

> Section 2(*b*) of the Canadian Charter of Rights and Freedoms guarantees freedom of expression, but it does not guarantee access to all documents in government hands. Access to documents in government hands is constitutionally protected only where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned.[13]

17. Likewise, the open court principle is not absolute in its guaranteed access to information. Even when it applies in a tribunal setting, its application is limited by both the underlying statutory regime and the provisions of the *Privacy Act*. Instead of one trumping the other, the open court principle and the *Privacy Act* work together through a careful balancing by the administrative tribunal in exercising discretion on whether to release information that would otherwise be statutorily protected.

Exercising discretion to release personal information under the *Privacy Act* must be informed by the open court principle

18. Under the *Privacy Act*, personal information under the control of a government institution is generally prohibited from release.[14] However, there are exceptions to this statutory requirement, one of which, s. 8(2), requires the exercise of discretion by the administrative decision-maker. Through this discretion under the *Privacy Act*, the

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11 *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] 1 S.C.R. 815, at para 5

12 *R v. Mentuck*, [2001] 3 S.C.R. 442, at paras 32-33.

13 *Ontario (Public Safety and Security)*, *supra*, at para 5

14 *Privacy Act*, R.S.C., 1985, c. P-21s. 8(1)

open court principle may come into play.

19. The first exception to the prohibition against the release of personal information is s. 69(2).[15] This section removes the general prohibition on disclosure of personal information found in s. 8(1), if the information is publicly available.

20. The second exception is where the exercise of discretion arises. Under s. 8(2) of the *Privacy Act*, personal information falling into one of the enumerated categories may be released.[16] As s. 8(2) is not imperative, the statute does not compel the release of the personal information. Instead, discretion is given to the decision-maker to determine whether the information should be held back or released, so long as the conditions of s. 8(2) are met and there are no other statutory requirements in the decision-maker's governing legislation that would dictate a certain course of action.

21. In *Doré v. Barreau du Québec*, the Supreme Court held that an administrative body making a discretionary decision that involves *Charter* values must balance these values with the statutory objectives of the legislation in the following manner:

    i) In conducting this balancing, the decision-maker should first consider the statutory objectives.[17]

    ii) The decision-maker should then ask how the *Charter* value will best be protected in light of the statutory objectives. This is at the core of the proportionality exercise and requires the decision-maker to balance the severity of the interference with the *Charter* protection with the statutory

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15 *Privacy Act*, *supra*, s. 69(2)
16 *Privacy Act*, *supra*, s. 8(2)
17 *Doré v. Barreau de Québec*, 2012 SCC 12, at para 55

objectives.[18]

22. As a negative decision on the release of personal information held by a tribunal would affect the public's ability to know about that tribunal's proceedings, the *Charter* value of the open court principle is implicated. The reasoning of the Supreme Court in *Doré* therefore requires the decision-maker to proportionally balance the open court principle with the objectives of the *Privacy Act* in order for the discretionary decision to be reasonable.[19]

23. In conducting the balancing under the *Doré* principles, the decision-maker has to consider the objectives of the *Privacy Act*, which establish a *prima facie* rule that a government institution shall not disclose personal information under its control unless the person to whom the information relates consents. These objectives must then be balanced with the *Charter* values embodied by the open court principle, which call for a presumption of public access to information about or relating to a judicial proceeding.

24. As part of this balancing under *Doré*, the decision-maker should also have regard to whether the circumstances can justify displacing the presumptive public access under the open court principle. The *Dagenais/Mentuck* test can provide the decision-maker with a framework for making this determination. Under the *Dagenais/Mentuck* framework, a discretionary decision should only limit public access to a judicial proceeding if: 1) it is necessary to do so in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the

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18 *Doré*, *supra*, at para 56
19 *Doré*, *supra*, at para 58

risk; and 2) 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 efficiency of the administration of justice.[20]

25. Furthermore, even if the open court principle does not apply to the administrative tribunals, consideration of Charter values should still form part of the exercise of discretion. In *Doré*, the Supreme Court noted that an administrative decision should *always* consider fundamental values, such as those set out in the *Charter*, and that these values should be considered within the decision-maker's scope of expertise.[21] Therefore, a specific determination on whether the open court principle applies is not required in order for the decision-maker to consider the underlying values of the open court principle in exercising its discretion.

26. After carefully weighing the *Charter* value of the open court principle and the objectives of the *Privacy Act*, the decision-maker will issue a decision on whether to permit the release of the otherwise protected information under s. 8(2). That discretion must be exercised in conformity with all of the governing legislation, including the *Privacy Act*, together with constitutional values such as the open court principle.

27. If the resulting decision demonstrates discretion was exercised to properly balance the

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20 *R v. Mentuck*, [2001] 3 S.C.R. 442, at paras 32-33. In *Named Person v. Vancouver Sun,* supra, at para 37, the Court extended this test to apply to any kind of discretionary decision having the potential to impact on the open court principle.

21 *Doré, supra*, at para 35

relevant *Charter* value with the statutory objectives, the decision will be reasonable.[22] The Supreme Court in *Doré* confirmed that reasonableness, rather than an analysis under s. 1 of the *Charter*, is the applicable standard of review for an administrative decision-maker considering *Charter* values.[23]

28. The Attorney General of Canada takes no position on whether the Agency is subject to the open court principle. If s. 2(b) of the *Charter* requires the application of the open court principle to the Agency, the Agency's duties under that principle should be determined based on the analysis set out above. Since respect for the open court principle can be maintained while balancing it with the purposes of the *Privacy Act*, there is no conflict between the constitutional requirements and those of the statute.

PART IV – ORDER REQUESTED

29. The Attorney General of Canada takes no position on the disposition of this application for judicial review. The Attorney General of Canada does not seek costs and asks that no costs be awarded against it.

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[22] *Doré, supra*, at para 58
[23] *Doré, supra*, at paras 57-58

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Halifax, Nova Scotia, this 5th day of March 2015.

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Per: _____

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PART V – LIST OF AUTHORITIES

Statutes

Privacy Act, R.S.C., 1985, c. P-21, ss. 8(1), 8(2), and 69(2)

Jurisprudence

Named Person v. Vancouver Sun, 2007 SCC 43

Southam v. Canada (Attorney General), [1997] 36 O.R. (3d) 721

Canadian Broadcasting Corp. v. Summerside (1999), 170 D.L.R. (4th) 731

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