Federal Court of Appeal | Cour d'appel fédérale

Date: 20150605

Docket: A-218-14

Citation: 2015 FCA 140

CORAM: **RYER J.A.**
NEAR J.A.
BOIVIN J.A.

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY ET AL.

Respondents

and

THE PRIVACY COMMISSIONER OF CANADA

Intervener

and

THE ATTORNEY GENERAL OF CANADA

Intervener

Heard at Halifax, Nova Scotia, on March 17, 2015.

Judgment delivered at Ottawa, Ontario, on June 5, 2015.

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: NEAR J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

RYER J.A.

[1] Dr. Gábor Lukács is a Canadian air passenger rights advocate. He brings this application for judicial review of a decision of the Canadian Transportation Agency (the "Agency") to refuse

his request for an unredacted copy of the materials that the Agency placed on its public record in a dispute resolution proceeding between Air Canada and a family whose flight from Vancouver to Cancun had been delayed (the "Cancun Matter").

[2] The Agency is constituted under the *Canada Transportation Act*, S.C. 1996, c.10 (the "CTA"). The jurisdiction of the Agency is broad, encompassing economic regulatory matters in relation to air, rail and marine transportation in Canada, and adjudicative decision-making in respect of disputes that arise in areas under its jurisdiction.

[3] When engaged in adjudicative dispute resolution, the Agency acts in a quasi-judicial capacity, functioning in many respects like a court of law, and members of the Agency, as defined in section 6 of the CTA, function like judges, in many respects.

[4] Adjudicative proceedings before a court of law are subject to the open court principle, which generally requires that such proceedings, the materials in the record before the court and the resulting decision must be open and available for public scrutiny, except to the extent that the court otherwise orders.

[5] These rights of access to court proceedings, documents and decisions are grounded in common law, as an element of the rule of law, and in the Constitution, as an element of the protection accorded to free expression by s.2(*b*) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c. 11 (the "*Charter*").

[6] Court-sanctioned limitations on the rights arising from the open court principle are often imposed under the procedural rules applicable to the court. In the context of the *Charter*, the appropriateness of requested limitations to the open court principle are determined under a judge-made test requiring the court to consider whether the salutary effects of the requested limitation on the administration of justice outweighs the deleterious effects of that limitation.

[7] In responding to Dr. Lukács' request for the materials on its public record in the Cancun Matter, the Agency acknowledged that it was subject to the open court principle. However, the Agency asserted that, unlike courts of law, the application of that principle to the Agency`s public record was circumscribed by the provisions of the *Privacy Act*, R.S.C., 1985, c. P-21 (the *"Privacy Act"*). Thus, before providing the materials to Dr. Lukács, one of the Agency's administrative employees removed portions of them that she determined to contain personal information ("Personal Information"), as defined in section 3 of the *Privacy Act*.

[8] The Agency refused Dr. Lukács' further request for a copy of the unredacted material on its public record, asserting that subsection 8(1) of the *Privacy Act* prevented it from disclosing Personal Information under its control.

[9] Dr. Lukács brought this application for judicial review challenging the Agency's refusal to provide the unredacted materials on a number of bases. Among his arguments, he asserted that because the requested materials had been placed on the Agency's public record ("Public Record") in accordance with subsection 23(1) of the *Canadian Transportation Agency General Rules*, SOR/2005-35 (the "Old Rules"), all of those materials – in an unredacted form – were

publicly available ("Publicly Available") within the meaning of subsection 69(2) of the *Privacy Act*, and, as such, the prohibition on disclosure in subsection 8(1) of the *Privacy Act* does not apply to his request.

[10] In my view, this argument is persuasive and, accordingly, the Agency's refusal to provide an unredacted copy of the requested materials to Dr. Lukács is impermissible.

I. BACKGROUND

[11] The Agency's decision in the Cancun Matter (Decision 55-C-A-2014) dealt with a claim for compensation for denied boarding and costs from flight delays that was made by a family in relation to a flight from Vancouver to Cancun, Mexico.

[12] On February 14, 2014, Dr. Lukács made a request to the Secretary of the Agency for a copy of all of the public documents that were filed with the Agency in the Cancun Matter.

[13] On February 24, 2014, Ms. Patrice Bellerose, a staff employee of the Agency, sent an email to Dr. Lukács indicating that the Agency would provide the Public Record as soon as they could do so.

[14] On March 19, 2014, Ms. Bellerose sent an email to Dr. Lukács that contained a copy of the materials that had been filed, but portions of those materials were redacted.

[15] Ms. Bellerose made the redactions on the basis that section 8 of the *Privacy Act* prevented the Agency from disclosing what she determined to be Personal Information contained in the materials that the Agency placed on its Public Record. Importantly, none of the materials filed in the Cancun Matter was subject to a confidentiality order, which the Agency was empowered to make, pursuant to subsections 23(4) to (9) of the Old Rules, upon request from any person who files a document in any given proceeding.

[16] On March 24, 2014, Dr. Lukács wrote to the Secretary of the Agency requesting "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."

[17] On March 26, 2014, Mr. Geoffrey C. Hare, Chairperson and CEO of the Agency, wrote to Dr. Lukács and, without specifically so stating, refused (the "Refusal") to accede to Dr. Lukács' request for unredacted copies of the materials (the "Unredacted Materials") in the Cancun Matter.

[18] On April 22, 2014, Dr. Lukács brought this application for judicial review in respect of the Agency's practice of limiting public access to Personal Information in documents filed in the Agency's adjudicative proceedings, specifically challenging the refusal of the Agency to provide him with the Unredacted Materials.

[19] The relief sought by Dr. Lukács is as follows:

l. 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 now 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)(*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 *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.

[20] By order dated December 10, 2014, Stratas J.A. granted the Privacy Commissioner of Canada (the "Privacy Commissioner") leave to intervene in this application on the basis that the application raises issues as to whether certain provisions of the *Privacy Act* provide justification for the Refusal.

[21] On November 21, 2014, Dr. Lukács filed a Notice of Constitutional Question in which he challenged the constitutional validity of certain provisions of the *Privacy Act*. Dr. Lukács contends that he has a constitutional right under the open court principle, protected by paragraph 2(b) of the *Charter*, to obtain the Unredacted Documents. He submitted that, if any provisions of the *Privacy Act* limit his right to obtain such documents, those provisions infringe paragraph 2(b) of the *Charter*. Further, Dr. Lukács argues that any infringement is not saved under section 1 of the *Charter*.

[22] On March 5, 2015, the Attorney General of Canada filed a Memorandum of Fact and Law and became a party to this application.

II. THE REFUSAL

[23] In the Refusal, Chairperson Hare stated that the Agency is a government institution ("Government Institution"), as defined under section 3 of the *Privacy Act*, that is subject to the full application of that legislation. He then referred to sections 8, 10 and 11 of the *Privacy Act* and stated that:

> 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 not to 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 InfoSource. This is all consistent with the directions of the Treasury Board 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 licence 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 required under the Act.

[24] While these reasons do not explicitly so state, it is apparent to me that the Agency concluded that subsection 8(1) of the *Privacy Act* circumscribes the scope and ambit of the open court principle. Thus, the Agency concluded that subsection 8(1) of the *Privacy Act* requires it to redact Personal Information contained in documents placed on its Public Record in dispute resolution proceedings before such documents can be disclosed to a member of the public who requests them.

[25] Chairperson Hare's reasons do not explain why any of the disclosure-permissive provisions in the *Privacy Act*, such as paragraphs 8(2)(*a*), (*b*) or (*m*), are inapplicable to Dr. Lukács' request. Additionally, his reasons do not discuss whether the Personal Information that the Agency redacted, in intended compliance with the non-disclosure requirement in subsection 8(1) of the *Privacy Act*, was Publicly Available.

III. ISSUES

[26] This appeal raises two general issues:

(a) whether subsection 8(1) of the *Privacy Act* requires or permits the Agency to refuse to provide the Unredacted Materials to Dr. Lukács (the "Refusal Issue"); and

(b) if the answer to the first issue is in the affirmative, whether subsection 8(1) of the *Privacy Act* infringes upon Dr. Lukács' rights under paragraph 2(*b*) of the *Charter* (the "Constitutional Issue").

IV. ANALYSIS

A. Introduction

The open court principle

[27] I will begin this analysis by considering what is meant by the open court principle. In the words of Chief Justice McLachlin in her speech "Openness and the Rule of Law" (Annual International Rule of Law Lecture, delivered in London, United Kingdom, 8 January 2014), at page 3:

> The open court principle can be reduced to two fundamental propositions. First, court proceedings, including the evidence and documents tendered, are open to the public. Second, juries give their verdicts and judges deliver their judgments in public or in published form.
>
> [Emphasis added]

[28] It is the first aspect of this formulation that is presently in issue. More particularly, the issue under consideration relates to disclosure of documents that were on the Agency's Public Record and formed the basis for its decision in the Cancun Matter.

[29] The open court principle has been recognized for over a century, as noted by the Supreme Court in *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253 at paragraph 31. In that case, Bastarache J. stated at paragraph 33:

> In addition to its longstanding role as a common law rule required by the rule of law, the open court principle gains importance from its clear association with free expression protected by s. 2(*b*) of the Charter. In the context of this appeal, it is important to note that 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 (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at 1328, citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), at p. 597). La Forest J. adds at para. 24 of [*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480]: "[e]ssential to the freedom of the press to provide information to the public is the ability of the press to have access to this information" (emphasis added). Section 2(*b*) also protects the ability of the press to have access to court proceedings (*CBC*, at para. 23; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at para. 53).
>
> [Emphasis added]

[30] Thus, where the open court principle is unrestricted in its application, a member of the public has a common law and perhaps a constitutional right to inspect and copy all documents that have been placed on the record that is or was before a court.

[31] An important consideration is whether there are any limits on the extent of the application of the open court principle. Clearly, there are.

[32] In *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, 132 D.L.R. (3d) 385, Dickson J., as he then was, stated at page 189:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

[33] In the context of access to documents, courts generally have procedural rules that permit the filing of documents on a confidential basis where an order to that effect is obtained. For example, sections 151 and 152 of the *Federal Courts Rules*, SOR/98-106 set out a scheme for claiming confidentiality with respect to materials filed in proceedings before the Federal Court and this Court. Importantly, subsection 151(2) of those Rules stipulates that before a confidentiality order can be made, the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings. Thus, both the Federal Court and this Court are empowered to circumscribe the open court principle in appropriate circumstances.

[34] More broadly, limitations on the application of the open court principle have been challenged, in a number of circumstances, on the basis that they infringe upon rights protected under s 2(*b*) of the *Charter*. For example:

(a) A time-limited publication ban to protect the identity of undercover police officers was upheld, but a publication ban on police operational methods was found to be unnecessary (*R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442);

(b) In connection with the construction and sale of two nuclear reactors by a Crown corporation to China, the Supreme Court granted a confidentiality order with respect to an affidavit that contained sensitive technical information about the ongoing environmental assessment of the construction site by Chinese authorities (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522);

(c) A request for a blanket sealing order with respect to search warrants and supporting information was denied because the party seeking the order failed to show a serious and specific risk to the integrity of a criminal investigation, but editing of the materials was permitted to protect the identity of a confidential informant (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188);

(d) A request for a publication ban prohibiting a newspaper from reporting on settlement negotiations between the federal government and a company with respect to the recovery of public funds in connection with the federal "Sponsorship Program" was denied on the basis that the settlement negotiations were already a matter of public record and a publication ban would stifle the media's exercise of their constitutionally-mandated role to report stories of public interest (*Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592); and

(e) A teenage girl, who was seeking an order to compel disclosure by an internet service provider of information relating to cyber-bullying, was granted permission to proceed anonymously, but a publication ban on those parts of the internet materials that did not identify the girl was denied (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567).

[35] In determining whether or not it was appropriate to limit the application of the open court principle in each of these matters, the courts adopted the approach taken by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 and *Mentuck* (the so-called *Dagenais/Mentuck* test). This test was described in *Toronto Star Newspapers*, at paragraph 4, as follows:

> Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration.*

Stated another way, the test is whether the salutary effects of the requested limitation of the open court principle will outweigh the deleterious effects of that limitation.

[36] Another important consideration is whether the open court principle applies only to courts or whether it also applies to quasi-judicial tribunals.

The Agency and the Open Court Principle

[37] In this application, all parties are agreed that the open court principle applies to the Agency when it undertakes dispute resolution proceedings in its capacity as a quasi-judicial tribunal. Support for this proposition can be found in *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726, 327 D.L.R. (4th) 470, at paragraph 22, where Sharpe J.A. stated:

> [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: *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, at p.

> 184 S.C.R. As Dickson J. stated, at pp. 186-87 S.C.R.: 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".
>
> [Emphasis added]

However, the Agency asserts that it is nonetheless obliged to first apply section 8 of the *Privacy Act* before it can give effect to the open court principle. This assertion necessitates a consideration of both the *Privacy Act* and the particular circumstances of the Agency.

The Privacy Act

[38] Section 2 of the *Privacy Act* contains Parliament's stipulation as to its purpose. That provision reads as follows:

Purpose	*Object*
2. The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.	2. La présente loi a pour objet de compléter la législation canadienne en matière de protection des renseignements personnels relevant des institutions fédérales et de droit d'accès des individus aux renseignements personnels qui les concernent.

[39] The Supreme Court of Canada has elaborated upon the objectives of the *Privacy Act*. In *Lavigne v. Canada*, 2002 SCC 53, [2002] 2 S.C.R. 773 at paragraph 24, Justice Gonthier stated,

> [24] The *Privacy Act* is also fundamental in the Canadian legal system. It has two major objectives. Its aims 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…

Several paragraphs later, Justice Gonthier further stated:

> [27] To achieve the objectives of the *Privacy Act*, Parliament has created a detailed scheme for collecting, using and disclosing personal information. First, the Act specifies the circumstances in which personal information may be collected by a government institution, and what use the institution may make of it: only personal information that relates directly to an operating program or activity of the government institution that collects it may be collected (s.4), and it may be used for the purpose for which it was obtained or compiled by the institution or for a use consistent with that purpose, and for a purpose for which the information may be disclosed to the institution under s. 8(2) (s.7). As a rule, personal information may never be disclosed to third parties except with the consent of the individual to whom it relates (s.8(1)) and subject to the exceptions set out in the Act (s.8(2)).

[40] These passages from *Lavigne* indicate the importance of the protection of privacy in relation to Personal Information collected and held by our government and its emanations. However, they also point to a number of specific instances in which such Personal Information can be used and disclosed.

[41] The *Privacy Act* applies to Government Institutions. Section 4 of the *Privacy Act* prohibits the collection of Personal Information about individuals unless it relates directly to an operating program or activity of the institution.

[42] Once Personal Information has been collected and becomes subject to the control of a Government Institution, paragraph 7(*a*) of the *Privacy Act* limits its use to the purpose for which it was obtained or compiled, or to a use consistent with that purpose. Paragraph 7(*b*) of the *Privacy Act* permits such information to be used for a purpose for which it may be disclosed under subsection 8(2) of the *Privacy Act*.

[43] Section 7 of the *Privacy Act* reads as follows:

7. Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except:	**7.** À défaut du consentement de l'individu concerné, les renseignements personnels relevant d'une institution fédérale ne peuvent servir à celle-ci:
(*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or	*a*) qu'aux fins auxquelles ils ont été recueillis ou préparés par l'institution de même que pour les usages qui sont compatibles avec ces fins;
(*b*) for a purpose for which the information may be disclosed to the institution under subsection 8(2).	*b*) qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).

[44] Subsection 8(1) of the *Privacy Act* prohibits disclosure of Personal Information under the control of a Government Institution without the consent of the individual, subject to certain exceptions contained in subsection 8(2) of the *Privacy Act*. Subsection 8(1) reads as follows:

8. (1) 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.	8. (1) Les renseignements personnels qui relèvent d'une institution fédérale ne peuvent être communiqués, à défaut du consentement de l'individu qu'ils concernent, que conformément au présent article.

[45] Of particular relevance to this appeal are the exceptions to paragraph 8(1) of the *Privacy Act* contained in paragraphs 8(2)(*a*) and (*b*) and sub-paragraph (*m*)(i) of the *Privacy Act*, which read as follows:

8. (2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed	8. (2) Sous réserve d'autres lois fédérales, la communication des renseignements personnels qui relèvent d'une institution fédérale est autorisée dans les cas suivants :
(*a*) for the purpose for which the	*a*) communication aux fins auxquelles

information was obtained or compiled by the institution or for a use consistent with that purpose;	ils ont été recueillis ou préparés par l'institution ou pour les usages qui sont compatibles avec ces fins;
(*b*) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;	*b*) communication aux fins qui sont conformes avec les lois fédérales ou ceux de leurs règlements qui autorisent cette communication;
…	...
(*m*) for any purpose where, in the opinion of the head of the institution,	*m*) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :
(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure,	(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,

[46] A further exemption with respect to the use and disclosure of Personal Information is found in subsection 69(2) of the *Privacy Act*, which reads as follows:

69. (2) Sections 7 and 8 do not apply to personal information that is publicly available.	69. (2) Les articles 7 et 8 ne s'appliquent pas aux renseignements personnels auxquels le public a accès.

The *Privacy Act* contains no definition of Publicly Available.

The Agency

[47] There is no doubt that the Agency falls within the definition of Government Institution. As such, the Agency is bound by the provisions of that legislation. However, this case raises interesting questions as to how the Agency's adjudicative function – one part of its broad legislative mandate – is affected by the scope and application of the *Privacy Act*.

[48] A helpful description of the Agency and its functions can be found in *Lukács v. Canadian Transportation Agency*, 2014 FCA 76, 456 N.R. 186, wherein, at paragraphs 50 to 53, Justice Dawson of this Court stated:

> [50] the Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.
>
> [51] First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.
>
> [52] Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

[49] This description highlights the duality of the Agency's functions. It acts in an administrative capacity, when carrying out its economic regulatory mandate, and in a quasi-judicial, or court-like capacity, when carrying out its adjudicative dispute resolution mandate. In this latter capacity, the Agency exercises many of the powers, rights and privileges of superior courts (see sections 25 to 35 of the CTA).

The Agency's Rules

[50] Section 17 of the CTA empowers the Agency to make rules governing the manner of and procedures for dealing with matters and business that come before it. At the time that Dr. Lukács brought this application, the Old Rules were in force. They have been superseded by the *Canadian Transportation Agency Rules (Dispute Proceedings at Certain Rules Applicable to All Proceedings*), SOR/2014-104 (the "New Rules").

[51] While both sets of Rules relate to proceedings before the Agency, the New Rules are more comprehensive and, in general, apply only to the Agency's dispute resolution proceedings. In an annotated version of the New Rules (the "Annotation") (See: Canadian Transportation Agency, *Annotated Dispute Adjudication Rules* (21 August 2014), online: Canadian Transportation Agency <https://www.otc-cta.gc.ca/eng/publication/annotated-dispute-adjudication-rules>), the Agency provides the following description of its adjudicative and non-adjudicative functions:

> The Agency performs two key functions within the federal transportation system:
>
> - Informally and through formal adjudication (where the Agency reviews an application and makes a decision), the Agency resolves a range of commercial and consumer transportation-related disputes, including accessibility issues for persons with disabilities. It operates like a court when adjudicating disputes.
> - As an economic regulator, the Agency makes decisions and issues authorities, licences and permits to transportation service providers under federal jurisdiction.
>
> [Emphasis added]

[52] Both the Old Rules and the New Rules contemplate the commencement of dispute resolution proceedings by the filing of complaint documentation. The New Rules specifically provide that the proceedings do not commence until the application documentation has been accepted by the Agency.

[53] Both sets of Rules require that documents filed with the Agency in respect of dispute resolution proceedings must be placed by it on its Public Record. Subsection 23(1) of the Old Rules reads as follows:

Claim for confidentiality	*Demande de traitement confidentiel*
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. (1) L'Office verse dans ses archives publiques les documents concernant une instance qui sont déposés auprès de lui, à moins que la personne qui les dépose ne présente une demande de traitement confidentiel conformément au présent article.

Subsection 7 of the New Rules reads as follows:

Filing	*Dépôt*
7. (1) Any document filed under these Rules must be filed with the Secretary of the Agency.	7. (1) Le dépôt de documents au titre des présentes règles se fait auprès du secrétaire de l'Office.
Agency's public record	*Archives publiques de l'Office*
(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.	(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.

Both sets of Rules – subsections 23(3) to (9) of the Old Rules and section 31 of the New Rules – empower the Agency to grant confidentiality protection in respect of documents that are filed by parties to the proceedings.

[54] The Agency's perspective with respect to the privacy implications of filings made under subsection 7(2) of the New Rules is set forth in the Annotation as follows:

> The Agency's record
>
> The Agency's record is made up of all the documents and information gathered during the dispute proceeding that have been accepted by the Agency. This record will be considered by the Agency when making its decision.
>
> The Agency's record can consist of two parts: the public record and the confidential record.
>
> Public Record
>
> Generally, all documents filed with and accepted by the Agency during the dispute proceeding, including the names of parties and witnesses, form part of the public record.
>
> Parties filing documents with the Agency should not assume that a document that they believe is confidential will be kept confidential by the Agency. A request to have a document kept confidential may be made pursuant to section 31 of the Dispute Adjudication Rules.
>
> Documents on the public record will be:
>
> - Provided to the other parties involved;
> - Considered by the Agency in making its decision; and
> - Made available to members of the public, upon request, with limited exceptions.
>
> Decisions and applications are posted on the Agency's website and include the names of the parties involved, as well as witnesses. Medical conditions which relate to an issue raised in the application will also be disclosed. The decision will also be distributed by e-mail to anyone who has subscribed through the Agency's website to receive Agency decisions.
>
> Confidential record
>
> The confidential record contains all the documents from the dispute proceeding that the Agency has determined to be confidential.
>
> If there are no confidential documents, then there is only a public record.
>
> No person can refuse to file a document with the Agency or provide it to a party because they believe that it is confidential. If a person is of the view that a

> document is confidential, they must file it with the Agency along with a request for confidentiality under section 31 of the Dispute Adjudication Rules. This will trigger a process where the Agency will determine whether the document is confidential. During this process, the document is not placed on the public record.
>
> Decisions that contain confidential information that is essential to understanding the Agency's reasons will be treated as confidential as well and will not be placed on the Agency's website. However, a public version of the decision will be issued and placed on the website.
>
> [Emphasis added]

[55] There is no definition of Public Record in either the Old Rules or the New Rules.

The Factual Context in this Application

[56] It is undisputed that the documents that were requested by Dr. Lukács were placed by the Agency on its Public Record in the Cancun Matter and that the Agency made no confidentiality order in respect of any of those documents

[57] It is equally clear that certain portions of the documents that were provided by the Agency to Dr. Lukács were redacted. Moreover, those redactions were made by an employee of the Agency, not by a member of the Agency carrying out a quasi-judicial function.

B. The Refusal Issue

The Standard of Review

[58] The issue is whether the Agency, acting through its Chairperson, erred in concluding that subsection 8(1) of the *Privacy Act* required it to redact Personal Information contained in the

documents on its Public Record in the Cancun Matter, before disclosing those documents to Dr. Lukács in response to his request.

[59] In accordance with this Court's decision in *Nault v. Canada (Public Works and Government Services)*, 2011 FCA 263, 425 N.R. 160 at paragraph 19, citing *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 at paragraphs 14 to 19, the standard of review applicable to the decision of the head of a Government Institution to refuse to disclose documents containing Personal Information is correctness. *Nault* also stipulates that the interpretation of provisions of the *Privacy Act* that are relevant to the refusal to disclose is also to be reviewed on the standard of correctness.

The Positions of the Parties

[60] The determination of the correctness of the Refusal requires the interpretation of a number of provisions of the *Privacy Act*.

[61] By virtue of subsection 69(2) of the *Privacy Act*, it is clear that the prohibition on disclosure of Personal Information in subsection 8(1) of the *Privacy Act* is inapplicable in respect of Personal Information that is Publicly Available.

[62] Thus, if the documents placed by the Agency on its Public Record in the Cancun Matter are Publicly Available, then the redactions made to them on behalf of the Agency were impermissible and, without more, the application for judicial review must be allowed.

Dr. Lukács' Submission – "Publicly Available"

[63] Dr. Lukács argues that he is entitled to receive the Unredacted Documents because they were placed on the Agency's Public Record and, accordingly, any Personal Information that might be contained in them is Publicly Available. As such, he asserts that the prohibition in subsection 8(1) of the *Privacy Act* is inapplicable.

The Agency's Position – "Publicly Available"

[64] Counsel for the Agency asserts that Personal Information of each party to an adjudicative proceeding before the Agency is put into a personal information bank (a "Personal Information Bank"), as contemplated by section 10 of the *Privacy Act*, and therefore is not information that is Publicly Available. Further, counsel for the Agency asserts that this Court should reject the argument that, in absence of a confidentiality order, the Agency is required to disclose documents on its Public Record in an unredacted form. Finally, counsel for the Agency asserted that, if Parliament had intended that the right to disclosure of documents pursuant to the open court principle was to override subsection 8(1) of the *Privacy Act*, that legislation would have contained a specific provision to that effect.

The Attorney General of Canada's Position – "Publicly Available"

[65] The Attorney General of Canada took no position with respect to the interpretation and application of subsection 69(2) of the *Privacy Act* in this appeal.

The Privacy Commissioner's Position – "Publicly Available"

[66] Counsel for the Privacy Commissioner asserts that Personal Information cannot be Publicly Available unless it is obtainable from another source or available in the public domain for ongoing use by the public when Dr. Lukács made his request. In addition, the Privacy Commissioner asserts that information on the Agency's Public Record cannot be Publicly Available simply because the Agency is subject to the open court principle.

Discussion

[67] To decide this issue, it is necessary to interpret the terms Publicly Available and Public Record. Unfortunately, the parties were unable to provide the Court with any determinative authorities in this regard.

The interpretative approach

[68] In *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, the Supreme Court provided the following interpretative guidance at paragraph 10:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose

> on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> [Emphasis added]

"Publicly Available"

[69] The term Publicly Available appears to me to be relatively precise and unequivocal. I interpret these words as meaning available to or accessible by the citizenry at large. This interpretation is also consistent with the apparent context and purpose of subsection 69(2) of the *Privacy Act*. That provision is located in a portion of the *Privacy Act*, entitled "Exclusions", that sets out circumstances in which the *Privacy Act*, or sections thereof, do not apply. The purpose of subsection 69(2) of the *Privacy Act* is to render the use and disclosure limitations that are contained in sections 7 and 8 of the *Privacy Act* inapplicable to Personal Information if and to the extent that the citizenry at large otherwise has the ability to access such information.

"Public Record"

[70] In my view, the meaning of Public Record is not precise and unequivocal. Instead, the context in which this term appears is critical to the discernment of its meaning. The term appears in subsection 23(1) of the Old Rules.

[71] In the judicial context, the record consists of a documentary memorialization of the proceedings that have come before the court. The documents on the record constitute the foundation upon which the court grounds its ultimate decision. The purpose of the record is to facilitate scrutiny of the court's decision, whether for the specific purpose of appellate review or

the more general purpose of judicial transparency. Thus, when a court places documents on its record, it adheres to the open court principle.

[72] However, as has been noted earlier in these reasons, there are circumstances in which unfettered access to the record before the court runs counter to competing societal interests. In those circumstances, the affected party may apply to the court for relief, either under the procedural rules of that court or on the basis of the *Dagenais/Mentuck* test in respect of *Charter*-based applications. In appropriate circumstances, the court will circumscribe the scope and application of the open court principle. When it does so, the court will have determined that, in the circumstances, safeguarding the integrity of the administration of justice and protecting the often vulnerable party who seeks that protection, outweigh the benefits of open access that the open court principle would otherwise provide. Thus, the open court principle mandates that the record of the court will be available for public access and scrutiny, except to the extent that the Court otherwise determines.

[73] In my view, there is no principled reason to employ a more limited interpretation of the term record simply because that term relates to a quasi-judicial adjudicative tribunal, such as the Agency, rather than a court. The record of the proceedings before the Agency performs essentially the same function as the record of a court.

[74] In interpreting the term record, in subsection 23(1) of the Old Rules, I adopt the meaning referred to above, namely a documentary memorialization of the proceedings that have come before the Agency. The additional word "public" provides a useful contrast to the situation in

which materials on the record have been determined by the Agency to be confidential. In other words, as noted in the excerpt from the Annotation referred to in paragraph 54 of these reasons, the Agency's Public Record can be viewed as a record that contains no confidential documents.

[75] The Annotation provides an illustration of the Agency's perspective with respect to requests for confidentiality

> The Agency is a quasi-judicial tribunal that follows the "open court principle." This principle guarantees the public's right to know how justice is administered and to have access to decisions rendered by courts and tribunals, except in exceptional cases. That is, the other parties in a dispute proceeding have a fundamental right to know the case being made against them and the documents that the decision-maker will review when making its decision which must be balanced against any specific direct harm the person filing the documents alleges will occur if it is disclosed. This means that, upon request, and with limited exceptions, all information filed in a dispute proceeding can be viewed by the public.
>
> In general, all documents filed with or gathered by the Agency in a dispute proceeding, including the names of the parties and witnesses, form part of the public record. Parties filing documents with the Agency must also provide the documents to the other parties involved in the dispute proceeding under section 8 of the Dispute Adjudication Rules.
>
> [Emphasis added]

Is the Agency's public record publicly available?

[76] The Privacy Commissioner asserts that to be Publicly Available, the documents requested by Dr. Lukács must have been freely obtainable from a source other than the Agency. However, the Privacy Commissioner offers no jurisprudential authority for this proposition, and I reject it.

[77] This assertion ignores the bifurcated nature of the Agency's mandate. As noted above, the Agency functions as an economic regulator and as a quasi-judicial dispute resolution tribunal.

[78] The documents initiating a dispute may well be required to be kept in Personal Information Banks, immediately after their receipt by the Agency. However, compliance by the Agency with its obligation in subsection 23(1) of the Old Rules means that those documents have left the cloistered confines of such banks and moved out into the sunlit Public Record of the Agency. In my view, the act of placing documents on the Public Record is an act of disclosure on the part of the Agency. Thus, documents placed on the Agency's Public Record are no longer "held" or "under the control" of the Agency acting as a Government Institution. From the time of their placement on the Public Record, such documents are held by the Agency acting as a quasi-judicial, or court-like body, and from that time they become subject to the full application of open court principle. It follows, in my view, that, once on the Public Record, such documents necessarily become Publicly Available.

[79] In this regard, two comments are apposite. First, in placing documents on its Public Record, the Agency is acting properly and within the law. Such disclosure by the Agency is necessary for it to fulfill its dispute resolution mandate, and in particular to comply with the requirements of subsection 23(1) of the Old Rules or subsection 7(2) of the New Rules. Secondly, either subsections 23(3) to (9) of the Old Rules or section 31 of the New Rules will permit the parties to the proceedings to request a confidentiality order from the Agency. These confidentiality provisions enable the Agency to protect the privacy interests of participants in dispute resolution proceedings before it. They do so in substantially the same way that such interests are protected in judicial proceedings, while preserving the presumptively open access to the Agency's proceeding in accordance with the open court principle. To underscore this point, it

was open to the parties in the Cancun Matter to request a confidentiality order in relation to any Personal Information filed in that matter, but no such request was made.

[80] In conclusion, it is my view that once the Agency placed the documents in the Cancun Matter on its Public Record, as required by subsection 23(1) of the Old Rules, those documents became Publicly Available. As such, the limitation on their disclosure, contained in subsection 8(1) of the *Privacy Act*, was no longer applicable by virtue of subsection 69(2) of the *Privacy Act*. Accordingly, Dr. Lukács was entitled to receive the documents that he requested and the Agency's refusal to provide them to him was impermissible.

C. The Constitutional Issue

[81] The resolution of the Refusal Issue makes it unnecessary for me to consider the Constitutional Issue.

V. DISPOSITION

[82] For the foregoing reasons, I would allow the application for judicial review and direct the Agency to provide the Unredacted Documents to Dr. Lukács. In view of the complexities of the issues that were raised in this application and the considerable time that was spent by Dr. Lukács I would award Dr. Lukács a moderate allowance in the amount of $750.00 plus reasonable disbursements, such amounts to be payable by the Agency.

"C. Michael Ryer"
J.A.

"I agree
D.G. Near, J.A."

"I agree
Richard Boivin, J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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