Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

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

APPLICANT'S RECORD
VOLUME 1

Dated: September 30, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant

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

Odette Lalumière

Tel: (819) 994 2226
Fax: (819) 953 9269

Solicitor for the Respondent,
Canadian Transportation Agency

TABLE OF CONTENTS OF VOLUME 1

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CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

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

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

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

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

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

Date: April 22, 2014

Issued by: _____

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

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

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

APPLICATION

This is an application for judicial review in respect of:

(a) the practices of the Canadian Transportation Agency ("Agency") related to the rights of the public, pursuant to the open-court principle, to view information provided in the course of adjudicative proceedings; and

(b) the refusal of the Agency to allow the Applicant to view unredacted documents in File No. M4120-3/13-05726 of the Agency, even though no confidentiality order has been sought or made in that file.

The Applicant makes application for:

1. a declaration that adjudicative proceedings before the Canadian Transportation Agency are subject to the constitutionally protected open-court principle;

2. a declaration that all information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings are part of the public record in their entirety, unless confidentiality was sought and granted in accordance with the Agency's *General Rules*;

3. a declaration that members of the public are entitled to view all information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings, unless confidentiality was sought and granted in accordance with the Agency's *General Rules*;

4. a declaration that information provided to the Canadian Transportation Agency in the course of adjudicative proceedings fall within the exceptions of subsections 69(2) and/or 8(2)(a) and/or 8(2)(b) and/or 8(2)(m) of the *Privacy Act*, R.S.C. 1985, c. P-21;

5. in the alternative, a declaration that provisions of the *Privacy Act*, R.S.C. 1985, c. P-21 are inapplicable with respect to information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings to the extent that these provisions limit the rights of the public to view such information pursuant to subsection 2(b) of the *Canadian Charter of Rights and Freedoms*;

6. a declaration that the power to determine questions related to confidentiality of information provided in the course of adjudicative proceedings before the Canadian Transportation Agency is reserved to Members of the Agency, and cannot be delegated to Agency Staff;

7. an order of *a mandamus*, directing the Canadian Transportation Agency to provide the Applicant with unredacted copies of the documents in File No. M4120-3/13-05726, or otherwise allow the Applicant and/or others on his behalf to view unredacted copies of these documents;

8. costs and/or reasonable out-of-pocket expenses of this application;

9. such further and other relief or directions as the Applicant may request and this Honourable Court deems just.

The grounds for the application are as follows:

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

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

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

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

A. The Agency's *General Rules*

3. The *Canadian Transportation Agency General Rules*, S.O.R./2005-35, contain detailed provisions implementing the open-court principle, and provide for procedures for claiming confidentiality:

> **23.** (1) The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person filing the document makes a claim for its confidentiality in accordance with this section.
>
> **23.** (5) A person making a claim for confidentiality shall indicate
>
> (a) the reasons for the claim, including, if any specific direct harm is asserted, the nature and extent of the harm that would likely result to the person making the claim for confidentiality if the document were disclosed; and
>
> (b) whether the person objects to having a version of the document from which the confidential information has been removed placed on the public record and, if so, shall state the reasons for objecting.
>
> **23.** (6) A claim for confidentiality shall be placed on the public record and a copy shall be provided, on request, to any person.
>
> **24.** (2) The Agency shall place a document in respect of which a claim for confidentiality has been made on the public record if the document is relevant to the proceeding and no specific direct harm would likely result from its disclosure or any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed.

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

B. The Agency's *Privacy Statement*

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

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

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

C. The Agency's practice

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

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

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

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

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

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

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

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

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

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

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

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

    (a) name and/or work email address of counsel acting for Air Canada in the proceeding (e.g., pages 1, 27, 28, 36, 37, 45, 72, 75);

    (b) names of Air Canada employees involved (e.g., pages 29, 31, 62, 64, 84, 87, 90, 92); and

    (c) substantial portions of submissions and evidence (e.g., pages 41, 54-56, 63, 68-70, 85, 94, 96, 100-112).

15. On March 24, 2014, the Applicant made a written demand to the Agency to be provided with unredacted copies of all documents in File No. M4120-3/13-05726 with respect to which no confidentiality order was made by a Member of the Agency.

16. On March 26, 2014, Mr. Geoffrey C. Hare, hair and Chief Executive Officer of the Agency, wrote to the Applicant, among other things, that:

> The Canadian Transportation Agency (Agency) is a government institution which was included in the schedule to the *Privacy Act* (Act) in 1982. [...]
>
> [...] Section 8 of the Act is clear that, except for specific exceptions found in that section, personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by that institution. [...]
>
> Although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social in-

> surance number, driver's license number, or credit card or passport details, is not available for consultation.
>
> The file you requested has such sensitive personal information and it has therefore been removed by the Agency as it required under the Act.

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

D. The open-court principle

18. Long before the *Charter*, the doctrine of open court had been well established at common law. In *Scott v. Scott*, [1913] A.C. 419 (H.L.), Lord Shaw held that "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." On the same theme, Justice Brandeis of the American Supreme Court has famously remarked that "Sunlight is the best disinfectant."

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Authority to determine what to redact

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

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

G. Statutory provisions

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

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

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

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

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

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

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

This application will be supported by the following material:

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

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

April 22, 2014

DR. GÁBOR LUKÁCS

Halifax, Nova Scotia

lukacs@AirPassengerRights.ca

Applicant

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: April 25, 2014)

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

1. I am a Canadian citizen, a frequent traveller, and an air passenger rights advocate. My activities in the latter capacity include:

   (a) filing approximately two dozen successful regulatory complaints with the Canadian Transportation Agency (the “Agency”), resulting in airlines being ordered to implement policies that reflect the legal principles of the *Montreal Convention* or otherwise offer better protection to passengers;

   (b) promoting air passenger rights through the press and social media; and

   (c) referring passengers mistreated by airlines to legal information and resources.

2. On September 4, 2013, the Consumers' Association of Canada recognized my achievements in the area of air passenger rights by awarding me its Order of Merit for "singlehandedly initiating Legal Action resulting in revision of Air Canada unfair practices regarding Over Booking."

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

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

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

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

5. On February 17, 2014, Ms. Odette Lalumiere, Senior Counsel of the Agency, advised me by email that "Your request is being processed by Ms Bellerose's group." A copy of Ms. Lalumiere's email, dated February 17, 2014, is attached and marked as Exhibit "C".

6. On February 21, 2014, I sent a second follow-up email to the Agency, a copy of which is attached and marked as Exhibit "D".

7. On February 24, 2014, Ms. Lalumiere wrote me again that "your request is being processed by Ms. Bellerose's group." A copy of Ms. Lalumiere's email, dated February 24, 2014, is attached and marked as Exhibit "E".

8. On February 24, 2014, I expressed concern to Ms. Lalumiere about the delay related to my request. A copy of my email to Ms. Lalumiere, dated February 24, 2014, is attached and marked as Exhibit "F".

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

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

A copy of Ms. Bellerose's email, dated February 24, 2014, is attached and marked as Exhibit "G".

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

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

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

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

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

The email had as an attachment a PDF file called "AI-2013-00081.PDF" that consisted of 121 numbered pages. A copy of Ms. Bellerose's email, dated March 19, 2014, including its attachment, is attached and marked as Exhibit "I".

12. On March 24, 2014, I made a written demand to the Agency to be provided with unredacted copies of all documents in File No. M4120-3/13-05726 with respect to which no confidentiality order was made by a Member of the Agency. A copy of my March 24, 2014 letter is attached and marked as Exhibit "J".

13. On March 26, 2014, Mr. Geoffrey C. Hare, Chair and Chief Executive Officer of the Agency, wrote to me, among other things, that:

> The Canadian Transportation Agency (Agency) is a government institution which was included in the schedule to the *Privacy Act* (Act) in 1982. [...]
>
> [...] Section 8 of the Act is clear that, except for specific exceptions found in that section, personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by that institution. [...]
>
> Although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social insurance number, driver's license number, or credit card or passport details, is not available for consultation.

> The file you requested has such sensitive personal information and it has therefore been removed by the Agency as it required under the Act.

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

AFFIRMED before me at the City of Halifax in the Regional Municipality of Halifax on April 25, 2014.

_____

_____

Dr. Gábor Lukács

Halifax, NS

lukacs@AirPassengerRights.ca

This is **Exhibit "A"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 25, 2014

_____

Signature

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

Dear Madam Secretary,

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

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

Sincerely yours,
Dr. Gabor Lukacs

This is **Exhibit "B"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 25, 2014

_____

Signature

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

Dear Madam Secretary,

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

I look forward to hearing from you.

Sincerely yours,
Dr. Gabor Lukacs

On Fri, 14 Feb 2014, Gabor Lukacs wrote:

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

This is **Exhibit "C"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 25, 2014

_____

Signature

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

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

Odette Lalumi??re

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

Dear Madam Secretary,

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

I look forward to hearing from you.

Sincerely yours,
Dr. Gabor Lukacs

On Fri, 14 Feb 2014, Gabor Lukacs wrote:

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

This is **Exhibit "D"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 25, 2014

_____

Signature

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

Dear Ms. Lalumiere and Ms. Bellerose,

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

Yours very truly,
Dr. Gabor Lukacs

On Mon, 17 Feb 2014, Odette Lalumiere wrote:

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

>

This is **Exhibit "E"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 25, 2014

_____

Signature

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

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

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

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

odette.lalumiere@otc-cta.gc.ca

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

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

Yours very truly,
Dr. Gabor Lukacs

On Mon, 17 Feb 2014, Odette Lalumiere wrote:

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

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

This is **Exhibit "F"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 25, 2014

_____

Signature

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

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

Ms. Lalumiere,

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

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

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

Yours very truly,
Dr. Gabor Lukacs

On Mon, 24 Feb 2014, Odette Lalumiere wrote:

> Mr. Lukacs,
> As indicated in my e-mail of February 17, 2014, your request is being
> processed by Ms. Bellerose’s group.
>
>
>
> Odette Lalumière
> Avocate principale/Senior Counsel
> Direction des services juridiques/Legal Services Directorate
> Office des transports du Canada/Canadian Transportation Agency
> Tél./Tel.: 819 994-2226
>
> odette.lalumiere@otc-cta.gc.ca
>
>
>>>> Gabor Lukacs <lukacs@AirPassengerRights.ca> 21/02/2014 1:19 PM >>>
> Dear Ms. Lalumiere and Ms. Bellerose,
>
> I am writing to follow up on the request below. I am profoundly
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> about what transpires as the Agency attempting to frustrate my rights
> pursuant to s. 2(b) of the Charter.
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> Yours very truly,
> Dr. Gabor Lukacs
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>> Odette Lalumi??re
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>>
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>> Sent: Monday, February 17, 2014 4:07 PM
>> To: secretaire-secretary
>> Cc: Odette Lalumiere; Patrice Bellerose
>> Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s.
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>> of the Charter
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>> I look forward to hearing from you.
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>> Sincerely yours,
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>>
>>
>

This is **Exhibit "G"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 25, 2014

_____

Signature

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

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

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

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

Ms. Lalumiere,

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

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

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

Yours very truly,
Dr. Gabor Lukacs

On Mon, 24 Feb 2014, Odette Lalumiere wrote:

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

>
> odette.lalumiere@otc-cta.gc.ca
>
>
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>> Sent: Monday, February 17, 2014 4:07 PM
>> To: secretaire-secretary
>> Cc: Odette Lalumiere; Patrice Bellerose
>> Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s.
> 2(b)
>> of the Charter
>>
>> Dear Madam Secretary,
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This is **Exhibit "H"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 25, 2014

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Signature

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

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

Ms. Bellerose,

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

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

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

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

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

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

Sincerely yours,
Dr. Gabor Lukacs

On Mon, 24 Feb 2014, Patrice Bellerose wrote:

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

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> >
> >
> > Odette Lalumière
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> >
> > odette.lalumiere@otc-cta.gc.ca
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> >> From: Gabor Lukacs
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> >> To: secretaire-secretary
> >> Cc: Odette Lalumiere; Patrice Bellerose
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> > >
>
>

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

affirmed before me on April 25, 2014

_____

Signature

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

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

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

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

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

From: Cathy Murphy
To: [redacted]@aircanada.ca; [redacted]@shaw.ca; [redacted]@aircanada.ca
CC: Giroux, Sylvie
BC Macaire Acha
Date: 14/02/2014 1:00 PM
Subject: Decision No. 55-C-A-2014 dated February 14, 2014
Attachments: 55-C-A-2014_app.pdf; 55-C-A-2014.pdf

Please find attached a PDF version of the above Decision.

Please confirm receipt.

Sincerely,

Cathy Murphy
819-997-0099 | télécopieur/facsimile 819-953-5253 | ATS/TTY 800-669-5575
cathy.murphy@cta-otc.gc.ca
Secrétaire de l'Office des Transports du Canada/ Secretary of the Canadian Transportation Agency
15, rue Eddy, Hull QC K1A 0N9/
15 Eddy St., Hull QC K1A 0N9
Gouvernement du Canada | Government of Canada

DECISION NO. 55-C-A-2014

February 14, 2014

COMPLAINT by Allane, Richard, David and Michael Brine against Air Canada.

File No. M4120-3/13-05726

INTRODUCTION

[1] On June 4, 2013, Allane Brine filed a complaint with the Canadian Transportation Agency (Agency) on behalf of herself, Richard, David and Michael Brine (Brines) against Air Canada regarding certain problems associated with their travel to Cancun, Mexico in February, 2012.

[2] The Brines purchased tickets to travel to Cancun with Air Canada on February 17, 2012. Allane, Richard and David Brine were booked to travel from Vancouver, British Columbia, Canada to Cancun via Toronto, Ontario, Canada, and Michael Brine was booked to travel from Halifax, Nova Scotia, Canada to Cancun via Toronto. Their plan was for the family to meet in Toronto and then to travel together to Cancun.

[3] The departure of Flight No. AC108 (Vancouver-Toronto) was delayed such that Air Canada knew that Allane, Richard and David Brine would not make it on time for their connecting Flight No. AC1256 (Toronto-Cancun). As a result, Air Canada cancelled their boarding cards and reprotected them on a subsequent flight. However, as Flight No. AC1256 was delayed in departing, and one seat remained available, Air Canada offered this seat to Allane Brine, who accepted it and continued her travel with Michael Brine, who had arrived from Halifax. Allane Brine left her baggage to be transported by Richard Brine on a subsequent flight.

[4] Richard and David Brine were reprotected to travel the following day, i.e., February 18, 2012, on Flight No. AC993 from Toronto to Mexico City, Mexico and then on Flight No. AM445 from Mexico City to Cancun. Due to a misconnection in Mexico City, Richard and David Brine arrived in Cancun on February 19, 2012. Once in Cancun, they used transportation to their hotel.

[5] The Brines request:

- a reimbursement of the cost of their four tickets, totalling $3,605.56, for the "wrong decisions and mistreatment that Air Canada put the family through";
- a refund of the following out-of-pocket expenses:
  - $277.60 (roaming charges for David Brine's cellullar phone);

  - $30.40 for other airport and hotel calls (the difference between the claimed $308 and the $277.60 in roaming charges);
  - $100 transportation to the hotel;
  - $30 (over the $30 meal vouchers provided by Air Canada) for meals purchased in Toronto; and
  - $20 for meals purchased in Mexico.

- compensation for the delay in delivery of baggage, and the loss of certain items.

PRELIMINARY MATTERS

[6] David Brine noted that some items were missing from his baggage when it was delivered late to him in Cancun. In its submission, Air Canada advises that it provided compensation in the amount of $193.65 for the late delivery of the baggage and for the missing items, and $100 for the cost of transportation to the hotel. In addition, Air Canada states that damages for inconvenience are not recoverable under the Convention for the Unification of Certain Rules for International Carriage by Air - Montreal Convention (Montreal Convention). In their reply, the Brines do not contest Air Canada's submission with respect to baggage and transportation to the hotel compensation. The Agency therefore considers this part of the complaint to be settled and will not address it.

[7] Also, the Agency will not address the Brines' request for a reimbursement of their four tickets as compensation for mistreatment because the Agency does not have jurisdiction to order payment of compensation for things such as pain and suffering or loss of enjoyment.

RELEVANT TARIFF AND STATUTORY EXTRACTS

[8] The Tariff provisions that were in effect at the time of the Brines' travel [Rules 60(D)(3), 80(C)(1) and (2), 80(D), 89(Part1)(E)(1)(a) and 55(B)(5)(a)] as well as the statutory extracts and Article 19 of the Montreal Convention are set out in the Appendix.

ISSUES

1. Were Richard and David Brine denied boarding, according to Rule 89 of Air Canada's International Passenger Rules and Fares Tariff, NTA(A) No. 458 (Tariff), relating to denied boarding compensation, and, if so, what amount of denied boarding compensation are they entitled to receive?

2. Did Air Canada properly apply the terms and conditions of carriage specified in Rule 80(C), relating to schedule irregularity, of its Tariff as required by subsection 110(4) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR)?

3. Did Air Canada properly apply the terms and conditions of carriage relating to the limits of liability as set out in Rule 55(B)(5)(a) of its Tariff, which incorporates the Montreal Convention by reference, as required by subsection 110(4) of the ATR? If not, are the complainants entitled to reimbursement for out-of-pocket expenses?

POSITIONS OF THE PARTIES

The Brines

[9] The Brines submit that, knowing that they might be late to catch Flight No. AC1256 because of their delay departing Vancouver, Allane, Richard and David Brine asked the Vancouver gate crew to arrange to have a golf cart waiting for them at the Toronto-Lester B. Pearson International Airport. The Brines indicate that a golf cart was not provided.

[10] The Brines contend that some of the crew they had seen on Vancouver-Toronto Flight No. AC108 boarded Flight No. AC1256 as a means of obtaining a last minute increase in previously arranged off-duty time in Cancun, which originally was to involve a later departing flight, and that some stand-by passengers boarded as well. The Brines also contend that some of these people were given the preassigned seats of Richard and David Brine. The Brines wonder why Richard and David Brine were passed over in Toronto while some crew and stand-by passengers were able to travel on Flight No. AC1256.

[11] The Brines also question why it took so long for Richard and David Brine to finally arrive in Cancun; they were all in Toronto on February 17, 2012, but Richard and David Brine only arrived in Cancun on February 19, 2012.

[12] The Brines submit that Richard and David Brine should have been offered denied boarding compensation at the Toronto-Lester B. Pearson International Airport when they were advised that they would not be travelling on Flight No. AC1256.

[13] The Brines seek compensation for the following out-of-pocket expenses, totalling $358, incurred as a result of the flight delay and the delay in delivery of David Brine's baggage:

- meal in Toronto: $30;
- two meals in Mexico City: $20; and
- roaming fees for cellular phone – airport and hotel calls: $308.

Air Canada

[14] Air Canada submits that although Flight No. AC108 was initially scheduled to land in Toronto at 2:29 p.m., which would have allowed Allane, Richard and David Brine to make their connection to Flight No. AC1256, it arrived at 3:42 p.m., i.e., two minutes after the scheduled departure time of Flight No. AC1256.

[15] Air Canada indicates that as Flight No. AC1256 was pushed back to 4:13 p.m., Allane, Richard and David Brine were able to get to the departure gate before the aircraft door was closed; however, they did not arrive at the gate before the boarding gate cut-off time.

[16] Air Canada submits that because Allane, Richard and David Brine's boarding cards and seat assignments had been cancelled, they were told that they were no longer on board Flight No. AC1256. However, Air Canada advises that as there was a seat that remained available, Allane Brine opted to embark on Flight No. AC1256, albeit without her baggage.

[17] Air Canada indicates that Richard and David Brine were reprotected on a flight departing the following day to Cancun via Mexico City. Air Canada further indicates that Richard and David Brine were not rebooked on Air Canada's direct flights to Cancun as these flights were already at full capacity. Due to a subsequent missed connection in Mexico City, Richard and David Brine arrived at their final destination on February 19, 2012.

[18] Air Canada advises that Richard and David Brine were each provided with a $30 meal voucher, overnight accommodation in Toronto at a hotel near the airport, a $200 voucher, and a reimbursement of $100 for the cost of transportation to the hotel. Air Canada further advises that the Brines were given, on a goodwill basis, two 20 percent promotion codes, and that both the vouchers and the promotion codes were used by the Brines towards the purchase of subsequent travel.

[19] Air Canada submits that the fact that Flight No. AC108 was delayed and caused Richard and David Brine not to be able to successfully board Flight No. AC1256 constituted a missed connection and, as such, Air Canada met its legal and contractual obligations towards them under Rule 80(D) of its Tariff regarding missed connections. Air Canada adds that in cases of missed connections, the transfer of baggage and movement time within the terminal must be taken into account. This is exemplified by the fact that Allane Brine was able to board Flight No. AC1256 without her baggage.

[20] Air Canada submits that, although compensation in the form of travel vouchers was given to Richard and David Brine for the inconvenience they encountered for not being able to travel as originally scheduled, they were not entitled to denied boarding compensation. The compensation provided to them was a gesture of goodwill.

[21] Air Canada contends that the exception to the payment of denied boarding compensation found in Rule 89(Part 1)(E)(1) under the requirement to arrive on time clarifies and exemplifies the fact that where such situations are the result of misconnections, the applicable regime is that of misconnections under Rule 80(D), and not of denied boarding.

[22] Air Canada submits that even if Richard and David Brine were considered as having been denied boarding, the conditions to receive denied boarding compensation under Rule 89(Part 1)(E)(l)(a) of the Tariff were not fulfilled. Under this Rule, in order to be eligible to receive denied boarding compensation, passengers must be present at the appropriate time and place, having complied with applicable reservations, ticketing, check in and reconfirmation procedures, and being acceptable for transportation. Air Canada states that it requires that passengers be at the boarding gate within 30 minutes of the scheduled departure time of the flight, as set out on Air Canada's Web site and in Rule 60(D)(3) of the Tariff. As it was impossible for Allane, Richard and David Brine to make their connection, as scheduled, they were offloaded from Flight No. AC1256.

[23] With respect to the Brines' submission respecting Air Canada's failure to arrange for a golf cart upon arrival in Toronto of Allane, Richard and David Brine, Air Canada submits that there is no legal requirement for a carrier to facilitate the movement of a passenger during connections. This is policy-driven and the extent of assistance directly provided to passengers whose connection is at risk varies depending on the circumstances of the daily operations in a given airport and on the transit security restrictions.

[24] Air Canada asserts that its obligation in a case of a scheduled irregularity and missed connection is to reprotect the passenger(s) or provide a refund, where requested. In this case, Air Canada advises that David and Richard Brine were effectively reprotected as they travelled with Air Canada to their final destination, and therefore, they are not entitled to a refund as there was no unused portion of their tickets.

[25] Air Canada submits that it is not liable for the consequential damages claimed by the Brines. In this respect, Air Canada refers to Agency Decision Nos. 185-C-A-2003 (*Yehia v. Air Canada*) and 31-A-1999 (*Katchmar v. Air Ukraine*).

[26] With respect to the Brines' claim seeking compensation of $358 for telephone and roaming charges, and meals in Toronto and Mexico City, Air Canada submits that it more than fully reimbursed the Brines in providing two $200 vouchers and two promotion codes for a 20 percent discount, which provided the Brines with another $641.60 discount. Air Canada argues that the provision of the vouchers and promotion codes, totalling savings of $1,041.60, exceeded that to which the Brines were entitled. Air Canada submits that as a goodwill gesture, upon presentation of relevant receipts, Air Canada will provide the Brines with compensation of $358 for out-of-pocket expenses pertaining to telephone and roaming charges, and for meals in Toronto and Mexico City.

ANALYSIS AND FINDINGS

Issue 1: Were Richard and David Brine denied boarding, according to Rule 89 of Air Canada's Tariff, relating to denied boarding compensation, and, if so, what amount of denied boarding compensation are they entitled to receive?

[27] The Brines submit that Richard and David Brine were denied boarding, and wonder why they were not offered denied boarding compensation, whereas Air Canada claims that Richard and David Brine were not available at the boarding gate by the cut-off time for Flight No. AC1256 and therefore were not eligible for such compensation.

[28] Pursuant to Rule 89(Part I)(E)(1)(a) of the Tariff, to be eligible for denied boarding compensation, passengers are required to present themselves for carriage at the appropriate time. Given Air Canada's evidence that Flight No. AC108 arrived in Toronto two minutes after the scheduled departure time of Flight No. AC1256, it was not possible for Allane, Richard and David Brine to present themselves at the boarding gate for Flight No. AC1256 at the appropriate time as provided in Rule 60(D)(3).

[29] The Agency notes the factual similarities between this case and the circumstances in Decision No. 264-C-A-2013 (*Azar v. Air Canada*) in which the passenger also missed a connection and had her seat given to another passenger, and sought denied boarding compensation. In that case, the Agency found that the situation was not one of denied boarding, but a missed connection, and determined that there was no entitlement to denied boarding compensation in such circumstances.

[30] For this case, the Agency is of the opinion that the event was also clearly a situation of a missed connection, not a denied boarding.

[31] In light of the foregoing, the Agency finds that Richard and David Brine were not denied boarding and, therefore, they are not entitled to denied boarding compensation.

Issue 2: Did Air Canada properly apply the terms and conditions of carriage specified in Rule 80(C), relating to schedule irregularity, of its Tariff as required by subsection 110(4) of the ATR?

[32] The Agency notes that, on February 17, 2012, Air Canada's Flight No. AC108 experienced a schedule irregularity, as defined by Rule 80(C) of its Tariff in effect on the date of commencement of Allane, Richard and David Brine's carriage, in that the arrival of the flight in Toronto was delayed, causing Richard and David Brine to miss their connection from Toronto to Cancun. The Agency also notes that Air Canada satisfied the requirements of Rule 80(C) of its Tariff by reprotecting Richard and David Brine, and by carrying them to their final destination. Also, Air Canada provided Richard and David Brine with overnight accommodation in Toronto and gave them meal vouchers.

[33] The Agency therefore finds that Air Canada properly applied its terms and conditions under Rule 80(C) of its Tariff when it reprotected Richard and David Brine, and when it provided them with overnight accommodation in Toronto and meal vouchers.

Issue 3: Did Air Canada properly apply the terms and conditions of carriage relating to the limits of liability as set out in Rule 55(B)(5)(a) of its Tariff, which incorporates the Montreal Convention by reference, as required by subsection 110(4) of the ATR? If not, are the complainants entitled to reimbursement for out-of-pocket expenses?

[34] In response to the Brines' request for compensation of $358 for telephone and cellular phone roaming charges, and for meals, Air Canada submits that it has more than fulfilled its obligation by providing the Brines with travel vouchers and promotion codes for discounts, amounting to savings of $1,041.60. However, as a goodwill gesture, upon presentation of relevant receipts, Air Canada submits that it will provide the Brines with compensation of $358 for out-of-pocket expenses pertaining to telephone and roaming charges, and for meals in Toronto and Mexico City.

[35] Article 19 of the Montreal Convention provides that:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[36] Rule 55(B)(5)(a) of the Tariff provides that:

> For the purpose of international carriage governed by the Montreal Convention, the liability rules set out in the Convention are fully incorporated herein and shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules.

[37] In Decision No. 250-C-A-2012 (*Lukács v, Air Canada*), the Agency stated:

> [25] It is clear that Article 19 of the Convention imposes on a carrier liability for damage occasioned by delay in the carriage of, amongst other matters, passengers, but a carrier will not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or it was impossible for them to take such measures. As the Agency stated in the Show Cause Decision, with a presumption of liability for delay against a carrier, there is a concomitant obligation for a carrier to mitigate such liability and address the damage which has or may be suffered by a passenger as a result of delay. In addition, Article 19 of the Convention provides a carrier with a defence to the liability if it can show that it took, or it was impossible to take, all reasonable measures to avoid the damage caused by the delay. [...]

[38] The Agency is of the opinion that the delay in the departure of Flight No. AC108 on February 17, 2012, the subsequent delay in the arrival in Cancun of David and Richard Brine, and the delay in the delivery of David Brine's baggage, constitute a delay as referred to in Article 19 of the Montreal Convention, and that the out-of-pocket expenses pertaining to telephone and roaming charges, and for meals in Toronto and Mexico City, constitute damages that are occasioned by those delays.

[39] The Agency is also of the opinion that the travel vouchers and promotions codes were provided to the Brines by Air Canada of its own volition, and not because it was compelled to do so by any legislative or regulatory requirement.

[40] The Agency finds that, although it was Air Canada's obligation to demonstrate that it took all reasonable measures to avoid the damage or that it was impossible for Air Canada to take such measures, there is no evidence on file to show that Air Canada took all reasonable measures to avoid the damage incurred by the Brines, or that it was impossible for Air Canada to take such measures, as required by Article 19 of the Montreal Convention.

[41] As such, in accordance with Article 19 of the Montreal Convention, Air Canada is liable for this damage.

[42] Consequently, the Agency finds that by not compensating the Brines for expenses related to the cellular phone roaming and telephone charges, and meals, Air Canada failed to properly apply the terms and conditions of carriage relating to the limits of liability as set out in Rule 55(B)(5)(a) of its Tariff, which incorporates the Montreal Convention by reference, and therefore contravened subsection 110(4) of the ATR.

CONCLUSION

[43] Based on the above findings, the Agency, pursuant to section 113.1 of the ATR, orders Air Canada to compensate the Brines, by not later than March 17, 2014, an amount of $348, upon presentation of appropriate receipts, and to advise the Agency once that compensation has been tendered.

(signed)

J. Mark MacKeigan
Member

DÉCISION N° 55-C-A-2014

le 14 février 2014

PLAINTE déposée par Allane, Richard, David et Michael Brine contre Air Canada.

Référence n° M4120-3/13-05726

INTRODUCTION

[1] Le 4 juin 2013, Allane Brine a déposé une plainte auprès de l'Office des transports du Canada (Office) en son nom et au nom de Richard, de David et de Michael Brine (les Brine) contre Air Canada concernant certains problèmes associés à leur voyage à Cancún, Mexique, en février 2012.

[2] Les Brine ont acheté des billets pour se rendre à Cancún avec Air Canada le 17 février 2012. Allane, Richard et David Brine avaient des réservations pour voyager de Vancouver (Colombie-Britannique), Canada, à Cancún via Toronto (Ontario), Canada, et Michael Brine avait une réservation pour voyager de Halifax (Nouvelle-Écosse), Canada, à Cancún via Toronto. Il était prévu que la famille se réunisse à Toronto et voyage ensemble jusqu'à Cancún.

[3] Le départ du vol n° AC108 (Vancouver-Toronto) a été retardé de sorte qu'Air Canada savait qu'Allane, Richard et David Brine ne pourraient pas arriver à temps pour le vol de correspondance n° AC1256 (Toronto-Cancún). Par conséquent, Air Canada a annulé leurs cartes d'embarquement et les a réacheminés sur un vol subséquent. Cependant, étant donné que le vol n° AC1256 a été retardé au départ, et qu'un siège était encore disponible, Air Canada a offert ce siège à Allane Brine, qui l'a accepté et a poursuivi son voyage en compagnie de Michael Brine, qui était arrivé d'Halifax. Allane Brine a laissé ses bagages pour qu'ils soient transportés par Richard Brine sur un vol subséquent.

[4] Richard et David Brine ont été réacheminés sur le vol n° AC993 du lendemain, c.-à.-d. le 18 février 2012, de Toronto à Mexico, au Mexique puis sur le vol n° AM445 de Mexico à Cancún. En raison du vol de correspondance manqué à Mexico, Richard et David Brine sont arrivés à Cancún le 19 février 2012. Une fois arrivés à Cancún, ils ont utilisé un service de transport jusqu'à leur hôtel.

[5] Les Brine demandent :

- le remboursement du coût de leurs quatre billets, soit un total de 3 605,56 $, pour [traduction] « les mauvaises décisions et le mauvais traitement que leur a fait subir Air Canada » ;

- le remboursement des dépenses personnelles suivantes :
  - 277,60 $ (frais d'itinérance pour le téléphone cellulaire de David Brine);
  - 30,40 $ pour d'autres appels à l'aéroport et à l'hôtel (la différence entre les 308 $ réclamés et les frais d'itinérance de 277,60 $);
  - 100 $ pour le transport à l'hôtel;
  - 30 $ (en plus des bons de repas de 30 $ fournis par Air Canada) pour des repas pris à Toronto;
  - 20 $ pour des repas pris à Mexico.

- une indemnité pour le retard dans la livraison des bagages et la perte de certains articles.

OBSERVATIONS PRÉLIMINAIRES

[6] David Brine a remarqué que certains articles ne se trouvaient plus dans ses bagages lors de leur livraison tardive à Cancún. Dans sa présentation, Air Canada souligne avoir accordé une indemnité de 193,65 $ pour la livraison tardive des bagages et pour les articles manquants ainsi que 100$ pour les frais de transport jusqu'à l'hôtel. De plus, Air Canada fait valoir que les dommages pour inconvénients ne sont pas recouvrables aux termes de la Convention pour l'unification de certaines règles relatives au transport aérien international – Convention de Montréal (Convention de Montréal). Dans leur réplique, les Brine ne contestent pas la présentation d'Air Canada concernant l'indemnité pour les bagages et le transport jusqu'à l'hôtel. Par conséquent, l'Office considère que cet élément de la plainte est réglé et ne l'examinera pas.

[7] En outre, l'Office n'examinera pas la demande de remboursement présentée par les Brine pour leurs quatre billets à titre d'indemnité pour mauvais traitement, parce que l'Office n'a pas compétence pour ordonner le versement d'une indemnité pour des éléments comme la douleur, la souffrance ou la perte de jouissance.

EXTRAITS TARIFAIRES ET LÉGISLATIFS PERTINENTS

[8] Les dispositions tarifaires qui étaient en vigueur au moment du voyage des Brine [règles 60(D)(3), 80(C)(1) et (2), 80(D), 89 (partie1)(E)(1)(a) et 55(B)(5)(a)] ainsi que les extraits législatifs et l'article 19 de la Convention de Montréal sont énoncés dans l'annexe.

QUESTIONS

1. Le transporteur a-t-il refusé l'embarquement à Richard et à David Brine, conformément à la règle 89 du tarif d'Air Canada intitulé International Passenger Rules and Fares Tariff, NTA(A) No. 458 (tarif), qui régit l'indemnisation pour refus d'embarquement, et, dans l'affirmative, quel montant d'indemnité pour refus d'embarquement sont-ils en droit de recevoir?

2. Air Canada a-t-elle appliqué correctement les conditions de transport indiquées dans la règle 80(C) de son tarif, relative aux irrégularités d'horaire, conformément au paragraphe 110(4) du *Règlement sur les transports aériens*, DORS/88-58, modifié (RTA)?

3. Air Canada a-t-elle correctement appliqué les conditions de transport relatives aux limites de responsabilité énoncées à la règle 55(B)(5)(a) de son tarif, qui incorpore la Convention de Montréal par renvoi, conformément au paragraphe 110(4) du RTA? Dans la négative, les plaignants ont-ils droit au remboursement de dépenses personnelles?

POSITIONS DES PARTIES

Les Brine

[9] Les Brine font valoir que, sachant qu'ils pourraient ne pas être en mesure de prendre le vol n° AC1256 en raison du départ tardif de Vancouver, Allane, Richard et David Brine ont demandé aux préposés à la porte d'embarquement à Vancouver de prendre des mesures pour qu'une voiturette les attende à l'Aéroport international Lester B. Pearson-Toronto. Les Brine indiquent qu'aucune voiturette n'a été fournie.

[10] Les Brine soutiennent que des membres du personnel qu'ils avaient vus à bord du vol n° AC108 Vancouver – Toronto ont pris le vol n° AC1256 de manière à prolonger à la dernière minute le temps hors service déjà prévu à Cancún, c'est-à-dire qu'initialement, un vol de départ plus tardif était prévu, et que quelques passagers en attente, ont également embarqué à bord. Les Brine soutiennent également que certaines de ces personnes ont reçu les sièges déjà assignés à Richard et David Brine. Les Brine se demandent pour quelle raison Richard et David Brine n'ont pu embarquer à bord de l'aéronef à Toronto tandis que des membres du personnel et des passagers en attente ont pu prendre le vol n° AC1256.

[11] Les Brine se demandent aussi pourquoi il a fallu autant de temps à Richard et à David Brine pour finalement arriver à Cancún; ils étaient tous à Toronto le 17 février 2012, mais Richard et David Brine sont arrivés à Cancún seulement le 19 février.

[12] Les Brine font valoir que Richard et David Brine auraient dû se voir offrir une indemnité pour refus d'embarquement à l'Aéroport international Lester B. Pearson-Toronto lorsqu'on les a informés qu'ils ne voyageraient pas à bord du vol n° AC1256.

[13] Les Brine demandent d'être indemnisés pour les dépenses personnelles suivantes, soit un total de 358 $, engagées à cause du retard du vol et du retard dans la livraison des bagages de David Brine :

- repas à Toronto : 30 $;
- deux repas à Mexico : 20 $;
- frais d'itinérance du téléphone cellulaire – appels à l'aéroport et à l'hôtel : 308 $.

Air Canada

[14] Air Canada fait valoir que, bien que le vol n° AC108 devait initialement atterrir à Toronto à 14 h 29, ce qui aurait permis à Allane, Richard et David Brine de prendre le vol de correspondance n° AC1256, le vol est arrivé à 15 h 42, c.-à.-d. deux minutes après l'heure de décollage prévue du vol n° AC1256.

[15] Air Canada indique que, étant donné que le départ du vol n° AC1256 a été reporté à 16 h 13, Allane, Richard et David Brine ont été en mesure de se présenter à la porte d'embarquement avant la fermeture de la porte de l'aéronef; cependant, ils ne sont pas arrivés à la porte d'embarquement avant l'heure limite d'embarquement.

[16] Air Canada fait valoir que, étant donné que les cartes d'embarquement d'Allane, de Richard et de David Brine et les sièges qui leur avaient été assignés avaient été annulés, on leur a dit qu'ils n'étaient plus à bord du vol n° AC1256. Cependant, Air Canada précise que, puisqu'il restait un siège disponible, Allane Brine a choisi de prendre le vol n° AC1256, mais sans ses bagages.

[17] Air Canada indique que Richard et David Brine ont été réacheminés sur un vol partant le lendemain en direction de Cancún via Mexico. Air Canada indique aussi que Richard et David Brine n'ont pas été placés sur des vols directs d'Air Canada en direction de Cancún parce que ces vols étaient complets. En raison d'un vol de correspondance manqué ensuite à Mexico, Richard et David Brine sont arrivés à leur destination finale le 19 février 2012.

[18] Air Canada soutient que Richard et David Brine ont reçu chacun un bon de repas de 30 $, l'hébergement pour la nuit à Toronto dans un hôtel près de l'aéroport, un bon de 200 $ et un remboursement de 100 $ pour les frais de transport jusqu'à l'hôtel. Air Canada soutient également avoir offert aux Brine, comme geste de bonne foi, deux codes de promotion de 20 pour cent, et que les Brine ont utilisé les bons et les codes de promotion pour l'achat d'un voyage subséquent.

[19] Selon Air Canada, le fait que le vol n° AC108 a été retardé et qu'en conséquence, Richard et David Brine n'ont pas pu prendre le vol n° AC1256, a constitué une correspondance manquée et, ainsi, Air Canada a respecté ses obligations juridiques et contractuelles envers eux en vertu de la règle 80(D) de son tarif relative aux correspondances manquées. Air Canada ajoute que, dans les cas de correspondances manquées, le transfert des bagages et le temps de déplacement dans l'aérogare doivent être pris en compte. Ceci est illustré par le fait qu'Allane Brine a été en mesure de prendre le vol n° AC1256, sans ses bagages.

[20] Air Canada fait valoir que, bien qu'une indemnité sous la forme de bons de voyage ait été accordée à Richard et à David Brine pour l'inconvénient subi du fait qu'ils n'ont pas pu voyager comme il avait été prévu à l'origine, ils n'étaient pas admissibles à une indemnité pour refus d'embarquement. L'indemnité qui leur a été accordée était un geste de bonne foi.

[21] Air Canada indique que l'exception au paiement d'une indemnité pour refus d'embarquement figurant dans la règle 89(partie 1)(E)(1) sous la disposition sur le respect de l'heure d'arrivée démontre et précise le fait que lorsque de telles situations résultent de correspondances manquées, il faut appliquer la disposition sur les correspondances manquées de la règle 80(D) et non celle sur le refus d'embarquement.

[22] Air Canada fait valoir que même si on considérait que Richard et David Brine se sont vu refuser l'embarquement, les conditions pour recevoir une indemnité pour refus d'embarquement en vertu de la règle 89(partie 1)(E)(l)(a) de son tarif n'ont pas été remplies. En vertu de cette règle, pour être admissibles à une indemnité pour refus d'embarquement, les passagers doivent se présenter à l'heure et au lieu indiqués, s'être conformés aux exigences en matière de réservation, de billetterie, d'enregistrement et de procédures de reconfirmation, et être admissibles au transport. Air Canada affirme que les passagers doivent se présenter à la porte d'embarquement dans les 30 minutes avant l'heure de départ prévue du vol, comme il est indiqué sur le site Web d'Air Canada et dans la règle 60(D)(3) de son tarif. Étant donné qu'il était impossible pour Allane, Richard et David Brine de prendre le vol de correspondance, comme prévu, ils ont été retirés du vol n° AC1256.

[23] En ce qui a trait à la présentation des Brine selon laquelle Air Canada n'a pas pris de dispositions pour qu'une voiturette soit à leur disposition à l'arrivée à Toronto d'Allane, de Richard et de David Brine, Air Canada soutient qu'un transporteur n'a aucune obligation juridique de faciliter le déplacement d'un passager entre les vols de correspondance. La situation est dictée par la politique, et la portée de l'aide fournie directement aux passagers dont la correspondance risque d'être manquée varie selon les circonstances des activités quotidiennes dans un aéroport donné mais aussi selon les restrictions en matière de sécurité en transit.

[24] Air Canada affirme que son obligation en cas d'irrégularité d'horaire et de correspondance manquée consiste à réacheminer le ou les passagers ou à fournir un remboursement, lorsque demandé. Dans le cas présent, Air Canada indique que David et Richard Brine ont bien été réacheminés puisqu'ils ont voyagé avec Air Canada jusqu'à leur destination finale et que, par conséquent, ils ne sont pas admissibles à un remboursement, car il n'y avait pas de portion inutilisée à leurs billets.

[25] Air Canada fait valoir qu'elle n'est pas responsable des dommages consécutifs réclamés par les Brine. À cet égard, Air Canada renvoie aux décisions de l'Office n^{os} 185-C-A-2003 (*Yehia c. Air Canada*) et 31-A-1999 (*Katchmar c. Air Ukraine*).

[26] En ce qui concerne la demande d'indemnité de 358 $ pour les frais de téléphone et les frais d'itinérance et pour les repas à Toronto et à Mexico, Air Canada fait valoir qu'elle a plus que dédommagé entièrement les Brine en leur donnant deux bons de 200 $ et deux codes de promotion donnant droit à un rabais de 20 pour cent, grâce auxquels les Brine ont obtenu un rabais additionnel de 641,60 $. Air Canada allègue que les bons et les codes de promotion donnés, qui représentent une économie totale de 1 041,60 $, dépassent ce à quoi les Brine étaient admissibles. Air Canada fait valoir que, comme geste de bonne foi, sur présentation des reçus pertinents, Air Canada fournira aux Brine une indemnité de 358 $ pour les dépenses personnelles relatives aux frais de téléphone, aux frais d'itinérance et pour les repas à Toronto et à Mexico.

ANALYSE ET CONSTATATIONS

Question 1 : Le transporteur a-t-il refusé l'embarquement à Richard et à David Brine, conformément à la règle 89 du tarif d'Air Canada, relative à l'indemnisation en cas de refus d'embarquement et, dans l'affirmative, quel montant d'indemnité pour refus d'embarquement sont-ils en droit de recevoir?

[27] Les Brine font valoir que Richard et David Brine se sont vu refuser l'embarquement et se demandent pourquoi on ne leur a pas offert d'indemnité pour refus d'embarquement, tandis qu'Air Canada allègue que Richard et David Brine ne se sont pas présentés à la porte d'embarquement à l'heure limite d'embarquement pour le vol n° AC1256 et ne sont donc pas admissibles à une telle indemnité.

[28] En vertu de la règle 89(partie 1)(E)(1)(a) du tarif, pour être admissibles à une indemnité pour refus d'embarquement, les passagers doivent se présenter pour le transport à l'heure appropriée. Selon la preuve présentée par Air Canada et démontrant que le vol n° AC108 est arrivé à Toronto deux minutes après l'heure de départ prévue du vol n° AC1256, il n'était pas possible pour Allane, Richard et David Brine de se présenter à la porte d'embarquement du vol n° AC1256 à l'heure appropriée comme le prévoit la règle 60(D)(3) du tarif d'Air Canada.

[29] L'Office note les similitudes factuelles qui existent entre le cas présent et les circonstances de la décision n° 264-C-A-2013 (*Azar c. Air Canada*) dans laquelle la passagère a également manqué un vol de correspondance, son siège a été donné à un autre passager et elle a réclamé une indemnité pour refus d'embarquement. Dans ce cas, l'Office a conclu qu'il ne s'agissait pas d'un refus d'embarquement, mais d'une correspondance manquée et par conséquent que la passagère n'avait pas droit à une indemnité pour refus d'embarquement dans de telles circonstances.

[30] Pour le cas présent, l'Office est d'avis qu'il s'agissait clairement aussi d'un cas de correspondance manquée et non pas d'un refus d'embarquement.

[31] À la lumière de ce qui précède, l'Office conclut que Richard et David Brine ne se sont pas vu refuser l'embarquement et que, par conséquent, ils n'ont pas droit à l'indemnité pour refus d'embarquement.

Question 2 : Air Canada a-t-elle appliqué correctement les conditions de transport indiquées dans la règle 80(C) de son tarif, relative aux irrégularités d'horaire, conformément au paragraphe 110(4) du RTA?

[32] L'Office note que, le 17 février 2012, le vol n° AC108 d'Air Canada a connu une irrégularité d'horaire, aux termes de la règle 80(C) de son tarif en vigueur à la date du début du transport d'Allane, de Richard et de David Brine, du fait que l'arrivée du vol à Toronto a été retardée, ce qui a fait que Richard et David Brine ont manqué leur vol de correspondante de Toronto à Cancún. L'Office note également qu'Air Canada a satisfait aux exigences de la règle 80(C) de son tarif en réacheminant Richard et David Brine et en les transportant à leur destination finale. En outre, Air Canada a fourni à Richard et à David Brine l'hébergement pour la nuit à Toronto et leur a donné des bons de repas.

[33] L'Office conclut donc qu'Air Canada a correctement appliqué les conditions en vertu de la règle 80(C) de son tarif quand elle a réacheminé Richard et David Brine et leur a fourni l'hébergement pour la nuit à Toronto et des bons de repas.

Question 3 : Air Canada a-t-elle correctement appliqué les conditions de transport relatives aux limites de responsabilité énoncées à la règle 55(B)(5)(a) de son tarif, qui incorpore la Convention de Montréal par renvoi, comme l'exige le paragraphe 110(4) du RTA? Dans la négative, les plaignants ont-ils droit au remboursement de dépenses personnelles?

[34] En réponse à la demande d'indemnisation des Brine d'une somme de 358 $ pour des frais de téléphone et d'itinérance pour le téléphone cellulaire, et pour des repas, Air Canada fait valoir qu'elle a déjà plus que rempli son obligation en fournissant aux Brine des bons de voyage et des codes de promotion donnant droit à des rabais équivalant à des économies de 1 041,60 $. Toutefois, en guise de geste de bonne volonté, Air Canada propose d'offrir aux Brine une indemnité de 358 $ au titre de dépenses personnelles liées à des frais de téléphone et d'itinérance et pour des repas à Toronto et à Mexico, sur présentation des reçus appropriés.

[35] L'article 19 de la Convention de Montréal prévoit ce qui suit :

> Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de passagers, de bagages ou de marchandises. Cependant, le transporteur n'est pas responsable du dommage causé par un retard s'il prouve que lui, ses préposés et mandataires ont pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter le dommage, ou qu'il leur était impossible de les prendre.

[36] La règle 55(B)(5)(a) du tarif prévoit ce qui suit :

> Aux fins du transport international régi par la Convention de Montréal, les règles de responsabilité prévues dans celle-ci font partie intégrante du présent texte et prévalent sur, voire remplacent, toutes les dispositions du présent tarif qui seraient contraires auxdites règles.

[37] Dans la décision n° 250-C-A-2012 (*Lukács v, Air Canada*), l'Office a indiqué ce qui suit:

> [25] Il est clair en vertu de l'article 19 de la Convention que la responsabilité des dommages résultant d'un retard dans le transport aérien de passagers, entre autres, incombe au transporteur, mais qu'un transporteur n'est pas responsable des dommages causés par un retard s'il prouve que lui, ses préposés et ses mandataires ont pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter les dommages ou qu'il leur était impossible de les prendre. Comme l'Office l'a indiqué dans la décision de demande de justification, lorsqu'il y a présomption de responsabilité à l'égard d'un transporteur résultant d'un retard, le transporteur a une obligation corollaire de l'atténuer et de se pencher sur les dommages qui ont été causés ou qui pourraient être causés aux passagers en raison du retard. De plus, l'article 19 de la Convention fournit au transporteur un moyen de défense s'il peut démontrer qu'il a pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter les dommages causés par le retard, ou qu'il lui était impossible de les prendre. [...]

[38] L'Office est d'avis que le départ retardé du vol n° AC108, le 17 février 2012, et que le retard subséquent de l'arrivée à Cancún de David et de Richard Brine ainsi que le retard de livraison des bagages de David Brine constituent un retard aux termes de l'article 19 de la Convention de Montréal et que les dépenses personnelles liées aux frais de téléphone et d'itinérance et aux repas pris à Toronto et à Mexico constituent des dommages occasionnés par ces retards.

[39] L'Office est également d'avis que les bons de voyage et les codes de promotion ont été offerts aux Brine par Air Canada de son propre chef et non pas parce qu'elle était tenue de le faire en vertu d'une loi ou d'un règlement.

[40] L'Office conclut que, même s'il incombait à Air Canada de prouver qu'elle a pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter les dommages ou qu'il lui était impossible de les prendre, le dossier ne comporte aucun élément de preuve démontrant qu'Air Canada a pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter les dommages subis par les Brine ou qu'il lui était impossible de les prendre, comme l'exige l'article 19 de la Convention de Montréal.

[41] Ainsi, conformément à l'article 19 de la Convention de Montréal, Air Canada est responsable de ces dommages.

[42] Par conséquent, l'Office conclut que, en n'indemnisant pas les Brine pour les dépenses liées aux frais d'itinérance pour le téléphone cellulaire et de téléphone, et aux repas, Air Canada n'a pas appliqué correctement les conditions de transport relatives aux limites de responsabilité énoncées dans la règle 55(B)(5)(a) de son tarif, qui incorpore la Convention de Montréal par renvoi, et a donc contrevenu au paragraphe 110(4) du RTA.

CONCLUSION

[43] À la lumière des constatations qui précèdent, l'Office enjoint à Air Canada, en vertu de l'article 113.1 du RTA, d'indemniser les Brine, au plus tard le 17 mars 2014, d'un montant de 348 $, sur présentation des reçus appropriés, et d'informer l'Office quand l'indemnité aura été versée.

(signature)

J. Mark MacKeigan
Membre

Tariff Rules in effect at the time of the Brines' travel

RULE 55 – LIABILITY OF CARRIERS

[...]

(B) – LAWS AND PROVISIONS APPLICABLE

[...]

(5)(a) For the purpose of international carriage governed by the Montreal Convention, the liability rules set out in the Montreal Convention are fully incorporated herein and shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules.

RULE 60 –RESERVATIONS

[...]

(D) CHECK-IN TIME LIMITS

[...]

(3) The passenger must be available for boarding at the boarding gate at least 55 minutes prior to scheduled departure time of the flight on which he/she holds a reservation.

EXCEPTIONS: Caracas 30 minutes
Grand Cayman 45 minutes
Tel Aviv 60 minutes

RULE 80 – REVISED ROUTINGS, FAILURE TO CARRY AND MISSED CONNECTIONS

[...]

(C) SCHEDULE IRREGULARITY

(1) In the event carrier cancels a flight, fails to operate according to schedule, fails to stop at a point to which the passenger is destined or is ticketed to stopover, substitutes a different type of equipment or class of service, is unable to provide previously confirmed space, causes a passenger to miss a connecting flight on which he holds a reservation, or the passenger is refused passage or removed in accordance with Rule 25(A) carrier will at its option and as passenger's sole remedy either:

(a) carry the passenger on another of its passenger aircraft on which space is available without additional charge regardless of the class of service; or at carrier's option;
(b) endorse to another air carrier with which Air Canada has an agreement for such transportation, the unused portion of the ticket for purposes or rerouting; or at carrier's option;
(c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower or;
(d) at passenger's option or if carrier is unable to perform the option stated in (A), (B) or (C) above within a reasonable amount of time, make involuntary refund in accordance with Rule 90(D).

(2) In the event carrier is a codeshare carrier and the operating carrier cancels a flight, fails to operate according to schedule, fails to stop at a point to which the passenger is destined or is ticketed to stopover, substitutes a different type of equipment or class of service, is unable to provide previously confirmed space, causes a passenger to miss a connecting flight on which he holds a reservation, or the passenger is refused passage or removed in accordance with Rule 25(A) carrier will, as the passenger's sole remedy, if the operating carrier fails to do so:

(a) carry the passenger on another of its passenger aircraft on which space is available without additional charge regardless of the class of service; or at carrier's option
(b) endorse to another carrier or other transportation service, the unused portion of the ticket for purposes of rerouting; or at carrier's option
(c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower at carrier's option.
(d) or, at carrier's option or if carrier is unable to perform the option stated in (A) (B) or (C) above within a reasonable amount of time, make involuntary refund in accordance with Rule 90(D).

(D) MISSED CONNECTIONS

In the event a passenger misses an onward connecting flight on which space has been reserved because the delivering carrier did not operate its flight according to schedule or changed the schedule of such flight, the delivering carrier will arrange for the carriage of the passenger or make involuntary refund in accordance with Rule 90.

RULE 89 – DENIED BOARDING COMPENSATION

(Part 1)

[...]

(E) COMPENSATION

In addition to providing transportation in accordance with (D), a passenger who has been denied boarding involuntarily will be compensated by AC as follows:

(1) Conditions for Payment

(a) The passenger must present himself for carriage at the appropriate time and place:

(i) having complied fully with AC applicable reservation, ticketing, check-in and reconfirmation procedures; and,

(ii) being acceptable for transportation in accordance with AC published tariffs.

RELEVANT STATUTORY EXTRACTS

Air Transportation Regulations, SOR/88-58, as amended

110. (4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

113.1 If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may direct it to:

(*a*) take the corrective measures that the Agency considers appropriate; and

(*b*) pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions set out in the tariff.

Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention

Article 19 – Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Règles tarifaires en vigueur au moment du voyage des Brine

RÈGLE 55 – RESPONSABILITÉ DES TRANSPORTEURS

[...]

(B) – LOIS ET DISPOSITIONS APPLICABLES

[...]

(5)(a) Aux fins du transport international régi par la Convention de Montréal, les règles de responsabilité prévues dans celle-ci font partie intégrante du présent texte et prévalent sur, voire remplacent, toutes autres dispositions du présent tarif qui seraient contraires auxdites règles.

RÈGLE 60 –RÉSERVATIONS

[...]

(D) DÉLAIS POUR L'ENREGISTREMENT

[...]

(3) Le passager doit se présenter à la porte d'embarquement au moins 55 minutes avant l'heure de départ prévue du vol pour lequel il détient une réservation.

EXECEPTIONS : Caracas : 30 minutes
Grand Caïman : 45 minutes
Tel-Aviv : 60 minutes

RÈGLE 80 – CHANGEMENTS D'ITINÉRAIRE, DÉFAUT DE TRANSPORT ET CORRESPONDANCES MANQUÉES

[...]

RÈGLE 80(C) – IRRÉGULARITÉS D'HORAIRE

(1) Si le transporteur annule un vol, n'assure pas un vol selon l'horaire prévu, ne s'arrête pas à un point de destination ou à une escale du passager, remplace un type d'équipement ou une classe de service, ne peut pas fournir un siège préalablement confirmé, fait en sorte qu'un passager manque un vol de correspondance pour lequel il a une réservation ou refuse au passager le transport ou le retire du vol conformément à la règle 25(A), le transporteur, à sa discrétion et comme seul recours du passager, exercera l'une des options suivantes :
   (a) transporte le passager sur un autre de ses aéronefs de passagers où il y des places disponibles, sans frais supplémentaires, indépendamment de la classe de service; ou, à la discrétion du transporteur,

(b) endosse auprès d'un autre transporteur aérien avec lequel Air Canada a conclu un accord pour ce transport la partie inutilisée du billet pour le réacheminement; ou, à la discrétion du transporteur,
(c) réachemine lui-même ou par l'entremise d'un autre transporteur le passager vers la destination figurant sur le billet ou la partie applicable du billet et, si le tarif du nouvel acheminement ou de la classe de service est supérieur à la valeur de remboursement du billet ou de sa partie applicable, selon la règle 90(D), le transporteur ne demande pas de paiement supplémentaire au passager, mais rembourse la différence si le tarif est inférieur; ou
(d) au choix du passager ou si le transporteur n'est pas en mesure d'exercer l'option indiquée en (A), (B) ou (C) ci-dessus dans un délai raisonnable, effectue un remboursement involontaire conformément à la règle 90(D).

(2) Si le transporteur est un transporteur à code partagé et le transporteur exploitant annule un vol, n'assure pas un vol selon l'horaire prévu, ne s'arrête pas à un point de destination ou à une escale du passager, remplace un type d'équipement ou une classe de service, ne peut pas fournir un siège préalablement confirmé, fait en sorte qu'un passager manque un vol de correspondance sur lequel il a une réservation ou refuse au passager le transport ou le retire du vol conformément à la règle 25(A), le transporteur, comme seul recours du passager, si le transporteur exploitant ne le fait pas, exercera l'une des options suivantes :
(a) transporte le passager sur un autre de ses aéronefs de passagers où il y des places disponibles, sans frais supplémentaires, indépendamment de la classe de service; ou, à la discrétion du transporteur,
(b) endosse auprès d'un autre transporteur aérien ou tout autre exploitant de service de transport la partie inutilisée du billet pour le réacheminement; ou, à la discrétion du transporteur,
(c) réachemine lui-même ou par l'entremise d'un autre transporteur le passager vers la destination figurant sur le billet ou la partie applicable du billet et si le tarif du nouvel acheminement ou de la classe de service est supérieur à la valeur de remboursement du billet ou de sa partie applicable, selon la règle 90(D), le transporteur ne demande pas de paiement supplémentaire au passager, mais, à sa discrétion, rembourse la différence si le tarif est inférieur; ou
(d) à la discrétion du transporteur ou s'il n'est pas en mesure d'exercer l'option indiquée en (A) (B) ou (C) ci-dessus dans un délai raisonnable, effectue un remboursement involontaire conformément à la règle 90(D).

(D) CORRESPONDANCES MANQUÉES

Advenant qu'un passager rate son vol de correspondance à bord duquel un siège a été réservé parce que le transporteur cédant n'a pas exploité son vol selon l'horaire établi ou a changé l'horaire d'un tel vol, le transporteur cédant prendra les arrangements nécessaires pour le transport du passager ou lui accordera un remboursement involontaire conformément à la règle 90.

RÈGLE 89 – INDEMNITÉ POUR REFUS D'EMBARQUEMENT

(Partie 1)

[...]

(E) INDEMNITÉ

En plus d'être transporté en vertu de ce qui est énoncé au point (D), un passager qui s'est vu refuser l'embarquement sera indemnisé par Air Canada comme suit :

(1) Conditions de paiement

(a) le passager doit se présenter pour le transport à l'heure et au lieu indiqués :

(i) il doit s'être entièrement conformé aux exigences pertinentes d'Air Canada en matière de réservation, de billetterie, d'enregistrement et de procédures de reconfirmation;

(ii) il doit avoir satisfait à toutes les exigences d'acceptation pour le transport conformément aux tarifs publiés d'Air Canada.

EXTRAITS LÉGISLATIFS PERTINENTS

***Règlement sur les transports aériens*, DORS/88-58, modifiée**

110. (4) Lorsqu'un tarif déposé porte une date de publication et une date d'entrée en vigueur et qu'il est conforme au présent règlement et aux arrêtés de l'Office, les taxes et les conditions de transport qu'il contient, sous réserve de leur rejet, de leur refus ou de leur suspension par l'Office, ou de leur remplacement par un nouveau tarif, prennent effet à la date indiquée dans le tarif, et le transporteur aérien doit les appliquer à compter de cette date.

111. (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

Convention pour l'unification de certaines règles relatives au transport aérien international – Convention de Montréal

Article 19 – Retard

Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de passagers, de bagages ou de marchandises. Cependant, le transporteur n'est pas responsable du dommage causé par un retard s'il prouve que lui, ses préposés et mandataires ont pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter le dommage, ou qu'il leur était impossible de les prendre.

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DIRECTION DU SECRÉTARIAT
SECRETARIAT DIRECTORATE

ARRÊTÉ-DÉCISION
ORDER-DECISION

RÉFÉRENCE : Email

PRÉPARÉ PAR
PREPARED BY : MSL

RÉVISÉ PAR
REVIEWED BY :

N° DU CAS /
CASE NO.: 13-05726

Nbre de membres : 1 Échéance 2014/02/14

Agent responsable : Mike Redmond

N° de téléphone : 997-1219

RDIMS # : Anglais 1153639 / 1153640

Français :

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From: [redacted]@shaw.ca>
To: "'Sylvie Giroux'" <Sylvie.Giroux@otc-cta.gc.ca>, <secretaire-secretary@otc-cta.gc.ca>
CC: [redacted]@aircanada.ca>, "'Cathy Doyle'" [redacted]@aircanada.ca>
Date: 14/11/2013 1:00 PM
Subject: Air Canada Complaint Response - Complaint File no. M4120-3/13-05726
Attachments: Air Canada Complaint response.pdf

Please reply to acknowledge receipt of "Air Canada Complaint Response" document.

Mrs. Allane Brine

Mr. Richard Brine

David Brine

Michael Brine

November 14, 2013

Canadian Transportation Agency – Sylvie Giroux, Analyst

Air Canada – [redacted] Counsel – Regulatory & Litigation

[redacted]

Complaint File no. M4120-3/13-05726

It pains me and my family that Air Canada cannot get to the point of doing the right thing but instead they are still relying on just their rules, but this incident does not fall within their rules. Plain and simple this was a screw up that should never have happened and they just are not willing to say sorry for ruining our family vacation.

1. According to the Globe and Mail published Thursday, February 9, 2012 "Air Canada is striving to avert a showdown next week after the union representing pilots called a strike vote," "Air Canada will be in a position to lock out 3,000 members of the Air Canada Pilots Association or impose new terms and conditions on them on Valentine's Day". "If ACPA obtains its strike mandate, the union will be in a position on Tuesday to issue 72 hour notice of walkout on **February 17,** but Capt. Tarves emphasized that no decision has been made on staging a work stoppage". This strike date/work stoppage is on the same date that we were flying to Cancun; could this have been the reason for the attitude by the gate crews and as to why they treated their associates/flight crew better than their paying passengers?

2. When the plane from Vancouver was going to be late due to "mechanical difficulties" I asked the gate crew at the desk in Vancouver for a golf cart to meet us in Toronto so that we could make our flight to Cancun, the woman told me that I could use a wheel chair (talk about being insulted!). I was trying everything possible within my means to make sure that we would make our connection to Cancun. On other trips I have seen golf carts being used all the time to help transport passengers to their connections. When we arrived in Toronto there was NO golf cart (nor a wheel chair for that matter) waiting.

3. When we landed in Toronto and while still taxiing to our gate I texted Michael who was waiting for us at the gate with the plane to Cancun and I told him to tell the gate crew that we had landed and that we were on our way, to hold the plane. They knew we were coming! On page 3, first paragraph of report she states that we were the only passengers on board the flight from Vancouver with a connection to Cancun with AC #1256. Does this imply that there are a minimum number of passengers required to hold a connecting flight? Technically they were also waiting for the 3 flight attendants from our flight. Furthermore, if they were waiting for those flight attendants then why were they not waiting for us, as we were on the same flight? We were told that "you're late!" but we arrived at the gate within seconds of the Vancouver flight crew and watched them walk straight down the skywalk onto the plane. Michael was standing there to greet us at the gate.

4. commented that Air Canada was using the rule of having to be "at the boarding gate within 30 minutes prior to departure of international flights" against us, then why was this rule not applied to all none working Air Canada employees travelling with your airline. It is apparent that Air Canada is and can be flexible on the "30 minute rule". Case in point: While in we were boarded on AC #034, an announcement came over the PA system that we would be waiting on the tarmac (1/2 hour) with the door open until a flight had landed and we were to wait for those passengers to board our flight That was really nice that our plane waited for those passengers and then while we were in the air another announcement came over the PA saying that because we were late taking off, passengers that were flying on with connecting flights to were now being put on new flights and to go to new gate numbers, this was all done for this passengers so that their flights and connections were not inconvenienced in any way. They even asked the passengers who did not have to rush to their connections to please stay seated so that the other passengers could exit the plane first. It appears that this is a common practice with Air Canada, why was none of this done for us back on February 17, 2012 while we were flying from Vancouver?

5. Why were the flight crew from flight AC #108 allowed to board to the flight to Cancun but not us? Or if all "six" of us were late, then why did the Cancun flight not close its doors to all "six" of us, rather than just "three" of us? These are questions that Air Canada refuses to answer. Do you not think it very odd that 3 passengers are denied boarding and in their place are 3 flight attendants now on a 16 hour extended vacation? While on route to Toronto both [redacted] and I spoke to several members of our flight crew and they all said "don't worry, they will hold the plane for you because we are going to be on the same plane as you to Cancun". These 3 stewardesses were suppose to leave on the Saturday morning flight to Cancun but they were really excited because they were now going to Cancun earlier; little did we know that meant they were taking our seats on the plane thus causing our family to be split up and two members not to be allowed on the flight to Cancun. Do you not find it strange that all 3 flight attendants sat in the same row, side-by-side; the row that David was to sit, yes that is only one seat but wasn't too hard to have the 2 stand-by university students that were to sit next to David moved back to the 2 seats that [redacted] and I were to occupy, now freeing up the whole row for the flight attendants. Why did these flight attendants not give [redacted] their seats back, they really were not supposed to be in Cancun until the next day? Yes I was eventually allowed to board the plane but only after they "found" me a seat. This was after they realized that they were sending [redacted] Michael to Cancun without a parent (yes I know that he was [redacted] and that would have been a media nightmare with all of the issues that Air Canada was having to deal with at that point in time. I was the only family member with all the information on the hotel [redacted] and transportation information and when they separated my family [redacted] David were left without that information. If Michael had of flown to Cancun without a family member (me) he too would have been without that information and with no way to get a hold of us. How would of Air Canada explained that to the media? During the flight to Cancun I watched from my seat as each flight attendant gets up and goes to the front of the plane and when they returned to their seat they had changed out of their uniforms and into street clothes.

6. **We keep coming back to the same questions – Why were the 3 flight attendants given the extra16 hours in Cancun? Furthermore, why did they not step off the plane, revert to their original flight plan for Saturday morning and allow our family to travel together?

7. Air Canada speaks of giving us 2 x $200.00 vouchers plus 2 x 20% off coupons, yes they did but only after I made several e-mail complaints to [redacted] from the Executive Centre. [redacted] made me feel like she was doing me a favour by giving me this money (it wasn't really money but $200 off vouchers off flights) and coupons (good for only one year) and if I did not accept their offer we would get nothing. Although we appreciate this minimal gesture from Air Canada; we have always said that we deserved more for what Air Canada put us through. Yes Air Canada reimbursed us for out of pocket expenses but they nickel and dimed us, not believing what we said, making us fight for every cent we received. David is still out almost $300.00 on his cell bill as result of Mexican roaming charges because he had to turn on his cell phone to find out where in [redacted] our hotel was. This charge would never have happened if Air Canada had not split up our family but [redacted] of the Executive Office would not allow that expense. [redacted] David was put up in a hotel for the Friday but only after they were stuck in Toronto by the inconsideration of the Toronto Air Canada gate crew and the flight attendants who were sitting in their seats. Yes the hotel was paid for by Air Canada, but do they think that makes up for my family members not being allowed on the flight we paid for.

8. Why did Air Canada book [redacted] David as a "stand-by" passenger through to Mexico City when we paid full fare for all our family members? What would have happened if [redacted] was able to get on that flight but not [redacted] because he was "stand-by"? You would have split up my family again, luckily that was not the case but the potential for that was there to happen. Why was AC #993 3 hours late in leaving Toronto Saturday morning? This caused [redacted] to miss several flights in Mexico City. The weather was fine in Toronto, so it was not due to snow storms. Did this have something to do with the pilot's strike that was to start the day before?

9. Since the flight attendants were no longer on the Saturday morning flight to Cancun via Montreal, in turns of customer service why couldn't [redacted] be given priority to occupy their vacant seats?

10. Why did it take [redacted] until Sunday morning to arrive in Cancun? Why were they not first on the list to get them to Cancun quickly? Michael and I (plus our flight crew from Vancouver) all arrived on Friday that is 2 days of our holidays that were ruined by having to wait for family members to arrive due the actions of Air Canada. I had no clothes for those days or toiletries until I was forced to buy what little I could. Air Canada even tried to charge [redacted] for having an extra checked bag, my bag that was not with me in Cancun.

11. Not only did Air Canada lose [redacted] bag, unfortunately David's bag was broken into and things were stolen; as he was asked to give up his bag keys in Mexico City. [redacted] arrived Sunday morning. By Tuesday evening Air Canada online lost luggage tracker had not found David's bag nor was it found by any Air Canada employee. It took a phone call on Wednesday morning to an airport floor worker who searched and found his bag, where a Cancun Airport Authority then had it delivered to our hotel doorstep. Weeks after our trip, the lost baggage on line tracker still had David's bag listed as "in transit" status. We have now lost 5 days of our [redacted] holiday (David and Michael were only there for [redacted]; none of this would have happened if it were not for the actions of the Air Canada employees in Toronto and Vancouver.

12. [redacted] states that "passengers (us) did not suffer any inconvenience", what does [redacted] consider an inconvenience?
    a. No golf cart waiting, [redacted] states "there is no legal requirement for a carrier to facilitate the movement of a passenger during connections". I asked for one while in Vancouver to help make our connection, what are the golf carts for but to transport customers trying to make connections.
    b. Family split up/separated.
    c. It takes Air Canada 3 days to get [redacted] to their destination.
    d. Lost luggage /stolen items.
    e. Out of pocket expenses.
    f. Lack of customer service & caring.

13. No arrival agent was waiting us to give us new boarding passes at the departure gate (or anywhere else for that matter), just two gate crew members, the woman who told us "You're late!" and a [redacted] man who just stood back not saying or doing anything. After I left for Cancun [redacted] had to walk down the concord to find Air Canada's Customer Service (and I say this lightly), where the woman asked him what did he wanted to do now, that it was up to him to decide (wasn't it quite obvious that they needed new tickets).The woman would not look [redacted] in the eyes and it was like trying to pull teeth to get the new tickets/boarding passes. These tickets/boarding passes were handwritten.

In summary there were a whole series of events:

We tried in advance to help ourselves to make the connecting flights in asking the gate crew at the desk in Vancouver for a golf cart to meet us in Toronto.

I texted Michael, who was waiting for us at the Toronto gate with the plane to Cancun; to tell the gate crew that we had landed and that we were on our way and to further hold the already awaiting plane.

Air Canada has a policy regarding the boarding gate within 30 minutes prior to departure of international flights. It is apparent that Air Canada is and can be flexible on this "30 minute rule"; we've seen numerous occasions where this rule is flexible with many connection passengers.

Is it a coincidence that all 3 flight attendants sat in the same row, side-by-side; the row that David was to sit?

Why did Air Canada book [redacted] David as a "stand-by" passenger through to Mexico City when we paid full fare for all our family members?

Air Canada even tried to charge [redacted] for having an extra checked bag; my bag that was not with me in Cancun.

Why was AC #993 three hours late in leaving Toronto Saturday morning? This caused [redacted] to miss several flights in Mexico City.

Not only did Air Canada lose [redacted] bag, unfortunately David's bag was broken into and things were stolen.

Weeks after our trip, the Air Canada online lost luggage tracker still had not found his bag.

We have not heard any apology or why someone made a decision to hold the plane for the flight attendants but not for us. This is the point where the domino effect kicked in, that lead to a many further misfortunes:
Late plane.
More missed connections.
Lost bag and stolen items.

Questions to address;

You allowed the flight crew from flight AC #108 to board the awaiting plane to Cancun but why not us?

If all "six" of us were late, then why did the Cancun flight not close its doors to all "six" of us, rather than just "three" of us?

Why were the 3 flight attendants given the extra 16 hours in Cancun?

Why did they not step off the plane, revert to their original flight plan for Saturday?

Whereas the flight attendants were no longer going on the Saturday morning flight to Cancun via Montreal; in terms of customer service, why wasn't [redacted] not be given priority to occupy their vacant seats?

CONCLUSION

Nine months prior, we bought our plane tickets through the Air Canada web site and we were allowed the specified connection times between flights. We arrived early to the Vancouver airport, had no problems going through security and did not cause any problems or issues. We did everything right, the delay was due a ledged "mechanical issues", however we were treated differently than the flight attendants who were given an early a vacation in Cancun.

We have never stopped flying with Air Canada; we like the planes, the seat sizes and for the most part their schedules to different destinations. Even with this incident we have continued to fly Air Canada but on that date back on February 17, 2012 you, Air Canada, failed us as passengers and we were made to feel that we did not matter.

We are not asking compensation due to mechanical difficulties as stated by [redacted] but for the wrong decisions and mistreatment that Air Canada put our family through on that date and the dates to follow. This not a case of missed connections but denied boarding and as result of that we are asking for our air fare ($3,605.56) plus David's roaming charges ($247.80) returned to our family.

Allane Brine on behalf of herself and Richard, David & Michael Brine

From: Cathy Doyle <[redacted]@aircanada.ca>
To: "secretary@otc-cta.gc.ca" <secretary@otc-cta.gc.ca>
CC: "sylvie.giroux@otc-cta.gc.ca" <sylvie.giroux@otc-cta.gc.ca>, [redacted]@aircanada.ca>, [redacted]@shaw.ca" [redacted]@shaw.ca>
Date: 08/11/2013 9:54 AM
Subject: Complaint M4120-3/13-05726
Attachments: image001.jpg; image002.jpg; image003.jpg; image004.jpg; image005.jpg; Air Canada's Answer 08NOV13.pdf; Annex A to G.pdf

All,

Please find attached Air Canada's Answer to the complaint filed by Ms. Allane Brine.

Yours sincerely,

[Description: AC_logo]<http://www.aircanada.com/>

[redacted]
Zip YUL1276
C.P. 7000, Succ. Aéroport
Dorval QC H4Y 1J2
[redacted]@aircanada.ca<mailto:[redacted]@aircanada.ca>

[Description: Skytrax_4star_fr]

[Description: enviro_logo_bil-f-e_2] [Description: twitter_newbird_boxed_whiteonblue] <https://twitter.com/aircanada> [Description: F_Facebook_] <https://www.facebook.com/aircanada>

AIR CANADA

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Email: [redacted]@aircanada.ca

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

VIA EMAIL

November 8, 2013

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

To the attention of Sylvie Giroux, Analyst

RE: Complaint File no. M4120-3/13-05726
Complaint of Allane L. Brine against Air Canada
Our file: 4402.0652

The present constitutes Air Canada's Answer to Mrs. Allane Brine's complaint made on behalf of herself, Mr. Richard Brine, David Brine and Michael Brine regarding her and her family's travels to Cancun on February 17 and 18, 2012. We understand that the complaint pertains to the following:

- Baggage (delayed and/or lost and/or allegedly stolen);
- Denied Boarding;
- Delays (due to mechanical).

We also understand that Mrs. Allane Brine is seeking the following remedies: (1) a refund, (2) compensation, and (3) consideration for future travel.

At the outset, we would like to call to the Complainants' attention the fact that the form and content of this letter necessarily takes a legalistic approach. In this regard, we trust that the Agency has made clear that the holder of an international license must respond to complaints to the Agency in a manner that involves the consideration and application of legal principles and

statutory interpretation to the facts at hand. We therefore respond in accordance with required procedures under the *Canada Transportation Act* (S.C. 1996, c.10).

I. APPLICABLE RULES

As this is a case in which the complainants are arguing that Air Canada did not provide service in accordance with its contractual obligations, the tariff provisions applicable for the complainant's travels are referenced below. **We disclaim, however, that the below-referenced tariff provisions are no longer applicable and have changed since the Complainants purchased their tickets and travelled.**

As the travel itinerary was between Canada and Mexico. The provisions of Air Canada's International Tariff on the date the tickets were purchased are applicable. For the purposes of the present file, the following International Tariff Rules are at issue: Rule 55(C) with respect to the limitations of the carrier's liability, Rules 60(D)(3) and 60(D)(4) with respect to reservations and applicable time-limits; Rule 80(D) with respect to missed connections, and Rule 89(Part 1)(E) with respect to denied boarding compensation amounts. The identified tariff provisions are provided in **Annex A**.

In addition, the contract of carriage was also subject to the *Convention for the Unification of certain Rules for International Carriage by Air*, signed in Montreal on May 28, 1999 (the "Montreal Convention"), enacted in Canadian law by the *Carriage by Air Act*, R.S.C. c. C-26.

II. RELEVANT FACTS

i. Sequence of events during travels

Mrs. Allane Brine and her family had purchased tickets on or about [redacted] for outbound itineraries set out below. As we understand, the return portion of their travels is not subject to the complaint. Consequently, it will not be addressed herein.

Passengers Mrs. Allane Brine, Mr. Richard Brine and David Brine were scheduled to take the following flights. Each passenger had been checked in with one checked baggage (see the departure control system ("DCS") records, **Annex B**).

- AC108 from Vancouver (YVR) to Toronto (YYZ) on 17 February 2012, scheduled to depart at 7:00 and arrive at 14:29. Due to the delay of flight AC108, the flight actually arrived at 15:42 at gate D26 (see AC108 flight record, **Annex C**).
- AC1256 Toronto (YYZ) to Cancun, Mexico (CUN) on 17 February 2012, scheduled to depart at 15:40 and arrive at 18:55. The departure of this flight was subsequently delayed to approximately 16:13 and departed out of gate E69 (see AC1256 flight record, **Annex D**).

With respect to Michael Brine, he was travelling separately and had a different itinerary than the rest of his family. He was not offloaded from flight AC1256. For the purpose of providing complete information, he was scheduled to take the following flights.

- AC605 from Halifax (YHZ) to Toronto (YYZ) on 17 February 2012, scheduled to depart at 7:00 time and arrive at 8:25 time;
- AC1256 Toronto (YYZ) to Cancun, Mexico (CUN) on 17 February 2012, scheduled to depart at 15:40 and arrive at 18:55. As previously stated, the departure of this flight was

subsequently delayed to approximately 16:13 and departed out of gate E69 (see AC1256 flight record, **Annex D**).

Although AC108 was initially scheduled to land in Toronto at 14:29, which would have allowed the passengers to make their connection to AC1256 departing at 15:40, it actually arrived at the gate at 15:42 (**Annex C**). In other words, flight AC108 arrived two minutes after the scheduled departure time of AC1256. As such, at 14:30 (see DCS records in **Annex B** where it is indicated that they were offloaded at 19:30 Zulu time), Air Canada's systems detected that Mrs. Allane Brine, Mr. Richard Brine and David Brine would not arrive in time to take flight AC1256 and therefore cancelled their boarding card and seat assignment for that flight ("offloaded" in the terminology used for DCS systems). They were the only passengers onboard AC108 that had a connection with AC1256.

Notwithstanding the delayed arrival of AC108, because the departure of AC1256 was pushed back to 16:13, the complainants Mrs. Allane Brine, Mr. Richard Brine and David Brine were able to get the departure gate E69 before the aircraft door for flight AC1256 was closed. Nonetheless, they did not arrive at the gate before the boarding gate cut-off time, as explained below.

As their boarding cards and seat assignments for flight AC1256 had been cancelled, the Air Canada agent correctly advised them that they were no longer onboard flight AC1256. Nonetheless, as there was a seat that remained available, Mrs. Allane Brine, who then opted to continue her travels without a bag (Mr. Brine subsequently travelled with two bags), was able to embark flight AC1256.

Mr. Richard Brine and David Brine were reprotected on the following flights departing on 18 February 2012, between Toronto and Cancun *via* Mexico City.

- AC993 Toronto (YYZ) to Mexico City (MEX) on 18 February 2012, scheduled to depart at 8:10 and actually departing at 10:57.
- AM445 Mexico City (MEX) to Cancun, Mexico (CUN) on 18 February 2012, departing at 14:55

Mr. Richard Brine and David Brine were not rebooked on the direct Air Canada flights between Toronto and Cancun departing on 18 February 2012 as those flights were already at full capacity. They were provided with a $30 meal-voucher as well as overnight accommodations in Toronto at a hotel near the airport.

Mr. Richard Brine completed his travels to Cancun with two checked bags while David Brine travelled with one checked bag, as appears from the bag tag references in their DCS records (**Annex B**). Based on the evidence on file, Mr. Richard Brine completed his travels with the bag initially checked by Mrs. Allane Brine on flight AC108. This is derived from the fact that he completed his travels with two (2) checked bags, as well as indicated in his correspondence dated 27 March 2012 that [redacted] *did not have her bags either until we arrived on Sunday*".

We understand that, notably due to a subsequent missed connection in Mexico City, Mr. Richard Brine and David Brine arrived at their final destination on 19 February 2013.

ii. Compensation claimed

a. Baggage claims

In the complaint, it is alleged that damages are due notably for:

- The interim expenses of $24 caused by the delay in delivery of David Brine's baggage;
- The interim expenses of $51.50 due to the fact that Mrs. Allane Brine opted in Toronto to have her baggage be transported by Mr. Richard Brine from Toronto to Cancun;
- Missing shorts from David Brine's baggage allegedly valued at $100 (see correspondence from Richard Brine dated 27 March 2012).

According to Air Canada's record, the complainants were reimbursed the following amounts:

- $118.15 for the alleged missing items from David Brine's bags;
- $75.5 for alleged interim expenses.

The above claims and reimbursement appear in the correspondence between Mrs. Allane Brine and Air Canada's baggage claims department, dated June 2012, annexed hereto as **Annex E**.

b. Compensation claims

We understand that the compensation requested by the complainants includes (see correspondence from Richard Brine dated 27 March 2012, already on file):

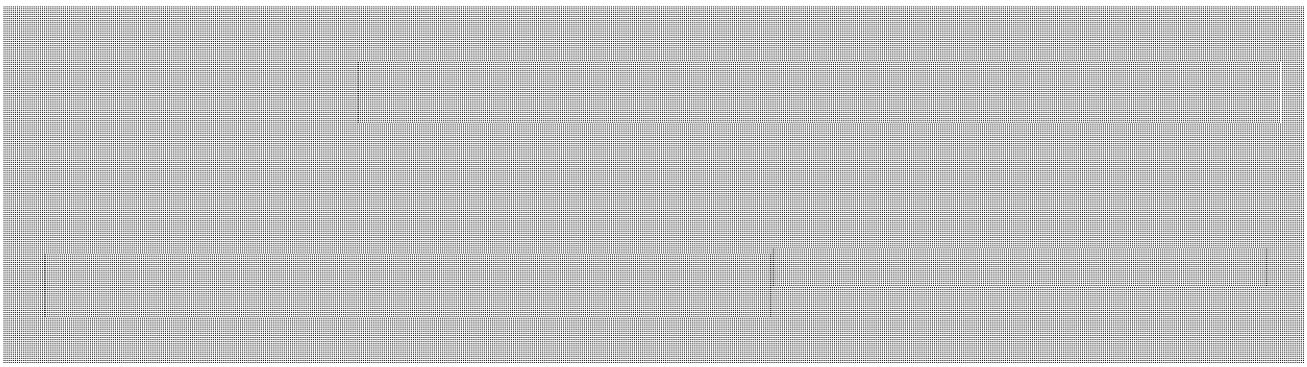
- A refund of the tickets that were purchased for a total amount of $3,605.65, which includes the costs of the tickets purchased for Mrs. Allane Brine, Mr. Richard Brine and David Brine for a total of $2,697.26 in addition to the ticket purchased for Michael Brine for a total of $908.39.
- A reimbursement of all of their claimed expenses:
    - $277.60 in data roaming charges for the use of David Brine's cell phone (see correspondence of Mrs. Allane Brine dated 24 May 2012, already on file);
    - $30.40 for other airports and hotel calls (the difference between the claimed $308 and the $277.60 in alleged roaming fees);
    - $100 transportation to hotel;
    - $30 (over the $30 meal vouchers) for meals purchased in Toronto;
    - $20 for meals purchased in Mexico.

In response to these claims, the complainants were given the following amounts, vouchers and promotion codes for future travel:

- $100 draft in order to reimburse for the cost of transportation (**Annex F**).
- Two 20% promotion codes (4X4T42CI and CQM8AN71) provided on a goodwill basis, as appears from Air Canada Customer Relations letter dated 11 June 2012, already on file;

- Two $200 vouchers for David and Richard (0140706926959) and (0140706927199) provided on a goodwill basis, as appears from the Air Canada Customer Relations letter dated 13 April 2012, already on file.

The Complainants have accepted the entirety of the above compensation as well as promotion codes.



III. AIR CANADA'S POSITION

i. Air Canada met its legal and contractual obligations towards the Complainants

Although the complainants ultimately received compensation in the form of $200 travel voucher for Mr. Richard Brine and David Brine's inconvenience with not being able to travel onboard AC108, they nonetheless seek the reasons for which denied boarding compensation was not offered to them on the spot. Air Canada submits that they were not entitled to denied boarding compensation and any compensation provided to them in this regard was as a gesture of goodwill, above and beyond the obligations that Air Canada has towards the complainants.

a. Complainants Mrs. Allane Brine, Mr. Richard Brine and David Brine missed their connection to AC1256

The fact that AC108 was delayed and caused Mr. Richard Brine and David Brine to not be able to successfully board AC1256 constituted a missed connection. As such, Air Canada met its legal and contractual obligations towards them under International Tariff Rule 80(D) regarding missed connections:

International Tariff Rule 80(D) sets out the obligation to arrange for the carriage of the passenger in the event that a passenger misses an onward connecting flight on which space has been reserved because the previous flight was not operated according to schedule.

As previously explained, due to the late arrival of flight AC108, which only arrived at the gate in Toronto at 15:42 on February 17th, 2012, the Complainants were offloaded from AC1256 as they were not able to successfully make the connecting flight. As previously explained, it would not have been possible for them to be at the gate within 30 minutes of the scheduled departure time of AC1256, which was set to depart at 15:40. Furthermore, even had the complainants not been offloaded, and even considering the revised time of departure of AC1256, which was set back to 16:13, it would still not have been possible for the Mrs. Allane Brine, Mr. Richard Brine and David Brine to be at the gate before the 30 minute boarding cut-off time. Furthermore, their

baggage would not have been able to be transferred onto AC1256 due to the limited amount of time between the arrival of AC108 and the departure of AC1256. In the cases of missed connection, the transfer of baggage and movement time within the terminal must also be taken into account. This is exemplified in the fact that Mrs. Allane Brine boarded flight AC1256 without her bag, choosing to rather have it carried by Mr. Richard Brine.

The exception to the payment of denied boarding compensation found in Rule 89(Part 1)(E)(1) under the requirement to arrive on time clarifies and exemplifies the fact that where such situations are the result of misconnections, the applicable regime is that of misconnections under International Tariff Rule 80(D) and not of denied boarding. As such, this was a case of a missed connection, and not of denied boarding.

b. The Complainants are not entitled to denied boarding compensation

Even if the Complainants were considered as having been denied boarding, the conditions to receive denied boarding compensation under Rule 89(Part 1)(E)(1)(A) of the International Tariff were not fulfilled. Under this rule, passengers must be acceptable for transportation in accordance with the published tariffs. Air Canada's International Tariff Rule 89 sets out when Air Canada has the obligation to pay a passenger denied boarding compensation. Tariff Rule 89 is divided into three parts, each part applying to different itinerary types. For the purposes of this complaint, International Tariff Rule 89(Part 1) is applicable.

Under Rule 89(Part 1)(E)(1)(A), in order to be eligible for denied boarding compensation, it was necessary for the passenger to be present at the appropriate time and place having complied with applicable reservations, ticketing, check-in and reconfirmation procedures, and being acceptable for transportation in accordance with the published tariffs.

Therefore, in order to be acceptable for transportation in accordance with Air Canada's published tariffs, passengers must be present at the gate at the boarding cut-off time. Air Canada requires that passengers be at the boarding gate within 30 minute of the scheduled departure time. Passengers had and still have the obligation to be present at the gate within a certain amount of time as set out on Air Canada's website and in Rule 60(D)(3) of the International Tariff[1]. As it was apparent that it was effectively impossible for the Complainants Mrs. Allane Brine, Mr. Richard Brine and David Brine to make their connection, as scheduled, they were offloaded from AC1256.

Due to the delay of flight AC108 on which Mrs. Allane Brine, Mr. Richard Brine and David Brine were travelling, said flight was only to arrive in Toronto after the scheduled departure of flight AC1256. Even had the passengers not been offloaded at 14:30 from flight AC1256, it would not have been possible for them to be at the gate within the required time limits. As appears from the times previously listed, although AC108 was initially scheduled to land in

[1] Note that, at the time of the Complainant's contract of carriage, the content of Rule 60(D)(3) on reservations and applicable time-limits referred to a 55 minute cut-off time for passengers to be at the boarding gate. However, Air Canada has consistently been applying a 30 minute cut-off time, in accordance with the information communicated to its passengers on the Air Canada website at www.aircanada.com/en/travelinfo/airport/checkin.html. For greater transparency, Rule 60(D)(3) was revised in April 2012 in order to reflect this 30 minute cut-off time for passengers to be present at the gate. Passengers did not suffer any inconvenience regarding the terms in the International Rule as Air Canada was applying a more generous required time for them to be present at the boarding gate than what was listed in the International Tariff.

Toronto at 14:29, which would have allowed the passengers to make their connection to AC1256 departing at 15:40, it actually arrived at 15:42 (**Annex C**). Even if we were to consider the revised departure time of AC1256, which effectively left the gate at 16:13 (**Annex D**), it would not have been possible for the plaintiffs to disembark flight AC108 at gate D26 and be at gate E69 for flight AC1256 within a period of one minute.

The obligation to be at the boarding gate within 30 minutes prior to the departure of international flights is a contractual obligation assumed by the passenger and is necessary for operational reasons (including security measures). In order to properly carry out the boarding process in a timely manner, Air Canada requires, for international flights, that all passengers be at the gate within a specified time so that they can board the aircraft at the appropriate time. Air Canada staff requires time to ensure that boarding can be completed, travel documents checked, passengers with special needs accommodated, luggage safely stowed in the overhead bins or under the seat in front of the passenger, prior to final passenger count and close of the flight. Moreover, it is a fact that some passengers do not make it to the flight, although they are checked-in, either because they checked-in from a remote station and never make it to the airport, they are blocked at security (and possibly at customs in the case of passengers transiting from the U.S.), or they get waylaid. If a passenger is not at the gate in time, or not checked-in, or if the system detects the passenger will not be there, any baggage checked-in by that passenger must be off-loaded. As well, during that period, passengers who are standing-by for a flight can be assigned a seat that is vacant. The cut-off time to arrive at the gate allows gate agents to ensure that all passengers have boarded when they begin processing the list of standby passengers.

The fact that carriers require passengers to comply with boarding gate deadlines is recognized by the Agency in their *Fly Smart* publication[2], which informs consumers to be aware that such deadlines exist and vary from carrier to carrier and between domestic and international flights. The Agency informs consumers, through this publication, that "*Check-in and boarding gate reporting deadlines vary from carrier to carrier and between domestic and international flights. If you miss any of them, the carrier may reassign your pre-reserved seat and/or cancel your reservation. In such situations, the air carrier has no obligation to put you on a later flight or to refund any portion of your unused ticket*".

Finally, there is no legal requirement for a carrier to facilitate the movement of a passenger during connections. This is policy driven and the extent of assistance directly provided to passengers whose connection is at risk varies depending on the circumstances of the daily operations (for e.g. weather conditions and number of irregular operations) in a given airport and on the transit security restrictions. For example, usually, where Air Canada expects a passenger to miss a connection due to the late arrival of a flight, an arrival agent will meet the passenger at the exit of the aircraft and/or intercept them with a new boarding card or rebook them on another flight. Unfortunately, due to the length of time since February 2012, it is no longer possible to determine what measures were in place on the date the Complainants travelled.

ii. Air Canada has already compensated the Complainants

a. Refund Request

The Agency's jurisdiction is limited to the application of the carrier's Tariff Rules. Accordingly, Tariff Rule 80 outlines Air Canada's obligation in the case of a scheduled irregularity and missed

[2] Canadian Transportation Agency, *Fly Smart* guide, available online at: http://www.cta-otc.gc.ca/eng/fly-smart.

connection, which is to reprotect the passenger or make a refund, where requested. In the present case, the passengers were effectively reprotected. They travel onboard Air Canada to their final destination. In such a case, passengers are not entitled to a refund – as there is no unused portion of the ticket.

Furthermore, with respect to Mr. Richard Brine and David Brine, Air Canada applied the terms of its Tariff Rule 80(C)(3) and ensured that they were accommodated overnight and given meal vouchers.

b. Baggage Claims

Damages for inconvenience are not recoverable under the Montreal Convention. This interpretation is confirmed by Canadian case law, notably in *Lukacs* v. *United Airlines Inc.* (2009 MBCA 111) and *Simard* v. *Air Canada Inc.* (2007 QCCS 4452).

As such, only out of pocket expenses are recoverable where there is a delay in the delivery of baggage; see *Girard et al.* v. *Air Canada* (Qc. Court) October 22, 2009, 500-32-019501-079.

Air Canada submits that, in accordance with the Montreal Convention, the complainants should only be compensated for out-of-pocket expenses associated with the delay in the baggage, up to the amounts set out in article 22 of the Montreal Convention. Non-compensatory damages, such as an alleged loss of time and inconvenience, are not recoverable pursuant to article 29 of the Montreal Convention.

Air Canada provided to the Complainants a refund associated with interim expenses and alleged lost items, for a total of $193.65. The reimbursement was carried out notwithstanding the fact that the Complainants did not provide Air Canada with the receipts for said expenses (**Annex E**), as required under Tariff Rule 55. Air Canada has therefore fulfilled its obligations in this regard.

c. Compensation claims

As specified above, Air Canada has compensated a total of $100 of the claimed transportation expenses.

The remaining claim of $358 pertains to telephone and roaming charges and amounts claimed for meals in Toronto and Mexico. Air Canada notes that it more than fully reimbursed the passengers in providing two $200 vouchers for a total of $400 as well as two promotion codes for a 20% discount that provided the Complainants with another $641.60 discount. Both the provision of the vouchers and the promotion codes – totaling a savings of $1041.60 – were above what the passengers were entitled to. As such, we submit that Air Canada fulfilled its obligations to compensation out of pocket expenses for the Complainants.

Even though Air Canada considers that it fulfilled its legal obligations towards the complainants, as an additional measure of goodwill, Air Canada will provide the Complainants with the balance of up to $358 upon presentation of relevant receipts.

d. Other claims

With respect to claims beyond the scope of out-of-pocket expenses, International Tariff Rule 55(C)(10) specifically sets out that Air Canada is not liable for consequential damages claimed by passengers.

The Agency has no jurisdiction to award additional damages sought by the Complainants that are not provided for under the International Tariff and unrelated to their out-of-pocket expenses. We refer to the Agency's previous decisions in *Danny Yehia* v. *Air Canada*, 185-C-A-2003, where the Agency recognized that its jurisdiction was limited with respect to compensation:

> With respect to the issue of compensation, the Agency has the authority, pursuant to paragraph 113.1(*b*) of the ATR, to order a carrier to compensate a passenger for his or her out-of-pocket expenses if these arose as a direct result of the carrier's failure to respect its tariff.
>
> Under this provision, however, the Agency does not have any jurisdiction to order compensation for loss of income, pain and suffering, or stress. These are issues that can only be resolved by the civil courts.

This decision was based on *Roman Katchmar* v. *Air Ukraine*, 31-C-A-1999, where the Agency affirmed that it has no authority to determine an entitlement to compensation in what is properly a civil matter. In *Katchmar*, the complainant was claiming monetary compensation for the inconvenience experienced and the loss of holiday time and various opportunities. In addition to the foregoing, the recovery of general damages for inconvenience is excluded by the *Montreal Convention*, which provides the exclusive rules that govern carrier liability in such a context[3].

IV. CONCLUSION

In light of the above, and as evident from the Complainants' correspondence to Air Canada, already on file, the present complaint pertains to the Complainants' dissatisfaction with the service they received. Air Canada treated this complaint accordingly and notably offered promotion codes and travel vouchers in order to address the Complainant's concerns. What was provided by Air Canada to the Complainants is above and beyond that to which they are entitled under the contract of carriage. Air Canada respectfully submits that the above demonstrates that the complaint filed by Mrs. Allane Brine on behalf of herself and Mr. Richard Brine, David Brine and Michael Brine should be dismissed.

Sincerely,

[redacted] - Regulatory & Litigation

[redacted]

Encl.

---

3 *Lukács* v. *United Airlines Inc. and Skywest Airlines Inc.*, 2009 MBCA 111 (Man. C.A.), para. 11.

AIR CANADA

Annex A

Relevant International Tariff Provisions applicable in 2011

AREA: ZZ TARIFF: IPRG CXR: AC RULE: 0055 - LIMITATIONS OF LIABILITY

(C) LIMITATION OF LIABILITY
EXCEPT AS PROVIDED IN PARAGRAPH (B) ABOVE, OR OTHER APPLICABLE LAW MAY OTHERWISE REQUIRE:

(1) CARRIER IS NOT LIABLE FOR ANY DEATH, INJURY, DELAY, LOSS, OR OTHER DAMAGE OF WHATSOEVER NATURE (HEREINAFTER IN THIS TARIFF COLLECTIVELY REFERRED TO AS "DAMAGE" TO PASSENGERS OR UNCHECKED BAGGAGE ARISING OUT OF OR IN CONNECTION WITH CARRIAGE OR OTHER SERVICES PERFORMED BY CARRIER INCIDENTAL THERETO, UNLESS SUCH DAMAGE IS CAUSED BY THE NEGLIGENCE OF CARRIER. ASSISTANCE RENDERED TO THE PASSENGER BY CARRIER'S EMPLOYEES IN LOADING, UNLOADING, OR

(2) CARRIER IS NOT LIABLE FOR ANY DAMAGE DIRECTLY AND SOLELY ARISING OUT OF ITS COMPLIANCE WITH ANY LAWS, GOVERNMENT REGULATIONS, ORDERS, OR REQUIREMENTS OR FROM FAILURE OF PASSENGER TO COMPLY WITH SAME, OR OUT OF ANY CAUSE BEYOND CARRIER'S CONTROL.

(3) ANY LIABILITY OF CARRIER IS LIMITED TO 250 FRENCH GOLD FRANCS (APPROXIMATELY USD $20.00) PER KILOGRAM IN THE CASE OF CHECKED BAGGAGE AND 5000 FRENCH GOLD FRANCS (APPROXIMATELY USD $400.00) PER PASSENGER IN THE CASE OF UNCHECKED BAGGAGE OR OTHER PROPERTY, UNLESS A HIGHER VALUE IS DECLARED IN ADVANCE AND ADDITIONAL CHARGES ARE PAID PURSUANT TO CARRIER'S REGULATIONS. IN THAT EVENT THE LIABILITY OF THE CARRIER SHALL BE LIMITED TO SUCH HIGHER DECLARED VALUE. IN NO CASE SHALL THE CARRIER'S LIABILITY EXCEED THE ACTUAL LOSS SUFFERED BY THE PASSENGER. ALL CLAIMS ARE SUBJECT TO PROOF OF AMOUNT OF LOSS.

NOTE: IN CANADA THE FRENCH GOLD FRANC SHALL BE CONVERTED INTO CANADIAN DOLLARS IN ACCORDANCE WITH THE PROVISION OF THE CARRIAGE BY AIR ACT GOLD FRANC CONVERSION REGULATIONS SOR/83-79.

EXCEPTION: FOR TRANSPORTATION OUTSIDE CONTINENTAL NORTH AMERICA WHERE THE TRANSPORTATION ORIGINATES OR TERMINATES IN THE UNITED STATES AND IS VIA A POINT OR POINTS WITHIN CANADA, IN EITHER DIRECTION, AND THE NUMBER OF PIECES AND WEIGHT OF CHECKED BAGGAGE IS NOT ENDORSED ON THE PASSENGER TICKET, THE CARRIER'S LIABILITY IN THE EVENT OF LOSS, DAMAGE OR THE DELAY IN DELIVERY OF CHECKED BAGGAGE SHALL BE LIMITED TO THE CARRIER'S FREE BAGGAGE ALLOWANCE PER PASSENGER (X) FOR EACH AFFECTED PIECE OF BAGGAGE TIMES USD 20.00 PER KG. (USD 640.00 PER BAG (X)). THIS LIMITATION ON LIABILITY SHALL NOT APPLY IF (1) THE PASSENGER HAS PAID THE EXCESS BAGGAGE PREMIUM FOR EACH ADDITIONAL BAG IN EXCESS OF THE FREE ALLOWANCE, IN WHICH EVENT THE ALLOWANCE OF 32 KGS. PER BAG SHALL APPLY FOR EACH ADDITIONAL AFFECTED PIECE, OR, (2) THE PASSENGER HAS DECLARED AND PURCHASED VALUATION

IN EXCESS OF THE MAXIMUM MONETARY ALLOWANCE BY WEIGHT. ALL CLAIMS ARE SUBJECT TO PROOF OF THE AMOUNT OF LOSS CLAIMED, THE EXCLUSIONS FROM LIABILITY AS CONTAINED IN THIS RULE, THE TIME LIMITATIONS AS CONTAINED IN PARAGRAPH (D) BELOW AND THE EXCLUSIONS APPLICABLE TO THE PURCHASE OF EXCESS VALUATION CONTAINED IN RULE 118. IN NO CASE SHALL THE CARRIER'S LIABILITY EXCEED THE ACTUAL LOSS SUFFERED BY THE PASSENGER.

THE FOREGOING LIMITATION SHALL NOT APPLY WHEN THE PASSENGER CAN PROVE THAT THE CARRIER HAS FAILED TO COMPLY WITH THE NOTICE PROVISIONS OF SECTION 221.176 OF PART 221 OF THE CIVIL AERONAUTICS BOARD'S ECONOMIC REGULATIONS.

NOTE: UNDER NO CIRCUMSTANCES WILL THE CARRIER BE LIABLE FOR THE LOSS, DELAY OR DAMAGE TO UNCHECKED BAGGAGE OR CABIN BAGGAGE NOT ATTRIBUTED TO THE NEGLIGENCE OF THE CARRIER. ASSISTANCE RENDERED TO THE PASSENGER BY THE CARRIER'S EMPLOYEES IN LOADING, UNLOADING OR TRANS-SHIPPING OF UNCHECKED OR CABIN BAGGAGE SHALL BE CONSIDERED AS A GRATUITOUS SERVICE TO THE PASSENGER.

(4) (A) IN ANY EVENT LIABILITY OF CARRIER FOR DELAY OF A PASSENGER SHALL NOT EXCEED 125,000 FRENCH GOLD FRANCS, OR ITS EQUIVALENT.

(B) IN ANY EVENT LIABILITY OF CARRIER FOR DEATH OR INJURY SHALL NOT EXCEED 125,000 FRENCH GOLD FRANCS, OR ITS EQUIVALENT. (SEE NOTE, PARAGRAPH (B)(1) ABOVE.)

(5) IN THE EVENT OF DELIVERY TO THE PASSENGERS OF PART BUT NOT ALL OF HIS CHECKED BAGGAGE, OR IN THE EVENT OF DAMAGE TO PART BUT NOT ALL OF SUCH BAGGAGE, THE LIABILITY OF THE CARRIER WITH RESPECT TO THE UNDELIVERED OR DAMAGED PORTION SHALL BE REDUCED PROPORTIONATELY ON THE BASIS OF WEIGHT, NOTWITHSTANDING THE VALUE OF ANY PART OF THE BAGGAGE OR CONTENTS THEREOF.

(6) CARRIER IS NOT LIABLE FOR DAMAGE TO A PASSENGER'S BAGGAGE CAUSED BY PROPERTY CONTAINED IN THE PASSENGER'S BAGGAGE. ANY PASSENGER WHOSE PROPERTY CAUSED DAMAGE TO ANOTHER PASSENGER'S BAGGAGE OR TO THE PROPERTY OF CARRIER SHALL INDEMNIFY CARRIER FOR ALL LOSSES AND EXPENSES INCURRED BY CARRIER AS A RESULT THEREOF.

(7) SUBJECT TO THE CONVENTION, WHERE APPLICABLE, CARRIER IS NOT LIABLE FOR LOSS, DAMAGE TO, OR DELAY IN THE DELIVERY OF FRAGILE OR PERISHABLE ARTICLES, MONEY, JEWELRY, SILVERWARE, NEGOTIABLE PAPERS, SECURITIES, OR OTHER VALUABLES, BUSINESS DOCUMENTS, OR SAMPLES THAT ARE INCLUDED IN THE PASSENGER'S CHECKED BAGGAGE, WITH OR WITHOUT THE KNOWLEDGE OF CARRIER.

(8) CARRIER MAY REFUSE TO ACCEPT ANY ARTICLES THAT DO NOT CONSTITUTE BAGGAGE AS SUCH TERM IS DEFINED HEREIN, BUT IF DELIVERED TO AND RECEIVED BY CARRIER, SUCH ARTICLES SHALL BE DEEMED TO BE WITHIN THE BAGGAGE VALUATION AND LIMIT OF LIABILITY, AND SHALL BE SUBJECT TO THE PUBLISHED RATES AND CHARGES OF CARRIER.

(9) (A) LIABILITY OF CARRIER FOR DAMAGES SHALL BE

LIMITED TO OCCURRENCES ON ITS OWN LINE, EXCEPT IN THE CASE OF CHECKED BAGGAGE AS TO WHICH THE PASSENGER ALSO HAS A RIGHT OF ACTION AGAINST THE FIRST OR LAST CARRIER.

(B) A CARRIER ISSUING A TICKET OR CHECKING BAGGAGE FOR CARRIAGE OVER THE LINES OF ANOTHER CARRIER DOES SO ONLY AS AGENT. (SEE NOTE, PARAGRAPH (B)(1) ABOVE.)

(10) CARRIER SHALL NOT BE LIABLE FOR CONSEQUENTIAL, SPECIAL, PUNITIVE OR EXEMPLARY DAMAGES ARISING FROM OR CONNECTED IN ANY WAY WITH ANY ACT OR OMISSION BY THE CARRIER, ITS EMPLOYEES OR AGENTS, WHETHER OR NOT SUCH ACT OR OMISSION WAS NEGLIGENT AND WHETHER OR NOT THE CARRIER HAD KNOWLEDGE THAT SUCH DAMAGES MIGHT BE INCURRED.

(...)

AREA: ZZ TARIFF: IPRG CXR: AC RULE: 0060 - CONDITIONS OF RESERVATIONS

(D) (...)

(3) THE PASSENGER MUST BE AVAILABLE FOR BOARDING AT THE BOARDING GATE AT LEAST 55 MINUTES PRIOR TO SCHEDULED DEPARTURE TIME OF THE FLIGHT ON WHICH HE/SHE HOLDS A RESERVATION.
EXCEPTIONS: CARACAS 30 MINUTES
GRAND CAYMAN 45 MINUTES
TEL AVIV 60 MINUTES

(4) IF PASSENGER FAILS TO MEET ANY OF THESE REQUIREMENTS, THE CARRIER WILL REASSIGN ANY PRE-RESERVED SEAT AND/OR CANCEL THE RESERVATION OF SUCH PASSENGER(S) WHO ARRIVES TOO LATE FOR SUCH FORMALITIES TO BE COMPLETED BEFORE SCHEDULED DEPARTURE TIME. CARRIER IS NOT LIABLE TO THE PASSENGER FOR LOSS OR EXPENSE DUE TO PASSENGER(S) FAILURE TO COMPLY WITH THIS PROVISION.
NOTE: FOR THE PURPOSE OF THIS RULE, CHECK-IN IS THE POINT FOR CHECKING BAGGAGE AND THE BOARDING GATE IS THE POINT WHERE THE BOARDING PASS STUB IS LIFTED AND RETAINED BY THE CARRIER.

AREA: ZZ TARIFF: IPRG CXR: AC RULE: 0080 - REVISED ROUTINGS, FAILURE TO CARRY AND MISSED CONNECTIONS

(A) DEFINITIONS. FOR THE PURPOSE OF THIS RULE, THE FOLLOWING TERMS HAVE THE MEANING INDICATED BELOW.

(1) COMPARABLE AIR TRANSPORTATION MEANS TRANSPORTATION PROVIDED BY AIR CARRIERS OR FOREIGN AIR CARRIERS HOLDING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY OR FOREIGN PERMITS ISSUED BY THE CIVIL AERONAUTICS BOARD.

(2) CONNECTING POINT MEANS A POINT TO WHICH A PASSENGER HOLDS OR HELD CONFIRMED SPACE ON A FLIGHT OF ONE CARRIER AND OUT OF WHICH THE PASSENGER HOLDS OR HELD CONFIRMED SPACE ON A FLIGHT OF THE SAME OR ANOTHER CARRIER. ALL AIRPORTS THROUGH WHICH A CITY IS SERVED BY ANY CARRIER SHALL BE DEEMED TO BE A SINGLE CONNECTING POINT WHEN THE RECEIVING CARRIER HAS CONFIRMED RESERVATIONS TO THE DELIVERING CARRIER;

(3) DELIVERING CARRIER MEANS A CARRIER ON WHOSE FLIGHT A PASSENGER HOLDS OR HELD CONFIRMED SPACE TO A CONNECTING POINT;

(4) MISCONNECTION OCCURS AT A CONNECTING POINT WHEN A

PASSENGER HOLDING CONFIRMED SPACE ON AN ORIGINAL RECEIVING CARRIER IS UNABLE TO USE SUCH CONFIRMED SPACE BECAUSE THE DELIVERING CARRIER WAS UNABLE TO DELIVER HIM TO THE CONNECTING POINT IN TIME TO CONNECT WITH SUCH RECEIVING CARRIER'S FLIGHT.

NOTE: THE SAME RULES REGARDING DELIVERING AND RECEIVING CARRIERS REPONSIBILITY APPLY AT THE SUBSEQUENT POINT(S) OF MISCONNECTION AS WOULD APPLY AT THE POINT OF ORIGINAL MISCONNECTION.

(5) NEW RECEIVING CARRIER(S) MEANS A CARRIER OR COMBINATION OF CONNECTING CARRIERS, OTHER THAN THE ORIGINAL RECEIVING CARRIER(S), OPERATING BETWEEN THE POINT OF MISCONNECTION AND THE DESTINATION OR NEXT POINT OF STOPOVER OR CONNECTING POINT SHOWN ON THE PASSENGER'S TICKET, ON WHOSE FLIGHT A PASSENGER IS TRANSPORTED FROM THE CONNECTING POINT;

(6) ORIGINAL RECEIVING CARRIER(S) MEANS A CARRIER OR COMBINATION OF CONNECTING CARRIERS ON WHOSE FLIGHT(S) A PASSENGER ORIGINALLY HELD OR HOLDS CONFIRMED SPACE FROM A CONNECTING POINT TO A DESTINATION, NEXT STOPOVER OR CONNECTING POINT;

(7) OUTBOUND FLIGHT MEANS THE FLIGHT ON WHICH A PASSENGER ORIGINALLY HELD CONFIRMED SPACE BEYOND THE POINT WHERE THE SCHEDULE IRREGULARITY OR FAILURE TO CARRY OCCURS;

(8) SCHEDULE IRREGULARITY MEANS ANY OF THE FOLLOWING IRREGULARITIES:

(A) DELAY IN SCHEDULED DEPARTURE OR ARRIVAL OF A CARRIER'S FLIGHT RESULTING IN A MISCONNECTION, OR

(B) FLIGHT CANCELLATION, OMISSION OF A SCHEDULED STOP, OR ANY OTHER DELAY OR INTERRUPTION IN THE SCHEDULED OPERATION OF A CARRIER'S FLIGHT, OR

(C) SUBSTITUTION OF EQUIPMENT OF A DIFFERENT CLASS OF SERVICE, OR

(D) SCHEDULE CHANGES WHICH REQUIRE REROUTING OF PASSENGER AT DEPARTURE TIME OF THE ORIGINAL FLIGHT.

(...)

(C) SCHEDULE IRREGULARITY

(1) IN THE EVENT CARRIER CANCELS A FLIGHT, FAILS TO OPERATE ACCORDING TO SCHEDULE, FAILS TO STOP AT A POINT TO WHICH THE PASSENGER IS DESTINED OR IS TICKETED TO STOPOVER, SUBSTITUTES A DIFFERENT TYPE OF EQUIPMENT OR CLASS OF SERVICE, IS UNABLE TO PROVIDE PREVIOUSLY CONFIRMED SPACE, CAUSES A PASSENGER TO MISS A CONNECTING FLIGHT ON WHICH HE HOLDS A RESERVATION, OR THE PASSENGER IS REFUSED PASSAGE OR REMOVED IN ACCORDANCE WITH RULE 25(A) CARRIER WILL AT ITS OPTION AND AS PASSENGER'S SOLE REMEDY EITHER:

(A) CARRY THE PASSENGER ON ANOTHER OF ITS PASSENGER AIRCRAFT ON WHICH SPACE IS AVAILABLE
WITHOUT ADDITIONAL CHARGE REGARDLESS OF THE CLASS OF SERVICE; OR AT CARRIER'S OPTION;

(B) ENDORSE TO ANOTHER AIR CARRIER WITH WHICH AIR CANADA HAS AN AGREEMENT FOR SUCH TRANSPORTATION, THE UNUSED PORTION OF THE TICKET FOR PURPOSES OF REROUTING; OR AT CARRIER'S OPTION;

(C) REROUTE THE PASSENGER TO THE DESTINATION NAMED ON THE TICKET OR APPLICABLE PORTION

THEREOF BY ITS OWN OR OTHER TRANSPORTATION SERVICES; AND IF THE FARE FOR THE REVISED ROUTING OR CLASS OF SERVICE IS HIGHER THAN THE REFUND VALUE OF THE TICKET OR APPLICABLE PORTION THEREOF AS DETERMINED FROM RULE 90(D), CARRIER WILL REQUIRE NO ADDITIONAL PAYMENT FROM THE PASSENGER BUT WILL REFUND THE DIFFERENCE IF IT IS LOWER OR.

(D) AT PASSENGER'S OPTION OR IF CARRIER IS UNABLE TO PERFORM THE OPTION STATED IN (A), (B) OR (C) ABOVE WITHIN A REASONABLE AMOUNT OF TIME, MAKE INVOLUNTARY REFUND IN ACCORDANCE WITH RULE 90(D).

(...)

(3) EXCEPT AS OTHERWISE PROVIDED IN APPLICABLE LOCAL LAW, IN ADDITION TO THE PROVISIONS OF THIS RULE, IN CASE OF SCHEDULED IRREGULARITY WITHIN ITS CONTROL AIR CANADA WILL OFFER:

(A) FOR A SCHEDULE IRREGULARITY LASTING LONGER THAN 4 HOURS, A MEAL VOUCHER FOR USE, WHERE AVAILABLE, AT AN AIRPORT RESTAURANT OR OUR ON BOARD CAFE, OF AN AMOUNT DEPENDANT ON THE TIME OF DAY.

(B) FOR A SCHEDULE IRREGULARITY LASTING OVERNIGHT, HOTEL ACCOMMODATION SUBJECT TO AVAILABILITY AND GROUND TRANSPORTATION BETWEEN THE AIRPORT AND THE HOTEL, (X). THIS SERVICE IS ONLY AVAILABLE FOR OUT OF TOWN PASSENGERS.

(C) IF PASSSENGERS ARE ALREADY ON THE AIRCRAFT WHEN A DELAY OCCURS, AIR CANADA WILL OFFER DRINKS AND SNACKS IF IT IS SAFE, PRACTICAL AND TIMELY TO DO SO. IF THE DELAY EXCEEDS 90 MINUTES AND CIRCUMSTANCES PERMIT, AIR CANADA WILL OFFER PASSENGERS THE OPTION OF DISEMBARKING FROM THE AIRCRAFT UNTIL IT IS TIME TO DEPART.

(D) MISSED CONNECTIONS

IN THE EVENT A PASSENGER MISSES AN ONWARD CONNECTING FLIGHT ON WHICH SPACE HAS BEEN RESERVED BECAUSE THE DELIVERING CARRIER DID NOT OPERATE ITS FLIGHT ACCORDING TO SCHEDULE OR CHANGED THE SCHEDULE OF SUCH FLIGHT, THE DELIVERING CARRIER WILL ARRANGE FOR THE CARRIAGE OF THE PASSENGER OR MAKE INVOLUNTARY REFUND IN ACCORDANCE WITH RULE 90.

AREA: ZZ TARIFF: IPRG CXR: AC RULE: 0089 - DENIED BOARDING COMPENSATION

PART 1

(APPLICABLE BETWEEN CANADA AND POINTS IN THE CARIBBEAN/BERMUDA/MEXICO/SOUTH AMERICA/CENTRAL AMERICA AND NORTH PACIFIC, FROM CA TO ALL POINTS IN AREA 2 AND FROM ARGENTINA TO CHILE. WHEN AC IS UNABLE TO PROVIDE PREVIOUSLY CONFIRMED SPACE DUE TO THERE BEING MORE PASSENGERS HOLDING CONFIRMED RESERVATIONS AND TICKETS THAN FOR WHICH THERE ARE AVAILABLE SEATS ON A FLIGHT, AC SHALL IMPLEMENT THE PROVISIONS OF THIS RULE.

(...)

(E) COMPENSATION

IN ADDITION TO PROVIDING TRANSPORTATION IN ACCORDANCE WITH (D), A PASSENGER WHO HAS BEEN DENIED BOARDING WILL BE COMPENSATED BY AC AS FOLLOWS:

(1) CONDITIONS FOR PAYMENT

(A) THE PASSENGER MUST PRESENT HIMSELF FOR CARRIAGE AT THE APPROPRIATE TIME AND PLACE:

(I) HAVING COMPLIED FULLY WITH AC APPLICABLE RESERVATION, TICKETING, CHECK-IN AND RECONFIRMATION PROCEDURES; AND,

(II) BEING ACCEPTABLE FOR TRANSPORTATION IN ACCORDANCE WITH AC PUBLISHED TARIFFS.

(B) IT MUST NOT HAVE BEEN POSSIBLE TO ACCOMMODATE THE PASSENGER ON THE FLIGHT ON WHICH HE HELD CONFIRMED RESERVATIONS AND THE FLIGHT MUST HAVE DEPARTED WITHOUT HIM.
EXCEPTION: THE PASSENGER WILL NOT BE ELIGIBLE FOR COMPENSATION:

(I) IF HE IS OFFERED ACCOMMODATION OR IS SEATED IN A COMPARTMENT OF THE AIRCRAFT OTHER THAN THAT SPECIFIED ON HIS TICKET AT NO EXTRA CHARGE TO HIM. (SHOULD HE BE SEATED IN A COMPARTMENT FOR WHICH A LOWER FARE APPLIES, HE SHALL BE ENTITLED TO THE APPROPRIATE REFUND); OR,

(II) WHEN THE FLIGHT ON WHICH HE HOLDS A CONFIRMED AND TICKETED RESERVATION IS CANCELLED OR SPACE HAS BEEN REQUISITIONED BY THE GOVERNMENT; OR,

(III) (APPLICABLE TO AC CONNECTOR CARRIER ZX ONLY) IF THE PASSENGER CAN BE ACCOMMODATED ON ANOTHER FLIGHT WHICH DEPARTS WITHIN ONE HOUR OF THE SCHEDULED DEPARTURE OF THE FLIGHT ON WHICH BOARDING HAS BEEN DENIED.

(2) AMOUNT OF COMPENSATION
SUBJECT TO THE PROVISIONS OF (E)(1)(A) AC WILL TENDER LIQUIDATED DAMAGES IN THE AMOUNTS IN CASH OR A CREDIT VOUCHER GOOD FOR TRAVEL ON AC AS FOLLOWS: CARIBBEAN/BERMUDA TO CANADA, COMPENSATION BY CASH IS EQUAL TO THE VALUE OF COUPONS REMAINING TO AN ONLINE OR INTERLINE DESTINATION, OR NEXT STOPOVER POINTS, MAXIMUM IS CAD 200.00. COMPENSATION BY MCO (CREDIT VOUCHER), IS EQUAL TO TWICE THE VALUE OF COUPONS REMAINING TO AN ONLINE OR INTERLINE DESTINATION OR NEXT STOPOVER POINT, MINIMUM IS CAD 100.00, MAXIMUM IS CAD 500.00. FROM VENEZUELA, COMPENSATION TO PASSENGERS MUST EQUAL 25% OF THE VALUE OF THE TICKET TO BE PAID BY CASH, BY ELECTRONIC BANK TRANSFER, CHEQUE, OR IN ACCORDANCE WITH AN AGREEMENT SIGNED WITH THE PASSENGER, WITH TRAVEL VOUCHERS OR OTHER SERVICES.

	DRAFT	MCO (CREDIT VOUCHER)
CANADA TO MEXICO/ MEXICO TO CANADA	CAD 100.00	CAD 200.00
CANADA TO OTHER DESTINATIONS	CAD 200.00	CAD 500.00
ASIA TO CANADA (EXCLUDING JAPAN AND KOREA)	CAD 300.00	CAD 600.00
JAPAN TO CANADA (COMPENSATION IS OFFERED IN CASH ONLY)	JPY 30,000	NOT APPLICABLE (PAID BY BANK TRANSFER)
SEOUL TO CANADA (COMPENSATION IS OFFERED IN CASH ONLY)	Y CLASS USD 400.00	NOT APPLICABLE
	J CLASS USD 600.00	NOT APPLICABLE
SOUTH AMERICA/ SOUTH PACIFIC TO CANADA	CAD 200.00	CAD 500.00
EXCEPTIONS		
FROM SAO PAULO TO TORONTO	USD 750.00	USD 1500.00

AIR CANADA

Annex B

Annex B - DCS records BRINE

```
AC0108  17FEB12 YVR  0700/0800     763W1
BRINE/RICHARD MR   ** Electronic Ticket **
  YYZ Y/S C  A2  **37A 1  P46IYE  Checked-in:000405/YVR  17FEB 04:21Z
    WEB Check-in   Security Number: 066A  Pool Ref: 0007
  Connecting Flight Details
    1. AC1256 Y 17FEB YYZ-CUN @
  Electronic Ticket Number:
  History Credits
    17FEB/1318Z YVR E81617-I9 BTP
    17FEB/1542Z YVR E202E4-1E PASSENGER BOARDED
```

```
AC0108  17FEB12 YVR  0700/0800     763W1

BRINE/ALLANE MRS   ** Electronic Ticket **
  YYZ Y/S C  A2  **37C 1  P46IYE  Checked-in:000405/YVR  17FEB 04:21Z
    WEB Check-in   Security Number: 067A  Pool Ref: 0007
  Comments:|WCHR|
  Connecting Flight Details
    1. AC1256 Y 17FEB YYZ-CUN @
  Electronic Ticket Number:
  History Credits
    17FEB/1318Z YVR E81617-I9 BTP
    17FEB/1542Z YVR E202E4-1E PASSENGER BOARDED
```

```
AC0108  17FEB12 YVR  0700/0800     763W1
BRINE/DAVID MR   ** Electronic Ticket **
  YYZ Y/S C      **21A 1  P4SI6R  Checked-in:000204/YVR  17FEB 04:24Z
  KIOSK Check-in   Security Number: 068A
  Connecting Flight Details
    1. AC1256 Y 17FEB YYZ-CUN @
  Electronic Ticket Number:
  History Credits
    17FEB/1320Z YVR E81617-I9 BTP
    17FEB/1550Z YVR E214D7-1E PASSENGER BOARDED
```

```
AC0993  18FEB12 YYZ  0810/1020     319B1
BRINE/RICHARD MR   ** Electronic Ticket **
  MEX Y/Y C AI2  **26E 2  P46IYE  Checked-in:000004/YYZ  18FEB 11:23Z  $M
  KIOSK Check-in   Security Number: 101A
  Inbound Flight: AC0108 S 17FEB YVR 1429
  Connecting Flight Details
    1. AM0445 Y 18FEB MEX-CUN
  Electronic Ticket Number:
  History Credits
    18FEB/1142Z YYZ E011C8-MM BTP
    18FEB/1247Z YYZ E11BFF-DL PASSENGER BOARDED
```

Annex B - DCS records BRINE

AC0993 18FEB12 YYZ 0810/1020 319B1

BRINE/ALLANE MRS
MEX Y/Y C AI2 0 P46IYE
Inbound Flight: AC0108 S 17FEB YVR 1429
Connecting Flight Details
1. AM0445 Y 18FEB MEX-CUN
Electronic Ticket Number:

AC0993 18FEB12 YYZ 0810/1020 319B1

BRINE/DAVID MR ** Electronic Ticket **
MEX J/Y C **04F 1 P4SI6R Checked-in:000007/YYZ 18FEB 11:21Z $M
KIOSK Check-in Security Number: 098
Inbound Flight: AC0108 S 17FEB YVR 1429
Connecting Flight Details
1. AM0445 Y 18FEB MEX-CUN
Electronic Ticket Number:
History Credits
18FEB/1134Z YYZ 000672-$$ BTP
18FEB/1244Z YYZ E31B99-ZU ONLOADED USING @O
18FEB/1253Z YYZ E11BFF-DL PASSENGER BOARDED

AC1256 17FEB12 YYZ 1540/1610 319B1
BRINE/MICHAEL MR ** Electronic Ticket **
CUN Y/S C @*19F 1 P5ILZ5 Checked-in:000441/YHZ 16FEB 16:33Z $W
WEB Check-in Security Number: 003A
Comments:CKIN STOPOVER YHZ YYZ 17FEB TP
Inbound Flight: AC0605 S 17FEB YHZ 0825
Electronic Ticket Number:
History Credits
17FEB/0924Z YHZ E20BF2-PM BTP
17FEB/2102Z YYZ E31B73-RA PASSENGER BOARDED

AC1256 17FEB12 YYZ 1540/1610 319B1
BRINE/RICHARD MR
CUN Y/S C B2 1 P46IYE
WEB Check-in Security Number: 026 Pool Ref: 0005
Comments:|MSCNX NIL PRO..CJM/RC|
Inbound Flight: AC0108 S 17FEB YVR 1429
Electronic Ticket Number:
History Credits
17FEB/0421Z YVR 000405-$W CHECKED PAX IN
17FEB/1318Z YVR E81617-I9 BTP
17FEB/1930Z YYZ E701DC-II OFFLOAD FROM 28A USING @Z

Annex B - DCS records BRINE

[redacted]

AC1256 17FEB12 YYZ 1540/1610 319B1

BRINE/ALLANE MRS ** Electronic Ticket **
CUN Y/S C B2 1 P46IYE
WEB Check-in Security Number: 027 Pool Ref: 0005
Comments:|MSCNX NIL PRO..CJM/RC|
Inbound Flight: AC0108 S 17FEB YVR 1429
Electronic Ticket Number: [redacted]
History Credits
17FEB/0421Z YVR 000405-$W CHECKED PAX IN
17FEB/1318Z YVR E81617-I9 BTP
17FEB/1930Z YYZ E701DC-II OFFLOAD FROM 28B USING @Z
[redacted]

AC1256 17FEB12 YYZ 1540/1610 319B1

BRINE/DAVID MR
CUN Y/S C 1 P4SI6R
Security Number: 028
Comments:|MSCNX NIL PRO..CJM/RC|
Inbound Flight: AC0108 S 17FEB YVR 1429
Electronic Ticket Number: [redacted]
History Credits
17FEB/0424Z YVR 000204-$M CHECKED PAX IN
17FEB/1320Z YVR E81617-I9 BTP
17FEB/1930Z YYZ E701DC-II OFFLOAD FROM 19A USING @Z
[redacted]

AC0605 17FEB12 YHZ 0700 319B1
BRINE/MICHAEL MR ** Electronic Ticket **
YYZ Y/S C **19A 1 P5ILZ5 Checked-in:000441/YHZ 16FEB 16:33Z $W
WEB Check-in Security Number: 021A
Comments:CKIN STOPOVER YHZ YYZ 17FEB TP
Connecting Flight Details
1. AC1256 Y 17FEB YYZ-CUN @
Electronic Ticket Number: [redacted]
History Credits
17FEB/0924Z YHZ E20BF2-PM BTP
17FEB/1043Z YHZ E81E14-DN PASSENGER BOARDED
[redacted]

AIR CANADA

Annex C

DailyOps Airports - Route Level

Dates: From 2012/02/17 to 2012/02/17

FLTNUM: 108

CARRIER: 'AC'

CAR	ORIG	DEST	FLT DATE	FLT NUM	FLT TIME	FIN	SKD DEP	ACT DEP	DEP DELAY	TAXI OUT	TAXI IN	ARR DELAY	ACT ARR	SKD ARR	ACT BLK	DLY REASON	SELL CNFG	TOT PAX PLF	TOT PAX
AC	YVR	YYZ	2012/02/17	108	237	683	7:00	8:14	74	22	9	73	15:42	14:29	4:28	EQI	211	85.30%	180

AIR CANADA

Annex D

DailyOps Airports - Route Level

Dates: From 2012/02/17 to 2012/02/17

FLTNUM: 1256

CARRIER: 'AC'

ORIG	DEST	EQUIP	FLT DATE	FLT NUM	FLT TIME	FIN	SKD DEP	ACT DEP	DEP DELAY	TAXI OUT	TAXI IN	ARR DELAY	ACT ARR	SKD ARR	ACT BLK	DLY REASON	SELL CNFG	TOT PAX PLF	TOT PAX
YYZ	CUN	319	2012/02/17	1256	230	283	15:40	16:13	33	13	5	26	19:21	18:55	4:08	ACG	120	100.00%	120

AIR CANADA

Annex E

Backwater

From: support@help-aircanada.com
Sent: Friday, May 18, 2012 11:40 AM
To: [redacted]@shaw.ca
Subject: Issue# [redacted] 03/27/2012 23:02:49:Bumped from flight, loss bags, poor service

==========
Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
==========

Dear Mr. Brine,

Thank you for your email to our Customer Relations Office and to [redacted] I am pleased to respond to your baggage concerns on behalf of Air Canada.

I am very sorry to hear that your [redacted] luggage were delayed during your recent family travel. Although our staff will attempt to transfer our customers luggage to their next flight even if the connecting time in some cases may have became limited between flights, regrettably, we are not always in a position to do so. If a baggage is delayed, we try to locate and return the delayed property to its owner as quickly as possible. I am truly sorry that the service you received fell bellow our expectations and we truly regret the adverse impression your family has received during this travel.

We would gladly reimburse the out of pocket expenses incurred in Cancun while [redacted] and David were without their baggage. Please provide the purchase receipts of the expenses incurred and we will provide a reimbursement. Additionally, as you have mentioned that two items have been missing from David's luggage, please provide a description of these items ,along with their values. Please separate each person's claim in order for us to issue the right amounts to the correct person. Upon following up with the documents, we kindly ask that you quote your [redacted] Our mailing address is the following:

Air Canada
Baggage Claims
Air Canada Centre 1116
PO Box 8000, Station Airport
Dorval, Quebec H4Y 1C3

Once again, we reiterate our apologies for the inconvenience caused during your recent travel. We can and usually do provide better service and I hope that this will be more evident on your next journey with us.

Sincerely,

[redacted]
Air Canada
Baggage Claims

------ Original Message ------

From: [redacted]@shaw.ca
Sent: 27/03/2012 11:02 PM
Subject: Bumped from flight, loss bags, poor service

June 7, 2012

Air Canada Baggage Claim #

Items missing from David Brine's luggage:

$65.97
$39.95
HST - $12.23
Total - $118.15

Both of these items were bought for David JUST for this holiday and they had NEVER been worn. I do not have receipts for any of the items as I was not excepting to have any items stolen from his bags.

Items that I had to purchase while waiting for my bag to arrive:

Sunscreen - $10.00US
T-shirt - $15.00US
Shorts - $20.00US
Toothbrush – $3.00US
Toothpaste - $2.50US
Comb - $1.00US
Total - $51.50US

Items bought for David while he waited 5 days for his bags

Toothbrush - $3.00US
Flipflops - $21.00US
Total - $24.00US

For a grand total of $193.65

I am sorry to say that I do not any receipts for items purchased in but please make one cheque out to: **Allane Brine** as ALL items were purchased by me.

Baggage Claims
Air Canada Centre 1116
PO Box 8000, Station Airport
Dorval, Quebec H4Y 1C3

Fax: (514) 422-2900 1-(800) 237-3563

AIR CANADA

Without Prejudice

June 14, 2012

Mrs. Allane Brine

[redacted]

Dear Mrs. Brine:

Thank you for your follow up correspondence. We are pleased to complete your baggage claim.

If a passenger is away from home and his or her baggage is delayed more than 24 hours, Air Canada will contribute towards the cost of interim clothing and toiletry purchases, to a maximum of $100.00 per person with delayed luggage, when substantiated with original purchase receipts. This policy is common to all STAR Alliance partners as well as our Connector carriers. Although you were unable to substantiate your claim with the purchase receipts, on exceptional basis, we are pleased to reimburse you the amount claimed for your and Mr Brine's interim expenses.

Additionally, we are glad to reimburse the amount of $118.15 for the two missing items from Mr. Brine's checked luggage.

Please find enclosed our reimbursement cheque for the total amount claimed of $193.65 CAD.

Once again, we offer our sincere apologies for the inconvenience you and your family have experienced during your travels. We trust that your future travels with Air Canada will be under better circumstances.

Sincerely,

[redacted]
Baggage Claims Specialist

[redacted]
Travel Date: 02/17/2012

AIR CANADA

Annex F

CLAIMS - CANADIAN DOLLARS
RÉCLAMATIONS EN DOLLARS CANADIENS

AIR CANADA

4150293

Clear to the Bank of Nova Scotia, Winnipeg Tiré sur la Banque Scotia, Winnipeg

Place / Lieu d'émission: Calgary, Alberta

DATE (Y/A M/M D/J): 2012 06 20

Payment details / Détail du paiement: [redacted]

$ 103.00

Pay the sum of / Payez la somme de: **One Hundred Three Dollars Zero Cents**

/100 DOLLARS

To the order of / À l'ordre de: Mr. Rick Brine [redacted]

Agent's Signature / Signature du mandataire X [redacted]

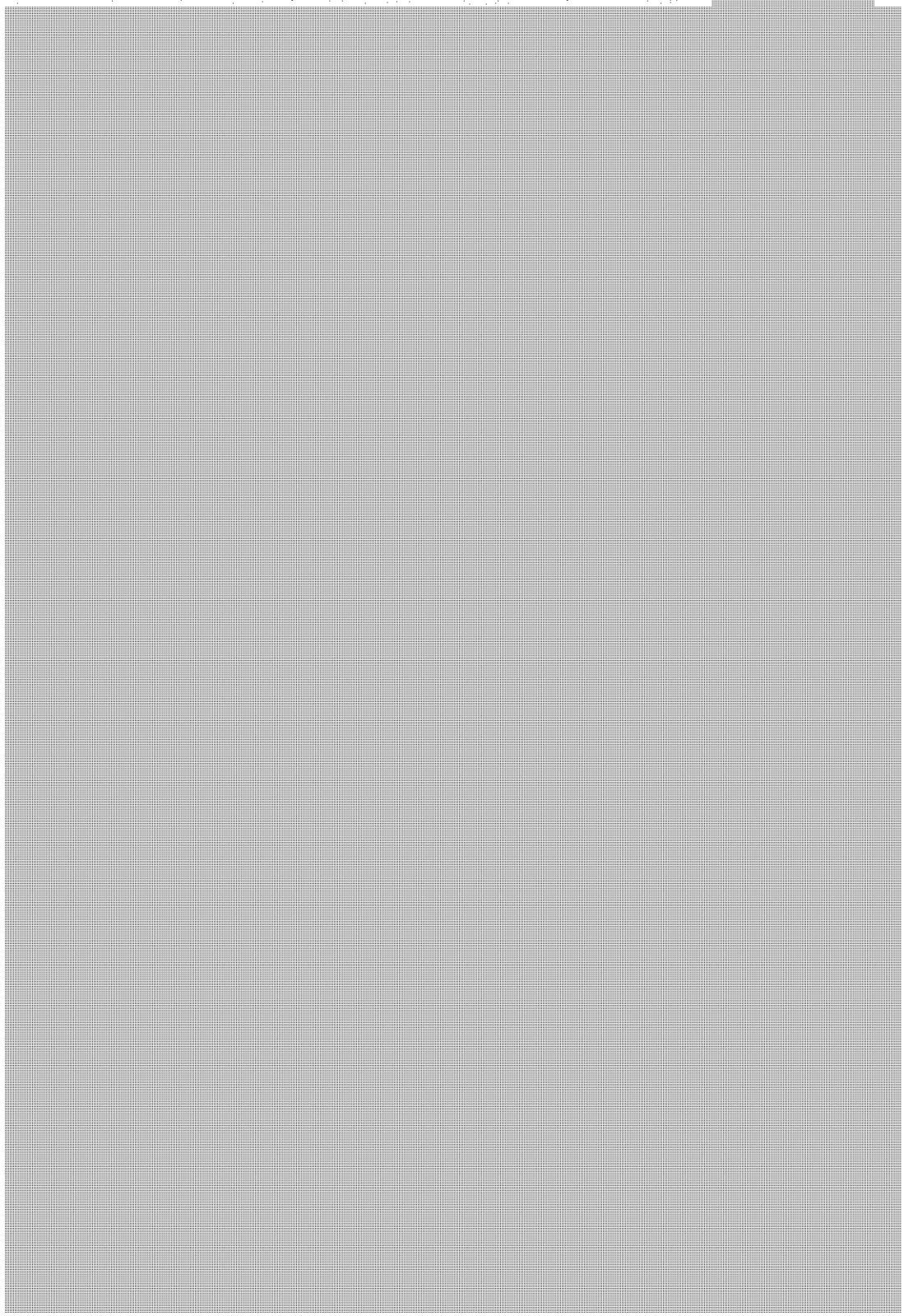
To / Dest. Air Canada Winnipeg, Canada

[redacted]

AIR CANADA

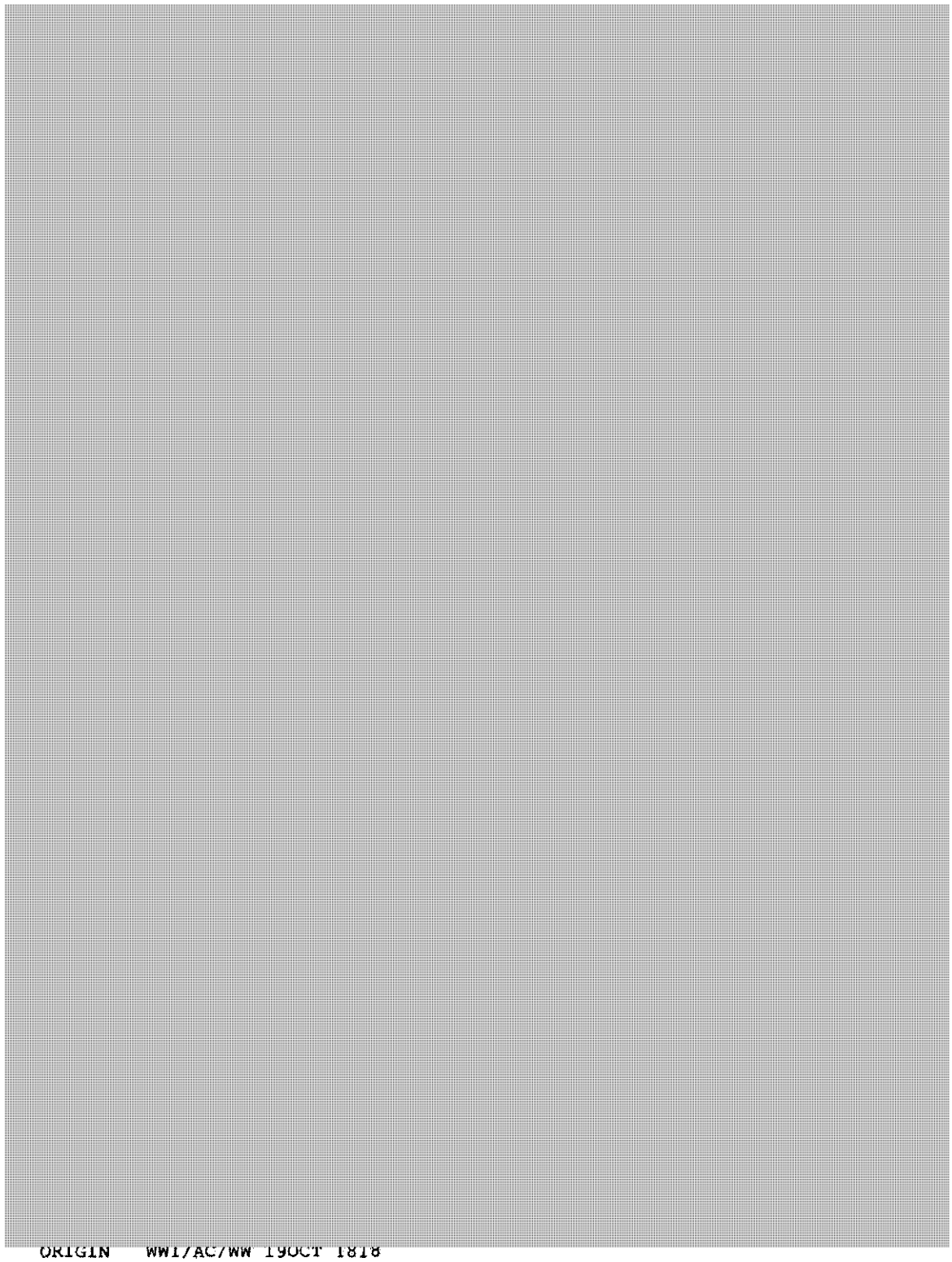
Annex G

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



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

PA



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

From: Cathy Murphy
To: [redacted]@shaw.ca; [redacted]@aircanada.ca
CC: Giroux, Sylvie
Date: 23/10/2013 2:07 PM
Subject: Complaint by Allane Brine against Air Canada (Case No. 13-05726)

I have been directed by the Panel assigned to this matter to advise that Air Canada's request is granted. Air Canada shall therefore have until November 8, 2013 to file its answer with the Agency, copied to Allane Brine at the same time. Mrs. Brine will then have 7 days from receipt of Air Canada's answer within which to file her reply with the Agency, copied concurrently to Air Canada.

Please confirm receipt.

Sincerely,

Cathy Murphy
819-997-0099 | télécopieur/facsimile 819-953-5253 | ATS/TTY 800-669-5575
cathy.murphy@cta-otc.gc.ca
Secrétaire de l'Office des Transports du Canada/ Secretary of the Canadian Transportation Agency
15, rue Eddy, Hull QC K1A 0N9/
15 Eddy St., Hull QC K1A 0N9
Gouvernement du Canada | Government of Canada

From: [redacted]@shaw.ca>
To: [redacted]@aircanada.ca>, "'Sylvie Giroux'" <Sylvie.Giroux@otc-cta.gc.ca>
CC: [redacted]@aircanada.ca>
Date: 20/10/2013 4:33 PM
Subject: RE: Complaint by A. Brine against Air Canada (13-05726)
Attachments: image001.jpg; image002.jpg; image003.jpg; image004.jpg

I, Allane Brine, whereby accept Air Canada's request for a 2 week extension, until November 8, 2013 but no longer as this has dragged on for far too long.

Mrs. Allane Brine

From: [redacted]@aircanada.ca]
Sent: Friday, October 18, 2013 10:42 AM
To: Sylvie Giroux; [redacted]@shaw.ca
Cc: [redacted]
Subject: RE: Complaint by A. Brine against Air Canada (13-05726)

Correction:

Please note that my reference to October 28, 2013 in the extension request should instead read November 8, 2013.

My apologies,

Kind regards,

Description: Description: AC_Stack

[redacted]

[redacted]Droit Règlementaire et Litiges / [redacted] Regulatory and Litigation

Yul 1276, 7373 Côte Vertu Blv. West, Saint-Laurent Québec, H4S 1Z3

[redacted] | F 514 422 5839 | <mailto[redacted]@aircanada.ca>
[redacted]@aircanada.ca

From: [redacted]@aircanada.ca>
To: Sylvie Giroux <Sylvie.Giroux@otc-cta.gc.ca>, '[redacted]@shaw.ca" [redacted]@shaw.ca>
CC: [redacted]@aircanada.ca>
Date: 18/10/2013 1:42 PM
Subject: RE: Complaint by A. Brine against Air Canada (13-05726)
Attachments: image009.jpg; image010.jpg; image011.jpg; image012.jpg; image013.jpg; image014.jpg; image015.jpg; image016.jpg

Correction:

Please note that my reference to October 28, 2013 in the extension request should instead read November 8, 2013.

My apologies,
Kind regards,

[Description: Description: AC_Stack]

[redacted] Droit Règlementaire et Litiges / [redacted] Regulatory and Litigation
Yul 1276, 7373 Côte Vertu Blv. West, Saint-Laurent Québec, H4S 1Z3
T [redacted] | F 514 422 5839 | [redacted]@aircanada.ca<mailto[redacted]@aircanada.ca>

[Description: Description: twitter_newbird_boxed_whiteonblue] Twitter.com/aircanada [Description: Description: F_Facebook_] Facebook.com/aircanada

[Description: Description: AC_SKYTRAX_hori_07-2012_COL_bil]

From: [redacted]
Sent: Friday, October 18, 2013 12:06 PM
To: 'Sylvie Giroux' [redacted]@shaw.ca
Cc: [redacted]
Subject: Complaint by A. Brine against Air Canada (13-05726)
Importance: High

Good afternoon,

From: [redacted]@aircanada.ca>
To: Sylvie Giroux <Sylvie.Giroux@otc-cta.gc.ca>, '[redacted]@shaw.ca" [redacted]@shaw.ca>
CC: [redacted]@aircanada.ca>
Date: 18/10/2013 12:07 PM
Subject: Complaint by A. Brine against Air Canada (13-05726)
Attachments: image009.jpg; image010.jpg; image011.jpg; image012.jpg; Let Air Canada 19Oct2013.pdf

Good afternoon,

Please see attached extension request filed by Air Canada.

Kind regards,

[Description: Description: AC_Stack]

[redacted]
[redacted] Droit Règlementaire et Litiges / [redacted] Regulatory and Litigation
Yul 1276, 7373 Côte Vertu Blv. West, Saint-Laurent Québec, H4S 1Z3
T [redacted] | F 514 422 5839 | [redacted]@aircanada.ca<mailto:[redacted]@aircanada.ca>

[Description: Description: twitter_newbird_boxed_whiteonblue] Twitter.com/aircanada [Description: Description: F_Facebook_] Facebook.com/aircanada

[Description: Description: AC_SKYTRAX_hori_07-2012_COL_bil]

-----Original Message-----
From: Sylvie Giroux [mailto:Sylvie.Giroux@otc-cta.gc.ca]
Sent: Tuesday, October 08, 2013 9:16 AM
To: Julianna Fox; [redacted]
Subject: Complaint by A. Brine against Air Canada (13-05726)

AIR CANADA

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

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

VIA EMAIL

October 18, 2013

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

To the attention of Sylvie Giroux, Analyst

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

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

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

Sincerely,

[redacted]
Regulatory & Litigation

From: Sylvie Giroux
To: [redacted]@shaw.ca; [redacted]@aircanada.ca
Date: 04/10/2013 1:59 PM
Subject: Complaint by A. Brine against Air Canada (13-05726)
Attachments: Complaint by ABrine against Air Canada.pdf; Letter opening pleadings (Brine vs Air Canada).pdf; Procuration.pdf; Supporting documents (Brine vs Air Canada).pdf

Dear Madames:

Please find attached a copy of:

- the above-noted complaint
- a procuration
- supporting documents
- a letter opening pleadings respecting this complaint.

Regards,

Sylvie Giroux
Air & Marine Investigation Division
Dispute Resolution Branch
Canadian Transportation Agency

Office
des transports
du Canada

Canadian
Transportation
Agency

October 4, 2013

File No. M4120-3/13-05726

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

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

Dear Madames:

Re: Complaint against Air Canada

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

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

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

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

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

.../2

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

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

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

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

It is important to read the attached privacy information.

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

Sincerely,

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

Attachment

Important privacy information

Open court principle

As a quasi-judicial tribunal operating like a court, the Canadian Transportation Agency is bound by the constitutionally protected open-court principle. This principle guarantees the public's right to know how justice is administered and to have access to decisions rendered by administrative tribunals.

Pursuant to the General Rules, all information filed with the Agency becomes part of the public record and may be made available for public viewing.

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

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

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

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

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

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

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

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

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

Privacy of records

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

From: [redacted]@shaw.ca>
To: "'Sylvie Giroux'" <Sylvie.Giroux@otc-cta.gc.ca>
Date: 02/10/2013 10:20 PM
Subject: Formal Complaint Against Air Canada
Attachments: CCF10022013_00000.jpg

Sylvie,

The signatures of [redacted] are on the attached jpg but if you need the original copy I am more than willing to mail you that copy [redacted] if you send me a mailing address. [redacted].

Mrs. Allane Brine

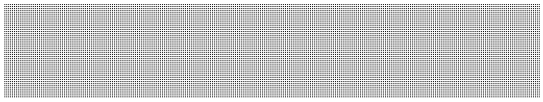
October 1, 2013

To Whom This May Concern,

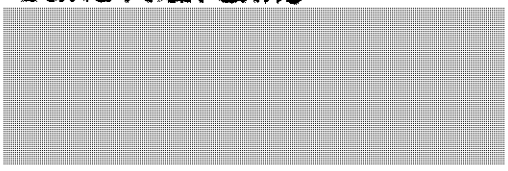
Re: Formal case against Air Canada

We, Richard John Brine, David Allan Brine and Michael Richard Brine hereby give Allane Laurie Brine permission to speak on our behalf in regards to our complaint against Air Canada.

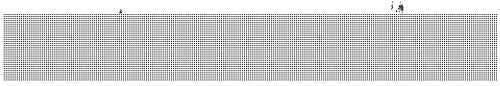
Richard John Brine



David Allan Brine



Michael Richard Brine



From: Sylvie Giroux
To: [redacted]
Date: 01/10/2013 9:35 AM
Subject: Acting on behalf of others

Dear Mrs. Brine,

I see that you have been the point of contact during the informal process. In order for me to proceed with your complaint formally, I must have on file a written statement signed by [redacted] authorizing you to act on their behalf respecting your formal complaint before the Canadian Transportation Agency. This statement must indicate that they authorize you to obtain all the details of the file with the Agency and with Air Canada.

The requested document could be a PDF copy, [redacted]

You may send the document to me by email or by fax at (819) 953-5686.

Regards,

Sylvie Giroux
Air & Marine Investigation Division
Dispute Resolution Branch
Canadian Transportation Agency

June 4, 2013

126

Please accept these enclosed documents as part of our complaint into lack of service/bumped from flight by Air Canada on February 17, 2012.

As you will see by the enclosed documents my family has made several attempts to have this issue resolved by ourselves and executive members of Air Canada but their unwillingness to go "above and beyond" for their customers has lead me to file a formal complaint with the Canadian Transportation Agency.

As you will see on June 11, 2012 in a letter from [redacted] (Executive Centre) we were told "Our previous correspondence has provided our explanations and the continual exchange of emails will not alter our position." Basically at this point Air Canada was blowing us off; telling us that they really didn't care that they ruined our family vacation and please stop sending us emails.

On June 14, 2012 we received an email from [redacted] Office of the President & CEO) stating the President of Air Canada – Calin Rovinescu had too many duties to fulfill to "review all of our customer's concerns." In her letter she states that "your concerns have been handled appropriately and we are unable to comply with your request for any further good will compensation."

We did not wish "good will compensation", we wanted Air Canada to return all of our ticket costs plus reimburse us all our out of pocket expenses for all that they caused our family on that day back in February 2012.

The stewardesses told us, that their original plan was to deadhead with the flight to Cancun via Montreal Saturday morning. For the stewardess to have that overnight stay in Cancun, rather than in Toronto, someone had to of changed their plans; for the Flight #1256 to Cancun was waiting for them (but not us) to arrive from Vancouver.
The poignant question is:
Whereas, they held the Cancun flight for the stewardesses
Whereas, we were on the same connecting flight to Cancun
Whereas, Air Canada knew that we were already booked on this connecting flight
Whereas, Air Canada accepted the time allotment between the connecting flights

- Why did the Air Canada staff at the gate allow the flight crew from our flight to board the plane to Cancun, but not us; knowing that we were already booked on this connecting flight to Cancun and allowed the crew and three "over-booked" passengers to seat in our assigned seats?

We were treated like it was our fault that our flight was late not the mechanical problems we were told about in Vancouver, BC. All of the Vancouver to Toronto flight crew and us "were late" but the Air Canada staff at the gate allowed the flight crew on. That was totally wrong! It is not our fault that it is Air Canada's policy to overbook their flights. In booking & paying for our tickets back on [redacted] gave us first rights to those seats, especially since the connecting flight was waiting for our plane to arrive. We were treated horribly by the Air Canada staff in Toronto.

Thank you for your time and I do hope that we hear from you in the very near future,

[redacted]

Mrs. Allane L. Brine

[redacted]

[redacted]@shaw.ca

Canadian Transportation Agency | Office des transports du Canada

AIR TRAVEL COMPLAINT FORM

- **Bring your complaint to the attention of the air carrier in writing before filing a complaint with the Canadian Transportation Agency (refer to the attached: Major Air Carriers – Customer Service Departments).**
- **Allow the air carrier at least 30 days for an opportunity to respond to your complaint before contacting the Agency. If you have not done so, the Agency's role will normally be limited to forwarding a copy of the complaint to the carrier which will be asked to respond directly to you.**

INSTRUCTIONS: Any field marked by an asterisk (*) must be completed. Attach additional pages if required.

Part 1 – COMPLAINANT INFORMATION (your contact information)

☐ Mr.	☐ Ms.	☒ Mrs.	☐ Miss

Given Name * ALLANE | Initial * | Surname (last name) * BRINC

[redacted]

E-mail Address [redacted]@shaw.ca

Part 2 – PASSENGER INFORMATION

Complete this part if you are submitting a complaint on behalf of someone else.

☒ Mr.	☐ Ms.	☐ Mrs.	☐ Miss

Given Name * Richard | Initial * | Surname (last name) * BRINC

[redacted]

Home telephone [redacted] | E-mail Address [redacted]@shaw.ca

Signature of the person on whose behalf you are complaining giving you authority to fully participate in all aspects of the complaint handling process, where applicable.

Signature [redacted] Date June 5 2013

Is there more than one additional passenger? ☐ No ☒ Yes

If yes, be sure to add the name and contact information of additional passengers on an attached page.

Part 2 – PASSENGER INFORMATION
Complete this part if you are submitting a complaint on behalf of someone else.

☒ Mr.	☐ Ms.	☐ Mrs.	☐ Miss

Given Name *	Initial *	Surname (last name) *
DAVID		BRINE

[redacted]

Home telephone	E-mail Address
[redacted]	[redacted]@shaw.ca

Signature of the person on whose behalf you are complaining giving you authority to fully participate in all aspects of the complaint handling process, where applicable.

Signature [redacted] Date June 5/13

Is there more than one additional passenger? ☐ No ☒ Yes

If yes, be sure to add the name and contact information of additional passengers on an attached page.

Part 2 – PASSENGER INFORMATION
Complete this part if you are submitting a complaint on behalf of someone else.

☒ Mr.	☐ Ms.	☐ Mrs.	☐ Miss

Given Name *	Initial *	Surname (last name) *
Michael	R.	BRINE

[redacted]

Is there more than one additional passenger? ☐ No ☒ Yes

If yes, be sure to add the name and contact information of additional passengers on an attached page.

Canada

Canadian Transportation Agency | Office des transports du Canada

Part 3 - COMPLAINT INFORMATION

Date of incident *			Location(s) where incident(s) occurred *
2012 Year	02 Month	17 Day	Vancouver – Toronto – Cancun

Provide a description of the incident or nature of your concern and any additional information that may prove to be useful, such as the names of those involved, names of witnesses and details of correspondence with your carrier (date, file number, etc.). Please keep your response as concise as possible. *

attached you will find our original complaint to air Canada Customer Relations – [redacted] I have sent emails to [redacted] and got responses from [redacted] Office of the President & CEO) he was too busy. [redacted] – media – no response. [redacted] (Executive Centre) responded but "was not willing to give a satisfactory solution" the continual exchange of emails will not alter our position". We were given 200$ coupon plus 2 - 20% off coupon for our "inconvience" but I have always felt that we deserved much more. what they did to our family was unexceptable! [redacted]

List of all documents enclosed to support your complaint *

To complete your application, as a minimum, legible copies of all correspondence exchanged with your air carrier, your electronic or paper ticket and, if applicable, any claim forms, including receipts of expenses for reimbursement, should be attached to this complaint form. You may also attach copies of any other pertinent information in support of your complaint at this time or wait until requested to do so. Do not send original documents.

1. All receipts were sent to:
2. air Canada Customer Relations
3. PO BOX 64239
4. R.P.O Thorncliffee
5. Calgary AB T2K 6J7
6. all correspondence is included

673/A3

Canada

Canadian Transportation Agency / Office des transports du Canada

Part 4 - SPECIFIC ISSUES *

Check the appropriate box to indicate what your complaint concerns (at least one box must be checked).

☒	**Baggage** (e.g. damaged, delayed, excess, liability, lost, size limits, theft)
☐	**Cargo** (e.g. rates, animals, damaged, delayed, lost)
☐	**Carrier-operated loyalty programs** (e.g. availability, missing points, points redemption, reservations)
☐	**Charges** (amounts in addition to the fare or rate payable)
☒	**Denied boarding** (inability to fly as a result of carrier overbooking)
☐	**Flight disruptions** (e.g. cancellation, missed connection, revised)
☒	**Delays** (e.g. mechanical, weather, delayed on tarmac) **Duration** 1 **hours**
☐	**Fares** (cost of transportation of a passenger and baggage, subject to charges and taxes)
☐	**Refusal to transport** (inability to fly for any other situation other than overbooking)
☐	**Reservations** (e.g. availability of seats, cancellation, non-delivery of confirmed seating)
☐	**Ticket** (e.g. lost, refunds, restrictions, travel vouchers)

If none of the above, please provide additional details.

Roaming charges on David's cell (277.60), turned on the phone to find out where the rest of the family was staying.

Part 5 - FLIGHT DETAILS

Please provide details concerning the flight itinerary. The information is available on your ticket.

Airline	Flight No.	From (City)	To (City)	Flight Date (yyyy-mm-dd)
Air Canada	108	Vancouver	Toronto	2012-02-17
Air Canada	1256	Toronto	Cancun	2012-02-17
Air Canada	607	Halifax	Toronto	2012-02-17
Air Canada	1256	Toronto	Cancun	2012-02-17

Part 6 - REMEDY SOUGHT *

Please indicate the type of remedy you are seeking (more than one may be selected).

☐	Air carrier policy change	☐	Explanation
☒	Compensation	☒	Refund #1
☒	Consideration for future travel (points/voucher)	☐	Regulatory Change
		☐	Other corrective measures

Please read carefully and signify your agreement to the attached Privacy Statement. Send the completed form, the signed Privacy Statement, legible copies of the documents supporting your complaint and any additional pages by e-mail to pta-atc@otc-cta.gc.ca or by mail or by fax (819-953-5686) to:

Air Travel Complaints Directorate
Canadian Transportation Agency
Ottawa, Ontario
K1A 0N9

Canadian Transportation Agency / Office des transports du Canada

There may be exceptional cases to warrant the omission of certain identifying information from an Agency decision. Such omission may be considered where minor children or innocent third parties will be harmed, where the ends of justice will be undermined by disclosure or the information will be used for an improper purpose. In such situations, the Agency may consider requests, supported by proper evidence, to prevent the use of information which identifies the parties or witnesses involved. Any individual who has concerns with respect to the publication of his or her name may contact the Agency's Secretariat by e-mail at NDN-NPN@otc-cta.gc.ca, or by calling 819-997-0099 or 1-888-222-2592 or TTY 1-800-669-5575, or by writing to the Canadian Transportation Agency, Ottawa, Ontario, K1A 0N9.

Privacy of Records

In all cases, the Agency's records relating to complaints will be retained in the Personal Information Bank numbers CTA-PPU-033 for 10 years after the complaint has been resolved & in CTA-PPU-014 for 10 years once received. An individual has the right of access to their personal information as this information will be protected in accordance with the *Privacy Act*. Questions or comments regarding your privacy may be directed to the Privacy Co-ordinator by e-mail at Patrice.Bellerose@otc-cta.gc.ca, by calling 819-994-2564 or 1-888-222-2592 or TTY 1-800-669-5575, or by writing to the Canadian Transportation Agency, Ottawa, Ontario, K1A 0N9.

Client Satisfaction Surveys

As a party to a complaint, you may be asked to participate in a survey as part of the Agency's ongoing efforts to improve its service delivery. Participation in the survey is voluntary. Your response will be kept confidential and will be reviewed by an independent third party, not the Agency. Any information provided during the survey process will remain protected and will not be used for any other purpose.

I, Allane Brine, **have read and agree to the above Privacy Statement.**
(your name)

[redacted]
Signature

2013-06-04
Date (yyyy-mm-dd)

From: acexecutive.hautedirectionac@aircanada.ca on behalf of Acexecutive Hautedirectionac [acexecutive.hautedirectionac@aircanada.ca]
Sent: Monday, June 11, 2012 12:20 PM
To: [redacted]@shaw.ca
Subject: RE: Bad Air Canada Service

Dear Mrs. Brine,

Thank you for your most recent correspondence. We appreciate yourpatience in awaiting our reply.

We have reviewed the matter following your most recent email and respectfully our position in this matter remains unchanged.

While we wish to assure you that we value your patronage, we are unable to offer further consideration to this matter. Our previous correspondence has provided our explanations and the continual exchange of emails will not alter our position.

As per your latest correspondence, as a gesture of goodwill, we are pleased to offer you an additional one time saving of 20% off of the base fare on your next booking at aircanada.com. Redemption instructions follow this email.

We hope you understand that we have made an sincere effort to address the situation, and we sincerely hope we have an opportunity to welcome you and your family onboard in the near future.

Kind Regards,
[redacted]
Executive Centre

Redemption Instructions:

Simply make your booking between June 15, 2012 and June 14, 2013. Please note all travel must be completed by June 14, 2013.

To receive your discount, enter the one time use Promotion Code [redacted] in the Promo Code box at www.aircanada.com when you make your booking. This offer is available on a new booking only and applies to a maximum of two passengers, provided both passengers are booked at the same time.

The discount applies exclusively on published fares for Air Canada and Air Canada Express designated flights. Multi-city bookings and flight pass purchases are not eligible for the discount and promo codes cannot be combined with other discount codes.

Please note the fare displayed on the Select Flights screen will reflect the discount rounded to the nearest dollar.

From: [redacted]@shaw.ca]
Sent: 08 June, 2012 1:00 PM
To: [redacted]
Cc: media@aircanada.ca
Subject: Bad Air Canada Service
Importance: High

Please go to the bottom of this message to read our original complaint and the responses that we have been receiving since then. There really seems to be no real solution in sight as of y[redacted]have sent the e-mail below twice in the past two days and have had no response from [redacted] of the Executive Centre.

Mrs. Allane Brine
[redacted]

-----Original Message-----
From: [redacted]@shaw.ca]
Sent: Friday, June 08, 2012 6:32 AM
To: 'acexecutive.hautedirectionac@aircanada.ca'
Subject: RE: Issue#: [redacted]03/27/2012 23:02:49:Bumped from flight, loss bags, poor service
Importance: High

[redacted]
We will accept the 2-20% off promotional codes in addition to the 2 $200.00 travel credits that we have already received (after the fact).
I still have to say that I am still very disappointed in Air Canada and the fact that your company is unwilling to go the extra mile for your customers and admit that a mistake occurred and try to solve that mistake to the best of your ability (and if you think that this was the best of your abilities you are very wrong!).

Questions we needed answers to but no one is willing to give us (could you please answer each question with a straight answer):
1. Why were we bumped from the Toronto to Cancun flight when Air Canada flight attendants and stand-by passengers were allowed to broad in our place.
2. While in Vancouver (when I knew that our flight was running late) I asked for a golf cart to be waiting for us in Toronto to get us to our connecting gate on time. Why was it not done?
3. Why was [redacted] Rick and [redacted] David not offered the $200 flight voucher at the boarding gate when they were bumped from their flight? This was offered to "stand-by" university students and they were booked on to the next morning's flight, Toronto - Montreal - Cancun immediately.
4. Why was the flight crew (from our flight from Vancouver to Toronto) that was now sitting in our seats not asked to leave the plane so that we as a family could continue our vacation that we had paid for?
5. When we paid full fare for all of us to fly, why was David put on "stand-by" when Air Canada rebooked his flight?
6. Why were we being blamed for the flight from Vancouver to Toronto being late? It was mechanical problems. We were told by the Toronto gate crew that we could not board the Cancun flight because "YOU'RE LATE!" but they allowed our Vancouver flight crew to board and they were late as well!!
7. Why did it take so long to get [redacted] to Mexico? We were in Toronto on Friday and they did not arrive in Cancun until Sunday morning!!

Mrs. Allane Brine

-----Original Message-----
From: acexecutive.hautedirectionac@aircanada.ca
[mailto:acexecutive.hautedirectionac@aircanada.ca]
Sent: Thursday, May 24, 2012 1:09 PM

To: [redacted]
Subject: RE: Issue#: [redacted]03/27/2012 23:02:49:Bumped from flight, loss bags, poor s

Dear Ms. Brine,

Thank you for your latest correspondence.

We regret that you were dissatisfied with our response. Although there is very little we can add to our initial explanation in this instance, we can assure you that your concerns have been reviewed appropriately.

We understand our response is not one you had hoped for, but we hope you will understand that we must remain fair and consistent in our handling of similar requests.

I shall await your reply regarding the promotion codes. Please note, I will be away from the office next week and will return Monday, June 4.

With Kind Regards,
[redacted]
Executive Centre

-----Original Message-----
From: [redacted]@shaw.ca]
Sent: 24 May, 2012 9:36 AM
To: acexecutive.hautedirectionac@aircanada.ca
Subject: RE: Issue#: [redacted]03/27/2012 23:02:49:Bumped from flight, loss bags, poor service
Importance: High

[redacted]
I understand you have to be consistent with "handling" all passengers but each situation is different and that requires a different solution and this is why we require a portion of our [redacted] cell phone bill to be paid by Air Canada. [redacted] David's cell phone was turned off after we arrived in Toronto because he did not expect to use it while in Mexico BUT when he and [redacted] were (bumped)not allowed on to the same flight with myself and [redacted] then he had NO CHOICE but to turn it on to get directions to where we were staying [redacted] while they were stuck in Mexico City because ALL of that important information was with me, we did not expect to be separated for 3 days and at the gate in Toronto your staff did not allow me time to give this information to the rest of my family. JUST by turning on his phone to get those directions it cost him $277.60 in data and roaming charges!!! His whole cell phone bill for that month was [redacted] and as you see he is not asking for Air Canada to pay his whole bill but the portion that incurred while in Mexico City.

Long Distance Charges	- $ 29.05
International Data Roaming Charges	- $247.80
While Roaming International - sent	- $ .75
Total	- $277.60 (You have to admit we really are not asking for much from Air Canada.)

This would never of happened if we were all allowed on the flight we had paid for and according to Bill C-11 of the Canada Transportation Act our airline ticket is our contract and if the airline does not provide the services we paid for, the law requires that we be treated fairly and offer a solution or a refund. (Flight Rights Canada)

Quote from Air Canada website:
Conditions of Contract and Other Important Notices Where the Montreal Convention applies, the limits of liability are as

follows:
3. For damage occasioned by delay to your journey, 4,694 Special Drawing Rights (imately $6,786US) per passenger in most cases.

At this point in time I will not give you an answer as far as our decision on the 20% off coupons until I have spoken further with my family.
Thank you for your time,

Mrs. Allane Brine

-----Original Message-----
From: acexecutive.hautedirectionac@aircanada.ca
[mailto:acexecutive.hautedirectionac@aircanada.ca]
Sent: Tuesday, May 22, 2012 12:29 PM
To: [redacted]
Subject: RE: Issue#: [redacted]:03/27/2012 23:02:49:Bumped from flight, loss bags, poor service

Dear Mrs. Brine,

Thank you for your reply.

Respectfully, we are unable to honor your request for reimbursement of Mr. Brine's cell phone expense. I understand this is disappointing however, we must remain fair and consistent with our handling for all passengers.

The Air Canada $200.00 CAD Travel Credits are valid for one year from the date of issue and may be extended for one additional year. If you wish to extend them after they have expired, you can do so. Please note Travel Credits are valid for no longer than two years from the original date of issue.

Due to system limitations Promotion Codes cannot be extended beyond the dates initially provided. Although, I am unable to issue 4 separate 20% discounts, I would be pleased to replace it with 2-20% or 4-10% promotion codes.

Kindly forward your original transportation receipt with Issue [redacted] to our Budget Office at the following:

Air Canada Customer Relations
PO Box 64239
RPO Thorncliffe
Calgary, AB T2K 6J7

Mrs. Brine, please know we would truly enjoy the opportunity to welcome you and your family back onboard to restore your faith in our business.

I look forward to your reply.

With Kind Regards,
[redacted]
Executive Centre

-----Original Message-----
From: [redacted]@shaw.ca]
Sent: 22 May, 2012 10:12 AM

136

To: acexecutive.hautedirectionac@aircanada.ca
Subject: RE: Issue#: [redacted]:03/27/2012 23:02:49:Bumped from flight, loss bags, poor s[redacted]
Importance: High

Thank you for giving us clarity as to how your company operates but before we send any receipts into the address you supplied in hopes that they MAY be found them acceptable [redacted] David has a HUGE roaming/data charge because of Mexico City that he needs paid!!! Not just airport transportation!) When we send in these receipts what Issue # do we send it under so that it does not get lost in all the other issues that have been sent in??
Now I have one comment followed by a question that I would like answered.
Comment-
[redacted]

Question-
**Air Canada has offered [redacted] David each a $200.00 voucher good for one year starting April 13, 2012, good for one year, can this be extended to 2 years? You also offered us 20% off our next family holiday (all 4 of us travelling together within the next year), [redacted] so I was wondering if this could also be changed to 4 separate 20% off (Rick, Allane, David, Michael) coupons good for 2 years as well??? This is a very small thing to ask and for all that we have been through this is the very least that you should do for us.

Thank you for your time,

Mrs. Allane Brine

-----Original Message-----
From: acexecutive.hautedirectionac@aircanada.ca
[mailto:acexecutive.hautedirectionac@aircanada.ca]
Sent: Friday, May 18, 2012 5:50 AM
To: [redacted]@shaw.ca
Subject: RE: Issue#: [redacted]:03/27/2012 23:02:49:Bumped from flight, loss bags, poor service

Dear Mrs. Brine,

Thank you for your patience in awaiting our reply.

On behalf of Air Canada, I offer my sincere apologies for the inconvenience that you and your family experienced this past February 17.

We can assure you that [redacted] has reviewed your concerns appropriately. The goodwill travel discount and the future travel credit was offered to demonstrate our regret for the lapse in our usual high standard of service.

We work hard to rectify situations where one of our customers is dissatisfied, and I am sorry we have not been more successful in this instance, but we are limited in the range of r[redacted]s that can realistically be employed in situations such as these.

Minimum connecting times have been established to ensure customers with baggage can rely on making connecting flights. The Airport Authority of each airport collaborates with the airlines to establish minimum connecting times. Many factors are taken into consideration including the time required to complete airport processes, security checks and baggage transfers. As your flight was late arriving in Toronto, it appeared that your connecting time would fall below the minimum amount required to reach your connecting flight. Our system is designed to avoid onward connection problems by automatically removing customers from an anticipated misconnected segment and rebooking onto the next available flight. In most cases this process works well for both customers and airport personnel as flight confirmation is secured before the misconnection occurs and time consuming rebooking at the connection airport is avoided. We regret that in this instance, the outcome was not favorable for Mr. Brine and your son.

As there are instances where avoiding a flight delay is impossible, times shown on tickets are not guaranteed. If a flight is delayed or cancelled, the airlines' responsibility is to transport the passengers on their first flight on that routing on which space is available. Although, airlines do not accept responsibility for consequential expenses incurred as a result of such a delay or intangibles such as loss of time or enjoyment, we offer our sincere apologies for the inconvenience your family experienced.

As an indication of how important your patronage is, in addition to your original compensation, we are pleased to consider your airport transportation charges. Kindly submit your original receipt for our consideration, please forward the original receipts to our Budget Office at the following:

Air Canada Customer Relations
PO Box 64239
RPO Thorncliffe
Calgary, AB T2K 6J7

We look forward to receiving these shortly.

Sincerely,
[redacted]
Executive Centre

-----Original Message-----
From: Acexecutive Hautedirectionac
[mailto:acexecutive.hautedirectionac@aircanada.ca]
Sent: 17 May, 2012 7:28 AM
To: [redacted]@shaw.ca'
Subject: FW: Issue#: [redacted]:03/27/2012 23:02:49:Bumped from flight, loss bags, poor service

Dear Mrs. Brine,

Thank you for your email to [redacted] It is my pleasure to respond on behalf of Air Canada.

This is to confirm that we have received your email and there is no requirement to re-submit your information. However, as your concern requires more in-depth investigation we appreciate your patience and understanding as you await our response.

In the meantime, we apologize for any inconvenience caused.

[redacted]y,

[redacted]
Executive Centre

-----Original Message-----
From: [redacted]@shaw.ca]
Sent: Wednesday, May 16, 2012 1:13 PM
To: Calin Rovinescu
Subject: RE: Issue#: [redacted] 03/27/2012 23:02:49:Bumped from flight, loss bags, poor service

[redacted]
Please take the time and read our original complaint, thank you.

I am now writing you personally because I feel that not only was [redacted] treated badly by your airline but so was [redacted] and myself.
[redacted]. We were all to be together on the flight out of Toronto to Cancun but that was not to be, at one point [redacted] from Halifax was the only one who was going to fly to Cancun on that flight but after a long time they allowed me to board the plane. Upon arriving in Cancun I discover that your airline could not be bothered to send my luggage with me, I spent 2 days without any change of clothes or toilet items, my luggage finally did arrive with [redacted] but your airline tried to charge him for having an extra bag! [redacted] and because of your airline's screw-ups we were unable to spend all of that time together! They even had the nerve to put [redacted] David on "stand-by" when we had purchased tickets for him, WHY??
We had a contract with your airline when we purchased the tickets and I feel that your airline did not fulfill that contract to the best of their abilities.

Thank you for your valuable time,

Mrs. Allane Brine

-----Original Message-----
From: [redacted]@shaw.ca]
Sent: Tuesday, May 15, 2012 8:43 PM
To: 'support@help-aircanada.com'
Cc: [redacted]@aircanada.ca'
Subject: RE: Issue#: [redacted] 03/27/2012 23:02:49:Bumped from flight, loss bags, poor service

Thank for your response.

Yes we will accept the $200 voucher. As as you referred, this should have been done on site in Toronto, why not?
With all the stress your airline put us through we deserve much more.

Again I am asking you to please answer these two questions:

Whereas; Upon booking, our connection time became a contract which you had to fulfill, your company knew that we were arriving in Toronto with a connection to Cancun and in Vancouver our bags should have been flagged as

(Late) priority - so again:
1) Can you please answer, Why were we passed over in Toronto for people who could not be b[redacted]d to book early (i.e. - stand-by passengers) and
2) Why haven't we yet been compensated for our out of pocket expenses of $427.60?

These two requests are important to me, and at a little cost to you.

Rick Brine

-----Original Message-----
From: support@help-aircanada.com [mailto:support@help-aircanada.com]
Sent: Friday, April 13, 2012 8:55 AM
To: [redacted]@shaw.ca
Subject: Issue#: [redacted] 03/27/2012 23:02:49:Bumped from flight, loss bags, poor service

==========
Please do not change the Subject Line - Veuillez ne pas modifier le Sujet de ce courriel
==========

Dear Mr. Brine,

Thank you for your e-mail and letter.

On-time departures, efficient procedures and superior service define our customers' most fundamental expectations. Our intention is to always do everything possible to ensure a pleasant, trouble-free trip. We are very sorry for the multiple service failures you encountered with your flight to Cancun and we sincerely apologize for the difficulties these caused.

While it is impossible for me to recreate the situation you have described in Toronto, please be assured we have documented your remarks for internal review. We apologize that you were not offered denied boarding compensation and we are pleased to provide you and David with an electronic travel voucher in the amount of $200.00 CAD. These transferable vouchers may be used toward the base fare when you purchase Air Canada tickets for travel on Air Canada and/or Air Canada Express, and are valid until one year from today. This means that they must be applied to new tickets purchased within that time frame, however, travel does not have to commence within the year.

Your voucher numbers are: David [redacted] Richard [redacted]

If booking through our Call Centre, simply provide the number shown above to the agent at the time of booking

If booking on our website or through a travel agent, please wait until travel has been completed to submit your online request for deferred credit to the original form of payment. Simply visit the EMCO/Travel Voucher Request form at the link below to redeem your travel voucher.

http://www.aircanada.com/en/customercare/emco/index.html

Your travel voucher is fully transferable to the customer of your choice when using the EMCO/Travel Voucher Request form. Please ensure you indicate you are using your voucher as credit towards the purchase of a ticket for another passenger where asked on the online form.

We know this unfortunate situation was very frustrating and as a gesture of goodwill, we are pleased to offer you a one time saving of 20% off of the base fare on their next booking at aircanada.com.

This offer is available on a new booking only and the discount will be applied to a maximum of four passengers, provided all passengers are booked at the same time on the same flight and dates. The details are as follows:

Promotion Code [redacted]

To receive your discount on a new online booking, enter the one time use Promotion Code (located above) in the Promotion Code box on www.aircanada.com. The discount is valid for new bookings between April 13,
2012 and April 12, 2013. All travel must be completed by April 12, 2013.

The discount applies exclusively on published fares for Air Canada and Air Canada Express designated flights. Multi-city bookings and flight pass purchases are not eligible for the discount and promo codes cannot be combined with other discount codes.

Our accounting office will consider your expenses in Mexico City but for auditing purposes the original receipts must be mailed to our office at:

Air Canada Customer Relations
PO Box 64239
RPO Thorncliffe
Calgary, AB T2K 6J7

We value your business and we hope you will consider us again in your future travel plans.

Sincerely,
[redacted]

------ Original Message ------

From: [redacted]@shaw.ca
Sent: 27/03/2012 09:02 PM
Subject: Bumped from flight, loss bags, poor service

The below message (attached letter)was mailed to your customer Service
*** Please acknowledge the receipt of this letter of complaint

We had an extremely disappointing experience with Air Canada while trying to get our family to a vacation in Mexico.
Last year [redacted] we booked 3 tickets through the Air Canada web site from Vancouver via Toronto to Cancun ($2697.26) plus another ticket for [redacted] who was flying AC from Halifax via Toronto to Cancun ($908.30). We were meeting him in Toronto and flying altogether on to Cancun or at least that was to be our plan!
On February 17, 2012 our flight AC108 left Vancouver an hour late (mechanical difficulties); this made me very concerned as this left us a 45 minute window for our connecting flight - AC1256. [redacted] had asked the Vancouver gate crew to arrange to have a golf cart waiting for us when we got off the plane in Toronto so that we could make our connection.
During our flight we were talking to the flight crew, they indicated that they too were to be on our AC1256 flight to Cancun. This left us with some comfort, as they told us "not to worry" about making the connection; furthermore, we know from past experience that airlines will hold the plane for a few minutes for connecting passengers. Upon landing [redacted] texted [redacted] Michael who had arrived from Halifax to let him know that we had arrived and he was

to let the gate crew know that we were on our way. Off we [redacted] Allane, [redacted] David and T raced to gate E69, (THERE WAS NO GOLF CART WAITING!) with coincidently our AC108 fl crew. I asked if they were dead heading it to Cancun, a stewardess indicated that they were all going for a little extra vacation before their next shift. I asked for how long and she said this would be an extended 15 hours holiday for a little extra R & R. I sensed from their conversation that they were originally to leave Saturday morning for Cancun.

Just before the gate we met [redacted] Michael and tried to proceed to the plane. Both a man and woman refused my entry, [redacted] entry and [redacted] David's entry. I said why, the plane is right there. She said "You are late!" I said "Excuse me!" but it was your plane that was late not us. She said we have already given your seats someone else. Ironically all of AC108 flight crew was marching onto the plane at this moment.

THIS IS WRONG - your computers knew our family was coming. Michael told your gate crew that we were coming. So why did you give our seats away? [redacted] showed the gate crew our boarding passes. According to [redacted] Michael [redacted] flight attendants were now seating in seats that we had paid for. JUST [redacted] was finally allowed board the plane with Michael but not in the seat that had been assigned to her back in [redacted], instead she was given seat [redacted] As she walked to length of the plane; she found three stewardesses seated in the row where [redacted] [redacted] (David) seat [redacted] was to be and university student girls sitting in the seats that had been assigned to me

[redacted] and [redacted]. Seated in the row that [redacted] was now in was another flight attendant seated in the window seat. The middle seat was occupied by a male university student who indicated that several of his friends that been "offered" a different flight (Saturday am - Toronto to Montreal to Cancun PLUS $200.00 for their inconvenience for Air Canada over booking the flight), WHAT!!! SUCH A DISASTER The gate crew in Toronto plus your customer service; all of these staff members demonstrated a "so sad too bad" attitude; no compassion, no eye contact and no attempt to "go to bat"

for us. We were given the feeling that we were the criminals here; that no compensating voucher offered to us for our inconvenience. When we had to rebook our flight, despite us paying full fare, you booked [redacted] to Mexico City as a "standby"; why is that we couldn't take priority on a rebook?

However it appears it is OK for some lower priorities to kick us off.

The performance of Air Canada gets worse; the morning flight out of Toronto was three hours late which made us miss our next flight in Mexico City.

During our flight to Mexico City you knew we were to be late and graciously pre booked another flight 2 hours later, an added frustration point here is that why was this not done during our Toronto flight?, booking us on the morning Cancun flight?

Unfortunately, because it took 45 minutes to go through customs in Mexico City and the time it took to figure the airport out, and the 10 minute terminal rail ride, we missed that flight too. ALL because someone in Toronto decided to give YOUR flight attendants a little extra vacation or give some students our seats when they couldn't be bothered to book early!

In a single day we missed THREE flights - is there any remorse here yet? A vacation which was to start on Friday, February 17, 2012 did not start until Sunday morning when the whole family FINALLY arrived in [redacted] Mexico!!!

The story does not stop here; David's bag never arrived in Cancun, [redacted] did not have her bags either until we arrived on Sunday, which was 2 days without a change of clothes, no shorts, t-shirts, sunscreen or any bathroom products!!). We filed a complaint with AC and they produced a delayed baggage file [redacted] For four days I phoned your baggage office and the only answer I got from them was that the bag had arrived, but they did not have the number for the Cancun airport - again where is the effort here?? I phoned them again; and again, the same answer, "we can't get hold of the airport." This was unbelievable!! What kind of operation is Air Canada operating here?? Gee, if one number doesn't work, try other resources!

Luckily I obtained a baggage floor clerk's cell phone number upon arrival; so I could personally phone him. Ironically it was this floor clerk who initiated the process of getting the bag delivered to our hotel on Wednesday evening; not your multi-million dollar corporation and when David's bag did arrive he discovered $100.00 worth of brand new shorts and shirts missing as the people in Mexico City had asked for his key to his bag locks!!

WHY??'Now if you look at the delay file number IT STILL reads "delivery arrangements are initiated". 142

THIS IS DOUBLE WRONG!
We booked our flights last spring through your web site!
We had our boarding passes in hand!
We were bounced off the flight in favor of AC staff members that were very happy with their extended holiday and bunch of students who did not book early!
Air Canada Lost Baggage Department made absolutely no attempt to get our bag delivered.

The lady said that 90 min is not enough time for connection but your web site allowed us this connection! If that's the case why did AC accept this booking? I smell a blame shift here as it was your plane that was late not us.
In terms of connection times; what is you recommended connection time? Is it 90 minutes, 120 minutes or 180 minutes?, in all of our cases here 90 min, 2 hours and 3 hours AC has failed us. The bottom line here.. did you guys really want to make our connection work!?
In Toronto, Customer Service said we sometimes over book a flight; OK, so where is our compensation - you gave us nothing but grief. I know you normally give a compensation package for people volunteering to forfeit their flight; HOW CONVENIENT when you can wave the "you're late" banner here. It is very apparent that someone screwed up with ulterior motives, because you can't tell me that AC never holds a flight for a few minutes for a connecting passenger. How can this be possible? What did we do wrong to deserve such a nightmare?
You guys knew exactly what container our bags were in for an "urgent" transfer, such a priority transfer can be done, but the question is "did AC really want to do this"? [redacted] So don't tell me this cannot be done. Are your motives here: customer service or staff vacation; which is more important to your company?

Thank you for your time and I expect to hear from you in the very near future, attached to the following page is our expenses we occurred.
Mr. Richard J. Brine
[redacted]

Attached are our out of pocket costs - $427.60.

Transportation to hotel [redacted] $100
A second hire, since we missed our pre-arranged pre-paid van for Feb. 17, 2012.
Toronto Meal cost, in additional to you measly $30 voucher - $30
Two meals in Mexico City - $20
Roaming fees for cell phone - airport & hotel calls $308
Because [redacted] had all the hotel & travel information, we had to use internet/email in Mexico to find location/directions.
** Original receipts will available upon request.

Plus because of your mis-treatment and error in judgment, to regain our trust in your company we demand: four full fare airline tickets as reimbursement for the avoidable grief and suffering that Air Canada had put all us through plus our out of pocket expenses.

Backwater

From: Air Canada [confirmation@aircanada.ca]
Sent: Friday, May 27, 2011 9:42 PM
To: [redacted]@shaw.ca
Subject: Air Canada - 17-Feb: Vancouver - Cancun (booking ref: [redacted] - seat selected

****** PLEASE DO NOT REPLY TO THIS E-MAIL ******

Itinerary/Receipt

Your booking is confirmed. Please print/retain this page for your financial records (for taxation, expense claim or credit card reconciliation purposes). We thank you for choosing Air Canada and look forward to welcoming you on board.

Scan this barcode to check in at any Air Canada check in kiosk.

[redacted]

Looking for Travel Insurance? Protect yourself and your family against unforeseen circumstances.

Need a hotel in Cancun? Competitive room pricing guaranteed. Earn Aeroplan Miles for every purchase.

Need a car in Cancun? Great rates and additional Aeroplan Miles. AVIS Budget

Booking Information

AIR CANADA

Booking Reference: [redacted]

Electronic Ticketing confirmed. This is your official itinerary/receipt.
Main Contact:
Mr David A Brine
[redacted]@shaw.ca
Mobile:
Home: [redacted]
At destination: [redacted]

Online Services

Manage my booking online (view/change my booking; select seats*).
Request an upgrade
Alert me of flight status changes directly to my mobile phone or email.
Flight Arrivals & Departures - check online if my flight is on time.
Check-in online and print my boarding pass.

* Can my booking be changed online?

Customer Care

Air Canada
1-888-247-2262

Flight Arrivals and Departures
1-888-422-7533

Additional passenger information is required

Your current flight itinerary includes travel to a country that requires additional passenger information.

We strongly encourage you to provide this information

ahead of time from the comfort of your home or office with our secure online form.

PROVIDE PASSENGER INFORMATION

Flight Itinerary

Flight	From	To	Stops	Duration	Aircraft	Fare Type	Meal
AC108	**Vancouver, Vancouver Int'l (YVR)** Fri 17-Feb 2012 07:00 - Terminal M	**Toronto, Pearson Int'l (YYZ)** Fri 17-Feb 2012 14:20 - Terminal 1	0	10hr20	763	Tango Plus S	F
AC1256	**Toronto, Pearson Int'l (YYZ)** Fri 17-Feb 2012 16:05 - Terminal 1	**Cancun (CUN)** Fri 17-Feb 2012 19:20 - Terminal 2	0		319	Tango Plus S	F

F: Food for purchase onboard All Onboard Café purchases made on board Air Canada flights are payable only with Visa, MasterCard and American Express credit cards.

Passenger Information

1: Mr David A Brine : Adult (16+), Ticket Number:

Frequent Flyer Pgm :
Meal Preference :
Credit Card:
Special Needs:
Seat Selection: AC108 , AC1256 ,

Purchase Summary

Fare Summary
Passenger Type
Departing Flight - Tango Plus
Return Flight - Tango Plus
Surcharges
Fuel Surcharge

Taxes, Fees and Charges
Canada Airport Improvement Fee
Air Travellers Security Charge (ATSC)
Mexico Intl. Arpt. Departure Tax
Canada Harmonized Sales Tax (GST/HST #10009-2287 RT0001)
Mexico Tourism Tax
Total airfare and taxes before options (per passenger)
Number of passengers
Total
RBC Travel Insurance (declined)

Grand Total - Canadian dollars

Vancouver x 3 people

145

Backwater

From: Air Canada [confirmation@aircanada.ca]
Sent: Friday, May 27, 2011 9:51 PM
To: [redacted]@shaw.ca
Subject: Air Canada - 17-Feb: Vancouver - Cancun (booking ref: [redacted] - seat selected

****** PLEASE DO NOT REPLY TO THIS E-MAIL ******

Itinerary/Receipt

Your booking is confirmed. Please print/retain this page for your financial records (for taxation, expense claim or credit card reconciliation purposes). We thank you for choosing Air Canada and look forward to welcoming you on board.

Scan this barcode to check in at any Air Canada check in kiosk.

[redacted]

Looking for Travel Insurance? Protect yourself and your family against unforeseen circumstances.

Need a hotel in Cancun? Competitive room pricing guaranteed. Earn Aeroplan Miles for every purchase.

Need a car in Cancun? Great rates and additional Aeroplan Miles. AVIS Budget

Booking Information

AIR CANADA

Booking Reference: [redacted]

Electronic Ticketing confirmed. This is your official itinerary/receipt.
Main Contact:
Mr Richard J Brine
[redacted]@shaw.ca
Home:
Mobile: [redacted]

Online Services

Manage my booking online (view/change my booking; select seats*).
Request an upgrade
Alert me of flight status changes directly to my mobile phone or email.
Flight Arrivals & Departures - check online if my flight is on time.
Check-in online and print my boarding pass.

* Can my booking be changed online?

Customer Care

Air Canada
1-888-247-2262

Flight Arrivals and Departures
1-888-422-7533

Additional passenger information is required

Your current flight itinerary includes travel to a country that requires additional passenger information.

We strongly encourage you to provide this information ahead of time from the comfort of your home or office with our secure online form.

000103

PROVIDE PASSENGER INFORMATION

Flight Itinerary

Flight	From	To	Stops	Duration	Aircraft	Fare Type	Meal
AC108	**Vancouver, Vancouver Int'l (YVR)** Fri 17-Feb 2012 07:00 - Terminal M	**Toronto, Pearson Int'l (YYZ)** Fri 17-Feb 2012 14:20 - Terminal 1	0	10hr20	763	Tango Plus S	F
AC1256	**Toronto, Pearson Int'l (YYZ)** Fri 17-Feb 2012 16:05 - Terminal 1	**Cancun (CUN)** Fri 17-Feb 2012 19:20 - Terminal 2	0		319	Tango Plus S	F

F: Food for purchase onboard All Onboard Café purchases made on board Air Canada flights are payable only with Visa, MasterCard and American Express credit cards.

Passenger Information

1: Mr Richard J Brine : **Ticket Number:**

Frequent Flyer Pgm :
Meal Preference :
Credit Card:
Special Needs:
Seat Selection: AC108 , AC1256

2: Mrs Allane L Brine : **Ticket Number:**

Frequent Flyer Pgm :
Meal Preference :
Credit Card:
Special Needs:
Seat Selection: AC108 , AC1256

Purchase Summary

Fare Summary

Passenger Type
Departing Flight - Tango Plus
Return Flight - Tango Plus
Surcharges
Fuel Surcharge

Taxes, Fees and Charges

Canada Airport Improvement Fee
Air Travellers Security Charge (ATSC)
Mexico Intl. Arpt. Departure Tax
Canada Harmonized Sales Tax (GST/HST #10009-2287 RT0001)
Mexico Tourism Tax
Total airfare and taxes before options (per passenger)
Number of passengers
Total
RBC Travel Insurance (declined)

Grand Total - Canadian dollars

The following charges (tax inclusive) will appear on your credit card statement:

Air Canada:

Ticket number(s):

AIR CANADA

147

Notice of change in Itinerary

PLEASE CONTACT US IMMEDIATELY AT THE NUMBER BELOW IF YOU HAVE ANY QUESTIONS CONCERNING THIS SCHEDULE CHANGE NOTICE.

Thank you for choosing Air Canada.

Please print this new itinerary and keep with your original for your reference.

Main Contact Information

Booking reference: [redacted]

Name: Mr Richard Brine
E-mail: [redacted]@SHAW.CA

Customer Care
Air Canada Reservations
1-888-247-2262

Air Canada Flight Information
1-888-422-7533

International Reservations

Alert me of flight changes
Flight notification

Updated Flight Itinerary

Flight	From	To	Aircraft	Booking class	Status
AC108	Vancouver (YVR) Fri 17-Feb 2012 07:00 - TERMINAL M -MAIN	Toronto Pearson (YYZ) Fri 17-Feb 2012 14:29 - TERMINAL T1	763	S	Confirmed
Seat number(s) requested: [redacted]					
AC1256	Toronto Pearson (YYZ) Fri 17-Feb 2012 15:40 - TERMINAL T1 INTL	Cancun (CUN) Fri 17-Feb 2012 18:55 - TERMINAL 2	319	S	Confirmed
Seat number(s) requested: [redacted]					

[redacted]

Passenger Information

Passenger 1

Name: **Mr Richard Brine**
Frequent Flyer Pgm:

Ticket number: [redacted]
Program number:

AIR CANADA

Name: [redacted]
Frequent Flyer Pgm:

Ticket number: [redacted]
Program number:

If the flight for which you have a confirmed upgrade has been cancelled and we were not able to rebook you in the Executive cabin, any eUpgrade Credits or frequent flyer miles/points that were used for the initial upgrade will be returned to your account. If you wish to change your new flight, please contact Air Canada Reservation.

You must obtain your boarding pass and check-in any baggage by the check-in deadline shown below.

Additionally, you must be available for boarding at the boarding gate by the boarding gate deadline shown below. Failure to respect check-in and boarding gate deadlines may result in the reassignment of any pre-reserved seats, the cancellation of reservations, and/or ineligibility for denied boarding compensation.

Travel	Recommended check-in Time	Check-in Deadline	Boarding Gate Deadline
Within Canada	60 min.	30 min.	20 min.
To/from the US	90 min.	60 min.	20 min.
International (incl. Mexico & Caribbean)	120 min.	60 min.	55 min.
Exceptions Due to local conditions, some airports suggest longer recommended check-in times. Please take note of specific check-in and boarding gate deadlines for flights departing from those locations.			
Flights departing from:	**Recommended check-in Time**	**Check-in Deadline**	**Boarding Gate Deadline**
Tel-Aviv	180 min.	75 min.	60 min.

Note:

If your itinerary now includes a flight operated by another airline, please refer to the code share flights page as baggage allowance and fees may vary with other carriers.

Comments, Compliments and Complaints
Would you like to comment on a past travel experience? Your comments, compliments and complaints will help us improve the services we offer. Send us an email (aircanada.com/customerrelations) or write to us at: Air Canada - Customer Relations, PO Box 64239, RPO Thorncliffe, Calgary, AB, Canada T2K 6J7.

Tarmac Delay Contingency Plan
In the event that you are on a flight operated by one of Air Canada's codeshare partners, the tarmac delay contingency plan of the carrier operating your flight will apply in the event of a tarmac delay.

AIR CANADA

Notice of change in Itinerary

PLEASE CONTACT US IMMEDIATELY AT THE NUMBER BELOW IF YOU HAVE ANY QUESTIONS CONCERNING THIS SCHEDULE CHANGE NOTICE.

Thank you for choosing Air Canada.

Please print this new itinerary and keep with your original for your reference.

Main Contact Information

Booking reference: [redacted]

Name: [redacted]
E-mail: [redacted]@SHAW.CA

Customer Care
Air Canada Reservations
1-888-247-2262

Air Canada Flight Information
1-888-422-7533

International Reservations

Alert me of flight changes
Flight notification

Updated Flight Itinerary

Flight	From	To	Aircraft	Booking class	Status
AC108	Vancouver (YVR) Fri 17-Feb 2012 07:00 - TERMINAL M -MAIN	Toronto Pearson (YYZ) Fri 17-Feb 2012 14:29 - TERMINAL T1	763	S	Confirmed
Seat number(s) requested:	21A				
AC1256	Toronto Pearson (YYZ) Fri 17-Feb 2012 15:40 - TERMINAL T1 INTL	Cancun (CUN) Fri 17-Feb 2012 18:55 - TERMINAL 2	319	S	Confirmed
Seat number(s) requested:	19A				

[redacted]

AIR CANADA 150

Passenger Information

Passenger 1

Name: **Mr David Brine** Ticket number:

Frequent Flyer Pgm: Program number:

If the flight for which you have a confirmed upgrade has been cancelled and we were not able to rebook you in the Executive cabin, any eUpgrade Credits or frequent flyer miles/points that were used for the initial upgrade will be returned to your account. If you wish to change your new flight, please contact Air Canada Reservation.

You must obtain your boarding pass and check-in any baggage by the check-in deadline shown below.

Additionally, you must be available for boarding at the boarding gate by the boarding gate deadline shown below. Failure to respect check-in and boarding gate deadlines may result in the reassignment of any pre-reserved seats, the cancellation of reservations, and/or ineligibility for denied boarding compensation.

Travel	Recommended check-in Time	Check-in Deadline	Boarding Gate Deadline
Within Canada	60 min.	30 min.	20 min.
To/from the US	90 min.	60 min.	20 min.
International (incl. Mexico & Caribbean)	120 min.	60 min.	55 min.
Exceptions Due to local conditions, some airports suggest longer recommended check-in times. Please take note of specific check-in and boarding gate deadlines for flights departing from those locations.			
Flights departing from:	**Recommended check-in Time**	**Check-in Deadline**	**Boarding Gate Deadline**
Tel-Aviv	180 min.	75 min.	60 min.

Note:

If your itinerary now includes a flight operated by another airline, please refer to the code share flights page as baggage allowance and fees may vary with other carriers.

Comments, Compliments and Complaints

Would you like to comment on a past travel experience? Your comments, compliments and complaints will help us improve the services we offer. Send us an email (aircanada.com/customerrelations) or write to us at: Air Canada - Customer Relations, PO Box 64239, RPO Thorncliffe, Calgary, AB, Canada T2K 6J7.

Tarmac Delay Contingency Plan

In the event that you are on a flight operated by one of Air Canada's codeshare partners, the tarmac delay contingency plan of the carrier operating your flight will apply in the event of a tarmac delay.

Halifax x 1 person

151

Backwater

From: Air Canada [confirmation@aircanada.ca]
Sent: Friday, May 27, 2011 10:00 PM
To: [redacted]@shaw.ca
Subject: Air Canada - 17-Feb: Halifax - Cancun (booking ref: [redacted]) - seat selected

****** PLEASE DO NOT REPLY TO THIS E-MAIL ******

Itinerary/Receipt

Your booking is confirmed. Please print/retain this page for your financial records (for taxation, expense claim or credit card reconciliation purposes). We thank you for choosing Air Canada and look forward to welcoming you on board.

[redacted]

Scan this barcode to check in at any Air Canada check in kiosk.

Looking for Travel Insurance? Protect yourself and your family against unforeseen circumstances.

Need a hotel in Cancun? Competitive room pricing guaranteed. Earn Aeroplan Miles for every purchase.

Need a car in Cancun? Great rates and additional Aeroplan Miles. AVIS Budget

Booking Information

AIR CANADA

Booking Reference: [redacted]

Electronic Ticketing confirmed. This is your official itinerary/receipt.
Main Contact:
Mr Michael R Brine
[redacted]@shaw.ca
Mobile:
Home: [redacted]
At destination: [redacted]

Online Services

Manage my booking online (view/change my booking; select seats*).
Request an upgrade
Alert me of flight status changes directly to my mobile phone or email.
Flight Arrivals & Departures - check online if my flight is on time.
Check-in online and print my boarding pass.

* Can my booking be changed online?

Customer Care

Air Canada
1-888-247-2262

Flight Arrivals and Departures
1-888-422-7533

Additional passenger information is required

Your current flight itinerary includes travel to a country that requires additional passenger information.

We strongly encourage you to provide this information

000109

ahead of time from the comfort of your home or office with our secure online form.

PROVIDE PASSENGER INFORMATION

Flight Itinerary

Flight	From	To	Stops	Duration	Aircraft	Fare Type	Meal
AC607	**Halifax, Halifax Int'l (YHZ)** Fri 17-Feb 2012 07:45	**Toronto, Pearson Int'l (YYZ)** Fri 17-Feb 2012 09:09 - Terminal 1	0	13hr35	319	Tango Plus S	F
AC1256	**Toronto, Pearson Int'l (YYZ)** Fri 17-Feb 2012 16:05 - Terminal 1	**Cancun (CUN)** Fri 17-Feb 2012 19:20 - Terminal 2	0		319	Tango Plus S	F

F: Food for purchase onboard All Onboard Café purchases made on board Air Canada flights are payable only with Visa, MasterCard and American Express credit cards.

Passenger Information

Ticket Number:

Frequent Flyer Pgm :
Credit Card:
Seat Selection: AC607 **19A** , AC1256 **19F** ,
Meal Preference :
Special Needs:

Purchase Summary

Fare Summary
Passenger Type
Departing Flight - Tango Plus
Return Flight - Tango Plus
Surcharges
Fuel Surcharge

Taxes, Fees and Charges
Canada Airport Improvement Fee
Air Travellers Security Charge (ATSC)
Mexico Intl. Arpt. Departure Tax
Canada Harmonized Sales Tax (GST/HST #10009-2287 RT0001)
Mexico Tourism Tax
Total airfare and taxes before options (per passenger)
Number of passengers
Total
RBC Travel Insurance (declined)

Grand Total - Canadian dollars

The following charges (tax inclusive) will appear on your credit card statement:

AIR CANADA 153

Notice of change in Itinerary

PLEASE CONTACT US IMMEDIATELY AT THE NUMBER BELOW IF YOU HAVE ANY QUESTIONS CONCERNING THIS SCHEDULE CHANGE NOTICE.

Thank you for choosing Air Canada.

Please print this new itinerary and keep with your original for your reference.

Main Contact Information

Booking reference: [redacted]

Name: [redacted]
E-mail: [redacted]@SHAW.CA

Customer Care
Air Canada Reservations
1-888-247-2262

Air Canada Flight Information
1-888-422-7533

International Reservations

Alert me of flight changes
Flight notification

Updated Flight Itinerary

Flight	From	To	Aircraft	Booking class	Status
AC605	Halifax (YHZ) Fri 17-Feb 2012 07:00	Toronto Pearson (YYZ) Fri 17-Feb 2012 08:25 - TERMINAL T1	319	S	Confirmed
Seat number(s) requested: 19A					
AC1256	Toronto Pearson (YYZ) Fri 17-Feb 2012 15:40 - TERMINAL T1 INTL	Cancun (CUN) Fri 17-Feb 2012 18:55 - TERMINAL 2	319	S	Confirmed
Seat number(s) requested: 19F					

[redacted]

Passenger Information

Passenger 1

Name: **Mr Michael Brine** Ticket number: [redacted]

Frequent Flyer Pgm: Program number:

If the flight for which you have a confirmed upgrade has been cancelled and we were not able to rebook you in the Executive cabin, any eUpgrade Credits or frequent flyer miles/points that were used for the initial upgrade will be returned to your account. If you wish to change your new flight, please contact Air Canada Reservation.

You must obtain your boarding pass and check-in any baggage by the check-in deadline shown below.

Additionally, you must be available for boarding at the boarding gate by the boarding gate deadline shown below. Failure to respect check-in and boarding gate deadlines may result in the reassignment of any pre-reserved seats, the cancellation of reservations, and/or ineligibility for denied boarding compensation.

Travel	Recommended check-in Time	Check-in Deadline	Boarding Gate Deadline
Within Canada	60 min.	30 min.	20 min.
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International (incl. Mexico & Caribbean)	120 min.	60 min.	55 min.
Exceptions Due to local conditions, some airports suggest longer recommended check-in times. Please take note of specific check-in *and boarding gate deadlines for flights departing from those locations.*			
Flights departing from:	**Recommended check-in Time**	**Check-in Deadline**	**Boarding Gate Deadline**
Tel-Aviv	180 min.	75 min.	60 min.

Note:

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Comments, Compliments and Complaints
Would you like to comment on a past travel experience? Your comments, compliments and complaints will help us improve the services we offer. Send us an email (aircanada.com/customerrelations) or write to us at: Air Canada - Customer Relations, PO Box 64239, RPO Thorncliffe, Calgary, AB, Canada T2K 6J7.

Tarmac Delay Contingency Plan
In the event that you are on a flight operated by one of Air Canada's codeshare partners, the tarmac delay contingency plan of the carrier operating your flight will apply in the event of a tarmac delay.

NTA(A) No. 458 ¶C.A.B. No. 696

. line Tariff Publishing Company, Agent

INTERNATIONAL PASSENGER RULES AND FARES TARIFF NO. AC-2

6th Revised Page AC-15
Cancels 5th Revised Page AC-15

RULE	AIR CANADA SECTION I - GENERAL RULES
55	LIABILITY OF CARRIERS

(A) SUCCESSIVE CARRIERS
Carriage to be performed under one ticket or under a ticket and any conjunction ticket issued in connection therewith by several successive carriers is regarded as a single operation.

(B) LAWS AND PROVISIONS APPLICABLE

(1) The Carrier agrees in accordance with Article 22(1) of the Convention for the Unification of Certain Rules relating to International Transportation by Air signed at Warsaw, October 12, 1929 or, where applicable, that Convention as amended by the Protocol signed at the Hague on September 28, 1955 (the "Convention") that, as to all international carriage or transportation hereunder as defined in the Convention:

(a) The Carrier shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.

(b) The Carrier shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed

C †[R]100,000 Special Drawing Rights ("SDR").

(c) Except as otherwise provided in paragraphs (i) and (ii) hereof, the Carrier reserves all defenses available under the Convention to any such claim. With respect to third parties, the Carrier reserves all rights of recourse against any other person, including without limitation, rights of contribution and indemnity.

(d) (Not applicable to social agencies in the United States)
Neither the waiver of limits nor the waiver of defenses shall be applicable in respect of claims made by public social insurance or similar bodies however asserted. Such claims shall be subject to the limit in Article (22)(1) and to the defenses under Article (20)(1) of the Convention.

NOTE 1: (Applicable only for transportation to and from the United States) Paragraph (B)(1)(a) shall expire upon any final action of the Department of Transportation of the United States in proceedings in Docket OST-95-232 which does not make provisions for identical tariffs or in accordance with any order of the Department entered in the said proceedings.

NOTE 2: Rules stating any limitation on, or condition relating to, the liability of carriers for personal injury or death are not permitted to be included in tariffs filed pursuant to the laws of the United States, except to the extent provided in paragraph (B)(1) above with respect to Tariff C.A.B. No. 696. Insofar as this rule states any such limitation or condition it is included herein, except to the extent provided in paragraph (B)(1) above with respect to Tariff C.A.B. No. 696, as part of the tariff filed with governments other than the United States and not as part of tariff C.A.B. No. 696 filed with the Civil Aeronautics Board of the United States.

(2) Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs, and carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket, and for the purpose of the Convention the agreed stopping places (which may be altered by carrier in case of necessity) are those places, except the place of departure and the place of destination set forth in the ticket and any conjunction ticket issued therewith, or shown in carrier's timetable as scheduled stopping places on the passenger's route. A list giving the full name and abbreviation of each carrier in this tariff is provided at the front of this tariff.

(3) All carriage hereunder and other services performed by each carrier are subject to:
(a) applicable laws (including national laws implementing the Convention or extending the rules of the Convention to carriage which is not "international carriage" as defined in the Convention), government regulations, orders, and requirements;
(b) provisions set forth in the passenger's ticket;
(c) applicable tariffs;
(d) except in transportation between a place in the United States and any place outside thereof and also between a place in Canada and any place outside thereof, conditions of carriage, regulations and timetables (but not the times of departure and arrival therein specified) of carrier, which may be inspected at any of its offices and at airports from which it operates regular services.

(4) (a) Normal carrier limit of liability will be waived for substantiated claims involving loss damage or delay in delivery to mobility aids such as wheelchairs, walkers, crutches etc. when such items have been accepted into the care of the carrier as checked baggage or otherwise.

(b) In case of damaged or delayed mobility aids e.g. wheelchairs and walkers, a temporary replacement will be obtained without undue delay while the passenger's mobility aid is being repaired or returned.

(5) (a) For the purpose of international carriage governed by the Montreal Convention, the liability rules set out in the Montreal Convention are fully incorporated herein and shall supersede and prevail over any provisions of this tariff which may be inconsistent with those rules.

(Continued on next page)

NTA(A) No. 458 ¶C.A.B. No. 696

Airline Tariff Publishing Company, Agent
INTERNATIONAL PASSENGER RULES AND FARES TARIFF
NO. AC-2

4th Revised Page AC-15-A
Cancels 3rd Revised Page AC-15-A

RULE

AIR CANADA
SECTION I - GENERAL RULES

55 LIABILITY OF CARRIERS (Continued)

(C) LIMITATION OF LIABILITY

Except as provided in paragraph (B) above, or other applicable law may otherwise require:

(1) Carrier is not liable for any death, injury, delay, loss, or other damage of whatsoever nature (hereinafter in this tariff collectively referred to as "damage" to passengers or unchecked baggage arising out of or in connection with carriage or other services performed by carrier incidental thereto, unless such damage is caused by the negligence of carrier. Assistance rendered to the passenger by carrier's employees in loading, unloading, or

(2) Carrier is not liable for any damage directly and solely arising out of its compliance with any laws, government regulations, orders, or requirements or from failure of passenger to comply with same, or out of any cause beyond carrier's control.

(3) Any liability of carrier is limited to 250 French gold francs (approximately USD $20.00) per kilogram in the case of checked baggage and 5000 French gold francs (approximately USD $400.00) per passenger in the case of unchecked baggage or other property, unless a higher value is declared in advance and additional charges are paid pursuant to carrier's regulations. In that event the liability of the carrier shall be limited to such higher declared value. In no case shall the carrier's liability exceed the actual loss suffered by the passenger. All claims are subject to proof of amount of loss.

NOTE: In Canada the French gold franc shall be converted into Canadian Dollars in accordance with the provision of the carriage by Air Act Gold Franc Conversion Regulations SOR/83-79.

EXCEPTION: For transportation outside continental North America where the transportation originates or terminates in the United States and is via a point or points within Canada, in either direction, and the number of pieces and weight of checked baggage is not endorsed on the passenger ticket, the carrier's liability in the event of loss, damage or the delay in delivery of checked baggage shall be limited to the carrier's free baggage allowance per passenger for each affected piece of baggage (USD 20.00 per kg. (USD 640.00 per bag). This limitation on liability shall not apply if (1) the passenger has paid the excess baggage premium for each additional bag in excess of the free allowance, in which event the allowance of 32 kgs. per bag shall apply for each additional affected piece, or, (2) the passenger has declared and purchased valuation in excess of the maximum monetary allowance by weight. All claims are subject to proof of the amount of loss claimed, the exclusions from liability as contained in this rule, the time limitations as contained in Paragraph (D) below and the exclusions applicable to the purchase of excess valuation contained in Rule 118. In no case shall the carrier's liability exceed the actual loss suffered by the passenger.

The foregoing limitation shall not apply when the passenger can prove that the carrier has failed to comply with the notice provisions of Section 221.176 of Part 221 of the Civil Aeronautics Board's Economic Regulations.

NOTE: Under no circumstances will the carrier be liable for the loss, delay or damage to unchecked baggage or cabin baggage not attributed to the negligence of the carrier. Assistance rendered to the passenger by the carrier's employees in loading, unloading or trans-shipping of unchecked or cabin baggage shall be considered as a gratuitous service to the passenger.

(4) (a) In any event liability of carrier for delay of a passenger shall not exceed 125,000 French gold francs, or its equivalent.

(b) In any event liability of carrier for death or injury shall not exceed 125,000 French gold francs, or its equivalent. (See Note, paragraph (B)(1) above.)

(5) In the event of delivery to the passengers of part but not all of his checked baggage, or in the event of damage to part but not all of such baggage, the liability of the carrier with respect to the undelivered or damaged portion shall be reduced proportionately on the basis of weight, notwithstanding the value of any part of the baggage or contents thereof.

(6) Carrier is not liable for damage to a passenger's baggage caused by property contained in the passenger's baggage. Any passenger whose property caused damage to another passenger's baggage or to the property of carrier shall indemnify carrier for all losses and expenses incurred by carrier as a result thereof.

C †(C)(7) Carrier shall not be liable for the destruction, loss, damage, or delay in delivery of any property which is not acceptable for transportation in accordance with Rules 117 and 118 or for any other loss or damage of whatever nature resulting from any such loss or damage or from the transportation of such property, including damage or delay to perishable items or loss or delay of unsuitably or inadequately packed items, to the extent that the destruction, loss or damage resulted from the inherent defect, quality or vice of the baggage, or, in case of delay, that the carrier, its agents, and servants took all measures that could reasonably be required to avoid the damage or that it was impossible to take such measures. This exclusion is applicable whether the non acceptable property is included in the passenger's checked baggage with or without knowledge of the carrier.

(8) Carrier may refuse to accept any articles that do not constitute baggage as such term is defined herein, but if delivered to and received by carrier, such articles shall be deemed to be within the baggage valuation and limit of liability, and shall be subject to the published rates and charges of carrier.

(Continued on next page)

† - Effective August 12, 2011 per CTA decision No. 291-C-A-2011.

RULE

AIR CANADA
SECTION I - GENERAL RULES

60 RESERVATIONS

(A) GENERAL
A ticket will be valid only for flight(s) for which reservation(s) shall have been made, and only between the points named on the ticket or applicable flight coupons. A passenger holding an unused open-date ticket or portion thereof or exchange order for onward travel, or who wishes to change his ticketed reservations to another date, shall not be entitled to any preferential right with respect to the obtaining of reservations.

(B) CONDITIONS OF RESERVATIONS
(1) A reservation for space on a given flight is valid when the availability and allocation of such space is confirmed by a reservation agent of the carrier and entered into the carrier's reservation system. Subject to payment or other satisfactory credit arrangement and compliance with the payment provisions of paragraph (D) below, a validated ticket will be issued to the passenger by the carrier or agent of the carrier indicating such confirmed space provided the passenger applies for such ticket prior to the expiration of the time limits prescribed in paragraph (D) below. Such reservation of space is subject to cancellation by the carrier without notice if the passenger has not applied to the carrier or agent of the carrier for a validated ticket specifying thereon the confirmed reserved space prior to the time limits prescribed in paragraph (D) below.
(2) Seat Allocation
Carrier does not guarantee allocation of any particular space in the aircraft.
(3) Preferred Advance Seat Selection
Passengers may pre-select a Preferred seat when booking a fare via the web or call center. A fee per passenger and per each way of travel applies as shown below:
(a) Restrictions
(i) All preferred seats
Air Canada reserves the right to change passenger seating at any time after booking, in exceptional circumstance. The Preferred seat fee will then be refunded automatically or upon request. Exit row seats are only available and offered to passengers 12 years of age and older) who are able to read, understand, and provide oral instructions in English or French) are able to visually assess if it is safe to open the emergency door; are free of any disability, condition or responsibility, such as attending to another person, that may prevent them from performing emergency exit functions, and are able to reach and operate the emergency exit and willing to assist in evacuating the aircraft in the event of an emergency.
(ii) Exit row seats
Passengers who attest, at time of booking, that they qualify for sitting in an exit row seat have the obligation of informing Air Canada should any of these qualificatiopns change after booking.

C [C](b) Applicable fees
C For tickets issued on/after 25JAN11/[N]before 01JAN12
Between Canada/US and International

	CAD	GBP	EUR	HKD	AUD	USD	CHF
Tango, Tango Plus, Latitude Caribbean/Mexico	25	15	19	200	28	25	26
Europe, Middle East, South America	75	46	56	580	83	75	77
Asia, South Pacific	100	62	74	770	110	100	103
INTERNATIONAL TO INTERNATIONAL VIA CANADA							
	CAD	GBP	EUR	HKD	AUD	USD	CHF
All fare families	125	77	89	970	82	125	121

The seat selection fee is non refundable.

C [N]For tickets issued on/after 01JAN12
between Canada/US and International

	CAD	GBP	EUR	HKD	AUD	USD	CHF
Tango, Tango Plus, Latitude Caribbean/Mexico	40	26	30	318	40	40	36
Europe, Middle East, South America	90	56	66	715	89	90	80
Asia, South Pacific	120	77	86	953	119	120	107
INTERNATIONAL TO INTERNATIONAL VIA CANADA							
	CAD	GBP	EUR	HKD	AUD	USD	CHF
All fare families	125	80	92	993	124	125	121

The seat selection fee is non refundable.
The seat selection fee is non refundable.

(Continued on next page)

RULE

AIR CANADA
SECTION I - GENERAL RULES

60 RESERVATIONS (Continued)

(B) CONDITIONS OF RESERVATIONS (Continued)

(4) (c) (continued)

C [I]274.00 AUD
C [I]1,910 HKD
C [I]1,465 NOK
C [I]1,750 SEK

This fee is non-refundable

(d) EXCEPTIONS

If due to involuntary schedule or airport change or Air Canada must move passenger from super comfort seat prior to departure. If passenger cancels the itinerary or voluntarily changes to a different and super comfort seat is not available on new itinerary. If passenger purchases an executive class ticket, passenger will be entitled to a comfort plus seat without charge.

(e) Aeroplan upgrade certificates are not applicable for comfort plus seat.

(C) COMMUNICATION CHARGES

(1) The passenger will be charged for any communication expense paid or incurred by carrier for telephone, telegraph, radio, or cable arising from a special request of the passenger concerning a reservation.

(2) Whenever a passenger cancels reservations made for him, carrier will require payment from the passenger of a sum fixed by carrier, to cover the communications costs of making such reservations and subsequent cancellation thereof.

(D) CHECK-IN TIME LIMITS

(1) The passenger is recommended to present himself/herself for check-in at locations designated for such purposes at least 120 minutes prior to scheduled departure time of the flight on which he/she holds a reservation in order to permit completion of government formalities and departure procedures. Passengers must check-in, with his/her baggage, at least 60 minutes prior to scheduled departure time.

EXCEPTIONS

Departure from	Minutes Before Departure
China	150 mn (recommended check in)
Venezuela	120 mn must check-in 180 mn (recommended check in)
France	150 mn (recommended check in)
Israel	180 mn (recommended check in)
Grand Cayman	180 mn (recommended check in)
London Heathrow	180 mn (recommended check in)

(2) Check-in times passenger must check in via self-service device, or through an AC agent within the aforementioned check-in times. Passengers checking baggage are also subject to the above check-in times.

(3) The passenger must be available for boarding at the boarding gate at least 55 minutes prior to scheduled departure time of the flight on which he/she holds a reservation.

EXCEPTIONS: Caracas 30 minutes
Grand Cayman 45 minutes
Tel Aviv 60 minutes

(4) If passenger fails to meet any of these requirements, the carrier will reassign any pre-reserved seat and/or cancel the reservation of such passenger(s) who arrives too late for such formalities to be completed before scheduled departure time. Carrier is not liable to the passenger for loss or expense due to passenger(s) failure to comply with this provision.

NOTE: For the purpose of this rule, check-in is the point for checking baggage and the boarding gate is the point where the boarding pass stub is lifted and retained by the carrier.

(E) RECONFIRMATION OF RESERVATIONS

(1) Applicable to travel via AC within the Canada

(a) Reconfirmation Required

Except as provided in (b) below, the carrier will cancel the reservation (including the complete remaining itinerary) of any passenger from any point named on his ticket or exchange order unless the passenger advises the carrier of his intention to use his reservation by communicating with a reservation or ticket office of the carrier at such point at least 72 hours before his scheduled departure time.

(b) Reconfirmation Not Required

(i) Ticket Issued at Point of Origin

Reconfirmation is not required at point named on the ticket or exchange order if the same was issued at such point.

(ii) Departure Less than Six Hours After Arrival

Reconfirmation is not required where the passenger's scheduled departure is less than six hours after his planned arrival (via carrier or other mode of transportation).

(iii) Extraterritorial Trip

Reconfirmation is not required at the first point of arrival within the area comprised of Canada in connection with a passenger arriving from a point outside such area via a carrier other than CU.

(2) Carrier is not liable when it cancels a passenger's reservation pursuant to this rule, but will refund in accordance with Rule 90(E).

(F) RESERVATIONS AND TICKETING TIME LIMITS

Reservations - Reservations requested from any carrier or authorized agency will be accepted subject to the ticketing provision of the rule governing the fare used.

RULE	AIR CANADA SECTION I - GENERAL RULES
60	RESERVATIONS (Continued)
	(B) CONDITIONS OF RESERVATIONS (Continued)
	(5) (Continued)
C	(C)(b) Applicable fees (Continued)
	(c) Exceptions: If due to involuntary schedule or airport change or Air Canada must move passenger from preferred seat prior to departure. If passenger has a confirmed upgrade to Executive or Executive First Class prior to flight check-in. If passenger cancels the itinerary or voluntarily changes to a different flight or fare family and preferred seat becomes complimentary on the new itinerary. If Purchasing a comfort plus seat (Rule 60(B)(4), preferred seat selection is free of charge.
	(4) Comfort Plus seats will be offered as a purchase option to all economy class customers for an additional charge. This option is available only on flight segments between YTO & DUB, and YTO/YMQ & ATH/BCN on select B767 aircraft. (a) Comfort plus seats can only be purchased via AC call centers once ticket has been purchased. (b) Passengers with domestic or US connecting itineraries who purchase a comfort plus seat can also reserve a preferred seat on the connecting leg free of charge. (c) For tickets issued on/after 25JAN11 Applicable Fees: (Based on point of sale) 249.00 CAD - (Except DUB 149.00 CAD) 249.00 USD - (Except DUB 149.00 CAD) 184.00 EUR 154.00 GBP 256.00 CHF 1,390 DKK

(Continued on next page)

RULE

AIR CANADA
SECTION I - GENERAL RULES

80 REVISED ROUTINGS, FAILURE TO CARRY AND MISSED CONNECTIONS (Continued)

(B) CHANGES REQUESTED BY PASSENGER (Continued)

(3) Applicable Fare (Continued)

(b) Any difference between the fare and charges applicable under subparagraph (A) above, and the fare and charges paid by the passenger will be collected from the passenger by the carrier accomplishing the rerouting, who will also pay to the †[C]original form of payment any amounts due on account of refunds or arrange for the applicable refund by the carrier that issued the original ticket. (See also Rule 60.)

C

(4) Expiration Date

The expiration date of any new ticket issued for a change in routing, destination, carrier(s), class of service or validity will be limited to the expiration date that would have been applicable if the new ticket had been issued on the date of sale of the original ticket or Miscellaneous Charges Order.

(C) SCHEDULE IRREGULARITY

(1) In the event carrier cancels a flight, fails to operate according to schedule, fails to stop at a point to which the passenger is destined or is ticketed to stopover, substitutes a different type of equipment or class of service, is unable to provide previously confirmed space, causes a passenger to miss a connecting flight on which he holds a reservation, or the passenger is refused passage or removed in accordance with Rule 25(A) carrier will at its option and as passenger's sole remedy either:

(a) carry the passenger on another of its passenger aircraft on which space is available without additional charge regardless of the class of service; or at carrier's option;

(b) endorse to another air carrier with which Air Canada has an agreement for such transportation, the unused portion of the ticket for purposes of rerouting; or at carrier's option;

(c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower or,

(d) at passenger's option or if carrier is unable to perform the option stated in (A), (B) or (C) above within a reasonable amount of time, make involuntary refund in accordance with Rule 90(D).

(2) In the event carrier is a codeshare carrier and the operating carrier cancels a flight, fails to operate according to schedule, fails to stop at a point to which the passenger is destined or is ticketed to stopover, substitutes a different type of equipment or class of service, is unable to provide previously confirmed space, causes a passenger to miss a connecting flight on which he holds a reservation, or the passenger is refused passage or removed in accordance with Rule 25 (A) carrier will, as the passenger's sole remedy, if the operating carrier fails to do so:

(a) carry the passenger on another of its passenger aircraft on which space is available without additional charge regardless of the class of service; or at carrier's option

(b) endorse to another carrier or other transportation service, the unused portion of the ticket for purposes of rerouting; or at carrier's option

(c) reroute the passenger to the destination named on the ticket or applicable portion thereof by its own or other transportation services; and if the fare for the revised routing or class of service is higher than the refund value of the ticket or applicable portion thereof as determined from Rule 90(D), carrier will require no additional payment from the passenger but will refund the difference if it is lower at carrier's option.

(d) or, at carrier's option or if carrier is unable to perform the option stated in (A) (B) or (C) above within a reasonable amount of time, make involuntary refund in accordance with Rule 90(D).

(3) Except as otherwise provided in applicable local law, in addition to the provisions of this rule, in case of scheduled irregularity within its control Air Canada will offer:

(a) For a schedule irregularity lasting longer than 4 hours, a meal voucher for use, where available, at an airport restaurant or our on board cafe, of an amount dependant on the time of day.

(b) for a schedule irregularity lasting overnight, hotel accomodation subject to availability and ground transportation between the airport and the hotel. This service is only available for out of town passengers.

(c) If passengers are already on the aircraft when a delay occurs, Air Canada will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, Air Canada will offer passengers the option of disembarking from the aircraft until it is time to depart.

(Continued on next page)

Airline Tariff Publishing Company, Agent
INTERNATIONAL PASSENGER RULES AND FARES TARIFF
NO. [illegible]-2

3rd Revised Page AC-22-B
Cancels 2nd Revised Page AC-22-B

RULE	AIR CANADA SECTION I - GENERAL RULES
80	REVISED ROUTINGS, FAILURE TO CARRY AND MISSED CONNECTIONS (Continued) (D) MISSED CONNECTIONS In the event a passenger misses an onward connecting flight on which space has been reserved because the delivering carrier did not operate its flight according to schedule or changed the schedule of such flight, the delivering carrier will arrange for the carriage of the passenger or make involuntary refund in accordance with Rule 90. (E) FREE BAGGAGE ALLOWANCE An involuntarily rerouted passenger shall be entitled to retain the free baggage allowance applicable for the type of service originally paid for. This provision shall apply even though the passenger may be transferred from a First Class flight to a Business/Economy/Tourist/Economy/Thrift Class flight and is entitled to a fare refund. (F) Time limits on cancellations and charges for late cancellations will be applicable to revised routings requested by passenger. (G) The rules set out in EU regulation no. 261/2004 are fully incorporated herein and shall supersede and prevail over any provision of this tariff which may be inconsistent with those rules.
85 C	SCHEDULES, DELAYS AND CANCELLATION OF FLIGHTS (A) SCHEDULES Times [illegible]and aircraft type shown in timetables or elsewhere are approximate and not guaranteed, and form no part of the contract of carriage. Schedules are subject to change without notice and carrier assumes no responsibility for passenger making connections. Carrier will not be responsible for errors or omissions either in timetables or other representations of schedules. No employee, agent or representative of carrier is authorized to bind carrier by any statements or representation as to the dates or times of departure or arrival, or of the operation of any flight. (B) CANCELLATIONS (1) Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch, but no particular time is fixed for the commencement or completion of carriage. Subject thereto carrier may, without notice, substitute alternate carriers or aircraft and may alter the route, add stopovers or omit the stopping places shown on the face of the ticket in case of necessity. (2) Carrier may, without notice, cancel, terminate, divert, postpone, or delay any flight or the further right of carriage or reservation of traffic accommodations and determine if any departure or landing should be made, without any liability except to refund in accordance with its tariffs the fare and baggage charges for any unused portion of the ticket, when it would be advisable to do so: (a) because of any fact beyond its control (including, but without limitation, meteorological conditions, acts of God, force majeure, strikes, riots, civil commotions, embargoes, wars, hostilities, disturbances or unsettled international conditions), actual, threatened or reported or because of any delay, demand, condition, circumstances or requirement due, directly or indirectly, to such fact; or (b) because of any fact not reasonably to be foreseen, anticipated, or predicted; or (c) because of any government regulation, demand, or requirement; or (d) because of shortage of labor, fuel, or facilities or labor difficulties of carrier or others. (3) Carrier may cancel the right or further right of carriage of the passenger and his baggage upon refusal of the passenger, after demand by carrier, to pay the fare or portion thereof so demanded, or to pay any charge so demanded and assessable with respect to the baggage of the passenger, without being subject to any liability therefore except to refund, in accordance herewith, the unused portion of the fare and baggage charge(s) previously paid, if any.

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 375.

Airline Tariff Publishing Company, Agent
INTERNATIONAL PASSENGER RULES AND FARES TARIFF NO. -2

7th Revised Page AC-22-K
Cancels 6th Revised Page AC-22-K

RULE

AIR CANADA
SECTION I - GENERAL RULES

90 REFUNDS

(A) GENERAL
Refund by carrier for an unused ticket or portion thereof, exchange order or miscellaneous charges order will be made in accordance with the following conditions, except as otherwise provided in paragraph (F) of this rule and subject to any restrictions contained in applicable fare rules.
(1) Persons requesting refund must surrender to carrier all unused flight coupon(s) of the ticket, exchange order or miscellaneous charges order.
(2) Carrier will refuse refund on a ticket which has been presented to government officials of a country or to carrier as evidence of intention to depart therefrom unless the passenger establishes to the carrier's satisfaction that he has permission to remain in the country or that he will depart therefrom by another carrier or conveyance.
(3) Carrier shall make all or any individual refunds through its general accounting offices of regional sales or accounting offices, and require prior written applications for refunds to be prepared by passengers on special forms furnished by carrier.

(B) CURRENCY
All refunds will be subject to government laws, rules, regulations, or orders of the country in which the ticket was originally purchased and of the country in which the refund is being made. Refunds will be made subject to the following provisions:
(1) Voluntary refunds of tickets, exchange orders or deposit receipts purchased in currency other than Canadian dollars shall be made ONLY in currency used for such purchases, and ONLY in country where such purchase was made.
(2) Voluntary refunds of tickets, exchange orders, or deposit receipts purchased in Canadian dollars may be made in Canadian dollars or local currency in any country providing such refund is not prohibited by local governmental exchange control regulations at point of refund.
(3) Involuntary refunds of tickets, exchange orders, or deposit receipts shall be made in the currency used for such purchase and in the country where such purchase was made, whenever possible. However, Canadian dollar refunds or refunds in the currency of the country where the involuntary refund is necessary may be made on request of passenger providing refund in such currency is not prohibited by local governmental exchange control regulations.
(4) Refunds of tickets, exchange orders, or deposit receipts purchased in currency other than Canadian dollars will only be made in an amount equal to the amount due in the currency in which the fare or fares for the flight covered by the ticket as originally issued was collected, using the same rate of exchange as was applied in computing the original cost of the ticket.

(C) PERSON TO WHOM REFUND IS MADE
C Carrier will refund in accordance with this rule to the †[C]original form of payment, except as provided below:
Ticket refund will be made for tickets issued as described in Column A and only to the purchaser described in Column B below:

CARRIER	COLUMN A
AC	In exchange for a Prepaid Ticket Advice
	Against a Transportation Request issued by a government agency

CARRIER	COLUMN B
AC	The purchaser of the Prepaid Ticket Advice
AC	The government agency that issued the Transportation Request

(D) INVOLUNTARY REFUNDS
(1) For the purpose of this paragraph, the term "Involuntary Refund" shall mean any refund made in the event the passenger is prevented from using the carriage provided for in his/her ticket because of cancellation of flight, inability of carrier to provide previously confirmed space, substitution of a different type of equipment or class of service by carrier, missed connections, postponement or delay of flight, omission of a scheduled stop, or removal or refusal to carry under conditions prescribed in "Acceptance of Children" provisions of Rule 25.
(2) Amount of Involuntary Refunds
The amount of involuntary refunds will be as follows:
(a) When no portion of the trip has been made, the amount of refund will be The fare and charges paid.

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

ISSUED: August 24, 2011 | EFFECTIVE: October 8, 2011 (Except as Noted)

† - Effective August 25, 2011 and issued on not less than one (1) day's notice under NTA(A) Special Permission No. 62845.

RULE

AIR CANADA
SECTION I - GENERAL RULES

90 REFUNDS (Continued)

(D) INVOLUNTARY REFUNDS (Continued)

(2) Amount of Involuntary Refunds (Continued)

(b) When a portion of the trip has been made, the amount of refund will be computed as follows:

(i) either an amount equal to the one-way fare less the same rate of discount, if any, that was applied in computing the original one-way fare (or on round-trip or circle-trip tickets, one half of the round-trip fare) and charges applicable to the unused transportation from the point of termination to the destination or stopover point named on the ticket or to the point at which transportation is to be resumed, via:

(aa) the routing specified on the ticket, if the point of termination was on such routing; or

(bb) the routing of any carrier operating between such points, if the point of termination was not on the routing specified on the ticket; in such case the amount of refund will be based on the lowest fares applicable between such points; or

(ii) The difference between the fare paid and the fare for the transportation used, whichever is higher.

EXCEPTION: In the event of illness, carrier will refund cancellation penalty where applicable. In such circumstances carrier will extend refund to persons travelling with incapacitated passenger.

(3) Communications Expenses

Any communication expenses paid by the passenger in accordance with Rule 60 will be refunded, or if such expense has not been collected by carrier, its collection will be waived, except as otherwise provided in Rule 25; provided, however, that the passenger will be required to pay for any communications pertaining to his own arrangements necessitated by such involuntary cancellation.

* cell phone

(4) Time Limitation for Refund Requests

Application for refund should be made during the period of validity of the ticket or exchange order, and the carrier reserves the right to refuse refund when application therefore is made more than 30 days after the expiry date of the ticket or exchange order.

(E) VOLUNTARY REFUNDS

(1) The term "Voluntary Refund," for the purpose of this paragraph, shall mean any refund of a ticket or portion thereof other than an involuntary refund as defined in paragraph (D) above.

(2) Amount of Voluntary Refund

The amount of voluntary refunds will be as follows:

(a) when no ticket coupons have been used, the amount of refund will be The fare and charges paid less any applicable communication expenses, service charges or cancellation penalty.

(b) when any ticket coupons have been used, the amount of refund will be: The difference, if any, between the fare and charges paid and the fare applicable for transportation used, less any applicable communication expenses, service charges or cancellation penalty.

(3) Time Limitation for Refund Request

Application for refund should be made during the period of validity of the ticket or exchange order, and the carrier reserves the right to refuse refund when application therefore is made more than 30 days after expiry date of the ticket or exchange order.

(F) LOST TICKETS, MISCELLANEOUS CHARGES ORDERS, DEPOSIT RECEIPTS AND EXCESS BAGGAGE TICKETS

The following provisions will govern refund or replacement of lost tickets, etc., or unused portions thereof.

(1) Time Limitation for Refund Request

(a) Subject to Rule 90(A)(1), carrier will refund a lost ticket or lost portion thereof upon receiving written request for refund from the passenger.

(b) Application for refund should be made during the period of validity of the ticket or exchange order, and the carrier reserves the right to refuse refund when application therefore is made more than 30 days after expiry date of the ticket or exchange order.

(2) Basis for Refund

(a) Refund will be made on one of the following bases, whichever is applicable:

(i) If no portion of the ticket has been used:

(aa) if the passenger has not purchased a replacement ticket, refund will be the full amount of the fare paid less any carrier compensation, if applicable; in the case of non-refundable tickets, the full amount of the fare paid may be used towards the purchase of a ticket at an applicable higher fare or, alternately, an MCO for future travel annotated "NON-REF".

C (bb) if the passenger has purchased a replacement ticket, the carrier that issued the original ticket will refund to the †[C]original form of payment the fare paid for such replacement ticket.

(Continued on next page)

For unexplained abbreviations, reference marks and symbols see IPGT-1, C.A.B. NO. 581, NTA(A) NO. 373.

† - Effective August 25, 2011 and issued on not less than one (1) day's notice under NTA(A) Special Permission No. 62845.

0675w

This is **Exhibit "J"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 25, 2014

_____

Signature

Halifax, NS

lukacs@AirPassengerRights.ca

March 24, 2014

VIA EMAIL and FAX

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

Dear Madam Secretary:

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

I am writing to make a final request, prior to making an application for judicial review, that the Agency comply with its obligations under the open court principle and s. 2(b) of the *Canadian Charter of Rights and Freedoms*, to make documents that are part of the public record available for public viewing.

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

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

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

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

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

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

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

> The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person filing the document makes a claim for its confidentiality in accordance with this section.

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

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

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

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

Therefore, I am requesting that:

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

B. the Agency provide me, within five (5) business days, with unredacted copies of all documents in File No. M4120-3-/13-05726 with respect to which no confidentiality order was made by a Member of the Agency.

Kindly please confirm the receipt of this letter.

Yours very truly,

Dr. Gábor Lukács

This is **Exhibit "K"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 25, 2014

_____

Signature

Office
des transports
du Canada

Canadian
Transportation
Agency

Bureau du
Président

Office of the
Chairman

March 26, 2014

Mr. Gábor Lukács

Halifax, NS

lukacs@AirPassengerRights.ca

Mr. Lukács,

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

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

The purpose of the Act is to protect the privacy of individuals with respect to personal information about themselves held by a government institution. Section 8 of the Act is clear that, except for specific exceptions found in that section, personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution. Also, in accordance with sections 10 and 11 of the Act, personal information under the control of a government institution such as the Agency must be accounted for in either personal information banks or classes of personal information. Because there are no provisions in the Act that grant to government institutions that are subject to the Act the discretion to not apply those provisions of the Act, personal information under the control of the Agency is not disclosed without the consent of the individual and are accounted for either in personal information banks or classes of personal information and consequently published in Info Source. This is all consistent with the directions of the Treasury Board of Canada Secretariat.

Although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social insurance number, driver's license number, or credit card or passport details, is not available for consultation.

The file you requested has such sensitive personal information and it has therefore been removed by the Agency as is required under the Act.

Sincerely,

Geoffrey C. Hare
Chair and Chief Executive Officer

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

FEDERAL COURT OF APPEAL

B E T W E E N:

DR. GABOR LUKACS

APPLICANT

- and –

CANADIAN TRANSPORTATION AGENCY

RESPONDENT

****

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

****

APPEARANCES:

Dr. Gabor Lukacs, for the Applicant

Mr. Simon-Pierre Lessard, for the Respondent

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

INDEX

NAME OF WITNESS: PATRICE BELLEROSE

CROSS-EXAMINATION BY: DR. GABOR LUKACS

NUMBER OF PAGES: 2 THROUGH TO AND INCLUDING 27

ADVISEMENTS, OBJECTIONS & UNDERTAKINGS

EXHIBITS

DATE TRANSCRIPT ORDERED: August 21, 2014

DATE TRANSCRIPT COMPLETED: August 25, 2014

PATRICE BELLEROSE, SWORN:

CROSS-EXAMINATION BY DR. GABOR LUKACS:

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

A. Yes.

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

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

DR. LUKACS:

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

A. That is correct.

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

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

DR. LUKACS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Of the which?

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

A. No.

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

A. Yes.

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

A. Exhibit A to my Affidavit?

14. Q. Yes.

A. Yes.

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

from myself to the secretary of the Agency, correct?

A. Yes.

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

A. Yes.

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

A. Yes.

18. Q. What does it mean?

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

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

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

DR. LUKACS: Sure.

THE WITNESS: Okay so my understanding is that you

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

DR. LUKACS:

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

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

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

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

DR. LUKACS:

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

section 2(b) of the Charter?

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

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

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

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

DR. LUKACS:

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

A. Yes.

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

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

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

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

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

A. Correct.

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

A. Correct.

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

A. That's correct.

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

A. Yes.

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

A. Yes.

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

A. Section 7.4.5.

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

A. “Informal processing

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

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

A. An informal?

34. Q. Yes.

A. That is correct.

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

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

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

A. Yes.

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

A. That is correct.

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

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

DR. LUKACS:

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

A. Yes.

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

A. Sorry. Can you repeat that?

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

documents?

A. No.

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

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

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

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

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

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

44. Q. That is not my question.

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

DR. LUKACS: Sure.

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

A. No.

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

A. Yes.

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

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

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

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

49. Q. All personal information?

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

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

A. The Privacy Act.

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

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

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

A. Correct.

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

A. Yes.

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

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

55. Q. Take your time.

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

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

A. Their contact information as well as their emails.

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

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

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

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

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

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

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

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

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

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

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

A. That is correct.

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

A. Correct.

63. Q. Why is that?

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

64. Q. All PNR information is personal information?

A. Pardon me?

65. Q. All PNR information is personal information?

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

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

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

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

principle?

A. I am.

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

A. Yes.

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

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

THE WITNESS: Sorry. Can you repeat the question?

DR. LUKACS:

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

A. Yes.

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

A. Yes.

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

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

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

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

74. Q. Approximately?

A. Twenty to 25.

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

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

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

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

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

the open court principle were handled as informal access requests?

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

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

A. “Important privacy information and Open Court Principle"

79. Q. And the first two paragraph?

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

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

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

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

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

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

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

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

A. I am sorry. Can you repeat that?

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

A. Correct.

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

A. Correct.

86. Q. Where does redaction come into this whole

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

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

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

A. Yes.

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

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

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

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

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

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

DR. LUKACS: I believe it was printed out.

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

DR. LUKACS: That's right.

THE WITNESS: Okay.

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

DR. LUKACS:

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

MR. LESSARD: I just gave it to her.

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

DR. LUKACS:

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

A. Rule 23 is here.

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

Rules that govern confidentiality?

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

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

A. Yes.

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

A. That's right.

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

A. Sure.

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

A. That is correct.

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

A. That is correct.

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

A. That's correct.

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

to Rule 23?

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

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

DR. LUKACS:

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

A. In a claim for confidentiality, yes.

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

A. With the personal information removed.

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

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

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

A. In the General Rules, no.

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

A. This is correct.

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

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

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

A. Correct.

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

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

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

A. I guess vaguely, yes.

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

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

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

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

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

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

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

A. Or if there was no request.

113. Q. Or if there was no request.

A. That's right.
114. Q. Then you go and make some decisions as to what to redact from the file before it is released to the public, correct?
A. Personal information is removed, that is correct.
115. Q. And you decide what will be removed and what not?
A. I personally decide or --
116. Q. Yes.
A. -- is there an approval process?
117. Q. What can you tell me about that approval process?
A. Sure. Generally speaking it depends on -- with informal requests generally we take care of them in our office. Sometimes we consult with legal services and depending on the file it is possible that it can go to the chair who is the delegated head for access to information and privacy at the Agency.
DR. LUKACS: I guess I have no more questions. Thank you.

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

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

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~~LG~~ R S / B M P

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The Applicant is seeking various declarations and a *mandamus* to enforce his rights pursuant to the open court principle and s. 2(b) of the *Charter* to view "tribunal files" of the Canadian Transportation Agency (the "Agency"), that is, files of adjudicative proceedings before the Agency, which contain documents received in the course of such proceedings, including submissions of the parties and exhibits.

2. The Applicant challenges the practices of the Agency that:

(a) the public can view only redacted tribunal files, even in cases where a confidentiality order was neither sought by the parties nor made by Member(s) of the Agency; and

(b) Agency Staff, who are not Members of the Agency, purport to make determinations of confidentiality in relation to tribunal files.

Notice of Application **[Tab 1, P1]**

B. BACKGROUND: THE AGENCY AND THE OPEN COURT PRINCIPLE

3. The Agency, established by the *Canada Transportation Act*, S.C. 1996, c. 10, consists of Members (including temporary members), who exercise the powers conferred upon the Agency by the Act. The Agency also has Staff, but they are not Members, and they cannot exercise the powers of the Agency.

***Canada Transportation Act*, ss. 7 and 19** **[App. "A", P239, P242]**

4. The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. One of the Agency's key functions is to adjudicate commercial and consumer transportation-related disputes as a quasi-judicial tribunal.

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

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

Lukács Affidavit, Ex. "I", p. 000079 **[Tab 2I, P121]**

6. The open court principle is incorporated in both the Agency's old and current procedural rules, which speak about the "public record" and the "confidential record" of the Agency, and provide that:

(a) all documents filed with the Agency are to be placed on the public record, unless confidentiality was sought and granted;

(b) a request for confidentiality must be made by the party who is filing the document, and at the time of the filing;

(c) requests for confidentiality and redacted versions of confidential documents are to be placed on the Agency's public record; and

(d) unredacted versions of confidential documents are to be placed on the Agency's confidential record.

***Canadian Transportation Agency Rules (Dispute Proceedings)*, S.O.R./2014-104 ("New Rules"), ss. 7(2), 31(2)** **[App. "A", P248-P251]**

***Canadian Transportation Agency General Rules*, S.O.R./2005-35 ("Old Rules"), ss. 23(1), 23(6)** **[App. "A", P257, P259]**

C. THE AGENCY'S PRACTICE WITH RESPECT TO VIEWING TRIBUNAL FILES

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

Bellerose Cross-Examination, Q82-Q86 **[Tab 3, P189-P190]**

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

Bellerose Cross-Examination, Q112-Q114 **[Tab 3, P195-P196]**

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

Bellerose Cross-Examination, Q53-Q57 **[Tab 3, P183]**

D. THE APPLICANT'S REQUEST TO VIEW A TRIBUNAL FILE

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

Lukács Affidavit, para. 1 **[Tab 2, P13]**

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

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

Lukács Affidavit, para. 3, Ex. “A” **[Tab 2A, P18]**

12. Lukács clearly indicated in his subsequent correspondence with Agency Staff that he was seeking documents on the Agency's public record, and that the legal basis of his request was subsection 2(b) of the *Charter*.

Lukács Affidavit, paras. 4-10, Ex. “B”-“H” **[Tab 2B-2H, P20-P37]**

(ii) Agency staff understood the nature of the request

13. Agency Staff handling the request of Lukács clearly understood that Lukács was seeking documents that were placed on the Agency's public record and that Lukács was making a request to exercise his open court principle and s. 2(b) *Charter* rights.

Lukács Affidavit, para. 9, Ex. "G" **[Tab 2G, P33]**

Bellerose Cross-Examination, Q16-Q18 **[Tab 3, P175]**

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

14. Requests for access to documents received by the Agency are classified as "formal requests" or "informal requests." A "formal request" is one that is made under the *Access to Information Act*. A "formal request" requires the payment of a $5.00 fee and a completed and signed request form. All other requests are "informal requests."

Bellerose Cross-Examination, Q21, Q26-Q28 **[Tab 3, P176, P178]**

15. The request of Lukács was not made under the *Access to Information Act*; indeed, no fee was collected nor was a request form completed, and the Agency treated the request as an "informal request."

Bellerose Cross-Examination, Q25 **[Tab 3, P178]**

Second Affidavit of Ms. Patrice Bellerose, (sworn on July 29, 2014), para. 3

(iv) Redacted tribunal file

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

(a) name and/or work email address of counsel acting for Air Canada in the proceeding (e.g., pages 1, 27, 28, 36, 37, 45, 72, 75);

(b) names of Air Canada employees involved (e.g., pages 29, 31, 62, 64, 84, 87, 90, 92); and

(c) substantial portions of submissions and evidence (e.g., pages 41, 54-56, 63, 68-70, 85, 94, 96, 100-112).

Lukács Affidavit, para. 11, Ex. "I" **[Tab 2I, P41]**

Bellerose Cross-Examination, Q53-Q57, Q61-Q62 **[Tab 3, P183, P185]**

(v) Confidentiality was never sought nor granted

17. File no. M4120-3/3-05726 contains no claim for confidentiality made by any of the parties nor a directive, decision, or order made by a Member of the Agency that any of the documents in the file be treated confidentially.

Lukács Affidavit, Ex. "I" **[Tab 2I, P41]**

Bellerose Cross-Examination, Q38, Q45 **[Tab 3, P180, P181]**

(vi) Final demand

18. On March 24, 2014, Lukács sent the Agency a final demand that:

> [...] the Agency comply with its obligations under the open court principle and s. 2(b) of the *Canadian Charter of Rights and Freedoms*, to make documents that are part of the public record available for public viewing.
>
> ⋮
>
> [...] the Agency provide me, within five (5) business days, with unredacted copies of all documents in File No. M4120-3-/13-05726 with respect to which no confidentiality order was made by a Member of the Agency.

Lukács Affidavit, Ex. "J" **[Tab 2J, P164]**

19. On March 26, 2014, Mr. Geoffrey C. Hare, Chair and Chief Executive Officer of the Agency, wrote to Lukács, among other things, that:

> The Canadian Transportation Agency (Agency) is a government institution which was included in the schedule to the *Privacy Act* (Act) in 1982. [...]
>
> [...] Section 8 of the Act is clear that, except for specific exceptions found in that section, personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by that institution. [...]
>
> Although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social insurance number, driver's license number, or credit card or passport details, is not available for consultation.
>
> The file you requested has such sensitive personal information and it has therefore been removed by the Agency as is required under the Act.
>
> **Lukács Affidavit, Ex. "K"** **[Tab 2K, P167]**

20. Mr. Hare's letter contained no explanation for the sweeping redactions in the Redacted File, which go well beyond any stretch of the notion of "personal information."

PART II – STATEMENT OF THE POINTS IN ISSUE

21. The present application raises the following questions:

(a) Are members of the public entitled, pursuant to the open court principle and s. 2(b) of the *Charter*, to access tribunal files of the Agency in their entirety?

(b) If so, does the *Privacy Act* limit the open court principle and s. 2(b) *Charter* rights to access tribunal files of the Agency?

(c) If so, can the limitation be saved under s. 1 of the *Charter*?

(d) If it cannot be saved, what is the appropriate remedy?

22. Lukács submits that pursuant to the open court principle and s. 2(b) of the *Charter*, members of the public are entitled to view tribunal files in their entirety, unless documents in a file are subject to a confidentiality order made by Member(s) of the Agency. Such orders must be made judicially, in accordance with the *Dagenais/Mentuck* test.

23. Lukács further submits that documents contained in the tribunal files of the Agency fall within the exclusions and/or exceptions of subsections 69(2) and/or 8(2)(a) and/or 8(2)(b) and/or 8(2)(m) of the *Privacy Act*.

24. Alternatively, if the *Privacy Act* does limit the open court principle and s. 2(b) *Charter* rights to access tribunal files of the Agency, then such infringement cannot be justified under s. 1 of the *Charter*, and should be declared inapplicable to the tribunal files of the Agency.

PART III – STATEMENT OF SUBMISSIONS

Preliminary matter: inadmissible portions of the First Bellerose Affidavit

25. Affidavits filed in relation to an application must be confined to facts within the personal knowledge of the deponent; argumentative materials or legal conclusions are not permitted. Tendentious, opinionated, or argumentative portions of affidavits may be struck.

***Federal Courts Rules*, s. 81(1)**	**[Tab 6, P271]**
***Canadian Tire Corporation v. Canadian Bicycle Manufacturers Association*, 2006 FCA 56, paras. 9-10**	**[Tab 4, P373]**

26. Lukács is asking that the Honourable Court strike out or disregard the portions of the May 23, 2014 affidavit of Ms. Patrice Bellerose ("First Bellerose Affidavit") that contain arguments or legal conclusions: the third sentence of paragraph 2 ("When..."); paragraph 3; the first sentence of paragraph 4; all but the last sentence of paragraphs 5, 6, 8, and 9; the second sentence of paragraph 7; and the first sentence of paragraph 10.

First Affidavit of Ms. Patrice Bellerose, (sworn on May 23, 2014), paras. 2-10

27. Lukács also asks that paragraph 12 and Exhibit "I" to the First Bellerose Affidavit be disregarded, because they are an attempt to introduce legal opinions in the guise of evidence.

First Affidavit of Ms. Patrice Bellerose, (sworn on May 23, 2014), para. 12

A. STANDARD OF REVIEW: CORRECTNESS

28. Constitutional issues are necessarily subject to correctness review because of the unique role of the courts as interpreters of the Constitution. Correctness is also the standard of review for questions that are both of central importance to the legal system as a whole and outside the specialized expertise of a tribunal.

> ***Dunsmuir v. New Brunswick*, 2008 SCC 9, paras. 58, 60** **[Tab 5, P402, P403]**

29. The present application concerns the open court principle and s. 2(b) of the *Charter*, and their possible interaction with the *Privacy Act* in the context of tribunal files. Thus, the issues are of a constitutional nature, the open court principle is of central importance for the legal system as a whole, and interpreting the *Privacy Act* is outside the specialized expertise of the Agency.

30. Therefore, Lukács submits that the impugned actions and practices of the Agency should be subject to correctness review (if the remedies sought may require determination of the appropriate standard of review at all).

B. THE OPEN COURT PRINCIPLE AND S. 2(B) OF THE CHARTER

31. The century-old judgment of the House of Lords in *Scott v. Scott* has been a leading authority on the open court principle for Canadian courts in the pre-*Charter* era, and remained so even after the *Charter* came into force. Some of the issues in *Scott* were the validity of an order directing that an embarrassing divorce case be heard in camera, and whether parties were required to keep details of the hearing in secret after the trial. Viscount Haldane L.C. held that:

> to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.

The Earl of Halsbury opined that "every Court of justice is open to every subject of the King," with only very few and special exceptions. With respect to the injunction for perpetual secrecy, Earl Loreburn held that:

> It is not that a Court ought to refrain from exercising its power in such a way. It is that the Court does not possess such a power.

Lord Shaw of Dunfermline cited Jeremy Bentham with approval:

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity."

***Scott v. Scott*, [1913] A.C. 417, at 439, 440, 448, and 477** **[Tab 13, P619, P620, P628, P657]**

32. In the pre-*Charter* case of *A.G. (Nova Scotia) v. MacIntyre*, the Supreme Court of Canada rejected the argument that privacy, in and on its own, trumps the requirement for openness of proceedings:

> Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.
>
> ⋮
>
> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

***Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 SCR 175, p. 8-9** **[Tab 10, P536-P537]**

33. Since the *Charter* came into force, the open court principle has become a constitutionally protected right. The rights guaranteed by s. 2(b) of the *Charter* do entail the open court principle and the right of the public to obtain information about the courts, including court proceedings:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.
>
> [Emphasis added.]

***CBC v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, para. 23** **[Tab 3, P350]**

(i) Open court principle rights are enforceable by *mandamus*

34. Access to exhibits is a corollary to the open court principle. The open court principle and s. 2(b) *Charter* rights are not limited to attending court and observing what actually transpires in the courtroom.

***R. v. CBC*, 2010 ONCA 726, para. 28** **[Tab 11, P557]**

35. The "open court principle" is not a mere principle, but rather it confers enforceable rights on members of the public (and the media), and a public duty on those controlling documents that are subject to the open court principle. These rights and public duties are enforceable by way of an application for judicial review for a writ of *mandamus*.

***Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, para. 11** **[Tab 15, P682]**

***Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, para. 11 (citing para. 6 of the reasons of the Ontario Court of Appeal)** **[Tab 18, P730]**

(ii) The *Dagenais/Mentuck* test

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

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

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

This test applies to all discretionary decisions that limit freedom of expression and freedom of the press in relation to legal proceedings.

***Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, paras. 3-4, 7, and 26-28** **[Tab 18, P728, P733]**

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

***A.B. v. Bragg Communications Inc.*, 2012 SCC 46, paras. 14, 27** **[Tab 1, P285, P289]**

(iii) The open court principle applies to tribunals engaged in quasi-judicial functions

38. The open court principle applies to statutory tribunals exercising judicial or quasi-judicial functions, because they constitute part of the administration of justice, and legitimacy of their authority requires that public confidence in their integrity be maintained. Tribunals must exercise their discretion to control their own procedures within the boundaries set by the *Charter*.

> ***Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, para. 9** **[Tab 15, P681]**
>
> ***Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 110, para. 13** **[Tab 17, P723]**
>
> ***Germain v. Saskatchewan (Automobile Injury Appeal Commission)*, 2009 SKQB 106, para. 104** **[Tab 7, P501]**
>
> ***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), para. 59** **[Tab 6, P454]**

39. Determining whether a tribunal exercises judicial or quasi-judicial functions requires considering a number of factors, including whether it involves adversarial-type processes, and whether the decision or order directly or indirectly affect the rights and obligations of a person.

> ***Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, para. 8** **[Tab 15, P681]**
>
> ***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), para. 60** **[Tab 6, P454]**

40. The presence of a provision in the enabling statute of a tribunal that allows the tribunal to determine that proceedings may be held in camera clarifies that the proceedings are presumptively open to the public.

> ***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), para. 61** **[Tab 6, P455]**

(iv) The open court principle applies to the Agency

41. In the *Tenenbaum v. Air Canada* case, the Agency correctly concluded after a very thorough analysis that when the Agency adjudicates complaints, it acts as a quasi-judicial tribunal, and as such, it is bound by the open court principle. In the same decision, the Agency also noted that:

> [...] section 23 of the General Rules provides that any document filed in respect of any proceeding will be placed on its public record, unless the person filing the document makes a claim for its confidentiality. The person making the claim must indicate the reasons for the claim. The record of the proceeding will therefore be public unless a claim for confidentiality has been accepted.
>
> [Emphasis added.]

***Tenenbaum v. Air Canada*, CTA Decision No. 219-A-2009, paras. 45-46** **[Tab 16, P689]**

42. The Agency's conclusions in *Tenenbaum* are further supported by the observation that subsection 17(b) of the *Canada Transportation Act* allows the Agency to make rules with respect to the circumstances in which hearings may be held in private. As noted in *El-Helou*, *supra*, such provisions clarify that the proceedings are presumptively open to the public.

***Canada Transportation Act*, s. 17(b)** **[App. "A", P242]**

***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), para. 61** **[Tab 6, P455]**

43. Lukács adopts the aforementioned conclusions of the Agency in *Tenenbaum* as his own position, and submits that members of the public are entitled to view all documents in tribunal files of the Agency in their entirety, with the exception of documents that are subject to a confidentiality order of the Agency (that is, a decision accepting a claim for confidentiality).

(v) Claims of confidentiality are to be decided by Members

44. Deciding whether a particular document or a portion thereof is to be granted confidentiality requires the decision-maker to apply the law, that is, the *Dagenais/Mentuck* test, to the facts. The power to make such decisions with respect to tribunal files of the Agency stems from the Agency's powers to control its proceedings and subsection 17(b) of the *Canada Transportation Act*. These powers have nothing to with the *Access to Information Act* or the *Privacy Act*.

***Canada Transportation Act*, s. 17(b)** **[App. "A", P242]**

45. Thus, decisions with respect to confidentiality of documents contained in tribunal files of the Agency are of a judicial or quasi-judicial nature, and not of an administrative or executive one. As such, the power to make such decisions must be exercised by the Agency, consisting of the Members (and temporary members) who are authorized to make orders and decisions.

***Canada Transportation Act*, ss. 7 and 19** **[App. "A", P239, P242]**

46. Section 73 of the *Access to Information Act* and the *Privacy Act* only permits delegation of administrative or executive powers, duties or functions of the head of the institute "under this Act," and do not authorize delegation of the Agency's judicial or quasi-judicial powers to control its own procedures and tribunal records, or to decide what matters will be heard in camera.

First Affidavit of Ms. Patrice Bellerose,
(sworn on May 23, 2014), Ex. "C"

47. Therefore, Agency Staff cannot be delegated the power to make decisions with respect to confidentiality of documents or portions thereof contained in the Agency's tribunal files, and these powers are reserved to Members of the Agency.

C. TRIBUNAL FILES FALL WITHIN THE EXCLUSIONS AND/OR EXCEPTIONS TO THE PRIVACY ACT

48. The Agency appears to claim that the *Privacy Act* prohibits the disclosure of "personal information" contained in the Agency's tribunal files, even if no confidentiality order was sought by any of the parties nor granted by Member(s) of the Agency.

Lukács Affidavit, Ex. "K" **[Tab 2K, P167]**

49. Lukács submits that the Agency's position is misguided in that it fails to recognize that the the Agency's tribunal files fall within the exclusions and/or exceptions to the *Privacy Act*.

(i) The "publicly available" exclusion and the "in accordance with any Act of Parliament or any regulation made thereunder" exception

50. Subsection 69(2) of the *Privacy Act* exempts personal information that is "publicly available" from the application of sections 7 and 8, while subparagraph 8(2)(b) permits disclosure for any purpose in accordance with legislation or regulation.

***Privacy Act*, R.S.C. 1985, c. P-21, ss. 69(2), 8(2)(b) [App. "A", P277, P273]**

51. Due to the open court principle, personal information that the Agency receives as part of its quasi-judicial functions is publicly available (unless a claim for confidentiality was granted). Thus, pursuant to s. 69(2) of the *Privacy Act*, personal information contained in the Agency's tribunal files is not subject to sections 7 and 8.

***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), para. 77** **[Tab 6, P461]**

52. The Agency is a statutory tribunal created by the *Canada Transportation Act* for the purpose of, among other things, carrying out quasi-judicial functions. The Agency's rules of procedures are regulations made under its enabling act. Both the Old Rules and the New Rules of the Agency require placing documents received by the Agency in the course of proceedings on "public record," unless a claim for confidentiality is made at the time of their filing.

New Rules, ss. 7(2), 31(2) **[App. "A", P248-P251]**
Old Rules, ss. 23(1), 23(6) **[App. "A", P257, P259]**

53. Therefore, disclosure of documents contained in the Agency's tribunal files, including any personal information that such documents may contain, is not only authorized, but explicitly required both by s. 2(b) of the *Charter*, and the Agency's Old and New Rules; hence, such disclosure is permitted by s. 8(2)(b) of the *Privacy Act*.

***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), paras. 69-71** **[Tab 6, P458-P459]**

(ii) The "use consistent with that purpose" exception

54. Subparagraph 8(2)(a) of the *Privacy Act* permits disclosure of personal information for the purpose for which the information was obtained or for a use consistent with that purpose.

***Privacy Act*, R.S.C. 1985, c. P-21, s. 8(2)(a)** **[App. "A", P273]**

55. Both the Agency's Old and New Rules require a party to a proceeding before the Agency to submit their complete address, telephone number, and all documents in support of their pleadings. These pieces of information are submitted by parties for the purpose of the adjudication by the Agency.

New Rules, ss. 18(1), 19, Schedules 5 and 6 **[App. "A", P249-P250, P254-P255]**
Old Rules, s. 40 **[App. "A", P262]**

56. Parties to adjudicative proceedings before the Agency are informed that the Agency is bound by the open court principle and that "all information filed with the Agency becomes part of the public record and may be made available for public viewing."

Lukács Affidavit, Ex. "I", p. 000079 **[Tab 2I, P121]**

57. Therefore, it is submitted that disclosure of information filed with the Agency in the course of adjudicative proceedings, by placing the documents on public record in their entirety, is consistent with the purpose for which the information was obtained.

***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), paras. 68, 71** **[Tab 6, P458-P459]**

(iii) Public interest in transparency

58. Subparagraph 8(2)(m)(i) of the *Privacy Act* also confers discretion to disclose personal information if 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)** **[App. "A", P274]**

59. In light of the role of the Agency as a quasi-judicial tribunal, there is an overwhelming public interest in the transparency of its proceedings through openness and public access.

***El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT), para. 72** **[Tab 6, P459]**

(iv) Conclusion with respect to the *Privacy Act*

60. In light of the foregoing, it is submitted that the *Privacy Act* does not limit access, pursuant to the open court principle, to documents in the tribunal files of the Agency, unless the documents are subject to a claim of confidentiality that was accepted by the Agency.

D. INAPPLICABILITY OF THE PRIVACY ACT: THE OAKES TEST

61. If the *Privacy Act* does limit the rights of the public, pursuant to the open court principle, to view documents in the tribunal files of the Agency (not subject to a confidentiality order), then these provisions of the *Privacy Act* infringe subsection 2(b) of the *Charter*, because the open court principle is a right protected by s. 2(b).

62. Thus, in this case, the Agency bears the onus of establishing that the impugned provisions are saved by s. 1 of the *Charter*. The Agency filed no affidavit evidence to discharge this burden of proof.

> ***Toronto Star Newspapers Ltd. v. Canada*, 2007 FC 128, para. 41** **[Tab 19, P748]**

63. The legal test for saving an infringing provision under s. 1 of the *Charter* is the *Oakes* test. The Supreme Court of Canada held that the *Dagenais/Mentuck* test requires neither more nor less than the *Oakes* test.

> ***A.B. v. Bragg Communications Inc.*, 2012 SCC 46, para. 16** **[Tab 1, P286]**

64. Thus, if a document (or personal information contained in a document) does not meet the *Dagenais/Mentuck* test for a confidentiality order, then restricting public access to the document cannot be justified pursuant to the *Oakes* test either.

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

66. Hence, if there are any provisions of the *Privacy Act* that purport to limit the rights of the public, pursuant to the open court principle, to view documents in the tribunal files of the Agency that are not subject to a confidentiality order, then these provisions are unconstitutional.

E. REMEDIES

(i) Mandamus

67. The Agency refused the request of Lukács for unredacted copies of the public documents in File No. M4120-3/13-05726, even though it was not subject to a confidentiality order. Lukács was provided only with redacted documents. The act of the redaction cannot be justified by the *Privacy Act*; even if it were, its extent cannot be justified (for example, the name or workplace contact information of counsel in an adjudicative proceeding is not personal information).

68. Lukács, whose s. 2(b) *Charter* rights were thus violated, is seeking a *mandamus* to enforce his open court principle rights. In *Apotex Inc. v. Canada*, this Honourable Court formulated eight requirements that must be met before a *mandamus* can be issued.

> ***Apotex Inc. v. Canada (Attorney General) (C.A.)*, [1994] 1 F.C. 742, para. 45** **[Tab 2, P313-P314]**

69. It is unclear whether these requirements must be individually addressed in the case of enforcing constitutional rights, such as the open court principle rights, or if s. 24(1) of the *Charter* is a sufficient basis for granting a *mandamus*.

> ***Southam Inc. v.Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, para. 11** **[Tab 15, P682]**
>
> ***Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, para. 11 (citing para. 6 of the reasons of the Ontario Court of Appeal)** **[Tab 18, P730]**

70. Lukács submits that all eight requirements for a *mandamus* set out in *Apotex* are met in the present case:

(a) the open court principle imposes a public legal duty upon the Agency, as a tribunal in control of records of its proceedings, to grant public access to its tribunal records in their entirety, with the exception of documents that are subject to a confidentiality order;

(b) the duty is owed to Lukács as a member of the public, and also as an individual who frequently comments on air passenger rights in the media;

(c) Lukács made numerous demands, including a final demand, for performance, that is, for unredacted copies of documents in File No. M4120-3/13-05726 (which is not subject to any confidentiality order), but was refused;

(d) the duty imposed on the Agency by the open court principle is not discretionary (only granting a confidentiality order is);

(e) there is no other adequate avenue for Lukács to obtain unredacted copies of the documents in question;

(f) the order will have a practical effect, namely, it will allow Lukács to obtain unredacted copies of the documents sought, which the Agency has refused to provide;

(g) there is no equitable bar to the relief sought; and

(h) since Lukács is seeking to enforce a constitutional right, the “balance of convenience” is clearly in favour of issuing an order.

(ii) Declarations

71. Lukács is challenging not only the Agency's actions with respect to his request to view File No. M4120-3/13-05726, but also the Agency's practices with respect to requests made pursuant to the open court principle. The reason for this broader challenge is that it would not be a good use of judicial resources if members of the public had to make an application for judicial review to this Honourable Court every time they wanted to view a public file of the Agency.

72. As the facts of the present case reveal, allowing the public to view only redacted documents in the Agency's tribunal files, even in the absence of a confidentiality order, is the *modus operandi* of the Agency. (Moreover, decisions as to what to redact is made by Agency Staff, who are not Members.) For the reasons set out above, this practice is inconsistent with the open court principle and s. 2(b) of the *Charter* and the enabling statute of the Agency. Such unconstitutional practices have been cured in *Southam* by a combination of a prohibition and a *mandamus*.

> ***Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, para. 11** **[Tab 15, P682]**

73. In the case of the Agency, the issue does not appear to be so much whether the open court principle applies to the Agency, but rather the extent of the duty it imposes on the Agency, and whether the *Privacy Act* affects this duty in any way.

74. Thus, guidance from this Honourable Court in the form of a declaration of the rights of members of the public, the duties of the Agency, and the state of the law with respect to the *Privacy Act* exclusions and exemptions might be sufficient to ensure that the Agency amends its practices.

(iii) Constitutional remedy with respect to the *Privacy Act*

75. As an alternative argument, Lukács submits that if there are any provisions of the *Privacy Act* that purport to limit open court principle rights of the public to view tribunal files of the Agency that are not subject to a confidentiality order, then these provisions are unconstitutional.

76. Lukács submits that in these circumstances the appropriate constitutional remedy, if such is necessary, is to "read down" the *Privacy Act* to apply only to confidential documents in the Agency's tribunal files, and to be inapplicable with respect to those documents that are not subject to a confidentiality order.

***Ruby v. Canada (Solicitor General)*, 2002 SCC 75, para. 60** **[Tab 12, P587]**

F. COSTS

77. The present application is of the nature of public interest litigation, because it raises a constitutional question that relates to the transparency of the administration of justice. The application is not frivolous; indeed, Webb, J.A. dismissed the Agency's motion to quash the application.

> ***Lukács v. Canadian Transportation Agency*, 2014 FCA 205** **[Tab 9, P519]**

78. Lukács is seeking disbursements and a moderate allowance for the considerable amount of time and effort he devoted to the present application.

> ***Sherman v. Canada (Minister of National Revenue)*, 2004 FCA 29** **[Tab 14, P669]**

79. In *Lukács v. Canada (Transportation Agency)*, this Honourable Court awarded the appellant disbursements even though the appeal was dismissed:

> In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.
>
> ***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, para. 62** **[Tab 8, P518]**

80. If Lukács is not successful on the present application, he is asking the Honourable Court to exercise its discretion by not awarding costs against him, and by ordering the Agency to pay Lukács his disbursements.

PART IV – ORDER SOUGHT

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

(a) granting a *mandamus*, directing the Canadian Transportation Agency to provide the Applicant with unredacted copies of the documents in File No. M4120-3/13-05726, or otherwise allow the Applicant and/or others on his behalf to view unredacted copies of these documents;

(b) declaring that adjudicative proceedings before the Canadian Transportation Agency are subject to the constitutionally protected open-court principle;

(c) declaring 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 rules;

(d) declaring that members of the public are entitled to view all information, including but not limited to documents and submissions, provided to the Canadian Transportation Agency in the course of adjudicative proceedings, unless confidentiality was sought and granted in accordance with the Agency's rules;

(e) declaring that information provided to the Canadian Transportation Agency in the course of adjudicative proceedings falls within the exceptions of subsections 69(2) and/or 8(2)(a) and/or 8(2)(b) and/or 8(2)(m) of the *Privacy Act*, R.S.C. 1985, c. P-21;

(f) in the alternative, declaring 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*;

(g) declaring 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;

(h) granting disbursements and a moderate allowance for the time and effort the Applicant devoted to the present application; and

(i) such further and other relief or directions as the Applicant may request and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 30, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

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Applicant

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Canadian Charter of Rights and Freedoms,
ss. 2(b) and 24(1)

Canada Transportation Act, S.C. 1996, c. 10,
ss. 1-41

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings),
S.O.R./2014-104, ss. 7(2), 31(2)

Canadian Transportation Agency General Rules,
S.O.R./2005-35, ss. 23(1), 23(6)

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

Federal Courts Rules, S.O.R./98-106,
s. 81

Privacy Act, R.S.C. 1985, c. P-21
ss. 8(2)(a), 8(2)(b), 8(2)(m)(i), 69(2)

CASE LAW

A.B. v. Bragg Communications Inc., 2012 SCC 46

Apotex Inc. v. Canada (Attorney General) (C.A.),
[1994] 1 F.C. 742

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

Canadian Tire Corporation v. Canadian Bicycle Manufacturers Association, 2006 FCA 56

CASE LAW (CONTINUED)

Dunsmuir v. New Brunswick, 2008 SCC 9

El-Helou v. Courts Administration Service,
2012 CanLII 30713 (CA PSDPT)

Germain v. Saskatchewan (Automobile Injury Appeal Commission), 2009 SKQB 106

Lukács v. Canada (Transportation Agency), 2014 FCA 76

Lukács v. Canadian Transportation Agency, 2014 FCA 205

Nova Scotia (Attorney General) v. MacIntyre, [1982] 1 SCR 175

R. v. Canadian Broadcasting Corporation, 2010 ONCA 726

Ruby v. Canada (Solicitor General), 2002 SCC 75

Scott v. Scott, [1913] A.C. 417 (H.L)

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

Southam Inc. v. Canada (Minister of Employment and Immigration), [1987] 3 F.C. 329

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

Tipple v. Deputy Head (Department of Public Works and Government Services), 2009 PSLRB 110

Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41

Toronto Star Newspapers Ltd. v. Canada, 2007 FC 128

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Appendix “A”

Statutes and Regulations

CONSTITUTION ACT, 1982 [80]

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

---

[80] Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto, reads as follows:

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act 1982*.

LOI CONSTITUTIONNELLE DE 1982 [80]

PARTIE I

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

Garantie des droits et libertés

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Libertés fondamentales

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

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[80] Édictée comme l'annexe B de la *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.), entrée en vigueur le 17 avril 1982. Texte de la *Loi de 1982 sur le Canada*, à l'exception de l'annexe B :

ANNEXE A — SCHEDULE A

Loi donnant suite à une demande du Sénat et de la Chambre des communes du Canada

Sa Très Excellente Majesté la Reine, considérant :

qu'à la demande et avec le consentement du Canada, le Parlement du Royaume-Uni est invité à adopter une loi visant à donner effet aux dispositions énoncées ci-après et que le Sénat et la Chambre des communes du Canada réunis en Parlement ont présenté une adresse demandant à Sa Très Gracieuse Majesté de bien vouloir faire déposer devant le Parlement du Royaume-Uni un projet de loi à cette fin,

sur l'avis et du consentement des Lords spirituels et temporels et des Communes réunis en Parlement, et par l'autorité de celui-ci, édicte :

1. La *Loi constitutionnelle de 1982*, énoncée à l'annexe B, est édictée pour le Canada et y a force de loi. Elle entre en vigueur conformément à ses dispositions.

2. Les lois adoptées par le Parlement du Royaume-Uni après l'entrée en vigueur de la *Loi constitutionnelle de 1982* ne font pas partie du droit du Canada.

3. La partie de la version française de la présente loi qui figure à l'annexe A a force de loi au Canada au même titre que la version anglaise correspondante.

4. Titre abrégé de la présente loi : *Loi de 1982 sur le Canada*.

all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

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

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

cette instruction est celle de la minorité francophone ou anglophone de la province,

ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue. [93]

Continuité d'emploi de la langue d'instruction

(2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

Justification par le nombre

(3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province :

a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité;

b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

Recours

Recours en cas d'atteinte aux droits et libertés

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

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[93] L'alinéa 23(1)*a*) n'est pas en vigueur pour le Québec. Voir l'article 59, ci-dessous.

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to November 26, 2013

À jour au 26 novembre 2013

Last amended on June 26, 2013

Dernière modification le 26 juin 2013

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http://lois-laws.justice.gc.ca

S.C. 1996, c. 10

L.C. 1996, ch. 10

An Act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts as a consequence

Loi maintenant l'Office national des transports sous le nom d'Office des transports du Canada, codifiant et remaniant la Loi de 1987 sur les transports nationaux et la Loi sur les chemins de fer et modifiant ou abrogeant certaines lois

[*Assented to 29th May 1996*]

[*Sanctionnée le 29 mai 1996*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

SHORT TITLE

TITRE ABRÉGÉ

Short title

1. This Act may be cited as the *Canada Transportation Act*.

Titre abrégé

1. *Loi sur les transports au Canada*.

HER MAJESTY

SA MAJESTÉ

Binding on Her Majesty

2. This Act is binding on Her Majesty in right of Canada or a province.

Obligation de Sa Majesté

2. La présente loi lie Sa Majesté du chef du Canada ou d'une province.

APPLICATION

APPLICATION

Application generally

3. This Act applies in respect of transportation matters under the legislative authority of Parliament.

Champ d'application

3. La présente loi s'applique aux questions de transport relevant de la compétence législative du Parlement.

Conflicts

4. (1) Subject to subsection (2), where there is a conflict between any order or regulation made under this Act in respect of a particular mode of transportation and any rule, order or regulation made under any other Act of Parliament in respect of that particular mode of transportation, the order or regulation made under this Act prevails.

Incompatibilité

4. (1) Sous réserve du paragraphe (2), les arrêtés ou règlements pris sous le régime de la présente loi à l'égard d'un mode de transport l'emportent sur les règles, arrêtés ou règlements incompatibles pris sous celui d'autres lois fédérales.

Competition Act

(2) Subject to subsection (3), nothing in or done under the authority of this Act, other than Division IV of Part III, affects the operation of the *Competition Act*.

Loi sur la concurrence

(2) Sous réserve du paragraphe (3), les dispositions de la présente loi — sauf celles de la section IV de la partie III — et les actes accomplis sous leur régime ne portent pas atteinte à l'application de la *Loi sur la concurrence*.

International agreements respecting air services

(3) In the event of any inconsistency or conflict between an international agreement or convention respecting air services to which Canada is a party and the *Competition Act*, the provisions of the agreement or convention prevail to the extent of the inconsistency or conflict.

1996, c. 10, s. 4; 2007, c. 19, s. 1.

Conventions ou accords internationaux sur les services aériens

(3) En cas d'incompatibilité ou de conflit entre une convention internationale ou un accord international sur les services aériens dont le Canada est signataire et les dispositions de la *Loi sur la concurrence*, la convention ou l'accord l'emporte dans la mesure de l'incompatibilité ou du conflit.

1996, ch. 10, art. 4; 2007, ch. 19, art. 1.

NATIONAL TRANSPORTATION POLICY

Declaration

5. It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when

(*a*) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;

(*b*) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;

(*c*) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;

(*d*) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and

(*e*) governments and the private sector work together for an integrated transportation system.

1996, c. 10, s. 5; 2007, c. 19, s. 2.

POLITIQUE NATIONALE DES TRANSPORTS

Déclaration

5. Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si :

a) la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;

b) la réglementation et les mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;

c) les prix et modalités ne constituent pas un obstacle abusif au trafic à l'intérieur du Canada ou à l'exportation des marchandises du Canada;

d) le système de transport est accessible sans obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience;

e) les secteurs public et privé travaillent ensemble pour le maintien d'un système de transport intégré.

1996, ch. 10, art. 5; 2007, ch. 19, art. 2.

INTERPRETATION

Definitions

6. In this Act,

"Agency" «*Office*»

"Agency" means the Canadian Transportation Agency continued by subsection 7(1);

"carrier" «*transporteur*»

"carrier" means a person who is engaged in the transport of goods or passengers by any means of transport under the legislative authority of Parliament;

"Chairperson" «*président*»

"Chairperson" means the Chairperson of the Agency;

"goods" «*marchandises*»

"goods" includes rolling stock and mail;

"member" «*membre*»

"member" means a member of the Agency appointed under paragraph 7(2)(*a*) and includes a temporary member;

"Minister" «*ministre*»

"Minister" means the Minister of Transport;

"rolling stock" «*matériel roulant*»

"rolling stock" includes a locomotive, engine, motor car, tender, snow-plough, flanger and any car or railway equipment that is designed for movement on its wheels on the rails of a railway;

"shipper" «*expéditeur*»

"shipper" means a person who sends or receives goods by means of a carrier or intends to do so;

"sitting day of Parliament" «*jour de séance*»

"sitting day of Parliament" means a day on which either House of Parliament sits;

"superior court" «*cour supérieure*»

"superior court" means

(*a*) in Ontario, the Superior Court of Justice,

(*b*) in Quebec, the Superior Court,

(*c*) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(*d*) in Nova Scotia, British Columbia, Yukon and the Northwest Territories, the Supreme Court,

(*e*) in Prince Edward Island and Newfoundland, the Trial Division of the Supreme Court, and

(*f*) in Nunavut, the Nunavut Court of Justice;

"temporary member" «*membre temporaire*»

"temporary member" means a temporary member of the Agency appointed under subsection 9(1);

DÉFINITIONS

Définitions

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

«cour supérieure»

«cour supérieure» "*superior court*"

a) La Cour supérieure de justice de l'Ontario;

b) la Cour supérieure du Québec;

c) la Cour du Banc de la Reine du Nouveau-Brunswick, du Manitoba, de la Saskatchewan ou de l'Alberta;

d) la Cour suprême de la Nouvelle-Écosse, de la Colombie-Britannique, du Yukon ou des Territoires du Nord-Ouest;

e) la section de première instance de la Cour suprême de l'Île-du-Prince-Édouard ou de Terre-Neuve;

f) la Cour de justice du Nunavut.

«expéditeur» Personne qui expédie des marchandises par transporteur, ou en reçoit de celui-ci, ou qui a l'intention de le faire.

«expéditeur» "*shipper*"

«jour de séance» Tout jour où l'une ou l'autre chambre du Parlement siège.

«jour de séance» "*sitting day of Parliament*"

«marchandises» Y sont assimilés le matériel roulant et le courrier.

«marchandises» "*goods*"

«matériel roulant» Toute sorte de voitures et de matériel muni de roues destinés à servir sur les rails d'un chemin de fer, y compris les locomotives, machines actionnées par quelque force motrice, voitures automotrices, tenders, chasse-neige et *flangers*.

«matériel roulant» "*rolling stock*"

«membre» Tout membre de l'Office nommé en vertu du paragraphe 7(2) et tout membre temporaire de l'Office.

«membre» "*member*"

«membre temporaire» Tout membre temporaire de l'Office nommé en vertu du paragraphe 9(1).

«membre temporaire» "*temporary member*"

«ministre» Le ministre des Transports.

«ministre» "*Minister*"

«Office» L'Office des transports du Canada, maintenu par le paragraphe 7(1).

«Office» "*Agency*"

«président» Le président de l'Office.

«président» "*Chairperson*"

«transporteur» Personne se livrant au transport de passagers ou de marchandises par un moyen

«transporteur» "*carrier*"

"Vice-Chairperson" «*vice-président*»

"Vice-Chairperson" means the Vice-Chairperson of the Agency.

1996, c. 10, s. 6; 1998, c. 30, ss. 13(F), 15(E); 1999, c. 3, s. 20; 2002, c. 7, s. 114(E).

de transport assujetti à la compétence législative du Parlement.

«vice-président» Le vice-président de l'Office.

1996, ch. 10, art. 6; 1998, ch. 30, art. 13(F) et 15(A); 1999, ch. 3, art. 20; 2002, ch. 7, art. 114(A).

«vice-président» "*Vice-Chairperson*"

PART I

ADMINISTRATION

Canadian Transportation Agency

Continuation and Organization

PARTIE I

ADMINISTRATION

Office des transports du Canada

Maintien et composition

Agency continued

7. (1) The agency known as the National Transportation Agency is continued as the Canadian Transportation Agency.

Maintien de l'Office

7. (1) L'Office national des transports est maintenu sous le nom d'Office des transports du Canada.

Composition of Agency

(2) The Agency shall consist of not more than five members appointed by the Governor in Council, and such temporary members as are appointed under subsection 9(1), each of whom must, on appointment or reappointment and while serving as a member, be a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

Composition

(2) L'Office est composé, d'une part, d'au plus cinq membres nommés par le gouverneur en conseil et, d'autre part, des membres temporaires nommés en vertu du paragraphe 9(1). Tout membre doit, du moment de sa nomination, être et demeurer un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.

Chairperson and Vice-Chairperson

(3) The Governor in Council shall designate one of the members appointed under paragraph (2)(*a*) to be the Chairperson of the Agency and one of the other members appointed under that paragraph to be the Vice-Chairperson of the Agency.

Président et vice-président

(3) Le gouverneur en conseil choisit le président et le vice-président de l'Office parmi les membres nommés en vertu du paragraphe (2).

1996, c. 10, s. 7; 2001, c. 27, s. 221; 2007, c. 19, s. 3.

1996, ch. 10, art. 7; 2001, ch. 27, art. 221; 2007, ch. 19, art. 3.

Term of members

8. (1) Each member appointed under paragraph 7(2)(*a*) shall hold office during good behaviour for a term of not more than five years and may be removed for cause by the Governor in Council.

Durée du mandat

8. (1) Les membres nommés en vertu du paragraphe 7(2) le sont à titre inamovible pour un mandat d'au plus cinq ans, sous réserve de révocation motivée par le gouverneur en conseil.

Reappointment

(2) A member appointed under paragraph 7(2)(*a*) is eligible to be reappointed on the expiration of a first or subsequent term of office.

Renouvellement du mandat

(2) Les mandats sont renouvelables.

Continuation in office

(3) If a member appointed under subsection 7(2) ceases to hold office, the Chairperson may authorize the member to continue to hear any matter that was before the member on the expiry of the member's term of office and that member is deemed to be a member of the Agency, but that person's status as a member does not preclude the appointment of up to five members under subsection 7(2) or up to three temporary members under subsection 9(1).

Continuation de mandat

(3) Le président peut autoriser un membre nommé en vertu du paragraphe 7(2) qui cesse d'exercer ses fonctions à continuer, après la date d'expiration de son mandat, à entendre toute question dont il se trouve saisi à cette date. À cette fin, le membre est réputé être membre de l'Office mais son statut n'empêche pas la nomination de cinq membres en vertu du paragraphe 7(2) ou de trois membres temporaires en vertu du paragraphe 9(1).

1996, c. 10, s. 8; 2007, c. 19, s. 4.

1996, ch. 10, art. 8; 2007, ch. 19, art. 4.

Temporary members

9. (1) The Minister may appoint temporary members of the Agency from the roster of individuals established by the Governor in Council under subsection (2).

Membres temporaires

9. (1) Le ministre peut nommer des membres à titre temporaire à partir d'une liste de personnes établie par le gouverneur en conseil au titre du paragraphe (2).

Roster

(2) The Governor in Council may appoint any individual to a roster of candidates for the purpose of subsection (1).

Liste

(2) Pour l'application du paragraphe (1), le gouverneur en conseil peut nommer les personnes à inscrire sur la liste de candidats qui y est prévue.

Maximum number

(3) Not more than three temporary members shall hold office at any one time.

Nombre maximal

(3) L'Office ne peut compter plus de trois membres temporaires.

Term of temporary members

(4) A temporary member shall hold office during good behaviour for a term of not more than one year and may be removed for cause by the Governor in Council.

Durée du mandat

(4) Les membres temporaires sont nommés à titre inamovible pour un mandat d'au plus un an, sous réserve de révocation motivée par le gouverneur en conseil.

No reappointment

(5) A person who has served two consecutive terms as a temporary member is not, during the twelve months following the completion of the person's second term, eligible to be reappointed to the Agency as a temporary member.

Renouvellement du mandat

(5) Les membres temporaires ayant occupé leur charge pendant deux mandats consécutifs ne peuvent, dans les douze mois qui suivent, recevoir un nouveau mandat.

Members — conflicts of interest

10. (1) A member appointed under paragraph 7(2)(*a*) shall not, directly or indirectly, as owner, shareholder, director, officer, partner or otherwise,

(*a*) be engaged in a transportation undertaking or business; or

(*b*) have an interest in a transportation undertaking or business or an interest in the manufacture or distribution of transportation plant or equipment, unless the distribution is merely incidental to the general merchandising of goods.

Conflits d'intérêts : membres

10. (1) Les membres nommés en vertu du paragraphe 7(2) ne peuvent, directement ou indirectement, à titre de propriétaire, d'actionnaire, d'administrateur, de dirigeant, d'associé ou autre :

a) s'occuper d'une entreprise ou d'une exploitation de transport;

b) avoir des intérêts dans une entreprise ou exploitation de transport ou dans la fabrication ou la distribution de matériel de transport, sauf si la distribution n'a qu'un caractère secondaire par rapport à l'ensemble des activités de commercialisation des marchandises.

Temporary members may not hold other office

(2) During the term of office of a temporary member, the member shall not accept or hold any office or employment that is inconsistent with the member's duties under this Act.

Conflits d'intérêts : membres temporaires

(2) Les membres temporaires ne peuvent accepter ni occuper une charge ou un emploi incompatible avec les attributions que leur confère la présente loi.

Disposal of conflict of interest

(3) Where an interest referred to in subsection (1) vests in a member appointed under paragraph 7(2)(*a*) for the benefit of the member by will or succession, the interest shall, within three months after the vesting, be absolutely disposed of by the member.

Cession d'intérêts

(3) Le membre nommé en vertu du paragraphe 7(2) qui est investi d'intérêts visés au paragraphe (1) par l'ouverture d'une succession doit les céder entièrement dans les trois mois suivant la saisine.

Remuneration

Rémunération

Remuneration

11. (1) A member shall be paid such remuneration and allowances as may be fixed by the Governor in Council.

Rémunération et indemnités

11. (1) Les membres reçoivent la rémunération et touchent les indemnités que peut fixer le gouverneur en conseil.

Expenses

(2) Each member is entitled to be paid reasonable travel and living expenses incurred by the member in carrying out duties under this Act or any other Act of Parliament while absent from the member's ordinary place of work.

Frais de déplacement

(2) Les membres ont droit aux frais de déplacement et de séjour entraînés par l'exercice, hors de leur lieu de travail habituel, des fonctions qui leur sont confiées en application de la présente loi ou de toute autre loi fédérale.

Members — retirement pensions

12. (1) A member appointed under paragraph 7(2)(*a*) is deemed to be employed in the public service for the purposes of the *Public Service Superannuation Act*.

Pensions de retraite des membres

12. (1) Les membres nommés en vertu du paragraphe 7(2) sont réputés appartenir à la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*.

Temporary members not included

(2) A temporary member is deemed not to be employed in the public service for the purposes of the *Public Service Superannuation Act* unless the Governor in Council, by order, deems the member to be so employed for those purposes.

Membres temporaires

(2) Sauf décret prévoyant le contraire, les membres temporaires sont réputés ne pas appartenir à la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*.

Accident compensation

(3) For the purposes of the *Government Employees Compensation Act* and any regulation made pursuant to section 9 of the *Aeronautics Act*, a member is deemed to be an employee in the federal public administration.

Indemnisation

(3) Pour l'application de la *Loi sur l'indemnisation des agents de l'État* et des règlements pris en vertu de l'article 9 de la *Loi sur l'aéronautique*, les membres sont réputés appartenir à l'administration publique fédérale.

1996, c. 10, s. 12; 2003, c. 22, ss. 224(E), 225(E).

1996, ch. 10, art. 12; 2003, ch. 22, art. 224(A) et 225(A).

Chairperson

Président

Duties of Chairperson

13. The Chairperson is the chief executive officer of the Agency and has the supervision over and direction of the work of the members and its staff, including the apportionment of work among the members and the assignment of members to deal with any matter before the Agency.

Pouvoirs et fonctions

13. Le président est le premier dirigeant de l'Office; à ce titre, il assure la direction et le contrôle de ses travaux et la gestion de son personnel et procède notamment à la répartition des tâches entre les membres et à la désignation de ceux qui traitent des questions dont est saisi l'Office.

Absence of Chairperson

14. In the event of the absence or incapacity of the Chairperson or if the office of Chairperson is vacant, the Vice-Chairperson has all the powers and shall perform all the duties and functions of the Chairperson.

Intérim du président

14. En cas d'absence ou d'empêchement du président ou de vacance de son poste, la présidence est assumée par le vice-président.

Absence of both Chairperson and Vice-Chairperson

15. The Chairperson may authorize one or more of the members to act as Chairperson for the time being if both the Chairperson and Vice-Chairperson are absent or unable to act.

Choix d'un autre intérimaire

15. Le président peut habiliter un ou plusieurs membres à assumer la présidence en prévision de son absence ou de son empêchement, et de ceux du vice-président.

Quorum

Quorum

Quorum

16. (1) Subject to the Agency's rules, two members constitute a quorum.

Quorum

16. (1) Sous réserve des règles de l'Office, le quorum est constitué de deux membres.

Quorum lost because of incapacity of member

(2) Where a member who is conducting a hearing in respect of a matter becomes incapacitated or dies during the hearing or after the conclusion of the hearing but before rendering a decision and quorum is lost as a result, the

Perte de quorum due à un décès ou un empêchement

(2) En cas de décès ou d'empêchement d'un membre chargé d'une audience, pendant celle-ci ou entre la fin de l'audience et le prononcé de la décision, et de perte de quorum résultant de ce fait, le président peut, avec le consente-

Chairperson may, with the consent of all the parties to the hearing,

(*a*) if the incapacity or death occurs during the hearing, authorize another member to continue the hearing and render a decision, or

(*b*) if the incapacity or death occurs after the conclusion of the hearing, authorize another member to examine the evidence presented at the hearing and render a decision,

and in either case, the quorum in respect of the matter is deemed never to have been lost.

ment des parties à l'audience, si le fait survient :

a) pendant l'audience, habiliter un autre membre à continuer l'audience et à rendre la décision;

b) après la fin de l'audience, habiliter un autre membre à examiner la preuve présentée à l'audience et à rendre la décision.

Dans l'une ou l'autre de ces éventualités, le quorum est réputé avoir toujours existé.

Quorum not lost because of incapacity of member

(3) Where a member who is conducting a hearing in respect of a matter becomes incapacitated or dies during the hearing and quorum is not lost as a result, another member may be assigned by the Chairperson to participate in the hearing and in the rendering of a decision.

Décès ou empêchement sans perte de quorum

(3) En cas de décès ou d'empêchement, pendant une audience, du membre qui en est chargé, sans perte de quorum résultant de ce fait, le président peut habiliter un autre membre à participer à l'audience et au prononcé de la décision.

Rules

Rules

17. The Agency may make rules respecting

(*a*) the sittings of the Agency and the carrying on of its work;

(*b*) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and

(*c*) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament.

Règles

Règles

17. L'Office peut établir des règles concernant :

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

Head Office

Head office

18. (1) The head office of the Agency shall be in the National Capital Region described in the schedule to the *National Capital Act*.

Residence of members

(2) The members appointed under subsection 7(2) shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within any distance of it that the Governor in Council determines.

1996, c. 10, s. 18; 2007, c. 19, s. 5; 2008, c. 21, s. 61.

Siège de l'Office

Siège

18. (1) Le siège de l'Office est fixé dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale*.

Lieu de résidence des membres

(2) Les membres nommés au titre du paragraphe 7(2) résident dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale* ou dans la périphérie de cette région définie par le gouverneur en conseil.

1996, ch. 10, art. 18; 2007, ch. 19, art. 5; 2008, ch. 21, art. 61.

Staff

Secretary, officers and employees

19. The Secretary of the Agency and the other officers and employees that are necessary for the proper conduct of the business of the

Personnel

Secrétaire et personnel

19. Le secrétaire de l'Office et le personnel nécessaire à l'exécution des travaux de celui-ci

Agency shall be appointed in accordance with the *Public Service Employment Act*.

sont nommés conformément à la *Loi sur l'emploi dans la fonction publique*.

Technical experts

20. The Agency may appoint and, subject to any applicable Treasury Board directive, fix the remuneration of experts or persons who have technical or special knowledge to assist the Agency in an advisory capacity in respect of any matter before the Agency.

Experts

20. L'Office peut nommer des experts ou autres spécialistes compétents pour le conseiller sur des questions dont il est saisi, et, sous réserve des instructions du Conseil du Trésor, fixer leur rémunération.

Records

Registre

Duties of Secretary

21. (1) The Secretary of the Agency shall

(*a*) maintain a record in which shall be entered a true copy of every rule, order, decision and regulation of the Agency and any other documents that the Agency requires to be entered in it; and

(*b*) keep at the Agency's office a copy of all rules, orders, decisions and regulations of the Agency and the records of proceedings of the Agency.

Attributions du secrétaire

21. (1) Le secrétaire est chargé :

a) de la tenue du registre du texte authentique des règles, arrêtés, règlements et décisions de l'Office et des autres documents dont celui-ci exige l'enregistrement;

b) de la conservation, dans les bureaux de l'Office, d'un exemplaire des règles, arrêtés, règlements, décisions et procès-verbaux de celui-ci.

Entries in record

(2) The entry of a document in the record referred to in paragraph (1)(*a*) shall constitute the original record of the document.

Original

(2) Le document enregistré en application de l'alinéa (1)*a*) en constitue l'original.

Copies of documents obtainable

22. On the application of any person, and on payment of a fee fixed by the Agency, the Secretary of the Agency or, in the absence of the Secretary, the person assigned by the Chairperson to act in the absence shall issue under the seal of the Agency to the applicant a certified copy of any rule, order, regulation or any other document that has been issued by the Agency.

Copies conformes

22. Le secrétaire de l'Office, ou la personne chargée par le président d'assurer son intérim, délivre sous le sceau de l'Office, sur demande et contre paiement des droits fixés par celui-ci, des copies certifiées conformes des règles, arrêtés, règlements ou autres documents de l'Office.

Judicial notice of documents

23. (1) Judicial notice shall be taken of a document issued by the Agency under its seal without proof of the signature or official character of the person appearing to have signed it.

Admission d'office

23. (1) Les documents délivrés par l'Office sous son sceau sont admis d'office en justice sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

Evidence of deposited documents

(2) A document purporting to be certified by the Secretary of the Agency as being a true copy of a document deposited or filed with or approved by the Agency, or any portion of such a document, is evidence that the document is so deposited, filed or approved and, if stated in the certificate, of the time when the document was deposited, filed or approved.

Preuve

(2) Le document censé être en tout ou en partie la copie certifiée conforme, par le secrétaire de l'Office, d'un document déposé auprès de celui-ci, ou approuvé par celui-ci, fait foi du dépôt ou de l'approbation ainsi que de la date, si elle est indiquée sur la copie, de ce dépôt ou de cette approbation.

Powers of Agency

Attributions de l'Office

Policy governs Agency

24. The powers, duties and functions of the Agency respecting any matter that comes within its jurisdiction under an Act of Parliament

Directives

24. Les attributions de l'Office relatives à une affaire dont il est saisi en application d'une loi fédérale sont exercées en conformité avec

shall be exercised and performed in conformity with any policy direction issued to the Agency under section 43.

les directives générales qui lui sont données en vertu de l'article 43.

Agency powers in general

25. The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

Pouvoirs généraux

25. L'Office a, à toute fin liée à l'exercice de sa compétence, la comparution et l'interrogatoire des témoins, la production et l'examen des pièces, l'exécution de ses arrêtés ou règlements et la visite d'un lieu, les attributions d'une cour supérieure.

Power to award costs

25.1 (1) Subject to subsections (2) to (4), the Agency has all the powers that the Federal Court has to award costs in any proceeding before it.

Pouvoirs relatifs à l'adjudication des frais

25.1 (1) Sous réserve des paragraphes (2) à (4), l'Office a tous les pouvoirs de la Cour fédérale en ce qui a trait à l'adjudication des frais relativement à toute procédure prise devant lui.

Costs may be fixed or taxed

(2) Costs may be fixed in any case at a sum certain or may be taxed.

Frais fixés ou taxés

(2) Les frais peuvent être fixés à une somme déterminée, ou taxés.

Payment

(3) The Agency may direct by whom and to whom costs are to be paid and by whom they are to be taxed and allowed.

Paiement

(3) L'Office peut ordonner par qui et à qui les frais doivent être payés et par qui ils doivent être taxés et alloués.

Scale

(4) The Agency may make rules specifying a scale under which costs are to be taxed.

Tarif

(4) L'Office peut, par règle, fixer un tarif de taxation des frais.

Compelling observance of obligations

26. The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

Pouvoir de contrainte

26. L'Office peut ordonner à quiconque d'accomplir un acte ou de s'en abstenir lorsque l'accomplissement ou l'abstention sont prévus par une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

Relief

27. (1) On an application made to the Agency, the Agency may grant the whole or part of the application, or may make any order or grant any further or other relief that to the Agency seems just and proper.

Réparation

27. (1) L'Office peut acquiescer à tout ou partie d'une demande ou prendre un arrêté, ou, s'il l'estime indiqué, accorder une réparation supplémentaire ou substitutive.

(2) and (3) [Repealed, 2008, c. 5, s. 1]

(2) et (3) [Abrogés, 2008, ch. 5, art. 1]

Amendments

(4) The Agency may, on terms or otherwise, make or allow any amendments in any proceedings before it.

Modification

(4) L'Office peut, notamment sous condition, apporter ou autoriser toute modification aux procédures prises devant lui.

(5) [Repealed, 2008, c. 5, s. 1]

1996, c. 10, s. 27; 2008, c. 5, s. 1.

(5) [Abrogé, 2008, ch. 5, art. 1]

1996, ch. 10, art. 27; 2008, ch. 5, art. 1.

Orders

28. (1) The Agency may in any order direct that the order or a portion or provision of it shall come into force

(*a*) at a future time,

(*b*) on the happening of any contingency, event or condition specified in the order, or

(*c*) on the performance, to the satisfaction of the Agency or a person named by it, of any

Arrêtés

28. (1) L'Office peut, dans ses arrêtés, prévoir une date déterminée pour leur entrée en vigueur totale ou partielle ou subordonner celle-ci à la survenance d'un événement, à la réalisation d'une condition ou à la bonne exécution, appréciée par lui-même ou son délégué, d'obligations qu'il aura imposées à l'intéressé; il peut en outre y prévoir une date déterminée pour leur cessation d'effet totale ou partielle ou

terms that the Agency may impose on an interested party,

and the Agency may direct that the whole or any portion of the order shall have force for a limited time or until the happening of a specified event.

subordonner celle-ci à la survenance d'un événement.

Interim orders

(2) The Agency may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

Arrêtés provisoires

(2) L'Office peut prendre un arrêté provisoire et se réserver le droit de compléter sa décision lors d'une audience ultérieure ou d'une nouvelle demande.

Time for making decisions

29. (1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.

Délai

29. (1) Sauf indication contraire de la présente loi ou d'un règlement pris en vertu du paragraphe (2) ou accord entre les parties sur une prolongation du délai, l'Office rend sa décision sur toute affaire dont il est saisi avec toute la diligence possible dans les cent vingt jours suivant la réception de l'acte introductif d'instance.

Period for specified classes

(2) The Governor in Council may, by regulation, prescribe periods of less than one hundred and twenty days within which the Agency shall make its decision in respect of such classes of proceedings as are specified in the regulation.

Délai plus court

(2) Le gouverneur en conseil peut, par règlement, imposer à l'Office un délai inférieur à cent vingt jours pour rendre une décision à l'égard des catégories d'affaires qu'il indique.

Pending proceedings

30. The fact that a suit, prosecution or proceeding involving a question of fact is pending in any court does not deprive the Agency of jurisdiction to hear and determine the same question of fact.

Affaire en instance

30. L'Office a compétence pour statuer sur une question de fait, peu importe que celle-ci fasse l'objet d'une poursuite ou autre instance en cours devant un tribunal.

Fact finding is conclusive

31. The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

Décision définitive

31. La décision de l'Office sur une question de fait relevant de sa compétence est définitive.

Review of decisions and orders

32. The Agency may review, rescind or vary any decision or order made by it or may re-hear any application before deciding it if, in the opinion of the Agency, since the decision or order or the hearing of the application, there has been a change in the facts or circumstances pertaining to the decision, order or hearing.

Révision, annulation ou modification de décisions

32. L'Office peut réviser, annuler ou modifier ses décisions ou arrêtés, ou entendre de nouveau une demande avant d'en décider, en raison de faits nouveaux ou en cas d'évolution, selon son appréciation, des circonstances de l'affaire visée par ces décisions, arrêtés ou audiences.

Enforcement of decision or order

33. (1) A decision or order of the Agency may be made an order of the Federal Court or of any superior court and is enforceable in the same manner as such an order.

Homologation

33. (1) Les décisions ou arrêtés de l'Office peuvent être homologués par la Cour fédérale ou une cour supérieure; le cas échéant, leur exécution s'effectue selon les mêmes modalités que les ordonnances de la cour saisie.

Procedure

(2) To make a decision or order an order of a court, either the usual practice and procedure of the court in such matters may be followed or the Secretary of the Agency may file with the

Procédure

(2) L'homologation peut se faire soit selon les règles de pratique et de procédure de la cour saisie applicables en l'occurrence, soit au moyen du dépôt, auprès du greffier de la cour

registrar of the court a certified copy of the decision or order, signed by the Chairperson and sealed with the Agency's seal, at which time the decision or order becomes an order of the court.

par le secrétaire de l'Office, d'une copie certifiée conforme de la décision ou de l'arrêté en cause, signée par le président et revêtue du sceau de l'Office.

Effect of variation or rescission

(3) Where a decision or order that has been made an order of a court is rescinded or varied by a subsequent decision or order of the Agency, the order of the court is deemed to have been cancelled and the subsequent decision or order may be made an order of the court.

(3) Les décisions ou arrêtés de l'Office qui annulent ou modifient des décisions ou arrêtés déjà homologués par une cour sont réputés annuler ces derniers et peuvent être homologués selon les mêmes modalités.

Annulation ou modification

Option to enforce

(4) The Agency may, before or after one of its decisions or orders is made an order of a court, enforce the decision or order by its own action.

(4) L'Office peut toujours faire exécuter lui-même ses décisions ou arrêtés, même s'ils ont été homologués par une cour.

Faculté d'exécution

1996, c. 10, s. 33; 2002, c. 8, s. 122; 2006, c. 11, s. 17; 2007, c. 19, s. 6.

1996, ch. 10, art. 33; 2002, ch. 8, art. 122; 2006, ch. 11, art. 17; 2007, ch. 19, art. 6.

Fees

34. (1) The Agency may, by rule, fix the fees that are to be paid to the Agency in respect of applications made to it, including applications for licences or permits and applications for amendments to or for the renewal of licences or permits, and any other matters brought before or dealt with by the Agency.

34. (1) L'Office peut, par règle, établir les droits à lui verser relativement aux questions ou demandes dont il est saisi, notamment les demandes de licences ou de permis et les demandes de modification ou de renouvellement de ceux-ci.

Droits

Advance notice to Minister

(2) The Agency shall give the Minister notice of every rule proposed to be made under subsection (1).

(2) L'Office fait parvenir au ministre un avis relativement à toute règle qu'il entend prendre en vertu du paragraphe (1).

Préavis

Fees for witnesses

35. Every person summoned to attend before the Agency under this Part or before a person making an inquiry under this Part shall receive the fees and allowances for so doing that the Agency may, by regulation, prescribe.

35. Il est alloué à toute personne qui se rend à la convocation de l'Office ou d'un enquêteur, dans le cadre de la présente partie, les indemnités que l'Office peut fixer par règlement.

Indemnité des témoins

Approval of regulations required

36. (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.

36. (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.

Agrément du gouverneur en conseil

Advance notice of regulations

(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

Préavis au ministre

Mediation

Médiation

Request by parties

36.1 (1) If there is a dispute concerning a matter within the Agency's jurisdiction, all the parties to the dispute may, by agreement, make a request to the Agency for mediation. On receipt of the request, the Agency shall refer the dispute for mediation.

36.1 (1) Les parties entre lesquelles survient un différend sur toute question relevant de la compétence de l'Office peuvent d'un commun accord faire appel à la médiation de celui-ci. Le cas échéant, l'Office renvoie sans délai le différend à la médiation.

Demande des parties

Appointment of mediator

(2) When a dispute is referred for mediation, the Chairperson shall appoint one or two persons to mediate the dispute.

(2) En cas de renvoi à la médiation par l'Office, le président nomme une ou deux personnes pour procéder à celle-ci.

Nomination d'un médiateur

CANADA

CONSOLIDATION

CODIFICATION

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

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

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

Filing of Documents and Sending of Copy to Parties

Dépôt de documents et envoi de copies aux autres parties

Filing

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

Dépôt

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

Agency's public record

(2) All filed documents are placed on the Agency's public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document.

Archives publiques de l'Office

(2) Les documents déposés sont versés aux archives publiques de l'Office, sauf si la personne qui dépose le document dépose au même moment une requête de confidentialité, en vertu de l'article 31, à l'égard du document.

Copy to parties

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

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

(*b*) an application; or

(*c*) a position statement.

Copie aux autres parties

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

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

b) d'une demande;

c) d'un énoncé de position.

Means of transmission

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

Modes de transmission

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

Facsimile — cover page

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

Télécopieur — page couverture

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

Electronic transmission

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

Transmission électronique

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

tion from the Agency's record if the person fails to file the verification.

ne dépose pas l'attestation par affidavit ou par déclaration devant témoin.

Representation and Change of Contact Information

Représentation et changements des coordonnées

Representative not a member of the bar

16. A person that is represented in a dispute proceeding by a person that is not a member of the bar of a province must authorize that person to act on their behalf by filing the information referred to in Schedule 4.

Représentant — non-membre du barreau

16. La personne qui, dans le cadre d'une instance de règlement des différends, est représentée par une personne qui n'est membre du barreau d'aucune province dépose une autorisation en ce sens, qui comporte les éléments visés à l'annexe 4.

Change of contact information

17. A person must, if the contact information they provided to the Agency changes during the course of a dispute proceeding, provide their new contact information to the Agency and the parties without delay.

Changement des coordonnées

17. La personne qui a fourni ses coordonnées à l'Office et dont les coordonnées changent au cours d'une instance de règlement des différends fournit sans délai ses nouvelles coordonnées à l'Office et aux parties.

PLEADINGS

ACTES DE PROCÉDURE

Application

Demande

Filing of application

18. (1) Any application filed with the Agency must include the information referred to in Schedule 5.

Dépôt de la demande

18. (1) Toute demande déposée auprès de l'Office comporte les éléments visés à l'annexe 5.

Application complete

(2) If the application is complete, the parties are notified in writing that the application has been accepted.

Demande complète

(2) Si la demande est complète, les parties sont avisées par écrit de l'acceptation de la demande.

Incomplete application

(3) If the application is incomplete, the applicant is notified in writing and the applicant must provide the missing information within 20 business days after the date of the notice.

Demande incomplète

(3) Si la demande est incomplète, le demandeur en est avisé par écrit et dispose de vingt jours ouvrables suivant la date de l'avis pour la compléter.

Closure of file

(4) If the applicant fails to provide the missing information within the time limit, the file is closed.

Fermeture du dossier

(4) Si le demandeur ne complète pas la demande dans le délai imparti, le dossier est fermé.

New application

(5) An applicant whose file is closed may file a new application in respect of the same matter.

Nouvelle demande

(5) Le demandeur dont le dossier est fermé peut déposer à nouveau une demande relativement à la même affaire.

Answer

Filing of answer

19. A respondent may file an answer to the application. The answer must be filed within 15 business days after the date of the notice indicating that the application has been accepted and must include the information referred to in Schedule 6.

Réponse

Dépôt d'une réponse

19. Le défendeur qui souhaite déposer une réponse le fait dans les quinze jours ouvrables suivant la date de l'avis d'acceptation de la demande. La réponse comporte les éléments visés à l'annexe 6.

Reply

Filing of reply

20. (1) An applicant may file a reply to the answer. The reply must be filed within five business days after the day on which they receive a copy of the answer and must include the information referred to in Schedule 7.

Réplique

Dépôt d'une réplique

20. (1) Le demandeur qui souhaite déposer une réplique à la réponse le fait dans les cinq jours ouvrables suivant la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 7.

No new issues

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

Nouvelles questions

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

Intervention

Filing of intervention

21. (1) An intervener may file an intervention. The intervention must be filed within five business days after the day on which their request to intervene is granted by the Agency and must include the information referred to in Schedule 8.

Intervention

Dépôt de l'intervention

21. (1) L'intervenant qui souhaite déposer une intervention le fait dans les cinq jours ouvrables suivant la date à laquelle sa requête d'intervention a été accordée. L'intervention comporte les éléments visés à l'annexe 8.

Participation rights

(2) An intervener's participation is limited to the participation rights granted by the Agency.

Droits de participation

(2) La participation de l'intervenant se limite aux droits de participation que lui accorde l'Office.

Response to intervention

22. An applicant or a respondent that is adverse in interest to an intervener may file a response to the intervention. The response must be filed within five business days after the day on which they receive a copy of the intervention and must include the information referred to in Schedule 9.

Réponse à l'intervention

22. Le demandeur ou le défendeur qui a des intérêts opposés à ceux d'un intervenant et qui souhaite déposer une réponse à l'intervention le fait dans les cinq jours ouvrables suivant la date de réception de la copie de l'intervention. La réponse à l'intervention comporte les éléments visés à l'annexe 9.

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

No new issues

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

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

Nouvelles questions

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

Request for Confidentiality

Requête de confidentialité

Confidential treatment

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

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

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

Traitement confidentiel

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

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

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

Agency's record

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

Archives de l'Office

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

Request for disclosure

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

Requête de communication

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

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

Response to request for disclosure

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

Agency's decision

(5) The Agency may

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

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

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

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

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

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

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

Réponse à la requête de communication

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

Décision de l'Office

(5) L'Office peut :

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

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

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

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

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

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

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

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

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

Filing of undertaking of confidentiality

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

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

Dépôt de l'engagement de non-divulgation

Request to Require Party to Provide Complete Response

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

Requirement to respond

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

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

Obligation de répondre

Agency's decision

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

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

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

(2) L'Office peut :

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

b) exiger la production d'un document;

Décisions de l'Office

SCHEDULE 5
(Subsection 18(1))

APPLICATION

1. The applicant's name, complete address, telephone number and, if applicable, email address and facsimile number.

2. If the applicant is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

3. If the applicant is represented by a person that is not a member of the bar of a province, a statement to that effect.

4. The respondent's name and, if known, their complete address, telephone number and, if applicable, email address and facsimile number.

5. The details of the application that include

(*a*) any legislative provisions that the applicant relies on;

(*b*) a clear statement of the issues;

(*c*) a full description of the facts;

(*d*) the relief claimed; and

(*e*) the arguments in support of the application.

6. A list of any documents submitted in support of the application and a copy of each of those documents.

ANNEXE 5
(Paragraphe 18(1))

DEMANDE

1. Les nom et adresse complète ainsi que le numéro de téléphone et, le cas échéant, le numéro de télécopieur et l'adresse électronique du demandeur.

2. Si le demandeur est représenté par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

4. Le nom du défendeur et, s'il sont connus, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

5. Les détails concernant la demande, notamment :

a) les dispositions législatives sur lesquelles la demande est fondée;

b) un énoncé clair des questions en litige;

c) une description complète des faits;

d) les réparations demandées;

e) les arguments à l'appui de la demande.

6. La liste de tous les documents à l'appui de la demande et une copie de chacun de ceux-ci.

SCHEDULE 6
(Section 19)

ANSWER TO APPLICATION

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The respondent's name, complete address, telephone number and, if applicable, email address and facsimile number.

3. If the respondent is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

4. If the respondent is represented by a person that is not a member of the bar of a province, a statement to that effect.

5. The details of the answer that include

(*a*) a statement that sets out the elements that the respondent agrees with or disagrees with in the application;

(*b*) a full description of the facts; and

(*c*) the arguments in support of the answer.

6. A list of any documents submitted in support of the answer and a copy of each of those documents.

7. The name of each party to which a copy of the answer is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 6
(Article 19)

RÉPONSE À UNE DEMANDE

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom du défendeur, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si le défendeur est représenté par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

4. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

5. Les détails concernant la réponse, notamment :

a) les points de la demande sur lesquels le défendeur est d'accord ou en désaccord;

b) une description complète des faits;

c) les arguments à l'appui de la réponse.

6. La liste de tous les documents à l'appui de sa réponse et une copie de chacun de ceux-ci.

7. Le nom de chaque partie à qui une copie de la réponse est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency General Rules

Règles générales de l'Office des transports du Canada

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

Request for Agency order

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

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

Arrêté de l'Office sur demande

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

Formulation of Issues

Reasons for formulation of issues

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

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

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

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

Formulation des questions

Raisons de la formulation des questions

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

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

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

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

Determination of Issues

Determination prior to continuing a proceeding

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

Postponement of proceeding

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

Règlement des questions

Décision avant de poursuivre l'instance

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

Suspension de l'instance

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

Confidentiality

Claim for confidentiality

23. (1) The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person

Confidentialité

Demande de traitement confidentiel

23. (1) L'Office verse dans ses archives publiques les documents concernant une instance qui sont déposés auprès de lui, à

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

Prohibition

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

Form of claim

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

What to file

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

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

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

Content of claim

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

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

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

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

Interdiction

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

Forme de la demande

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

Documents à déposer

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

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

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

Contenu de la demande

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

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

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

Claim on public record

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

Demande versée dans les archives publiques

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

Request for disclosure and filing

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

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

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

Demande de divulgation et dépôt

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

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

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

Service of request for disclosure

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

Signification de la demande de divulgation

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

Reply to request for disclosure

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

Réplique

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

Disposition of Claim for Confidentiality

Décision sur la demande de traitement confidentiel

Agency's powers

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

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

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

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

Pouvoirs de l'Office

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

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

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

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

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

Placing of document on public record

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

Versement du document dans les archives publiques

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

Order for Withdrawal

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

Arrêté de retrait

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

Document confidential and relevant

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

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

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

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

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

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

Document confidentiel et pertinent

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

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

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

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

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

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

Agency Determination of Confidentiality

Procedure

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

Documents Containing Financial or Corporate Information

Confidential Documents

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

Postponements and Adjournments

Request

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

Agency's powers

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

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

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

Décision de l'Office sur le caractère confidentiel

Procédure

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

Documents contenant des renseignements financiers ou d'entreprise

Documents réputés confidentiels

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

Ajournement et suspension

Demande

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

Pouvoirs de l'Office

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

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

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

APPLICATION

Form and content

40. (1) Every application shall be in writing and shall be commenced by filing with the Agency

(*a*) the full name, address, telephone number and any other telecommunications numbers of the applicant or the applicant's representative;

(*b*) a clear and concise statement of the relevant facts, the grounds for the application, the provisions of the Act or any regulations made under the Act under which the application is made, the nature of, and the justification for, the relief sought in the application and any request for costs; and

(*c*) any other information or documentation that is relevant in explaining or supporting the application or that may be required by the Agency or under the Act.

Incomplete application

(2) If any of the information referred to in subsection (1) is not filed or is deficient in any way, the Agency may advise the applicant that the application is not complete and cannot be processed until the necessary information is filed.

Service

41. An applicant shall serve a copy of the application on each respondent and on any other person that the Agency directs.

ANSWER

Form and content

42. (1) A respondent may oppose an application within 30 days after receiving it, by filing with the Agency a clear and concise written answer that includes an admission or denial of any facts alleged in the application and any documents that are rel-

DEMANDE

Forme et contenu

40. (1) Toute demande se fait par écrit et est introduite par le dépôt auprès de l'Office des renseignements suivants :

a) le nom complet, l'adresse, le numéro de téléphone et autre numéro de télécommunication du demandeur ou de son représentant;

b) un exposé clair et concis des faits pertinents, les dispositions de la Loi ou de ses règlements d'application aux termes desquelles la demande est présentée, la nature et les motifs du redressement recherché et toute demande de frais liée à la demande;

c) tout autre renseignement ou document utile à l'appui de la demande ou requis par l'Office ou sous le régime de la Loi.

Demande incomplète

(2) Si l'un ou l'autre des renseignements visés au paragraphe (1) n'est pas déposé ou est incomplet de quelque façon que ce soit, l'Office peut aviser le demandeur que la demande est incomplète et qu'elle ne pourra être examinée tant que tous les renseignements nécessaires n'auront pas été déposés.

Signification

41. Le demandeur signifie une copie de la demande à chaque intimé et à toute autre personne désignée par l'Office.

RÉPONSE

Forme et contenu

42. (1) L'intimé peut s'opposer à la demande en déposant auprès de l'Office, dans les trente jours suivant la réception de la demande, une réponse écrite claire et concise qui comporte la reconnaissance ou la dénégation de tout ou partie des faits allégués dans la demande et des documents

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Act

Loi sur les Cours fédérales

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

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

Current to June 23, 2014

À jour au 23 juin 2014

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

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

tion de première instance de la Cour fédérale;

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

Conflicting claims against Crown

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

Demandes contradictoires contre la Couronne

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

Relief in favour of Crown or against officer

(5) The Federal Court has concurrent original jurisdiction

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

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

Actions en réparation

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

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

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

Federal Court has no jurisdiction

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

Incompétence de la Cour fédérale

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

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

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

Extraordinary remedies, federal tribunals

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

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

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

Recours extraordinaires : offices fédéraux

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

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

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

Extraordinary remedies, members of Canadian Forces

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

Recours extraordinaires : Forces canadiennes

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

Remedies to be obtained on application

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

Exercice des recours

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

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

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

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Demande de contrôle judiciaire

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

Time limitation

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

Délai de présentation

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

Powers of Federal Court

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

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

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

Pouvoirs de la Cour fédérale

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

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

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

Grounds of review

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

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

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

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or

(*f*) acted in any other way that was contrary to law.

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(*a*) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(*b*) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

1990, c. 8, s. 5; 2002, c. 8, s. 27.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

1990, ch. 8, art. 5; 2002, ch. 8, art. 27.

Interim orders

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Mesures provisoires

18.2 La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Reference by federal tribunal

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

Renvoi d'un office fédéral

18.3 (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

Reference by Attorney General of Canada

(2) The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Renvoi du procureur général

(2) Le procureur général du Canada peut, à tout stade des procédures d'un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, renvoyer devant la Cour fédérale pour audition et jugement toute question portant sur la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une loi fédérale ou de ses textes d'application.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Hearings in summary way

18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and

Procédure sommaire d'audition

18.4 (1) Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les

(*f*) acted in any other way that was contrary to law.

e) elle a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) elle a agi de toute autre façon contraire à la loi.

Hearing in summary way

(1.4) An appeal under subsection (1.2) shall be heard and determined without delay and in a summary way.

Procédure sommaire

(1.4) L'appel interjeté en vertu du paragraphe (1.2) est entendu et tranché immédiatement et selon une procédure sommaire.

Notice of appeal

(2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal

(*a*) in the case of an interlocutory judgment, within 10 days after the pronouncement of the judgment or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 10 days; and

(*b*) in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.

Avis d'appel

(2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour d'appel fédérale, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire qu'un juge de la Cour d'appel fédérale peut, soit avant soit après l'expiration de celui-ci, accorder. Le délai imparti est de :

a) dix jours, dans le cas d'un jugement interlocutoire;

b) trente jours, compte non tenu de juillet et août, dans le cas des autres jugements.

Service

(3) All parties directly affected by an appeal under this section shall be served without delay with a true copy of the notice of appeal, and evidence of the service shall be filed in the Registry of the Federal Court of Appeal.

Signification

(3) L'appel est signifié sans délai à toutes les parties directement concernées par une copie certifiée conforme de l'avis. La preuve de la signification doit être déposée au greffe de la Cour d'appel fédérale.

Final judgment

(4) For the purposes of this section, a final judgment includes a judgment that determines a substantive right except as to any question to be determined by a referee pursuant to the judgment.

Jugement définitif

(4) Pour l'application du présent article, est assimilé au jugement définitif le jugement qui statue au fond sur un droit, à l'exception des questions renvoyées à l'arbitrage par le jugement.

R.S., 1985, c. F-7, s. 27; R.S., 1985, c. 51 (4th Supp.), s. 11; 1990, c. 8, ss. 7, 78(E); 1993, c. 27, s. 214; 2002, c. 8, s. 34.

L.R. (1985), ch. F-7, art. 27; L.R. (1985), ch. 51 (4e suppl.), art. 11; 1990, ch. 8, art. 7 et 78(A); 1993, ch. 27, art. 214; 2002, ch. 8, art. 34.

Judicial review

28. (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

(*a*) the Board of Arbitration established by the *Canada Agricultural Products Act*;

(*b*) the Review Tribunal established by the *Canada Agricultural Products Act*;

(*b.1*) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*;

Contrôle judiciaire

28. (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

a) le conseil d'arbitrage constitué par la *Loi sur les produits agricoles au Canada*;

b) la commission de révision constituée par cette loi;

b.1) le commissaire aux conflits d'intérêts et à l'éthique nommé en vertu de l'article 81 de la *Loi sur le Parlement du Canada*;

c) le Conseil de la radiodiffusion et des télécommunications canadiennes constitué par la

(*c*) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

(*d*) [Repealed, 2012, c. 19, s. 272]

(*e*) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

(*f*) the National Energy Board established by the *National Energy Board Act*;

(*g*) the Governor in Council, when the Governor in Council makes an order under subsection 54(1) of the *National Energy Board Act*;

(*g*) the Appeal Division of the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, unless the decision is made under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the *Canada Pension Plan*, section 27.1 of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;

(*h*) the Canada Industrial Relations Board established by the *Canada Labour Code*;

(*i*) the Public Service Labour Relations Board established by the *Public Service Labour Relations Act*;

(*j*) the Copyright Board established by the *Copyright Act*;

(*k*) the Canadian Transportation Agency established by the *Canada Transportation Act*;

(*l*) [Repealed, 2002, c. 8, s. 35]

(*m*) [Repealed, 2012, c. 19, s. 272]

(*n*) the Competition Tribunal established by the *Competition Tribunal Act*;

(*o*) assessors appointed under the *Canada Deposit Insurance Corporation Act*;

(*p*) [Repealed, 2012, c. 19, s. 572]

(*q*) the Public Servants Disclosure Protection Tribunal established by the *Public Servants Disclosure Protection Act*; and

Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes;

d) [Abrogé, 2012, ch. 19, art. 272]

e) le Tribunal canadien du commerce extérieur constitué par la *Loi sur le Tribunal canadien du commerce extérieur*;

f) l'Office national de l'énergie constitué par la *Loi sur l'Office national de l'énergie*;

g) le gouverneur en conseil, quand il prend un décret en vertu du paragraphe 54(1) de la *Loi sur l'Office national de l'énergie*;

g) la division d'appel du Tribunal de la sécurité sociale, constitué par l'article 44 de la *Loi sur le ministère de l'Emploi et du Développement social*, sauf dans le cas d'une décision qui est rendue au titre du paragraphe 57(2) ou de l'article 58 de cette loi ou qui vise soit un appel interjeté au titre du paragraphe 53(3) de cette loi, soit un appel concernant une décision relative au délai supplémentaire visée au paragraphe 52(2) de cette loi, à l'article 81 du *Régime de pensions du Canada*, à l'article 27.1 de la *Loi sur la sécurité de la vieillesse* ou à l'article 112 de la *Loi sur l'assurance-emploi*;

h) le Conseil canadien des relations industrielles au sens du *Code canadien du travail*;

i) la Commission des relations de travail dans la fonction publique constituée par la *Loi sur les relations de travail dans la fonction publique*;

j) la Commission du droit d'auteur constituée par la *Loi sur le droit d'auteur*;

k) l'Office des transports du Canada constitué par la *Loi sur les transports au Canada*;

l) [Abrogé, 2002, ch. 8, art. 35]

m) [Abrogé, 2012, ch. 19, art. 272]

n) le Tribunal de la concurrence constitué par la *Loi sur le Tribunal de la concurrence*;

o) les évaluateurs nommés en application de la *Loi sur la Société d'assurance-dépôts du Canada*;

p) [Abrogé, 2012, ch. 19, art. 572]

q) le Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles constitué par la *Loi sur la protection des*

(*r*) the Specific Claims Tribunal established by the *Specific Claims Tribunal Act*.

fonctionnaires divulgateurs d'actes répréhensibles;

r) le Tribunal des revendications particulières constitué par la *Loi sur le Tribunal des revendications particulières*.

Sections apply

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

Dispositions applicables

(2) Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

Federal Court deprived of jurisdiction

(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

Incompétence de la Cour fédérale

(3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

R.S., 1985, c. F-7, s. 28; R.S., 1985, c. 30 (2nd Supp.), s. 61; 1990, c. 8, s. 8; 1992, c. 26, s. 17, c. 33, s. 69, c. 49, s. 128; 1993, c. 34, s. 70; 1996, c. 10, s. 229, c. 23, s. 187; 1998, c. 26, s. 73; 1999, c. 31, s. 92(E); 2002, c. 8, s. 35; 2003, c. 22, ss. 167(E), 262; 2005, c. 46, s. 56.1; 2006, c. 9, ss. 6, 222; 2008, c. 22, s. 46; 2012, c. 19, ss. 110, 272, 572; 2013, c. 40, s. 236.

L.R. (1985), ch. F-7, art. 28; L.R. (1985), ch. 30 (2e suppl.), art. 61; 1990, ch. 8, art. 8; 1992, ch. 26, art. 17, ch. 33, art. 69, ch. 49, art. 128; 1993, ch. 34, art. 70; 1996, ch. 10, art. 229, ch. 23, art. 187; 1998, ch. 26, art. 73; 1999, ch. 31, art. 92(A); 2002, ch. 8, art. 35; 2003, ch. 22, art. 167(A) et 262; 2005, ch. 46, art. 56.1; 2006, ch. 9, art. 6 et 222; 2008, ch. 22, art. 46; 2012, ch. 19, art. 110, 272 et 572; 2013, ch. 40, art. 236.

29. to 35. [Repealed, 1990, c. 8, s. 8]

29. à 35. [Abrogés, 1990, ch. 8, art. 8]

SUBSTANTIVE PROVISIONS

DISPOSITIONS DE FOND

Prejudgment interest — cause of action within province

36. (1) Except as otherwise provided in any other Act of Parliament, and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

Intérêt avant jugement — Fait survenu dans une province

36. (1) Sauf disposition contraire de toute autre loi fédérale, et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt avant jugement qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province.

Prejudgment interest — cause of action outside province

(2) A person who is entitled to an order for the payment of money in respect of a cause of action arising outside a province or in respect of causes of action arising in more than one province is entitled to claim and have included in the order an award of interest on the payment at any rate that the Federal Court of Appeal or the Federal Court considers reasonable in the circumstances, calculated

(*a*) where the order is made on a liquidated claim, from the date or dates the cause of action or causes of action arose to the date of the order; or

(*b*) where the order is made on an unliquidated claim, from the date the person entitled

Intérêt avant jugement — Fait non survenu dans une seule province

(2) Dans toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur n'est pas survenu dans une province ou dont les faits générateurs sont survenus dans plusieurs provinces, les intérêts avant jugement sont calculés au taux que la Cour d'appel fédérale ou la Cour fédérale, selon le cas, estime raisonnable dans les circonstances et :

a) s'il s'agit d'une créance d'une somme déterminée, depuis la ou les dates du ou des faits générateurs jusqu'à la date de l'ordonnance de paiement;

b) si la somme n'est pas déterminée, depuis la date à laquelle le créancier a avisé par écrit le débiteur de sa demande jusqu'à la date de l'ordonnance de paiement.

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to September 15, 2014

À jour au 15 septembre 2014

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Affidavit by deponent who does not understand an official language

(2.1) Where an affidavit is written in an official language for a deponent who does not understand that official language, the affidavit shall

(*a*) be translated orally for the deponent in the language of the deponent by a competent and independent interpreter who has taken an oath, in Form 80B, as to the performance of his or her duties; and

(*b*) contain a jurat in Form 80C.

Affidavit d'une personne ne comprenant pas une langue officielle

(2.1) Lorsqu'un affidavit est rédigé dans une des langues officielles pour un déclarant qui ne comprend pas cette langue, l'affidavit doit :

a) être traduit oralement pour le déclarant dans sa langue par un interprète indépendant et compétent qui a prêté le serment, selon la formule 80B, de bien exercer ses fonctions;

b) comporter la formule d'assermentation prévue à la formule 80C.

Exhibits

(3) Where an affidavit refers to an exhibit, the exhibit shall be accurately identified by an endorsement on the exhibit or on a certificate attached to it, signed by the person before whom the affidavit is sworn.

SOR/2002-417, s. 10.

Pièces à l'appui de l'affidavit

(3) Lorsqu'un affidavit fait mention d'une pièce, la désignation précise de celle-ci est inscrite sur la pièce même ou sur un certificat joint à celle-ci, suivie de la signature de la personne qui reçoit le serment.

DORS/2002-417, art. 10.

Content of affidavits

81. (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

Contenu

81. (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

Affidavits on belief

(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

SOR/2009-331, s. 2.

Poids de l'affidavit

(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

DORS/2009-331, art. 2.

Use of solicitor's affidavit

82. Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit.

Utilisation de l'affidavit d'un avocat

82. Sauf avec l'autorisation de la Cour, un avocat ne peut à la fois être l'auteur d'un affidavit et présenter à la Cour des arguments fondés sur cet affidavit.

Cross-examination on affidavits

83. A party to a motion or application may cross-examine the deponent of an affi-

Droit au contre-interrogatoire

83. Une partie peut contre-interroger l'auteur d'un affidavit qui a été signifié par

CANADA

CONSOLIDATION

CODIFICATION

Privacy Act

Loi sur la protection des renseignements personnels

R.S.C., 1985, c. P-21

L.R.C. (1985), ch. P-21

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(*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or

(*b*) for a purpose for which the information may be disclosed to the institution under subsection 8(2).

1980-81-82-83, c. 111, Sch. II "7".

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) qu'aux fins auxquelles ils peuvent lui être communiqués en vertu du paragraphe 8(2).

1980-81-82-83, ch. 111, ann. II « 7 ».

Disclosure of personal information

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.

Communication des renseignements personnels

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.

Where personal information may be disclosed

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

Cas d'autorisation

(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 information was obtained or compiled by the institution or for a use consistent with that purpose;

a) communication aux fins auxquelles 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;

(*c*) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;

c) communication exigée par *subpoena*, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de renseignements;

(*d*) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;

d) communication au procureur général du Canada pour usage dans des poursuites judiciaires intéressant la Couronne du chef du Canada ou le gouvernement fédéral;

(*e*) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed;

e) communication à un organisme d'enquête déterminé par règlement et qui en fait la demande par écrit, en vue de faire respecter des lois fédérales ou provinciales ou pour la tenue d'enquêtes licites, pourvu que la demande précise les fins auxquelles les renseignements sont destinés et la nature des renseignements demandés;

(*f*) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation — as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act* —, the government of a foreign state, an international organization of states or an international organization

f) communication aux termes d'accords ou d'ententes conclus d'une part entre le gouvernement du Canada ou l'un de ses organismes et, d'autre part, le gouvernement d'une province ou d'un État étranger, une or-

established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;

(*g*) to a member of Parliament for the purpose of assisting the individual to whom the information relates in resolving a problem;

(*h*) to officers or employees of the institution for internal audit purposes, or to the office of the Comptroller General or any other person or body specified in the regulations for audit purposes;

(*i*) to the Library and Archives of Canada for archival purposes;

(*j*) to any person or body for research or statistical purposes if the head of the government institution

(i) is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and

(ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;

(*k*) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;

(*l*) to any government institution for the purpose of locating an individual in order to collect a debt owing to Her Majesty in right of Canada by that individual or make a payment owing to that individual by Her Majesty in right of Canada; and

(*m*) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

ganisation internationale d'États ou de gouvernements, le conseil de la première nation de Westbank, le conseil de la première nation participante — au sens du paragraphe 2(1) de la *Loi sur la compétence des premières nations en matière d'éducation en Colombie-Britannique* — ou l'un de leurs organismes, en vue de l'application des lois ou pour la tenue d'enquêtes licites;

g) communication à un parlementaire fédéral en vue d'aider l'individu concerné par les renseignements à résoudre un problème;

h) communication pour vérification interne au personnel de l'institution ou pour vérification comptable au bureau du contrôleur général ou à toute personne ou tout organisme déterminé par règlement;

i) communication à Bibliothèque et Archives du Canada pour dépôt;

j) communication à toute personne ou à tout organisme, pour des travaux de recherche ou de statistique, pourvu que soient réalisées les deux conditions suivantes :

(i) le responsable de l'institution est convaincu que les fins auxquelles les renseignements sont communiqués ne peuvent être normalement atteintes que si les renseignements sont donnés sous une forme qui permette d'identifier l'individu qu'ils concernent,

(ii) la personne ou l'organisme s'engagent par écrit auprès du responsable de l'institution à s'abstenir de toute communication ultérieure des renseignements tant que leur forme risque vraisemblablement de permettre l'identification de l'individu qu'ils concernent;

k) communication à tout gouvernement autochtone, association d'autochtones, bande d'Indiens, institution fédérale ou subdivision de celle-ci, ou à leur représentant, en vue de l'établissement des droits des peuples autochtones ou du règlement de leurs griefs;

l) communication à toute institution fédérale en vue de joindre un débiteur ou un créancier de Sa Majesté du chef du Canada et de recouvrer ou d'acquitter la créance;

(ii) disclosure would clearly benefit the individual to whom the information relates.

m) communication à toute autre fin dans les cas où, de l'avis du responsable de l'institution :

(i) des raisons d'intérêt public justifieraient nettement une éventuelle violation de la vie privée,

(ii) l'individu concerné en tirerait un avantage certain.

Personal information disclosed by Library and Archives of Canada

(3) Subject to any other Act of Parliament, personal information under the custody or control of the Library and Archives of Canada that has been transferred there by a government institution for historical or archival purposes may be disclosed in accordance with the regulations to any person or body for research or statistical purposes.

Communication par Bibliothèque et Archives du Canada

(3) Sous réserve des autres lois fédérales, les renseignements personnels qui relèvent de Bibliothèque et Archives du Canada et qui y ont été versés pour dépôt ou à des fins historiques par une institution fédérale peuvent être communiqués conformément aux règlements pour des travaux de recherche ou de statistique.

Copies of requests under paragraph (2)(*e*) to be retained

(4) The head of a government institution shall retain a copy of every request received by the government institution under paragraph (2)(*e*) for such period of time as may be prescribed by regulation, shall keep a record of any information disclosed pursuant to the request for such period of time as may be prescribed by regulation and shall, on the request of the Privacy Commissioner, make those copies and records available to the Privacy Commissioner.

Copie des demandes faites en vertu de l'al. (2)*e*)

(4) Le responsable d'une institution fédérale conserve, pendant la période prévue par les règlements, une copie des demandes reçues par l'institution en vertu de l'alinéa (2)*e*) ainsi qu'une mention des renseignements communiqués et, sur demande, met cette copie et cette mention à la disposition du Commissaire à la protection de la vie privée.

Notice of disclosure under paragraph (2)(*m*)

(5) The head of a government institution shall notify the Privacy Commissioner in writing of any disclosure of personal information under paragraph (2)(*m*) prior to the disclosure where reasonably practicable or in any other case forthwith on the disclosure, and the Privacy Commissioner may, if the Commissioner deems it appropriate, notify the individual to whom the information relates of the disclosure.

Avis de communication dans le cas de l'al. (2)*m*)

(5) Dans le cas prévu à l'alinéa (2)*m*), le responsable de l'institution fédérale concernée donne un préavis écrit de la communication des renseignements personnels au Commissaire à la protection de la vie privée si les circonstances le justifient; sinon, il en avise par écrit le Commissaire immédiatement après la communication. La décision de mettre au courant l'individu concerné est laissée à l'appréciation du Commissaire.

Definition of "Indian band"

(6) In paragraph (2)(*k*), "Indian band" means

(*a*) a band, as defined in the *Indian Act*;

(*b*) a band, as defined in the *Cree-Naskapi (of Quebec) Act*, chapter 18 of the Statutes of Canada, 1984;

(*c*) the Band, as defined in the *Sechelt Indian Band Self-Government Act*, chapter 27 of the Statutes of Canada, 1986; or

(*d*) a first nation named in Schedule II to the *Yukon First Nations Self-Government Act*.

Définition de « bande d'Indiens »

(6) L'expression « bande d'Indiens » à l'alinéa (2)*k*) désigne :

a) soit une bande au sens de la *Loi sur les Indiens*;

b) soit une bande au sens de la *Loi sur les Cris et les Naskapis du Québec*, chapitre 18 des Statuts du Canada de 1984;

c) soit la bande au sens de la *Loi sur l'autonomie gouvernementale de la bande indienne sechelte*, chapitre 27 des Statuts du Canada de 1986;

(*d*) the Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the *Nisga'a Final Agreement Act*;

(*e*) the council of the Westbank First Nation;

(*f*) the Tlicho Government, as defined in section 2 of the *Tlicho Land Claims and Self-Government Act*;

(*g*) the Nunatsiavut Government, as defined in section 2 of the *Labrador Inuit Land Claims Agreement Act*;

(*h*) the council of a participating First Nation as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act*;

(*i*) the Tsawwassen Government, as defined in subsection 2(2) of the *Tsawwassen First Nation Final Agreement Act*;

(*j*) a Maanulth Government, within the meaning of subsection 2(2) of the *Maanulth First Nations Final Agreement Act*; or

(*k*) Sioux Valley Dakota Oyate Government, within the meaning of subsection 2(2) of the *Sioux Valley Dakota Nation Governance Act*.

d) la première nation dont le nom figure à l'annexe II de la *Loi sur l'autonomie gouvernementale des premières nations du Yukon*.

Définition de « gouvernement autochtone »

(7) L'expression « gouvernement autochtone » à l'alinéa (2)*k*) s'entend :

a) du gouvernement nisga'a, au sens de l'Accord définitif nisga'a mis en vigueur par la *Loi sur l'Accord définitif nisga'a*;

b) du conseil de la première nation de Westbank;

c) du gouvernement tlicho, au sens de l'article 2 de la *Loi sur les revendications territoriales et l'autonomie gouvernementale du peuple tlicho*;

d) du gouvernement nunatsiavut, au sens de l'article 2 de la *Loi sur l'Accord sur les revendications territoriales des Inuit du Labrador*;

e) du conseil de la première nation participante, au sens du paragraphe 2(1) de la *Loi sur la compétence des premières nations en matière d'éducation en Colombie-Britannique*;

f) du gouvernement tsawwassen, au sens du paragraphe 2(2) de la *Loi sur l'accord définitif concernant la Première Nation de Tsawwassen*;

g) de tout gouvernement maanulth, au sens du paragraphe 2(2) de la *Loi sur l'accord définitif concernant les premières nations maanulthes*;

h) du gouvernement de l'oyate dakota de Sioux Valley, au sens du paragraphe 2(2) de la *Loi sur la gouvernance de la nation dakota de Sioux Valley*.

Définition de « conseil de la première nation de Westbank »

(8) L'expression « conseil de la première nation de Westbank » aux alinéas (2)*f*) et (7)*b*) s'entend du conseil au sens de l'Accord d'autonomie gouvernementale de la première nation de Westbank mis en vigueur par la *Loi sur l'autonomie gouvernementale de la première nation de Westbank*.

L.R. (1985), ch. P-21, art. 8; L.R. (1985), ch. 20 (2e suppl.), art. 13, ch. 1 (3e suppl.), art. 12; 1994, ch. 35, art. 39; 2000, ch. 7, art. 26; 2004, ch. 11, art. 37, ch. 17, art. 18; 2005, ch. 1, art. 106 et 109, ch. 27, art. 21 et 25; 2006, ch. 10, art. 33; 2008, ch. 32, art. 30; 2009, ch. 18, art. 23; 2014, ch. 1, art. 19.

in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.

1980-81-82-83, c. 111, Sch. II "67".

de la vie privée dans le cadre de la présente loi, ainsi que les relations qui en sont faites de bonne foi par la presse écrite ou audio-visuelle.

1980-81-82-83, ch. 111, ann. II « 67 ».

OFFENCES

INFRACTIONS

Obstruction

68. (1) No person shall obstruct the Privacy Commissioner or any person acting on behalf or under the direction of the Commissioner in the performance of the Commissioner's duties and functions under this Act.

Entrave

68. (1) Il est interdit d'entraver l'action du Commissaire à la protection de la vie privée ou des personnes qui agissent en son nom ou sous son autorité dans l'exercice des pouvoirs et fonctions qui lui sont conférés en vertu de la présente loi.

Offence and punishment

(2) Every person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars.

1980-81-82-83, c. 111, Sch. II "68".

Infraction et peine

(2) Quiconque contrevient au présent article est coupable d'une infraction et passible, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de mille dollars.

1980-81-82-83, ch. 111, ann. II « 68 ».

EXCLUSIONS

EXCLUSIONS

Act does not apply to certain materials

69. (1) This Act does not apply to

(*a*) library or museum material preserved solely for public reference or exhibition purposes; or

(*b*) material placed in the Library and Archives of Canada, the National Gallery of Canada, the Canadian Museum of History, the Canadian Museum of Nature, the National Museum of Science and Technology, the Canadian Museum for Human Rights or the Canadian Museum of Immigration at Pier 21 by or on behalf of persons or organizations other than government institutions.

Non-application de la loi

69. (1) La présente loi ne s'applique pas aux documents suivants :

a) les documents de bibliothèque ou de musée conservés uniquement à des fins de référence ou d'exposition pour le public;

b) les documents déposés à Bibliothèque et Archives du Canada, au Musée des beaux-arts du Canada, au Musée canadien de l'histoire, au Musée canadien de la nature, au Musée national des sciences et de la technologie, au Musée canadien des droits de la personne ou au Musée canadien de l'immigration du Quai 21 par des personnes ou organisations extérieures aux institutions fédérales ou pour ces personnes ou organisations.

Sections 7 and 8 do not apply to certain information

(2) Sections 7 and 8 do not apply to personal information that is publicly available.

R.S., 1985, c. P-21, s. 69; R.S., 1985, c. 1 (3rd Supp.), s. 12; 1990, c. 3, s. 32; 1992, c. 1, s. 143(E); 2004, c. 11, s. 39; 2008, c. 9, s. 10; 2010, c. 7, s. 9; 2013, c. 38, s. 18.

Non-application des art. 7 et 8

(2) Les articles 7 et 8 ne s'appliquent pas aux renseignements personnels auxquels le public a accès.

L.R. (1985), ch. P-21, art. 69; L.R. (1985), ch. 1 (3e suppl.), art. 12; 1990, ch. 3, art. 32; 1992, ch. 1, art. 143(A); 2004, ch. 11, art. 39; 2008, ch. 9, art. 10; 2010, ch. 7, art. 9; 2013, ch. 38, art. 18.

Canadian Broadcasting Corporation

69.1 This Act does not apply to personal information that the Canadian Broadcasting Corporation collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose.

2006, c. 9, s. 188.

Société Radio-Canada

69.1 La présente loi ne s'applique pas aux renseignements personnels que la Société Radio-Canada recueille, utilise ou communique uniquement à des fins journalistiques, artistiques ou littéraires.

2006, ch. 9, art. 188.

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Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

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

APPLICANT'S RECORD
VOLUME 2
(Appendix "B" – Book of Authorities)

Dated: September 30, 2014

DR. GÁBOR LUKÁCS

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Applicant

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Solicitor for the Respondent,
Canadian Transportation Agency

TABLE OF CONTENTS OF VOLUME 2

Indexed as:

A.B. v. Bragg Communications Inc.

A.B., by her Litigation Guardian, C.D., Appellant;
v.
Bragg Communications Incorporated, a body corporate and Halifax Herald Limited, a body corporate, Respondents, and BullyingCanada Inc., British Columbia Civil Liberties Association, Kids Help Phone, Canadian Civil Liberties Association, Privacy Commissioner of Canada, Newspapers Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists, Professional Writers Association of Canada, Book and Periodical Council, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Unicef Committee, Information and Privacy Commissioner of Ontario and Beyond Borders, Interveners.

[2012] 2 S.C.R. 567

[2012] 2 R.C.S. 567

[2012] S.C.J. No. 46

[2012] A.C.S. no 46

2012 SCC 46

File No.: 34240.

Supreme Court of Canada

Heard: May 10, 2012;
Judgment: September 27, 2012.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Karakatsanis JJ.

(31 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Catchwords:

Courts -- Open court principle -- Publication bans -- Children -- 15-year-old victim of sexualized cyberbullying applying for order requiring Internet provider to disclose identity of person(s) using IP address to publish fake and allegedly defamatory Facebook profile -- Victim requesting to proceed anonymously in application and seeking publication ban on contents of fake profile -- Whether victim required to demonstrate [page568] specific harm or whether court may find objectively discernable harm.

Summary:

A 15-year-old girl found out that someone had posted a fake Facebook profile using her picture, a slightly modified version of her name, and other particulars identifying her. The picture was accompanied by unflattering commentary about the girl's appearance along with sexually explicit references. Through her father as guardian, the girl brought an application for an order requiring the Internet provider to disclose the identity of the person(s) who used the IP address to publish the profile so that she could identify potential defendants for an action in defamation. As part of her application, she asked for permission to anonymously seek the identity of the creator of the profile and for a publication ban on the content of the profile. Two media groups opposed the request for anonymity and the ban. The Supreme Court of Nova Scotia granted the request that the Internet provider disclose the information about the publisher of the profile, but denied the request for anonymity and the publication ban because there was insufficient evidence of specific harm to the girl. The judge stayed that part of his order requiring the Internet provider to disclose the publisher's identity until either a successful appeal allowed the girl to proceed anonymously or until she filed a draft order which used her own and her father's real names. The Court of Appeal upheld the decision primarily on the ground that the girl had not discharged the onus of showing that there was evidence of harm to her which justified restricting access to the media.

Held: The appeal should be allowed in part.

The critical importance of the open court principle and a free press has been tenaciously embedded in the jurisprudence. In this case, however, there are interests that are sufficiently compelling to justify restricting such access: privacy and the protection of children from cyberbullying.

Recognition of the inherent vulnerability of children has consistent and deep roots in Canadian law and results in the protection of young people's privacy rights based on age, not the sensitivity of the particular child. In an application involving cyberbullying, there is no [page569] need for a child to demonstrate that he or she personally conforms to this legal paradigm. The law attributes the

heightened vulnerability based on chronology, not temperament.

While evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm. It is logical to infer that children can suffer harm through cyberbullying, given the psychological toxicity of the phenomenon. Since children are entitled to protect themselves from bullying, cyber or otherwise, there is inevitable harm to them -- and to the administration of justice -- if they decline to take steps to protect themselves because of the risk of further harm from public disclosure. Since common sense and the evidence show that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and since the right to protection will disappear for most children without the further protection of anonymity, the girl's anonymous legal pursuit of the identity of her cyberbully should be allowed.

In *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, prohibiting identity disclosure was found to represent only minimal harm to press freedom. The serious harm in failing to protect young victims of bullying through anonymity, as a result, outweighs this minimal harm. But once the girl's identity is protected through her right to proceed anonymously, there is little justification for a publication ban on the non-identifying content of the profile. If the non-identifying information is made public, there is no harmful impact on the girl since the information cannot be connected to her. The public's right to open courts -- and press freedom -- therefore prevail with respect to the non-identifying Facebook content.

Cases Cited

Referred to: *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Canadian [page570] Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65; *R. v. Oakes*, [1986] 1 S.C.R. 103; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27 (CanLII); *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *Doe v. Church of Jesus Christ of Latter-Day Saints in Canada*, 2003 ABQB 794, 341 A.R. 395; *R. v. R.(W.)*, 2010 ONCJ 526 (CanLII); *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122; *R. v. D.H.*, 2002 BCPC 464 (CanLII); *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880.

Statutes and Regulations Cited

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[page571]

History and Disposition:

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J.N.S. and Saunders and Oland JJ.A.), 2011 NSCA 26, 301 N.S.R. (2d) 34, 953 A.P.R. 34, 228 C.R.R. (2d) 181, 97 C.P.C. (6) 54, 80 C.C.L.T. (3d) 180, [2011] N.S.J. No. 113 (QL), 2011 CarswellNS 135, affirming a decision of LeBlanc J., 2010 NSSC 215, 293 N.S.R. (2d) 222, 928 A.P.R. 222, 97 C.P.C. (6) 24, [2010] N.S.J. No. 360 (QL), 2010 CarswellNS 397. Appeal allowed in part.

Counsel:

Michelle C. Awad, Q.C., and *Jane O'Neill*, for the appellant.

Daniel W. Burnett and *Paul Brackstone*, for the *amicus curiae*.

Written submissions only by *Brian F. P. Murphy* and *Wanda M. Severns*, for the intervener BullyingCanada Inc.

Marko Vesely and *M. Toby Kruger*, for the intervener the British Columbia Civil Liberties Association.

Mahmud Jamal, *Jason MacLean*, *Carly Fidler* and *Steven Golick*, for the intervener Kids Help Phone.

Iris Fischer and *Dustin Kenall*, for the intervener the Canadian Civil Liberties Association.

Joseph E. Magnet and *Patricia Kosseim*, for the intervener the Privacy Commissioner of Canada.

Ryder Gilliland and *Adam Lazier*, for the interveners Newspapers Canada, Ad IDEM/Canadian Media Lawyers Association, the Canadian Association of Journalists, the Professional Writers Association of Canada and the Book and Periodical Council.

Tamir Israel, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Jeffrey S. Leon, *Ranjan K. Agarwal* and *Daniel Holden*, for the intervener the Canadian Unicef Committee.

[page572]

Written submissions only by *William S. Challis* and *Stephen McCammon*, for the intervener the Information and Privacy Commissioner of Ontario.

Written submissions only by *Jonathan M. Rosenthal*, for the intervener Beyond Borders.

No one appeared for the respondents.

The judgment of the Court was delivered by

1 ABELLA J.:-- On March 4, 2010, a 15-year-old girl, A.B., found out that someone had posted a Facebook profile using her picture, a slightly modified version of her name, and other particulars

identifying her. Accompanying the picture was some unflattering commentary about the girl's appearance along with sexually explicit references. The page was removed by the internet provider later that month.

2 Once notified of the situation, Facebook's counsel in Palo Alto, California provided the IP address associated with the account, which was said to be located in Dartmouth, Nova Scotia. The girl's counsel determined that it was an "Eastlink address" in Dartmouth, Nova Scotia. Further inquiry confirmed that the respondent Bragg Communications owns Eastlink, a provider of Internet and entertainment services in Atlantic Canada.

3 Eastlink consented to giving more specific information about the address if it had authorization from a court to do so. As a result, A.B., through her father as guardian, brought a preliminary application under Nova Scotia's *Civil Procedure Rules*, N.S. Reg. 370/2008, for an order requiring Eastlink to disclose the identity of the person(s) who used the IP address to publish the profile to assist her in identifying potential defendants for an action in defamation. She stated in her Notice of Application that she had "suffered harm and seeks to minimize the chance of further harm" (A.R., at p. 98). As part [page573] of her application, she asked the court for permission to seek the identity of the creator of the fake profile anonymously and for a publication ban on the content of the fake Facebook profile. She did not ask that the hearing be held in camera.

4 Eastlink did not oppose her motion. The Halifax Herald and Global Television became aware of the girl's application when notice of the request for a publication ban appeared as an automatic advisory on the Nova Scotia publication ban media advisory website. They advised the court that they opposed both of the girl's requests: the right to proceed anonymously and a publication ban.

5 The court granted the order requiring Eastlink to disclose the information about the publisher of the fake Facebook profile on the basis that a *prima facie* case of defamation had been established and there were no other means of identifying the person who published the defamation. But it denied the request for anonymity and the publication ban because there was insufficient evidence of specific harm to the girl.

6 The judge stayed that part of his order requiring Eastlink to disclose the publisher's identity until either a successful appeal allowed the girl to proceed anonymously, or until she filed a draft order which used her own and her father's real names.

7 The decision was upheld by the Court of Appeal primarily on the ground that the girl had not discharged the onus of showing that there was real and substantial harm to her which justified restricting access to the media.

[page574]

8 Both courts ordered costs against the girl in favour of the two media outlets.

9 In my view, both courts erred in failing to consider the objectively discernable harm to A.B. I agree with her that she should be entitled to proceed anonymously, but once her identity has been protected, I see no reason for a further publication ban preventing the publication of the non-identifying content of the fake Facebook profile.

Analysis

10 A.B.'s appeal to this Court is based on what she says is the failure to properly balance the competitive risks in this case: the harm inherent in revealing her identity versus the risk of harm to the open court principle in allowing her to proceed anonymously and under a publication ban. Unless her privacy is protected, she argued, young victims of sexualized cyberbullying like her will refuse to proceed with their protective claims and will, as a result, be denied access to justice.

11 The open court principle requires that court proceedings presumptively be open and accessible to the public and to the media. This principle has been described as a "hallmark of a democratic society" (*Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, at para. 23) and is inextricably tied to freedom of expression. A.B. requested two restrictions on the open court principle: the right to proceed anonymously and a publication ban on the content of the fake Facebook profile. The inquiry is into whether each of these measures is necessary to protect an important legal interest and impairs free expression as little as possible. If alternative measures can just as effectively protect the interests engaged, the restriction is unjustified. If no such alternatives exist, the inquiry turns to whether the proper balance was struck between the open court principle [page575] and the privacy rights of the girl: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442.

12 The Halifax Herald and Global Television did not appear in the proceedings before this Court. Their "position" was, however, ably advanced by an *amicus curiae*. In his view, like the Court of Appeal, the mere fact of the girl's age did not, in the absence of evidence of specific harm to her, trump the open court principle and freedom of the press.

13 Since *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, the critical importance of the open court principle and a free press has been tenaciously embedded in the jurisprudence and need not be further revisited here. What does need some exploration, however, are the interests said to justify restricting such access in this case: privacy and the protection of children from cyberbullying. These interests must be shown to be sufficiently compelling to warrant restrictions on freedom of the press and open courts. As Dickson J. noted in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, there are cases in which the protection of social values must prevail over openness (pp. 186-87).

14 The girl's privacy interests in this case are tied both to her age and to the nature of the victimization she seeks protection from. It is not merely a question of her privacy, but of her privacy

from the relentlessly intrusive humiliation of sexualized online bullying: Carole Lucock and Michael Yeo, "Naming Names: The Pseudonym in the Name of the Law" (2006), 3 *U. Ottawa L. & Tech. J.* 53, at pp. 72-73; Karen Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship [page576] between Privacy and Accessibility in the Cyber Context" (2011), 56 McGill L.J. 289, at p. 302.

15 The *amicus curiae* pointed to the absence of evidence of harm from the girl about her own emotional vulnerability. But, while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm.

16 This Court found objective harm, for example, in upholding the constitutionality of Quebec's *Rules of Practice* that limited the media's ability to film, take photographs, and conduct interviews in relation to legal proceedings (in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19), and in prohibiting the media from broadcasting a video exhibit (in *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 S.C.R. 65). In the former, Deschamps J. held (at para. 56) that the *Dagenais/Mentuck* test requires neither more nor less than the one from *R. v. Oakes*, [1986] 1 S.C.R. 103. In other words, absent scientific or empirical evidence of the necessity of restricting access, the court can find harm by applying reason and logic: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 72; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 91.

17 Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under the *Criminal Code*, R.S.C. 1985, c. C-46 (s. 486), the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (s. 110), and child welfare legislation, not to mention international protections such as the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, all based on age, not the sensitivity of the particular child. As a result, in an application involving sexualized cyberbullying, there is no need for a particular child to demonstrate that she [page577] personally conforms to this legal paradigm. The law attributes the heightened vulnerability based on chronology, not temperament: See *R. v. D.B.*, [2008] 2 S.C.R. 3, at paras. 41, 61 and 84-87; *R. v. Sharpe*, [2001] 1 S.C.R. 45, at paras. 170-74.

18 This led Cohen J. in *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27 (CanLII), to explain the importance of privacy in the specific context of young persons who are participants in the justice system:

> The concern to avoid labeling and stigmatization is essential to an understanding of why the protection of privacy is such an important value in the *Act*. However it is not the only explanation. The value of the privacy of young persons under the *Act* has deeper roots than exclusively pragmatic considerations would suggest. We must also look to the Charter, because the protection of privacy of young persons has undoubted constitutional significance.

> Privacy is recognized in Canadian constitutional jurisprudence as implicating liberty and security interests. In *Dyment*, the court stated that privacy is worthy of constitutional protection because it is "grounded in man's physical and moral autonomy," is "essential for the well-being of the individual," and is "at the heart of liberty in a modern state" (para. 17). *These considerations apply equally if not more strongly in the case of young persons.* Furthermore, the constitutional protection of privacy embraces the privacy of young persons, not only as an aspect of their rights under section 7 and 8 of the Charter, but by virtue of the presumption of their diminished moral culpability, which has been found to be a principle of fundamental justice under the *Charter*.
>
> ...
>
> ... the protection of the privacy of young persons fosters respect for dignity, personal integrity and autonomy of the young person. [Emphasis added; paras. 40-41 and 44.]

19 And in *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, L'Heureux-Dubé J. upheld the constitutionality of [page578] the *Criminal Code* provisions that allowed for the admission of videotape evidence from child complainants in sexual assault cases, based on the need to reduce the stress and trauma suffered by child complainants in the criminal justice system: pp. 445-46; see also *Doe v. Church of Jesus Christ of Latter-Day Saints in Canada*, 2003 ABQB 794, 341 A.R. 395, at para. 9.

20 It is logical to infer that children may suffer harm through cyberbullying. Such a conclusion is consistent with the psychological toxicity of the phenomenon described in the Report of the Nova Scotia Task Force on Bullying and Cyberbullying, chaired by Prof. A. Wayne MacKay, the first provincial task force focussed on online bullying: (*Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying* (2012)). The Task Force was created as a result of "[a] tragic series of youth suicides" (p. 4).

21 The Report defined bullying as

> ... behaviour that is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property. Bullying can be direct or indirect, and can take place by written, verbal, physical or electronic means, or any other form of expression. [pp. 42-43]

Its harmful consequences were described as "extensive", including loss of self-esteem, anxiety, fear and school drop-outs (p. 4). Moreover, victims of bullying were almost twice as likely to report that they attempted suicide compared to young people who had not been bullied (p. 86): See also *R. v. R.(W.)*, 2010 ONCJ 526 (CanLII), at paras. 11 and 16, and "Cyberbullying: A Growing Problem", *Science Daily* (February 22, 2010, online).

22 The Report also noted that cyberbullying can be particularly harmful because the [page579] content can be spread widely, quickly - and anonymously:

> ... The immediacy and broad reach of modern electronic technology has made bullying easier, faster, more prevalent, and crueler than ever before... .
>
> ... cyberbullying follows you home and into your bedroom; you can never feel safe, it is "non-stop bullying"... . cyberbullying is particularly insidious because it invades the home where children normally feel safe, and it is constant and inescapable because victims can be reached at all times and in all places... .
>
> The anonymity available to cyberbullies complicates the picture further as it removes the traditional requirement for a power imbalance between the bully and victim, and makes it difficult to prove the identity of the perpetrator. Anonymity allows people who might not otherwise engage in bullying behaviour the opportunity to do so with less chance of repercussion... .
>
> ... The cyber-world provides bullies with a vast unsupervised public playground ... . [pp. 11-12]

23 In addition to the psychological harm of cyberbullying, we must consider the resulting inevitable harm to children - and the administration of justice - if they decline to take steps to protect themselves because of the risk of further harm from public disclosure.

24 Professor MacKay's Report is consistent with the inference that, absent a grant of anonymity, a bullied child may not pursue responsive legal action. He notes that half of all bullying goes unreported, largely out of fear that reporting will not be met with solutions or understanding sufficient to overcome the fear of retaliation: p. 10. One of his recommendations, as a result, was that mechanisms be developed to report cyberbullying *anonymously* (p. 66; Appendix E; see also Peter A. Winn, "Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic [page580] Information" (2004), 79 Wash. L. Rev. 307, at p. 328).

25 In the context of sexual assault, this Court has already recognized that protecting a victim's privacy encourages reporting: *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122. It does not take much of an analytical leap to conclude that the likelihood of a child protecting himself or herself from bullying will be greatly enhanced if the protection can be sought anonymously. As the Kids Help Phone factum constructively notes (at para. 16), protecting children's anonymity could help ensure that they will seek therapeutic assistance and other remedies, including legal remedies where appropriate. In particular, "[w]hile media publicity is likely to have a negative effect on all victims, there is evidence to be particularly concerned about

child victims... . Child victims need to be able to trust that their privacy will be protected as much as possible by those whom they have turned to for help": Lisa M. Jones, David Finkelhor and Jessica Beckwith, "Protecting victims' identities in press coverage of child victimization" (2010), 11 *Journalism* 347, at pp. 349-50.

26 Studies have confirmed that allowing the names of child victims and other identifying information to appear in the media can exacerbate trauma, complicate recovery, discourage future disclosures, and inhibit cooperation with authorities. (See, e.g., UNICEF Innocenti Research Centre, *Child Safety Online: Global challenges and strategies* (2011), at pp. 15-16; and *R. v. D.H.*, 2002 BCPC 464 (CanLII), at para. 8).

27 If we value the right of children to protect themselves from bullying, cyber or otherwise, if common sense and the evidence persuade us that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization [page581] upon publication, and if we accept that the right to protection will disappear for most children without the further protection of anonymity, we are compellingly drawn in this case to allowing A.B.'s anonymous legal pursuit of the identity of her cyberbully.

28 The answer to the other side of the balancing inquiry - what are the countervailing harms to the open courts principle and freedom of the press - has already been decided by this Court in *Canadian Newspapers*. In that case, the constitutionality of the provision in the *Criminal Code* prohibiting disclosure of the identity of sexual assault complainants was challenged on the basis that its mandatory nature unduly restricted freedom of the press. In upholding the constitutionality of the provision, Lamer J. observed that:

> While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognized that the limits imposed by [prohibiting identity disclosure] on the media's rights are *minimal*... . Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public. [Emphasis added; p. 133.]

In other words, the harm has been found to be "minimal". This perspective of the relative insignificance of knowing a party's identity was confirmed by Binnie J. in *F.N.* where he referred to identity in the context of the Young Offenders legislation as being merely a "sliver of information": *F.N. (Re)*, [2000] 1 S.C.R. 880, at para. 12.

29 The acknowledgment of the relative unimportance of the identity of a sexual assault victim is a complete answer to the argument that the non-disclosure of the identity of a young victim of online sexualized bullying is harmful to the exercise of press freedom or the open courts principle. *Canadian Newspapers* clearly establishes that the [page582] benefits of protecting such victims through anonymity outweigh the risk to the open court principle.

30 On the other hand, as in *Canadian Newspapers*, once A.B.'s identity is protected through her right to proceed anonymously, there seems to me to be little justification for a publication ban on the non-identifying content of the fake Facebook profile. If the non-identifying information is made public, there is no harmful impact since the information cannot be connected to A.B. The public's right to open courts and press freedom therefore prevail with respect to the non-identifying Facebook content.

31 I would allow the appeal in part to permit A.B. to proceed anonymously in her application for an order requiring Eastlink to disclose the identity of the relevant IP user(s). I would, however, not impose a publication ban on that part of the fake Facebook profile that contains no identifying information. I would set aside the costs orders against A.B. in the prior proceedings but would not make a costs order in this Court.

Appeal allowed in part.

Solicitors:

Solicitors for the appellant: McInnes Cooper, Halifax.

Solicitors appointed by the Court as amicus curiae: Owen Bird Law Corporation, Vancouver.

Solicitors for the intervener BullyingCanada Inc.: Murphy Group, Moncton.

Solicitors for the intervener the British Columbia Civil Liberties Association: Lawson Lundell, Vancouver.

Solicitors for the intervener Kids Help Phone: Osler, Hoskin & Harcourt, Toronto.

[page583]

Solicitors for the intervener the Canadian Civil Liberties Association: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener the Privacy Commissioner of Canada: Office of the Privacy Commissioner of Canada, Ottawa; University of Ottawa, Ottawa.

Solicitors for the intervener Newspapers Canada, Ad IDEM/Canadian Media Lawyers Association, the Canadian Association of Journalists, the Professional Writers Association of Canada and the Book and Periodical Council: Blake, Cassels & Graydon, Toronto.

Solicitor for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: University of Ottawa, Ottawa.

Solicitors for the intervener the Canadian Unicef Committee: Bennett Jones, Toronto.

Solicitor for the intervener the Information and Privacy Commissioner of Ontario: Information and Privacy Commissioner of Ontario, Toronto.

Solicitor for the intervener Beyond Borders: Jonathan M. Rosenthal, Toronto.

Indexed as:

Apotex Inc. v. Canada (Attorney General) (C.A.)

Merck & Co., Inc. and Merck Frosst Canada Inc. (Appellants) (Respondents)
v.
Apotex Inc. (Respondent) (Applicant)
and
Attorney General of Canada and The Minister of National Health and Welfare (Respondents) (Respondents)

[1994] 1 F.C. 742

[1993] F.C.J. No. 1098

Court File No. A-457-93

Federal Court of Canada - Court of Appeal

Mahoney, Robertson and McDonald JJ.A.

Heard: Ottawa, August 31 and September 1, 1993.
Judgment: October 22, 1993.

Food and drugs -- Appeal and cross-appeal from Trial Division decision granting mandamus and denying prohibition with respect to generic drug notice of compliance (NOC) -- Under Food and Drugs Act, "new drugs" must meet health and safety requirements -- NOC granted if drug found effective, safe -- Scientific safety and efficacy conditions met -- Apotex having vested right to NOC despite Minister's failure to render decision pending enactment of Patent Act Amendment Act, 1992 (Bill C-91) -- Narrow scope of ministerial discretion -- Pending legislative policy irrelevant consideration.

Patents -- Bill C-91 enacted to protect innovator pharmaceutical companies' distribution and sales rights to patented drugs -- Patented Medicines Regulations prohibiting issuance of NOCs in respect of patent-linked drugs -- NOCs, patent rights linked, not mutually dependent -- Mandamus not intended to facilitate patent infringement -- Regulations not procedural per se -- Generic drug manufacturer's vested right to NOC not divested by Bill C-91, Regulations, ss. 5(1),(2).

Judicial review -- Prerogative writs -- Mandamus -- Generic drug manufacturer seeking

mandamus to compel Minister to issue notice of compliance -- Case law on requirements for mandamus -- Available where duty to act not owing at time application filed -- Delay for seeking legal advice not bar to mandamus -- Court having discretion to invoke balance of convenience test as ground for refusing mandamus -- Criteria for exercise of discretion -- No legal basis to deny mandamus herein on ground of balance of convenience.

Federal Court jurisdiction -- Appeal Division -- Jurisdiction under Federal Court Act, s. 18 not ousted by paramountcy provision in Bill C-91 (Patent Act Amendment Act, 1992) -- Patent Act, s. 55.2(5) not privative clause insulating Minister, legislation from judicial review.

These were an appeal and a cross-appeal from a decision by Dubé J. allowing an application for mandamus to issue a notice of compliance (NOC) with respect to Apotex's generic version of the drug enalapril and denying the appellants' application for prohibition. The Patent Act Amendment Act, 1992 (Bill C-91), which was given Royal Assent on February 4, 1993, was enacted in order to protect innovator pharmaceutical companies' distribution and sales rights to patented drugs. Bill C-91 came into force on February 15, 1993 with the exception of the new section 55.2 of the Patent Act which, together with the Patented Medicines Regulations, were not brought into effect until March 12, 1993. Under the Food and Drugs Act (FDA), the Minister of National Health and Welfare must ensure that new drugs meet health and safety requirements. The manufacturer of a new drug must file a New Drug Submission (NDS) setting out the drug's qualities, ingredients and methods of manufacture and purification. The respondent, Apotex, after filing a NDS in respect of its generic drug Apo-Enalapril, sought an order of mandamus to compel the Minister to issue a notice of compliance with respect to that drug. Apotex's NDS was incomplete when it filed its mandamus application; nevertheless, by February 3, 1993, the new drug met all of the scientific safety and efficacy conditions required for a NOC to issue. Although the NDS had cleared the scientific and regulatory review process, the Department's ADM and DM decided to seek legal advice regarding the authority of the Minister or his ADM to issue the NOC in view of the impending passage of Bill C-91. The appellant, Merck, also forwarded a number of legal opinions to the Minister and then sought prohibition to prevent the Minister from issuing the notice of compliance. The Trial Judge ruled that the Minister did not possess the broad discretion to justify his refusal to issue the NOC and that the delay in issuing it was not warranted. He also rejected the argument that to issue mandamus when a new regulatory regime was pending would "frustrate the will of Parliament". This appeal raised a number of issues, namely: 1) the principles governing mandamus and the question of prematurity; 2) whether Apotex had a vested right to a NOC by March 12, 1993; 3) the balance of convenience; 4) whether Apotex's vested right to a NOC was divested by Bill C-91 and the Patented Medicines Regulations and 5) the jurisdiction of the Court. By cross-appeal, the Minister argued that the Trial Judge erred in finding the delay in issuing the NOC to be unwarranted.

Held, the appeal and cross-appeal should be dismissed.

1) Several principal requirements must be satisfied before mandamus will issue. First, there must be a public legal duty to act owed to the applicant. Generally, mandamus cannot issue with respect to a duty owed to the Crown. The Minister had a duty to act which was owed to Apotex. Merck's submission, that the Minister owed no duty to Apotex at the time it commenced its judicial review application on December 22, 1992 or on the hearing date, was partly correct. An order of mandamus will not lie to compel an officer to act in a specified manner if he is under no obligation to act as of the hearing date, but that rule was not valid if applied as of the date that the application for mandamus was filed. While it is open to a respondent to pursue dismissal of an application where the duty to perform has yet to arise, in the absence of compelling reasons, an application for mandamus should not be defeated on the ground that it was initiated prematurely. Provided that the conditions precedent to the exercise of the duty have been satisfied at the time of the hearing, the application should be assessed on its merits.

2) If a decision-maker has an unfettered discretion which he has not exercised as of the date a new law takes effect, the applicant cannot successfully assert either a vested right or even the right to have the decision-maker render a decision. A "vested right" must be distinguished from a "mere hope or expectation". The scope of a decision-maker's discretion is directly contingent upon the characterization of various considerations as "relevant or irrelevant" to its exercise. The Food and Drug Regulations restrict the factors to be considered by the Minister in the proper exercise of his discretion to those concerning a drug's safety and efficacy. They neither expressly nor implicitly contemplate the broad scope of ministerial discretion advocated by Merck. It cannot be said that the time needed to enable a decision-maker to seek and obtain legal advice in any decision-making process is of itself a basis for denying mandamus. That self-imposed obligation cannot of itself deprive Apotex of its right to mandamus. In the absence of intervening legislation, the "legal advice" issue would not have arisen. The legal advice sought herein had no bearing on the exercise of the Minister's narrowly circumscribed discretion. Moreover, to deny mandamus because of legal concerns generated by a party adverse in interest (Merck) would be to judicially condone what might be regarded as a tactical manoeuvre intended to obfuscate and delay the decision-making process. Pending legislative policy was not a consideration relevant to the exercise of the Minister's discretion. It could not be said that, in the exercise of his statutory power under the Food and Drug Regulations, the Minister was entitled to have regard to the provisions of Bill C-91 after enactment but prior to proclamation. Apotex had a vested right to the NOC notwithstanding the Minister's failure to render a decision by March 12, 1993.

3) The case law on mandamus reveals a number of techniques resorted to by courts in balancing competing interests. Any inclination to engage in a balancing of interests must be measured strictly against the rule of law. Having regard to the relevant jurisprudence, it had to be concluded that this Court possesses discretion to refuse mandamus on the ground of balance of convenience. The cases demonstrate three factual patterns in which the balance of convenience test has been implicitly acknowledged. First, there are those cases where the administrative cost or chaos that would result from granting such relief is obvious and unacceptable. The second ground for denying mandamus appears to arise in instances where potential public health and safety risks are perceived to outweigh

an individual's right to pursue personal or economic interests. In this case, there was no issue with respect to administrative chaos or public health and safety. The third line of authority attempts to establish a principle by which it can be determined whether a property owner has acquired a vested right to a building permit pending approval of a by-law amendment. That principle is of no relevance to this case nor to the issue of the Court's discretion to refuse mandamus on the ground of balance of convenience. There was no legal basis upon which the "balance of convenience" test could be applied to deny Apotex the relief sought.

4) The Patented Medicines Regulations prohibit the issuance of NOCs in respect of "patent-linked" drugs. Subsections 5(1) and (2) thereof refer to NDSs filed before March 12, 1993. While NOCs and patent rights are linked, they have never been mutually dependent. Practically speaking, Merck is seeking an interlocutory injunction against Apotex with respect to possible patent infringement without having to satisfy the conditions precedent imposed at law to the granting of such relief. An order in the nature of mandamus cannot be viewed as an instrument which "facilitates" patent infringement. The Patented Medicines Regulations are not procedural regulations per se. The imposition of a criterion that a NOC cannot issue with respect to a patent-linked NDS is clearly a substantive change in the law and hence subject to the rules of statutory construction applicable to legislation purporting to affect vested rights. Subsections 5(1) and (2) do not manifestly seek to divest persons of acquired rights; they are at best ambiguous. While Parliament has the authority to pass retroactive legislation, thereby divesting persons of an acquired right, vested rights could not be divested by the Patented Medicines Regulations unless the enabling legislation, that is the Patent Act or Bill C-91, implicitly or explicitly authorize such encroachments. Bill C-91 contains no provision specifically authorizing regulations to interfere with existing or vested rights except as to compulsory licences granted after December 20, 1991.

5) The jurisdiction of this Court was not "ousted" by the paramountcy provision in Bill C-91. Subsection 55.2(5) of the Patent Act could not be said to be paramount to section 18 of the Federal Court Act and could not be construed as a privative clause insulating the Minister and the relevant legislation from judicial review.

Statutes and Regulations Judicially Considered

Clean Water Act, R.S.A. 1980, c. C-13, s. 3.
Criminal Code, R.S.C. 1970, c. C-34.
Criminal Law Amendment Act, 1977, S.C. 1976-77, c. 53.
Federal Court Act, R.S.C., 1985, c. F-7, s. 18 (as am. by S.C. 1990, c. 8, s. 4).
Food and Drug Regulations, C.R.C., c. 870, ss. C.08.002 (as am. by SOR/85-143, s. 1), C.08.004 (as am. idem, s. 3, SOR/88-257, s. 1).
Food and Drugs Act, R.S.C., 1985, c. F-27.
Interpretation Act, R.S.C. 1952, c. 158.
Interpretation Act, S.C. 1967-68, c. 7, ss. 36(c), 37(c).
Interpretation Act, R.S.C., 1985, c. I-21, s. 44(c).

Orders and Regulations respecting Patents of Invention made under The War Measures Act, 1914, (1914), 48 The Canada Gazette 1107.
Patent Act, S.C. 1923, c. 23, s. 17.
Patent Act, R.S.C. 1952, c. 203, s. 41(3) (as am. by S.C. 1968-69, c. 49, s. 1).
Patent Act, R.S.C., 1985, c. P-4, ss. 39(4),(14), 55.2 (as enacted by S.C. 1993, c. 2, s. 4).
Patent Act Amendment Act, 1992, S.C. 1993, c. 2, ss. 3, 4, 12(1).
Patented Medicines (Notice of Compliance) Regulations, SOR/93-133, ss. 5, 6, 7(1).
War Measures Act, 1914 (The), S.C. 1914 (2nd Sess.), c. 2.

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Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant (1971), 65 C.P.R. 1 (Ex. Ct.); appeal to S.C.C. dismissed [1972] S.C.R. vi;
Director of Public Works v. Ho Po Sang, [1961] A.C. 901 (P.C.);
A.G. for British Columbia et al. v. Parklane Private Hospital Ltd., [1975] 2 S.C.R. 47; (1974), 47 D.L.R. (3d) 57; [1974] 6 W.W.R. 72; 2 N.R. 305.

Distinguished:

Ottawa, City of v. Boyd Builders Ltd., [1965] S.C.R. 408; (1965), 50 D.L.R. (2d) 704;
Engineers' and Managers' Association v. Advisory, Conciliation and Arbitration Service, [1980] 1 W.L.R. 302 (H.L.);
Wimpey Western Ltd. and W-W-W Developments Ltd. v. Director of Standards and Approvals of the Department of the Environment, Minister of the Environment and Province of Alberta (1983), 49 A.R. 360; 3 Admin. L.R. 247; 23 Alta. L.R. (2d) 193 (C.A.).

Considered:

Pfizer Canada Inc. v. Minister of National Health & Welfare et al. (1986), 12 C.P.R. (3d) 438 (F.C.A.); leave to appeal to S.C.C. refused (1987), 14 C.P.R. (3d) 447; 76 N.R. 397;
Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare), [1988] 1 F.C. 422; (1987), 43 D.L.R. (4th) 273; 16 C.I.P.R. 55; 18 C.P.R. (3d) 206; 16 F.T.R. 81; additional reasons at (1988), 19 C.I.P.R. 120; 19 C.P.R. (3d) 374 (T.D.); affd (1990), 68 D.L.R. (4th) 761; 31 C.P.R. (3d) 29; 107 N.R. 195 (F.C.A.);
O'Grady v. Whyte, [1983] 1 F.C. 719; (1982), 138 D.L.R. (3d) 167; 42 N.R. 608 (C.A.);
Karavos v. Toronto & Gillies, [1948] 3 D.L.R. 294; [1948] O.W.N. 17 (Ont. C.A.);
Distribution Canada Inc. v. M.N.R., [1991] 1 F.C. 716; (1990), 46 Admin. L.R. 34; 39 F.T.R. 127 (T.D.); affd [1993] 2 F.C. 26 (C.A.);
Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. (1965), 113 C.L.R. 177 (Aust. H.C.);
Martinoff v. Gossen, [1979] 1 F.C. 327 (T.D.); Lemyre v. Trudel, [1978] 2 F.C. 453; (1978), 41 C.C.C. (2d) 373 (T.D.); affd [1979] 2 F.C. 362; (1979), 49 C.C.C. (2d) 188 (C.A.);

Abell v. Commissioner of Royal Canadian Mounted Police (1979), 49 C.C.C. (2d) 193; 3 Sask. R. 181 (C.A.);
Re Central Canada Potash Co. Ltd. et al. and Minister of Mineral Resources for Saskatchewan (1972), 30 D.L.R. (3d) 480; [1972] 6 W.W.R. 62 (Sask. Q.B.); affd (1973), 32 D.L.R. (3d) 107; [1973] 1 W.W.R. 193 (Sask. C.A.); appeal to S.C.C. dismissed (1973), 38 D.L.R. (3d) 317; [1973] 2 W.W.R. 672;
Fitzgerald v. Muldoon, [1976] 2 N.Z.L.R. 615 (S.C.).

Referred to:

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Apotex Inc. v. Canada (Attorney General) et al. (1993), 59 F.T.R. 85 (F.C.T.D.);
C.E. Jamieson & Co. (Dominion) v. Canada (Attorney General), [1988] 1 F.C. 590; (1987), 46 D.L.R. (4th) 582; 37 C.C.C. (3d) 193; 12 F.T.R. 167 (T.D.);
Mensinger v. Canada (Minister of Employment and Immigration), [1987] 1 F.C. 59; (1986), 24 C.R.R. 260; 5 F.T.R. 64 (T.D.);
Minister of Employment and Immigration v. Hudnik, [1980] 1 F.C. 180; (1979), 103 D.L.R. (3d) 308 (C.A.);
Jefford v. Canada, [1988] 2 F.C. 189; (1988), 47 D.L.R. (4th) 321; 28 C.L.R. 266 (C.A.);
Winegarden v. Public Service Commission and Canada (Minister of Transport) (1986), 5 F.T.R. 317 (F.C.T.D.);
Rossi v. The Queen, [1974] 1 F.C. 531; (1974), 17 C.C.C. (2d) 1 (T.D.);
Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment), [1989] 3 F.C. 309; [1989] 4 W.W.R. 526; (1989), 37 Admin. L.R. 39; 3 C.E.L.R. (N.S.) 287; 26 F.T.R. 245 (T.D.); affd [1990] 2 W.W.R. 69; (1989), 38 Admin. L.R. 138; 4 C.E.L.R. (N.S.) 1; 99 N.R. 245 (F.C.A.);
Bedard v. Correctional Service of Canada, [1984] 1 F.C. 193 (T.D.);
Carota v. Jamieson, [1979] 1 F.C. 735 (T.D.); affd [1980] 1 F.C. 790 (C.A.);
Nguyen v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 232 (C.A.);
Rothmans of Pall Mall Canada Limited v. Minister of National Revenue (No. 1), [1976] 2 F.C. 500; (1976), 67 D.L.R. (3d) 505; [1976] C.T.C. 339; 10 N.R. 153 (C.A.);
Secunda Marine Services Ltd. v. Canada (Minister of Supply & Services) (1989), 38 Admin. L.R. 287; 27 F.T.R. 161 (F.C.T.D.);
Szoboszloi v. Chief Returning Officer of Canada, [1972] F.C. 1020 (T.D.);
Hutchins v. Canada (National Parole Board), [1993] 3 F.C. 505 (C.A.);
Thorson v. Attorney General of Canada et al., [1975] 1 S.C.R. 138; (1974), 43 D.L.R. (3d) 1; 1 N.R. 225;
Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265; (1975), 12 N.S.R. (2d) 85; 55 D.L.R. (3d) 632; 32 C.R.N.S. 376; 5 N.R. 43;
Minister of Justice of Canada et al. v. Borowski, [1981] 2 S.C.R. 575; (1981), 130 D.L.R. (3d) 588;

[1982] 1 W.W.R. 97; 12 Sask.R. 420; 64 C.C.C. (2d) 97; 24 C.P.C. 62; 24 C.R. (3d) 352; 39 N.R. 331;
Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607; (1986), 33 D.L.R. (4th) 321; [1987] 1 W.W.R. 603; 23 Admin. L.R. 197; 17 C.P.C. (2d) 289; 71 N.R. 338;
Bhatnager v. Minister of Employment and Immigration, [1985] 2 F.C. 315 (T.D.);
Restrictive Trade Practices Commission v. Director of Investigation and Research, Combines Investigation Act, [1983] 2 F.C. 222; (1983), 145 D.L.R. (3d) 540; 70 C.P.R. (2d) 145; 48 N.R. 305 (C.A.); revg [1983] 1 F.C. 520; (1982), 142 D.L.R. (3d) 333; 67 C.P.R. (2d) 172 (T.D.);
Maple Lodge Farms Ltd. v. Government of Canada, [1980] 2 F.C. 458 (T.D.); affd Maple Lodge Farms Ltd. v. R., [1981] 1 F.C. 500; (1980), 114 D.L.R. (3d) 634; 42 N.R. 312 (C.A.); affd Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2; (1982), 137 D.L.R. (3d) 558; 44 N.R. 354;
Kahlon v. Canada (Minister of Employment and Immigration), [1986] 3 F.C. 386; (1986), 30 D.L.R. (4th) 157; 26 C.R.R. 152 (C.A.);
Harelkin v. University of Regina, [1979] 2 S.C.R. 561; (1979), 96 D.L.R. (3d) 14; [1979] 3 W.W.R. 676; 26 N.R. 364;
Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1987] 1 F.C. 406; (1987), 35 D.L.R. (4th) 693; 27 Admin. L.R. 79; 73 N.R. 241 (C.A.); appeal dismissed [1989] 2 S.C.R. 49; (1989), 61 D.L.R. (4th) 604; 97 N.R. 241;
Friends of the Oldman River Society v. Canada (Minister of Transport), [1990] 2 F.C. 18; (1990), 68 D.L.R. (4th) 375; [1991] 1 W.W.R. 352; 76 Alta. L.R. (2d) 289; 5 C.E.L.R. (N.S.) 1; 108 N.R. 241 (C.A.); affd [1992] 1 S.C.R. 3; (1992), 88 D.L.R. (4th) 1; [1992] 2 W.W.R. 193; 84 Alta. L.R. (2d) 129; 3 Admin. L.R. (2d) 1; 7 C.E.L.R. (N.S.) 1; 132 N.R. 321;
Landreville v. The Queen, [1973] F.C. 1223; (1973), 41 D.L.R. (3d) 574 (T.D.);
Beauchemin v. Employment and Immigration Commission of Canada (1987), 15 F.T.R. 83 (F.C.T.D.);
Penner v. Electoral Boundaries Commission (Ont.), [1976] 2 F.C. 614 (T.D.);
Haines v. Attorney General of Canada (1979), 32 N.S.R. (2d) 271; 54 A.P.R. 271; 47 C.C.C. (2d) 548 (C.A.);
Carrier-Sekani Tribal Council v. Canada (Minister of the Environment), [1992] 3 F.C. 316 (C.A.);
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Howard Smith Paper Mills Ltd. et al. v. The Queen, [1957] S.C.R. 403; (1957), 8 D.L.R. (2d) 449; 118 C.C.C. 321; 29 C.P.R. 6; 26 C.R. 1;
Gardner v. Lucas (1878), 3 App. Cas. 582 (H.L.);
De Roussy v. Nesbitt (1920), 53 D.L.R. 514 (Alta. C.A.);
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Northern & Central Gas Corp. v. National Energy Board, [1971] F.C. 149; (1971), 26 D.L.R. (3d) 174; [1971] 4 W.W.R. 413 (T.D.);
Minister of National Revenue v. Gustavson Drilling (1964) Ltd., [1972] F.C. 92; [1972] C.T.C. 83; (1972), 72 D.T.C. 6068 (T.D.);
Zong v. Commissioner of Penitentiaries, [1976] 1 F.C. 657; (1975), 29 C.C.C. (2d) 114; 10 N.R. 1 (C.A.).

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APPEAL and CROSS-APPEAL from a Trial Division decision ((1993), 49 C.P.R. (3d) 161; 66 F.T.R. 36 (F.C.T.D.)) allowing application for mandamus to compel the Minister of National Health and Welfare to issue a notice of compliance with respect to a generic drug, and dismissing appellant's application for prohibition. Appeal and Minister's cross-appeal dismissed.

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Solicitors:

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Goodman & Goodman, Toronto, for respondent (applicant) Apotex Inc.
Deputy Attorney General of Canada for respondents (respondents) Attorney General of Canada and the Minister of National Health and Welfare.

The following are the reasons for judgment rendered in English by

1 ROBERTSON J.A.:-- The respondent, Apotex Inc. ("Apotex"), is a "generic" manufacturer and distributor of drugs. That is to say it manufactures and distributes drugs which were researched, developed and first brought to market by "innovator" companies. Apotex sought an order in the nature of mandamus to compel the Minister of National Health and Welfare (the "Minister") to issue a notice of compliance ("NOC") with respect to Apo-Enalapril, its generic version of the drug enalapril. Armed with a NOC, Apotex would have been in a position to market Apo-Enalapril in direct competition with "VASOTEC", the trade-mark under which the appellants, Merck & Co., Inc. and Merck Frosst Canada Inc. ("Merck"), manufacture and sell enalapril.

2 Merck, an "innovator" drug manufacturer, is the leading pharmaceutical company in Canada in terms of sales. Its drug "VASOTEC" is used for the treatment of congestive heart failure and hypertension and is the largest selling pharmaceutical in Canada, contributing approximately $140 million toward Merck's annual revenue of $400 million. It is thus not surprising that Merck sought an order prohibiting the Minister from issuing the NOC to Apotex. The mandamus and prohibition applications were consolidated by order of the Court and heard together. Apotex was the victor and hence the matter is before us for further consideration.

3 This is not the first time the competing economic interests of Canadian generic and innovator drug manufacturers have collided: e.g., Pfizer Canada Inc. v. Minister of National Health & Welfare et al. (1986), 12 C.P.R. (3d) 438 (F.C.A.); leave to appeal to Supreme Court refused (1987), 14 C.P.R. (3d) 447; Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare), [1988] 1 F.C. 422 (T.D.), additional reasons at (1988), 19 C.I.P.R. 120 (F.C.T.D.); affd (1990), 68 D.L.R. (4th) 761 (F.C.A.); and Apotex Inc. v. Attorney General of Canada et al. (1986), 11 C.P.R. (3d) 43 (F.C.T.D.); application for reconsideration denied (1986), 11 C.P.R. (3d) 62; affirmed (1986), 12 C.P.R. (3d) 95 (F.C.A.); leave to appeal to Supreme Court of Canada refused (1987), 14 C.P.R. (3d) 447.

4 This appeal, however, represents more than a private law skirmish about the economic and health interests of Canadians. At least one aspect of that issue was supposedly resolved by Parliament when it enacted the Patent Act Amendment Act, 1992, S.C. 1993, c. 2, amending [Patent Act] R.S.C., 1985, c. P-4, ("Bill C-91") with the intent of thwarting the possible appropriation by generic drug companies, such as Apotex, of the research and development initiatives of innovators,

such as Merck. The principal issue we must address here is the effect of Bill C-91 on what Apotex argues is a vested right to the NOC. The enactment of Bill C-91 between the date that Apotex's mandamus application was filed and the date it was heard, together with the Minister's continuing failure to issue the Apo-Enalapril NOC, were the legal catalysts which propelled both Apotex and Merck into the courtrooms of the Trial and Appeal Divisions of this Court.

5 Aside from reviewing the traditional requirements for mandamus, this Court must determine whether the Minister could withhold the NOC on the basis of the then unproclaimed provisions of Bill C-91. Alternatively, it is asked whether the delay occasioned by the need to obtain legal advice with respect to the legality of issuing the NOC prevented Apotex from acquiring a vested right to the NOC. Now that Bill C-91 is law, Merck argues that Apotex must comply with its provisions which, if applicable, clearly deny Apotex that which it seeks. Moreover, Merck submits that this Court has the discretion to refuse mandamus where the effect would be to "frustrate the will of Parliament." That argument essentially invites this Court to consider what has been labelled the "balance of convenience" test in evaluating Apotex's mandamus application. These issues, among others, may only be addressed against the legislative framework in place at the time Apotex submitted its NOC application and that currently in effect.

LEGISLATIVE FRAMEWORK

6 In part, this appeal hinges on the scope of ministerial discretion as set out in the Food and Drugs Act, R.S.C., 1985, c. F-27, (the "FDA") and the regulations enacted pursuant to that Act (the "FDA Regulations") [Food and Drug Regulations, C.R.C., c. 870]. The responsibility for administering the FDA rests principally with the Health Protection Branch of the Department of National Health and Welfare (the "HPB").

7 Under the FDA, the Minister must ensure that "new drugs" meet health and safety requirements. A "new drug" is defined in section C.08.001 of the FDA Regulations as a drug which contains a substance which has not been sold in Canada for a sufficient time and in sufficient quantity to establish its safety and effectiveness.

8 A "new drug" must undergo rigorous testing before it may be sold. The manufacturer of the drug must file a New Drug Submission ("NDS") with the HPB setting out, inter alia, the drug's qualities, ingredients and methods of manufacture and purification. The NDS also includes the results of the manufacturer's clinical studies supporting the drug's safety and effectiveness. All aspects of the NDS are examined by multidisciplinary teams of the Drugs Directorate of the HPB. A NOC will only issue if the drug is found to be both effective and safe for human use. The relevant provisions [C.08.002 (as am. by SOR/85-143, s. 1), C.08.004 (as am. idem, s. 3, SOR/88-257, s. 1)] of the FDA Regulations state:

> C.08.002. (1) No person shall sell or advertise for sale a new drug unless

> (a) the manufacturer of the new drug has filed with the Minister, in duplicate, a new drug submission relating to that new drug, having a content satisfactory to the Minister;
> (b) the Minister has issued a notice of compliance to the manufacturer of the new drug in respect of that new drug submission pursuant to section C.08.004;
> (c) that notice of compliance is not suspended pursuant to section C.08.006 . . .
>
> . . .
>
> C.08.004. (1) The Minister shall, after completing an examination of a new drug submission or supplement thereto,
>
> (a) if that submission or supplement complies with the requirements of section C.08.002 or C.08.003, as the case may be, and section C.08.005.1, issue a notice of compliance . . . . [Emphasis added.]

9 Prior to the proclamation of Bill C-91, a generic drug company could obtain a compulsory licence from the Commissioner of Patents authorizing it to advertise, manufacture and sell any drug in respect of which a NOC had been issued. Although the generic drug company was required to pay royalties to the drug's innovator, it could sell the drug notwithstanding the innovator's patent rights. This arrangement was governed by subsection 39(4) of the Patent Act, R.S.C., 1985, c. P-4, (the "Patent Act"):

> 39. . . .
>
> (4) Where, in the case of any patent for an invention intended or capable of being used for medicine or for the preparation or production of medicine, an application is made by any person for a licence to do one or more of the following things as specified in the application, namely,
>
> (a) where the invention is a process, to use the invention for the preparation or production of medicine, import any medicine in the preparation or production of which the invention has been used or sell any medicine in the preparation or production of which the invention has been used, or
> (b) where the invention is other than a process, to import, make, use or sell the invention for medicine or for the preparation or production of medicine,

> the Commissioner shall grant to the applicant a licence to do the things specified in the application except such, if any, of those things in respect of which he sees good reason not to grant a licence.

10 Subsection 39(14) of the Patent Act required the Commissioner of Patents to notify the Department of National Health and Welfare of all compulsory licence applications. To this extent, there was a "linkage" between NOCs and patent rights.

11 Bill C-91 was drafted in order to protect innovator pharmaceutical companies' distribution and sales rights to patented drugs and represents a reversal of government policy adopted by Parliament in 1923: see The Patent Act, S.C. 1923, c. 23, section 17; but compare Order in Council respecting patents of invention held by alien enemies [Orders and Regulations respecting Patents of Invention made under The War Measures Act, 1914], P.C. 1914-2436, The Canada Gazette, October 10, 1914, enacted pursuant to the War Measures Act, 1914 (The), S.C. 1914, (2nd Sess.), c. 2. Bill C-91 was introduced in the House of Commons on June 23, 1992 and passed its third reading on December 10, 1992. It was given Royal Assent on February 4, 1993.[1]

12 The immediate effects of Bill C-91 are well known. Section 3 of the Bill repealed the compulsory licensing provisions of the Patent Act, while subsection 12(1) extinguished all compulsory licences issued on or after December 20, 1991, as follows:

> 12. (1) Every licence granted under section 39 of the former Act on or after December 20, 1991 shall cease to have effect on the expiration of the day preceding the commencement day, and all rights or privileges acquired or accrued under that licence or under the former Act in relation to that licence shall thereupon be extinguished.

13 Section 4 of the Bill adds section 55.2 to the Patent Act. Subsection 55.2(4) authorizes the Governor in Council to make regulations concerning, inter alia, the issuance of NOCs, as follows:

55.2 . . .

> (4) The Governor in Council may make such regulations as the Governor in Council considers necessary for preventing the infringement of a patent by any person who makes, constructs, uses or sells a patented invention in accordance with subsection (1) or (2) including, without limiting the generality of the foregoing, regulations
>
> (a) respecting the conditions that must be fulfilled before a notice, certificate,

permit or other document concerning any product to which a patent may relate may be issued to a patentee or other person under any Act of Parliament that regulates the manufacture, construction, use or sale of that product, in addition to any conditions provided for by or under that Act;

(b) respecting the earliest date on which a notice, certificate, permit or other document referred to in paragraph (a) that is issued or to be issued to a person other than the patentee may take effect and respecting the manner in which that date is to be determined;

(c) governing the resolution of disputes between a patentee or former patentee and any person who applies for a notice, certificate, permit or other document referred to in paragraph (a) as to the date on which that notice, certificate, permit or other document may be issued or take effect;

(d) conferring rights of action in any court of competent jurisdiction with respect to any disputes referred to in paragraph (c) and respecting the remedies that may be sought in the court, the procedure of the court in the matter and the decisions and orders it may make; and

(e) generally governing the issue of a notice, certificate, permit or other document referred to in paragraph (a) in circumstances where the issue of that notice, certificate, permit or other document might result directly or indirectly in the infringement of a patent.

14 On February 12, 1993, the Governor in Council fixed February 15 as the date Bill C-91, with the exception of section 55.2, would come into force. On March 12, 1993, that section and the Patented Medicines (Notice of Compliance) Regulations, SOR/93-133, (the "Patented Medicines Regulations") were brought into effect.

15 The Patented Medicines Regulations prohibit the issuance of NOCs in respect of "patent-linked" drugs. A "patent-linked" drug is one in respect of which both a NOC and an unexpired patent have been issued. The patent may relate to either the medicine itself or the method of using the drug to treat an illness.

16 Subsections 5(1) and (2) of the Patented Medicines Regulations refer to NDSs filed before March 12, 1993 (the date the Regulations were brought into effect) and read as follows:

> 5. (1) Where a person files or, before the coming into force of these Regulations, has filed a submission for a notice of compliance in respect of a drug and wishes to compare that drug with, or make reference to, a drug that has been marketed in Canada pursuant to a notice of compliance issued to a first person in respect of which a patent list has been submitted, the person shall, in the submission, with respect to each patent on the patent list,

(a) state that the person accepts that the notice of compliance will not issue until the patent expires; or
(b) allege that

(i) the statement made by the first person pursuant to paragraph 4(2)(b) is false,
(ii) the patent has expired,
(iii) the patent is not valid, or
(iv) no claim for the medicine itself and no claim for the use of the medicine would be infringed by the making, constructing, using or selling by that person of the drug for which the submission for the notice of compliance is filed.

(2) Where, after a second person files a submission for a notice of compliance, but before the notice of compliance is issued, a patent list is submitted or amended in respect of a patent pursuant to subsection 4(5), the second person shall amend the submission to include, in respect of that patent, the statement or allegation that is required by subsection (1).

Subsection 7(1) of the Patented Medicines Regulations prohibits the Minister from issuing a NOC to generic drug companies who have not complied with section 5 of the Regulations.

17 One of the principal issues on appeal is whether the above provisions apply to Apotex's NDS. In this regard, Merck notes that Parliament specifically introduced a special paramountcy rule in subsection 55.2(5) of the Patent Act to explicitly reinforce the objective of Bill C-91:

55.2 . . .

(5) In the event of any inconsistency or conflict between

(a) this section or any regulations made under this section, and
(b) any Act of Parliament or any regulations made thereunder,

this section or the regulations made under this section shall prevail to the extent of the inconsistency or conflict. [Emphasis added.]

FACTS

18 There are two factual matters in dispute. In addition, one factual matter-the precise reason or reasons underlying the Minister's failure to issue the NOC-has apparently eluded the parties' consideration. The import of this gap will be evaluated following an outline of the commonly-held facts giving rise to this appeal.

(a) Common Ground

19 On July 3, 1989, the Minister delegated the authority to sign NOCs to persons occupying the positions of Assistant Deputy Minister ("ADM") and Director General of the Drugs Directorate. Throughout the relevant period in this appeal, Kent Foster was the ADM and the only person to whom the Minister's authority to sign NOCs had devolved.

20 Apotex submitted a NDS in respect of Apo-Enalapril on February 15, 1990.[2] Eight months later, on October 16, 1990, Merck was granted a seventeen-year patent in respect of enalapril to expire on October 16, 2007.

21 Bill C-91 received third reading on December 10, 1992. On December 22, thirty-four months after filing its NDS, Apotex initiated an application for judicial review against the Minister in which it sought an order in the nature of mandamus in respect of the Apo-Enalapril NOC.

22 Apotex's NDS was incomplete when it filed its mandamus application. The HPB had notified Apotex in writing of the deficiencies in the bio-equivalence portion of the Apo-Enalapril NDS on July 20, 1992 and did not receive all of the required information from Apotex until January 11, 1993. Additional information concerning the chemistry and manufacturing portion of the NDS was also requested and received from Apotex. Finally, on February 2, 1993, the HPB requested clean product monographs, which were provided on February 3, 1993. As of that date Apotex's NDS satisfied both the clinical and the chemistry and manufacturing requirements prescribed in the FDA Regulations. In other words, by February 3, 1993, Apo-Enalapril met all of the scientific safety and efficacy conditions required for a NOC to issue.

23 Two events relevant to this appeal transpired on February 4, 1993: Bill C-91 received Royal Assent and the Apo-Enalapril NOC was placed on Foster's desk for signature. Foster admitted that the NDS had "cleared the scientific and regulatory review process" and that he and the ADM of National Pharmaceutical Strategy were of the view that the NOC ought to issue. However, Foster had been advised by the Minister's Chief of Staff on January 21, 1993 that he should keep the Minister apprised of any "patent-linked" NDSs in view of the impending passage of Bill C-91. In a note accompanying the Apo-Enalapril NOC, the ADM of National Pharmaceutical Strategy intimated that the Apo-Enalapril NOC was one in respect of which Foster's signing authority had been effectively fettered.

24 Foster did not see the NOC-related documents until approximately 6:00 p.m. on February 4.

On the next day, because of the fetter placed on his authority and aware of Apotex's court application, he contacted his Deputy Minister. Together they decided to seek legal advice regarding the authority of the Minister or Foster to issue the Apo-Enalapril NOC in light of the passage of Bill C-91. Later that day, the president of Merck telephoned Foster, indicating that Foster was obligated to refrain from issuing the NOC. On February 8, 1993, the Department of National Health and Welfare sought and obtained legal opinions from outside counsel and the Department of Justice regarding the Minister's authority to issue the NOC. The substance of these opinions has not been released on the ground of privilege.[3]

25 Between February 12 and February 23, 1993, Merck forwarded eight legal opinions obtained from private law firms to the Minister. Those opinions supported Merck's position that it would be inappropriate and even unlawful for the Minister or Foster to issue a NOC in respect of Apo-Enalapril. To make sense of this flurry of unsolicited opinions, Foster sought further legal advice on February 24, 1993. He stated:

> My concern was that whatever action I took or did not take might have the Minister, by virtue of my delegated authority, contravening the law. I didn't know the answer to that and I wanted the answer to that.

26 To dispel any doubt harboured by the Minister and his staff, Merck submitted additional legal opinions which substantively reiterated those previously sent. Between February 12 and March 5, 1993, Merck provided the Government with a total of seventeen legal opinions. All were placed before the Trial Judge and this Court. None support Apotex's position that the Minister did not have the right to consider impending government policy in denying Apotex its NOC.

27 On February 22, 1993, Merck commenced an application for judicial review seeking, inter alia, a prohibition order preventing the Minister from issuing the Apo-Enalapril NOC. Apotex brought a motion for judgment directing the Minister to issue this NOC on March 4, 1993. On March 9, 1993, the Minister sought and received an adjournment of the Apotex application until March 16, 1993.[4] On March 12, 1993, subsection 55.2(4) of the Patent Act and the Patented Medicines Regulations came into effect.

28 On March 18, 1993, the applications of Merck and Apotex were consolidated by order of a Trial Judge. They were heard on June 21, 1993. On July 16, 1993, Dubé J. allowed Apotex's application for mandamus and denied Merck's application for prohibition [Apotex Inc. v. Canada (Attorney-General) (1993), 49 C.P.R. (3d) 161].

(b) Disputed Facts

29 In oral argument, Merck sought to establish that the Minister was still investigating allegations that Apo-Enalapril was unsafe after February 4, 1993. The HPB has apparently determined these allegations to be unfounded and, in any event, they are contrary to the Minister's position at trial that Apo-Enalapril had met all the criteria and conditions prescribed by the existing FDA

Regulations by February 3, 1993 (Apotex, supra, at page 176).

30 By counter-offensive, Apotex suggested that the Minister did not fairly consider the NDS. It alleged that other "patent-linked" generic NDSs were being approved while Apotex's NOC was being delayed. (From the appeal record, I note that Merck had accused the Minister of "accelerating" the processing of Apotex's NDS.) The Trial Judge acknowledged the issue but did not address it, either because it was unnecessary or because it was not deserving of attention (at page 170). Apotex did not launch a cross-appeal with respect to this issue.

(c) The Factual Lacuna

31 Only the Minister possessed the discretionary power to issue a NOC to Apotex once the NDS review was completed. Neither he nor Foster signed the NOC. However, the Minister's reasons for failing to issue the NOC are unclear.

32 Merck first maintains that there is no evidence the NOC had been formally presented to the Minister for his consideration, a fact acknowledged by the Trial Judge (appellants' memorandum of fact and law, paragraph 42, Apotex, supra, at pages 167-168). It also seeks to establish that the Minister was entitled to have regard to pending legislative policy in issuing the NOC (appellants' memorandum of fact and law, paragraph 67). The former submission implies that the Minister had not yet had the opportunity to review Apotex's application. The inference to be drawn from the latter is that, not only did the Minister review the NDS, but his lawful consideration of pending government legislation was one reason why the NOC did not issue. There is no evidence that the Minister received, much less acted upon, the legal advice sought on February 24, 1993.

33 Regrettably, no one has sought to elicit from the Minister the very reason or reasons underlying his failure to authorize the NOC prior to March 12, 1993.[5] Upon reflection, we are left with the following possibilities (there are others): Was the Minister still in search of the "definitive" legal opinion? Did he not have the opportunity to review the NDS? Or did the Minister conclude that as a matter of law the NOC could not issue? Since Apotex has neither impeached the motives of the Minister nor argued unreasonable delay, I am left with the legal arguments pursued by the parties.

DECISION UNDER APPEAL

34 At trial, Dubé J. perceived the central issue to be whether the Minister, prior to March 12, 1993, possessed the discretionary power to decline to issue the NOC to Apotex on the basis of anticipated changes to the Patent Act. He concluded (at page 177):

> In my view, there can be no doubt that the FDR did entitle the Minister to exercise his discretion in the Apotex NDS approval process. However, this discretion, like all discretionary authority, was not unfettered. The scope of the Minister's discretion was limited strictly to a consideration of factors relevant to

> the purposes of the FDR as they relate to the process for approval of new drugs to be marketed in Canada. . . . It was limited to a decision as to whether the HPB review of the Apotex NDS established that Apo-enalapril was safe and effective. Once that question had been answered in the affirmative, as it was in this case, any other extraneous consideration was irrelevant to the issuance of a NOC under the FDR.
>
> The Minister was not entitled to refuse to issue a NOC to Apotex on the basis of anticipated changes to the patent statute and regulations thereunder, an area within the authority of his colleague, the Minister of Consumer and Corporate Affairs.

35 The learned Judge found support for his position in three decisions of the Trial Division of this Court. First, he applied the reasoning of MacKay J. in Apotex Inc. v. Canada (Attorney General) et al. (1993), 59 F.T.R. 85, where it was held (at pages 108-109):

> [T]he words "having a content satisfactory to the Minister" qualify the words "new drug submission" so that in every case the content of a submission is a matter within the discretion of the Minister and those acting on his or her behalf to determine.
>
> . . .
>
> [T]he Regulations vest complete and exclusive discretion in the respondent Minister and the Director of HPB to determine the requirements of a new drug submission in terms of the information or evidence to be provided by the manufacturer. [Emphasis not in original.]

36 The second decision is Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare), supra, where Rouleau J. concluded (at page 426):

> The central purpose of the Regulations is to ensure that any new drug meets rigorous safety profile standards in order to protect the Canadian public. If, upon review, the Minister finds the new drug submission to be satisfactory, he is compelled to issue a notice of compliance . . . .

37 Finally, Dubé J. turned to the decision of Muldoon J. in C.E. Jamieson & Co. (Dominion) v. Canada (Attorney General), [1988] 1 F.C. 590 (T.D.), in which the Trial Judge held (at page 651):

> [W]hatever discretion is accorded by these clear and detailed Regulations is quite restricted . . . . Under regulation C.08.004 the Minister is bound either to issue a notice of compliance or to notify the manufacturer why the submission . . . does

> not comply . . . . The Minister is subject to the Court's supervising power to order mandamus in that regard . . . . These delegated powers do not permit the Minister or the Director to do as they please: they have no unfettered discretions.

38 Dubé J. had little difficulty in deciding that the Minister did not possess the broad discretion to justify his refusal to issue the NOC. It remained to be determined whether the Minister and his delegate, Foster, were entitled to seek legal advice and otherwise delay issuing the NOC. Dubé J. observed that the Minister did not know, either when Bill C-91 was passed or when it was proclaimed, that the Patented Medicines Regulations would come into force on March 12, 1993. In other words, the delay in determining whether the NOC could issue may have been considerably protracted. Acceding to Foster's pragmatic observation that "either the law is in effect or it isn't" the Trial Judge concluded "that the Minister's delay in issuing the Apotex NOC was not warranted" (at page 181).

39 Dubé J. went on to reject the argument that issuing mandamus in cases where new regulatory regimes are clearly pending would "frustrate the will of Parliament." He cautioned that the line of municipal law cases commencing with the Supreme Court's decision in Ottawa, City of v. Boyd Builders Ltd., [1965] S.C.R. 408 should not be "transported facilely to an entirely unrelated legal context" (at page 181).

40 Finally, the learned Trial Judge rejected the argument that Apotex's claim for mandamus was premature because its NDS was incomplete when the application was filed. He reasoned (at page 182):

> Before closing, I take the opportunity to dispose of a "preliminary" matter raised by Merck, that Apotex' December 22, 1992 originating notice of motion was premature because, as of that date, the Apo-enalapril NDS was incomplete. According to the terms of the notice of motion, Apotex sought an order directing the Minister to disclose the status of a number of NDS filed by Apotex, including that for Apo-enalapril; to complete the reviews of these submissions, should they not have been completed; and to issue NOCs "if the results of the reviews are satisfactory". Thus, Apotex was not requesting relief divorced from the normal requirements of the FDR, or "jumping the gun". And, as of February 3, 1993, long before this matter came on for hearing, the results of the Apo-enalapril NDS has been recommended for issuance of a NOC. The argument based on prematurity must therefore fail.

41 For the above reasons, the application for mandamus was allowed and the application for prohibition denied.

ISSUES RAISED ON APPEAL

42 An appeal provides both parties with the opportunity to reflect on, refine and reformulate

substantive arguments which may or may not have been pursued below. The following issues were identified by Merck in its memorandum of fact and law and addressed on appeal:

(1) Does mandamus lie against the Minister on the facts of this case?

(2) Was the Minister entitled to seek advice after February 4, 1993 about the legality of what Apotex was asking him to do, plus any other relevant information that may have occurred to him?

(3) In the exercise of his statutory power under the Food and Drug Regulations, was the Minister entitled to have regard to the provisions of Bill C-91 after they were enacted but before they were proclaimed in effect?

(4) Was the Minister acting unlawfully when he failed to reach a decision on the NOC application by March 12, 1993?

(5) If so, was the effect to give Apotex a "vested right" to the issuance of an NOC prior to March 12, 1993?

(6) If Apotex had acquired a "vested" right prior to March 12, 1993, was such right nevertheless divested by the Patented Medicines (Notice of Compliance) Regulations?

(7) Did the rights and remedies created by Bill C -91 and the Patented Medicines (Notice of Compliance) Regulations oust the jurisdiction of this Court from and after March 12, 1993 to grant judicial review in the circumstances of this case to compel issuance of the notice of compliance?

(8) Do the principles set out in Ottawa, City of v. Boyd Builders Ltd., [1965] S.C.R. 408 apply to the exercise of the Court's discretion in mandamus cases generally, or are they confined to building permit cases?

(9) If Apotex is otherwise entitled to the issuance of mandamus, is this a case in which the Court ought to have exercised its discretion (which Dubé J. believed he did not possess) against Apotex in light of the public policy enunciated in Bill C-91 and the Regulations?

(10) Does prohibition lie against the Minister on the facts of this case?

43 By cross-appeal, the Minister argues that the Trial Judge erred in finding the delay in issuing the NOC to be unwarranted. Like Merck he remains convinced that as a matter of law the NOC cannot issue.

ANALYSIS

44 Most issues raised by counsel concern the availability of orders in the nature of mandamus. I propose to outline in general terms the principles governing such orders before clarifying those issues central to this appeal.

(1) Mandamus-The Principles

45 Several principal requirements must be satisfied before mandamus will issue. The following general framework finds support in the extant jurisprudence of this Court (see generally O'Grady v. Whyte, [1983] 1 F.C. 719 (C.A.), at pages 722-723, citing Karavos v. Toronto & Gillies, [1948] 3 D.L.R. 294 (Ont. C.A.), at page 297; and Mensinger v. Canada (Minister of Employment and Immigration), [1987] 1 F.C. 59 (T.D.), at page 66.

1. There must be a public legal duty to act: Minister of Employment and Immigration v. Hudnik, [1980] 1 F.C. 180 (C.A.); Jefford v. Canada, [1988] 2 F.C. 189 (C.A.); Winegarden v. Public Service Commission and Canada (Minister of Transport) (1986), 5 F.T.R. 317 (F.C.T.D.); Rossi v. The Queen, [1974] 1 F.C. 531 (T.D.); Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment), [1989] 3 F.C. 309 (T.D.); affd [1990] 2 W.W.R. 69 (F.C.A.); Bedard v. Correctional Service of Canada, [1984] 1 F.C. 193 (T.D.); Carota v. Jamieson, [1979] 1 F.C. 735 (T.D.); affd [1980] 1 F.C. 790 (C.A.); and Nguyen v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 232 (C.A.).
2. The duty must be owed to the applicant:[6] Rothmans of Pall Mall Canada v. Minister of National Revenue (No. 1), [1976] 2 F.C. 500 (C.A.); Distribution Canada Inc. v. M.N.R., [1991] 1 F.C. 716 (T.D.); affd [1993] 2 F.C. 26 (C.A.); Secunda Marine Services Ltd. v. Canada (Minister of Supply & Services) (1989), 38 Admin. L.R. 287 (F.C.T.D.); and Szoboszloi v. Chief Returning Officer of Canada, [1972] F.C. 1020 (T.D.); see also Jefford v. Canada, supra.
3. There is a clear right to performance of that duty, in particular:
    (a) the applicant has satisfied all conditions precedent giving rise to the duty; O'Grady v. Whyte, supra; Hutchins v. Canada (National Parole Board), [1993] 3 F.C. 505 (C.A.); and see Nguyen v. Canada (Minister of Employment and Immigration), supra;
    (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; see O'Grady v. Whyte, supra, citing Karavos v. Toronto & Gillies, supra; Bhatnager v. Minister of Employment and Immigration, [1985] 2 F.C. 315 (T.D.); and Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment), supra.
4. Where the duty sought to be enforced is discretionary, the following rules apply:

(a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
(b) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
(c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
(d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and
(e) mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

See Restrictive Trade Practices Commission v. Director of Investigation and Research, Combines Investigation Act, [1983] 2 F.C. 222 (C.A); revg [1983] 1 F.C. 520 (T.D.); Carota v. Jamieson, supra; Apotex Inc. v. Canada (Attorney General) et al., supra; Maple Lodge Farms Ltd. v. Government of Canada, [1980] 2 F.C. 458 (T.D.); affd [1981] 1 F.C. 500 (C.A.); affd [1982] 2 S.C.R. 2; Jefford v. Canada, supra; Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant (1971), 65 C.P.R. 1 (Ex. Ct.); appeal dismissed [1972] S.C.R. vi; Distribution Canada Inc. v. M.N.R., supra; and Kahlon v. Canada (Minister of Employment and Immigration), [1986] 3 F.C. 386 (C.A.).

5. No other adequate remedy is available to the applicant: Carota v. Jamieson, supra; Maple Lodge Farms Ltd. v. Government of Canada, supra; Jefford v. Canada, supra; Harelkin v. University of Regina, [1979] 2 S.C.R. 561; and see Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1987] 1 F.C. 406 (C.A.); appeal dismissed [1989] 2 S.C.R. 49.
6. The order sought will be of some practical value or effect: Friends of the Oldman River Society v. Canada (Minister of Transport), [1990] 2 F.C. 18 (C.A.), per Stone J.A., at pages 48-52; affd [1992] 1 S.C.R. 3, per La Forest J., at pages 76-80; Landreville v. The Queen, [1973] F.C. 1223 (T.D.); and Beauchemin v. Employment and Immigration Commission of Canada (1987), 15 F.T.R. 83 (F.C.T.D.).
7. The Court in the exercise of its discretion finds no equitable bar to the relief sought: Penner v. Electoral Boundaries Commission (Ont.), [1976] 2 F.C. 614 (T.D.); Friends of the Oldman River Society v. Canada (Minister of Transport), supra.
8. On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

46 In this appeal, it is understood that the Minister had a duty to act which was owed to Apotex and not the Crown. Merck has not sought to show that Apotex is disentitled in equity to the relief sought. Nor has it sought to establish that an order of mandamus would be ineffectual. On the other hand, it argues that Apotex's application was premature to the extent that not all conditions precedent had been satisfied at the time the application was initiated. As well, it contends that an alternative and adequate remedy is available to Apotex. Aside from the balance of convenience issue noted earlier, the remaining issues central to this appeal may be stated as follows: Did Apotex have a vested right to the NOC as of March 12, 1993? If Apotex did have such a right, was that right divested by the Patented Medicines Regulations? Does the paramountcy provision in Bill C-91 oust the jurisdiction of this Court to grant the order sought by Apotex?

(2) An Alternative and Adequate Remedy

47 Bill C-91 authorizes Apotex to challenge the validity of Merck's patent. If successful, not only would Apotex be entitled to the NOC but Merck would be liable in damages for wrongfully delaying its issue (see section 6, Patented Medicines Regulations). Accordingly, Merck argues that compliance with the existing legislation is of itself an adequate remedy. This reasoning, of course, merely begs the question. I would note that Merck has not sought to establish that an order of mandamus would itself be ineffectual. Conversely, Apotex has not sought to show that Merck has a more adequate remedy-an action for patent infringement-as an alternative to its application for prohibition.

(3) Prematurity

48 Merck takes the position that the Minister owed no duty to Apotex at the time it commenced its judicial review application on December 22, 1992 or on the hearing date. This submission is certainly correct in part. The Minister owed no duty to Apotex on December 22; the HPB's review of Apotex's NDS was ongoing at that time. Merck maintains that filing an application before a duty is owed constitutes a bar to mandamus. It relies on Karavos v. Toronto & Gillies, supra, a decision of the Ontario Court of Appeal which has been cited with approval by this Court in O'Grady v. Whyte, supra, per Urie J.A., at page 722. In Karavos, Laidlaw J.A. stated (at page 297):

> I do not attempt an exhaustive summary of the principles upon which the Court proceeds on an application for mandamus, but I shall briefly state certain of them bearing particularly on the case presently under consideration. Before the remedy can be given, the applicant for it must show (1) "a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced": High op. cit., p. 13, art. 9; p. 15, art 10. (2) "The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform"; ibid., supra, p. 44, art. 36. (3) That duty must be purely ministerial in

> nature, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers": ibid., supra, p. 92, art. 80. (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy: ibid., supra, p. 18, art. 13. [Emphasis added.]

49 Merck seeks to extract from the phrase "at the time of seeking the relief" a rule of law to the effect that mandamus must be denied if a duty to act is not owing at the time the application for mandamus is filed. In my view, such a rule would be extremely short-sighted and finds no support in the facts of either Karavos or O'Grady.

50 In Karavos, the applicant sought an order of mandamus compelling the issue of a building permit even though he had not submitted his permit application as of the hearing date. Similarly in O'Grady, the applicant failed to submit an application for "landing" as of the date when an immigration officer was required to decide upon his sponsorship application. In both cases, it was held that the absence of the required application was fatal to the granting of mandamus.

51 The legal principle derived from these two cases is simply stated. An order of mandamus will not lie to compel an officer to act in a specified manner if he or she is not under an obligation to act as of the hearing date. The question remains whether the rule retains its validity if applied as of the date that the application for mandamus was filed. In my opinion, it cannot.

52 In its application Apotex requested the Court to issue two directives. First, it asked that the Minister process the NDS which had been submitted some thirty-four months prior to the mandamus application. Second, it sought an order directing the issuance of the NOC once the NDS review process was complete.

53 Whether or not the application for mandamus had the effect of propelling the HPB into action is a matter for speculation. We do know that safety and efficacy requirements for the Apo-Enalapril NOC had been met by February 3. We also know that an application to strike the mandamus application was made on January 27, 1993 by the Minister and the Attorney General of Canada. That application was apparently dismissed from the Bench for reasons which are not apparent on the face of the record (see Appeal Book, Vol. I, Tabs 4 & 5).

54 As a general proposition, it is not difficult to accept a rule which seeks to eliminate premature applications for mandamus. It is certainly open to a respondent to pursue dismissal of an application where the duty to perform has yet to arise. However, unless compelling reasons are offered, an application for an order in the nature of mandamus should not be defeated on the ground that it was initiated prematurely. Provided that the conditions precedent to the exercise of the duty have been satisfied at the time of the hearing, the application should be assessed on its merits. Those who unnecessarily complicate the proceedings may expose themselves to costs even if successful. For the foregoing reasons this submission must fail.

(4) Discretion Spent-Vested Rights

55 Simply stated, this Court must decide whether Apotex is entitled to the advantages of the "old" law or bound to accept the disadvantages arising from the "new". The traditional approach to this issue focusses on whether the decision-maker reached a decision before the intervening legislation came into effect. In other words, did Apotex acquire a vested right to the NOC by March 12, 1993?

56 If a decision-maker has an unfettered discretion which he or she has not exercised as of the date a new law takes effect, then the applicant cannot successfully assert either a vested right or even the right to have the decision-maker render a decision. This is the ratio of the Judicial Committee of the Privy Council in Director of Public Works v. Ho Po Sang, [1961] A.C. 901. In that case, the Court distinguished a "vested right" from a "mere hope or expectation" and determined that an applicant for a rebuilding permit had only a mere hope or expectation that the permit would be granted at the time that repealing legislation came into force. Ho Po Sang has been applied by the Exchequer Court in Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, supra. These cases provide the necessary background for an appreciation of the principles underlying the "vested rights" issue.

57 In Ho Po Sang, the lessee of Crown lands in Hong Kong was entitled by Ordinance to vacant possession of buildings occupied by sub-lessees on the condition that he erect new buildings and receive approval from the Director of Public Works. The legislation also exempted the lessee from compensating the sub- lessees with respect to termination of their tenancies. On July 20, 1956, the Director purported to give the lessee the required certificate. Upon receipt of their notices to quit the premises, the sub-lessees launched an appeal to the Governor in Council. The lessee immediately cross-appealed. On April 9, 1957, after the appeal had been initiated, the relevant provisions of the Ordinance were repealed to provide tenants with the right to compensation. As of that date the Governor in Council had not reached a decision.

58 The issue on appeal was whether on April 9, 1957, the lessee possessed "rights" under the Ordinance which remained unaffected by the repeal. The Privy Council based its conclusion on the "absolute" discretion which the Ordinance accorded the Governor in Council: "[The lessee] had no more than a hope that the Governor in Council would give a favourable decision" (at pages 920-921). The lessee's argument that he had an accrued right unaffected by the repeal to have the matter considered by the Governor in Council was rejected on the same grounds.

59 The decision of Thurlow J. (as he then was) in Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, supra, provides guidance in determining whether Apotex had a vested right to the NOC rather than a mere hope or expectation. The issue in that case was whether the Commissioner of Patents erred in fixing the royalty payable to Merck by Sherman under a compulsory licence. Sherman had submitted its patent specifications and the Commissioner had assessed the royalty on the basis of subsection 41(3) of the Patent Act, R.S.C. 1952, c. 203. That subsection was subsequently repealed and replaced with subsection 41(4) (S.C. 1968-69, c. 49, s. 1). The Commissioner did not hear the parties' oral arguments or receive their written submissions until after these amendments came into effect. The issue before the Trial Judge was

straightforward: Which statutory provision was applicable when fixing the royalty-the old or the new? After a careful analysis of competing provisions of the Interpretation Act, R.S.C. 1952, c. 158, Thurlow J. concluded that the "new" subsection 41(4) prevailed. His reasoning bears directly on the "vested rights" issue.

60 Paragraph 37(c) of the Interpretation Act, S.C. 1967-68, c. 7 (now Interpretation Act, R.S.C., 1985, c. I-21, paragraph 44(c)) considered the effect of proceedings commenced under a "former enactment" and was relied upon by Merck to sustain its argument that the proceedings could only be continued in accordance with the new provision. That section read as follows:

> 37. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor
>
> . . .
>
> (c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment;

61 The respondent Sherman relied on paragraph 36(c) (now paragraph 43(c)) of the Interpretation Act in support of its argument that it had an "accrued" or "accruing" right as of the date of its application for the compulsory licence.[7] Paragraph 36(c) read:

> 36. Where an enactment is repealed in whole or in part, the repeal does not
>
> . . .
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;
>
> . . .
>
> and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.[8]

62 Following an extensive analysis of Ho Po Sang, Thurlow J. concluded (at page 12):

> Here when s. 41(3) was repealed the procedure which the Commissioner had prescribed had not reached the stage where the matter was ready for decision, since the respondent's reply to the counterstatement had not been filed and had indeed been delayed at the respondent's request. But even if it had reached that stage and had been simply awaiting decision I do not think the

> respondent could properly be said to have had an accrued right either to a licence or to have the matter dealt with on the law as it had been. The Commissioner's authority, as I see it, is not merely to deprive an applicant of a licence where he sees good reason to do so but is an authority to decide whether or not a licence should be granted to which is coupled a direction that the licence is to be granted in the absence of good reason for refusing it. The distinction is perhaps a fine or narrow one but it is for the Commissioner rather than the applicant to say whether or not there will be a licence and the applicant has no control over the decision which the Commissioner may make on the question. As in the Ho Po Sang case the question itself was unresolved and the issue rested in the future. I agree with the submission of counsel for the appellant that at the stage which the proceeding had reached what the respondent had (whether it was stronger or not, by reason of the statutory direction for reaching a decision which s. 41(3) prescribed, than what the respondent had in the Ho Po Sang case) was nothing more than a hope. Nor do I think what the respondent had at that stage can be regarded as an "accruing" right (or privilege) within the meaning of s. 36(c) since the difficulty lies not with the words "accrued" or "accruing" but with the lack of anything that answers to the description of the words "right" or "privilege" in s. 36(c).
>
> In my opinion therefore s. 36(c) does not apply and the authority for continuing the proceeding commenced before the repeal is that contained in s. 37(c) of the Interpretation Act.

63 This analytical framework focusses the determination of whether Apotex had an "accrued" or "vested" right to the NOC. It is common ground that by February 4, 1993, "the matter was ready for decision". The question is whether the Minister's discretion with respect to the NOC had been spent as of that date.

64 Four issues are relevant to the determination of whether Apotex had a vested right to the NOC: (a) the scope of the Minister's discretion; (b) the relevance of legal advice; (c) the relevance of "pending legislative policy"; and (d) whether the matter had reached the Minister for his consideration.

(a) Ministerial Discretion-Narrow or Broad

65 The scope of a decision-maker's discretion is directly contingent upon the characterization of various considerations as "relevant" or irrelevant to its exercise: see generally, R. A. Macdonald and M. Paskell-Mede, "Annual Survey of Canadian Law: Administrative Law" (1981), 13 Ottawa L. Rev. 671, at page 720. Merck argues that the Minister's discretion under subsection C.08.002(1) of the FDA Regulations ("no person shall sell . . . a new drug unless . . . [the drug has] a content

satisfactory to the Minister") is, as a matter of statutory construction, sufficiently broad to embrace considerations other than those dealing with safety and efficacy. In my view, there is no merit in the submission. The law on this issue was carefully and extensively reviewed by the learned Trial Judge and three other judges of the Trial Division; see Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare), supra; C.E. Jamieson & Co. (Dominion) v. Canada (Attorney-General), supra; and Apotex Inc. v. Canada (Attorney-General) et al., supra.

66 I am in agreement with the Trial Judge that the FDA Regulations restrict the factors to be considered by the Minister in the proper exercise of his discretion to those concerning a drug's safety and efficacy. In reaching this conclusion, I am mindful of the two authorities cited by Merck. In Glaxo Canada Inc., supra, Rouleau J. stated that the "Minister's determination is one made in contemplation of public health and represents the implementation of social and economic policy" (at page 439). This Court made similar observations in Pfizer Canada Inc. v. Minister of National Health & Welfare et al., supra, where MacGuigan J.A. stated that "the Minister's determination was a decision made in contemplation of public health, and so amounted to an implementation of social and economic policy in a broad sense,' rather than application of substantive rules' to an individual case" (at page 440).

67 The above statements do not suggest that the Court was willing to overlook rudimentary canons of statutory construction. The matter to be resolved in Pfizer and on the Glaxo Canada appeal was the standing of the respective applicants.[9] In both cases, the drug in question had fulfilled the safety and efficacy requirements under the FDA Regulations. In both cases, the Court held that the NOC could issue. Viewed in this context, these cases do not detract from the reasoning of Dubé J. that the FDA Regulations neither expressly nor implicitly contemplate the broad scope of ministerial discretion advocated by Merck.

68 Apotex submits that the narrow scope of the Minister's discretion necessarily implies that its right to the NOC crystallized as of February 4, 1993, or in any event, prior to March 12, 1993, when the Patented Medicines Regulations came into force. Merck contends that irrespective of how the discretion is construed, the Minister is residually entitled as a matter of law to have regard to considerations other than those touching on the safety and efficacy of Apo-Enalapril. Merck has identified the need to obtain legal advice and the pending changes to the Patent Act found within Bill C-91 ("pending legislative policy") to be considerations relevant to the exercise of even a narrowly circumscribed discretion.

(b) Legal Advice

69 Merck has essentially asked this Court to find that the time needed to enable a decision-maker to seek and obtain legal advice in any decision-making process is of itself a basis for denying mandamus. It also implies that confessed ignorance of a law upon which divergent judicial legal opinions have been expressed affects the public's right to performance of a statutory duty. In my opinion, both submissions must be denied.

70 Merck's only support for its argument is the House of Lords' decision in Engineers' and Managers' Association v. Advisory, Conciliation and Arbitration Service, [1980] 1 W.L.R. 302 (H.L.). In that case, the House of Lords determined that a labour relations board had the power to suspend, for a period of over two years, its process relating to conflicting accreditation applications. The Board felt compelled to await the outcome of indirectly related court proceedings before reaching a decision. Merck would apply this decision to maintain that as the Minister was entitled to seek legal advice, he was under no obligation to issue the NOC prior to March 12, 1993. I do not agree.

71 First, the relevant statute in Engineers' conferred upon the tribunal a significantly broader discretion than that accorded the Minister under the Patented Medicines Regulations. Second, the proceedings in that case were at a preliminary stage rather than at the final stage reached with Apotex's NDS (both reasons were offered by Dubé J.: at page 180). Finally, unlike the case before us, in Engineers' the delay caused by the need for legal clarification did not and could not automatically divest the parties of rights established under the relevant legislation.

72 The right of a decision-maker to obtain legal advice with respect to the legality of the performance of a duty is not in issue. Indeed, in light of the overwhelming opinion evidence with respect to the "legality" of issuing Apotex's NOC, the Minister's failure to seek departmental or outside opinions could have been perceived as an abdication of responsibility. But that self-imposed obligation cannot of itself deprive Apotex of its right to mandamus. In the absence of intervening legislation, the "legal advice" issue would not have arisen. It cannot now be invoked to argue that the Patented Medicines Regulations governed the ongoing decision-making process the moment they became law.

73 I am in agreement with Dubé J. that the legal advice justification is potentially endless and would almost necessarily result in allegations of abuse of discretion or unreasonable delay. Furthermore, the legal advice sought in this case had no bearing on the exercise of the Minister's narrowly circumscribed discretion. Its relevance transcends the principal question to be answered by the Minister: Is Apo-Enalapril a safe drug? This is not to suggest that once that question was answered the Minister can be said to have acted unlawfully by seeking legal advice. But the inevitable delay arising from the solicitation of legal advice (as opposed to unreasonable delay) cannot prejudice the right to performance of a statutory duty. The guiding principle is well known-equity deems to be done what should have been done. Moreover, to deny mandamus because of legal concerns generated by a party adverse in interest (Merck) is to judicially condone what might be regarded as a tactical manoeuvre intended to obfuscate and delay the decision-making process.

74 In light of the foregoing, it is unnecessary to deal with the learned Trial Judge's conclusion that [at page 181], "the Minister's delay in issuing the Apotex NOC was not warranted." Whether or not the delay was reasonable is not an issue upon which we can adjudicate as the necessary facts are not before us. Unless the Minister can establish another basis upon which to justify the decision to

withhold performance of a duty otherwise owed, Merck's argument must fail.

(c) Pending Legislative Policy-Relevant or Irrelevant Consideration

75 In support of its submission that pending legislative policy is a consideration relevant to the exercise of the Minister's discretion, counsel for Merck has referred us to three cases. In my opinion, none support the proposition stated. Nonetheless, I shall deal with each case and then turn to the more general question: As a matter of law, should the Minister be entitled to refrain from issuing the NOC on the basis of pending legislative policy?

76 The first of the decisions is Distribution Canada Inc. v. M.N.R., supra. In that case, the applicant sought mandamus to compel the Minister of National Revenue to enforce strictly the collection of duties on non-exempt groceries being purchased in the United States. At that time it was departmental policy not to collect duties of less than $1 or even higher amounts if other factors such as traffic volumes dictated. The Trial Judge drew a distinction between a total abdication of responsibility and conflicting views regarding how the law should be enforced and found that mandamus is only available in respect of the former. On appeal, this Court held that the Minister must take all reasonable measures to enforce the customs legislation; "[t]he reasonableness of [which] requires the assessment of policy considerations which are outside the domain of the courts since they deal with the manner in which the law ought to be enforced" (at page 40).

77 In Distribution Canada, the exercise of a ministerial discretion by reference to government policy did not have as its principal objective the divestiture of acquired rights. The Court simply concluded that the Minister enjoyed a discretion with which the law would not interfere. In any event, the precedential value of this decision has been misplaced. Its relevance arises in the context of the "balance of convenience" issue and accordingly will be addressed below.

78 The second case is Wimpey Western Ltd. and W-W-W Developments Ltd. v. Director of Standards and Approvals of the Department of the Environment, Minister of the Environment and Province of Alberta (1983), 49 A.R. 360 (C.A.).[10] Here, the Alberta Court of Appeal was required to determine whether a Minister's policy views were relevant to the exercise of a discretion. The relevant subsection of the Clean Water Act, R.S.A. 1980, c. C-13, provides:

3 . . .

> (4) The Director of Standards and Approvals may issue or refuse to issue a permit or may require a change in location of the water facility or a change in the plans and specifications as a condition precedent to giving a permit under this section.

79 In Wimpey Western, the respondent denied the appellant a permit to construct its own waste water treatment facility on an industrial development site because it was felt that the erection of such treatment facilities should be deferred until a regional sewage plant was operational. That justification was in accord with the policy of the Minister of the Environment. The Court of Appeal held that the respondent's discretion was not limited to considerations of technical matters. The panel was unanimous in its analysis of the basis on which ministerial policy was deemed a relevant consideration (at pages 368-369):

> The purpose of the permit granting process in s. 3 is to give the Department power to control or limit potential sources of water contaminants before they are constructed. In my view, it is consistent with this purpose and with the wording of the section to allow the Director to consider a policy of his Minister aimed at limiting the number of points of discharge of contaminants into a waterway. It would seriously hamper the permit-granting system if the director could only look at applicants individually, but could not consider water quality objectives for the total river system.

80 The rather expansive view of relevant considerations advocated in Wimpey Western must be read in light of the broad discretionary power granted to the decision-maker. As well, the environmental aspects in Wimpey Western suggest a judicial predisposition, framed in terms of statutory construction, to recognize the promotion of public health concerns over a developer's self-interest. The Minister's discretion is carefully circumscribed in the case before us and specifically addresses health and efficacy concerns.

81 The last of the three cases cited, in my view, severely undermines Merck's position. In Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. (1965), 113 C.L.R. 177 (Aust. H.C.), the applicant sought an order of mandamus directing the respondent to allow it to import an aircraft and to issue the licence necessary for it to carry freight between cities. The legislation provided (at page 177):

> Regulation 199 of the Regulations provides:-" . . . (2) Where the proposed service is an interstate service, the Director-General shall issue an aerial work, charter or airline licence, as the case requires, unless the applicant has not complied with, or has not established that he is capable of complying during the currency of the licence with, the provisions of these Regulations, or of any direction or order given or made under these Regulations, relating to the safety of the operations." [Emphasis added.]

The respondent had refused both requests on the grounds of governmental policy against increasing the number of companies engaged in inter-State airfreight services.

82 On the issue of whether the charter licence should issue, a majority of the High Court of Australia held that mandamus was available as the respondent did not possess an unfettered discretion when deciding to issue a charter licence. The Court's rejection of government policy as a

relevant consideration is antithetical to Merck's submission. At pages 187-188, the High Court stated:

> The evidence, and particularly the Director-General's own statements, make it clear that his refusal of the charter licence had nothing whatever to do with any question of safety, and that in truth the prosecutor has established to the satisfaction of the Director-General that it is capable of complying with any and all provisions relating to the safety of the proposed operations. I read the Director-General's letter refusing the charter licence as acknowledging, even if unintentionally, that it was in spite of, and not because of, the concluding words of reg. 199(2) that the charter licence was being refused. I think the truth of the matter should be faced: the refusal of the licence was based upon nothing whatever but a policy against allowing anyone to participate in the relevant form of inter-State trade other than those already engaged in it. However wise and well-grounded in reason that policy may be, if the Regulations on their true construction authorize a refusal so based I should find great difficulty in avoiding the conclusion that reg. 197, in so far as it requires a charter licence for charter operations in inter-State air navigation, is invalid as being in conflict with s. 92 of the Constitution. In my opinion, however, such a refusal is contrary to the direct command of reg. 199(2).
>
> I regard this as a clear case for a writ of mandamus; and since on the view I take of the facts the Director-General is now under an absolute duty to issue a charter licence, a duty which is unqualified by any discretionary judgment still remaining to be exercised, I am of opinion that the tenor of the writ should be to command that that duty be performed. [Emphasis added.]

83 With respect to the application to import aircraft, the majority held that mandamus should not issue. Two of the three Judges held that this matter was within the ambit of the respondent's discretion. In a concurring judgment, the third Judge opined that the respondent was under an obligation to consider and act upon government policy (at pages 204-206). I should point out that the reasoning of the minority with respect to the first issue was premised on the reality that an order directing the respondent to issue a charter licence would be a practical nullity in light of the applicant's inability to obtain aircraft.

84 Anderson stands for the proposition that decision-makers vested with an unfettered discretion may have regard to existing government policy. What constitutes government policy (versus ministerial policy) is another matter. As the Minister's discretion in the instant case was narrowly circumscribed, it is evident that this case advances Apotex's position rather than Merck's.

85 Ultimately, the question before this Court is whether pending legislative policy can be a

relevant consideration notwithstanding the narrow scope of the Minister's discretion. As a matter of first impression, I am of the view that the law should not preclude the possibility of recognizing the Minister's right to refuse to perform a public duty on the basis of policy rationales underscoring impending legislation. Assuming that the Minister's discretion does not embrace health and safety criteria, it is conceivable that mandamus would not or should not issue where, for example, a person is entitled to a permit authorizing importation and sale of a product which the Minister, acting in good faith, believes poses an unacceptable health risk to Canadians. In this situation, a court may well adjourn a mandamus hearing if it could be shown that amending legislation is about to be brought into effect. In so doing, it would be effectively acknowledging and applying the "balance of convenience" test as a ground for refusing mandamus. It is thus not a question of whether the Minister has the power to refuse to perform a duty on the basis of pending changes to the legislation but whether the Court is willing to exercise its discretion to grant mandamus in light of the potential consequences.

86 Returning to the facts before us, in my view it cannot be said that in the exercise of his statutory power under the FDA Regulations the Minister was entitled to have regard to the provisions of Bill C-91 after they were enacted but before they were proclaimed in effect. In the circumstances of this case, pending legislative policy is not a relevant consideration which can be unilaterally invoked by the Minister.

(d) De Facto-Decision Never Made

87 Merck argues that the reason that the NOC did not issue before March 12, 1993, was because the Minister never considered Apotex's application. Since the Minister did not exercise his discretion, the learned Trial Judge erred in purporting to dictate the outcome of the Minister's deliberations. In the absence of a finding of bad faith on the part of the Minister Merck argues that Apotex could not have acquired a vested right to the NOC. Both parties support their arguments on this issue with reference to court decisions generated by the tightening of gun control measures in the late 1970s.

88 In 1977, Parliament introduced various amendments to the Criminal Code [R.S.C. 1970, c. C-34] (Criminal Law Amendment Act, 1977, S.C. 1976-77, c. 53) with a view to further restricting the use and sale of firearms in Canada. The legislation came into effect on January 1, 1978 and as a result, orders of mandamus were sought in a number of reported instances.[11] In each case the applicant had applied for a permit and had fulfilled all conditions precedent prior to January 1.

89 In Martinoff v. Gossen, [1979] 1 F.C. 327 (T.D.), the Trial Judge found that the applicant did not have an accrued right as of January 1 to a restricted weapons business permit. The Judge based his decision upon the fact that the respondent's authority to issue the permit had been revoked and that therefore there was no one who could issue the permit. Interestingly, he does not appear to have been influenced by the fact that the application was still being processed at the time the law came into effect.

90 In Lemyre v. Trudel, [1978] 2 F.C. 453 (T.D.); affd on other grounds, [1979] 2 F.C. 362 (C.A.), the applicant sought mandamus ordering the respondent to issue a registration certificate with respect to a fully automatic Walther MPL 9mm. At the time of the application the gun was classified as a restricted weapon which was required to be registered with the Commissioner of the RCMP. The amended Criminal Code prohibited possession of such a weapon unless [at page 363] "on the day on which this paragraph comes into force, [it] was registered as a restricted weapon." The applicant's registration was not approved by January 1. At trial, the Judge held that the applicant had no "acquired right to possess his weapon, since without the permit and certificate such possession was quite simply prohibited" (at page 457). In brief oral reasons, the Court of Appeal concluded that the only basis on which the appellant could succeed was by establishing that: "his weapon fell within this exception, namely that it was registered (not that it might or should have been) on January 1, 1978." (at page 364).

91 Lemyre contrasts sharply with the decision of the Saskatchewan Court of Appeal in Abell v. Commissioner of Royal Canadian Mounted Police (1979), 49 C.C.C. (2d) 193 (Sask. C.A.). In Abell, the applicant was successful in obtaining a registration permit for a "F.A. Mark II (1944) Sten gun". After canvassing the decisions in Ho Po Sang and Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, supra., the Saskatchewan Court of Appeal concluded that the applicant had complied with the requisite Criminal Code provisions as fully as possible prior to January 1, 1978 and therefore had acquired a right to have the weapon registered.

92 One commentator has noted that the decisions of this Court are "hard to reconcile" with Abell; see P.-A. Côté, supra, at pages 149-150. Yet it is not a question of choosing between Lemyre and Abell. Stare decisis dictates that the reasoning in Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, supra prevails. This is not to suggest that Lemyre or Martinoff would be decided any differently today; certainly, it is arguable that the "balance of convenience" would favour the same result.

93 In the end, I must conclude that Apotex had a vested right to the NOC notwithstanding the Minister's failure to render a decision by March 12, 1993.

(5) Balance of Convenience

94 If Apotex were found to be entitled to mandamus, Merck submits that this Court ought to exercise its discretion to refuse the order sought. It argues that mandamus should be denied where the effect would be to frustrate legislative change. Merck maintains that the principle established in Ottawa, City of v. Boyd Builders Ltd., supra, is persuasive authority for the proposition that this Court should not enforce the old legislation as Bill C-91 and the Patented Medicines Regulations were in place at the time of the hearing.

95 It is true that in Boyd Builders the Supreme Court acknowledged the relevance of pending legislative change when deciding whether to grant an order of mandamus. Unlike the Trial Judge, and with respect, I do not believe the argument can be side-stepped. Merck has touched upon what

has been described as a "controversial ground" upon which some courts have been prepared to deny mandamus. The decision in Boyd Builders has been cited as but one case in which courts have employed what has been labelled the "balance of convenience" test by weighing competing interests in determining the proper exercise of discretionary power: see J. M. Evans et al., Administrative Law: Cases, Text, and Materials, 3rd ed. (Toronto: Emond Montgomery, 1989), at page 1083.

96 Despite the way in which the issue was originally framed, three separate questions must be raised: (1) does the Court have the discretion to invoke the "balance of convenience" test as a ground for refusing mandamus? (2) if so, what are the criteria for its exercise? and (3) is this a case in which mandamus should be refused? I shall deal with each of the questions as required.

(a) The Ambit of the Court's Discretion-Balance of Convenience

97 The case law governing mandamus reveals a number of legal techniques by which courts have, on occasion, balanced competing interests. For example, when determining the relevancy or irrelevancy of considerations influencing the decision-maker, a Court may construe either broadly or narrowly the statutory discretion imposed by apparently clearly worded legislation. The same is true of provisions which seek to encroach upon vested rights. Indeed, a discussion of vested rights can be found to be underscored by policy considerations implicit in the formal reasons for judgment. Professor Côté offers a penetrating analysis of this process in The Interpretation of Legislation in Canada, supra, at page 143:

> It seems that judges, in ruling on the recognition of vested rights, silently weigh individual and social consequences. The greater the prejudice suffered by the individual, the greater are the chances that vested rights will be recognized. If the individual prejudice is relatively limited (for example, when the law simply determines a "procedure"), the court is more likely to apply the new law immediately. If the judge perceives the social consequences of delays in the application of the new statute to be significant (for example, if the health or safety of the public is endangered), there will be considerable hesitation to recognize vested rights. Where survival of the earlier statute is not viewed as a threat to the interests of society, the courts find it easier to admit the existence of vested rights.

98 The Court's discretion must be exercised discriminantly. One commentator cautions that as the scope of the Court's discretion can intrude upon the rule of law, it must be exercised with the greatest of care: see Sir W. Wade, Administrative Law, 6th ed. (Oxford: Clarendon, 1988), at page 709. Another has observed that the Court has no discretion to refuse mandamus when it is the only means of securing performance of a ministerial duty, while assuming at the same time that it is not available as of right: see S. A. de Smith, Judicial Review of Administrative Action, 4th ed. by J. M. Evans (London: Stevens, 1980), at page 558.

99 Merck has asked this Court to decline to interfere with the Minister's discretion even though

his failure to perform a statutory duty has been found to be unjustified, in effect rendering lawful that which has been deemed unlawful. It is perhaps with these concerns in mind that Dubé J. implied that the decision in Boyd Builders prohibited the Court from exercising its discretion to deny mandamus (at page 181). Certainly, the introduction of the "balance of convenience" variable into the mandamus equation ultimately leads to the question of whether there are any limits to the considerations upon which a Court may exercise its discretion.

100 Despite obvious concerns, the law reports yield a thread of cases which may collectively lead one to conclude that the courts have all but formally recognized another guiding principle in law of mandamus.[12] In Distribution Canada Inc. v. M.N.R., supra, discussed earlier, it could be argued that the Court effectively balanced the benefits of strict enforcement of a duty against the interests of the enforcers and the general public. Arguably, a similar balancing technique was adopted in the gun control decisions.

101 By contrast, the "balance of convenience" test was effectively recognized in Re Central Canada Potash Co. Ltd. et al. and Minister of Mineral Resources for Saskatchewan (1972), 30 D.L.R. (3d) 480 (Sask. Q.B.); affd (1973), 32 D.L.R. (3d) 107 (Sask C.A.); appeal to Supreme Court dismissed (1973), 38 D.L.R. (3d) 317. The Minister's discretion in that case was unfettered and mandamus could have been denied on that ground alone. However, both the trial and appeal Courts supported an alternative ground for refusing mandamus: such an order "would lead to confusion and disorder in the potash industry." At the Court of Appeal, Chief Justice Culliton stated (at page 115):

> The learned Chambers Judge also held that even if mandamus lay he would not, in the exercise of his discretion, grant it in any event. There can be no doubt that mandamus is above all a discretionary remedy. While it would be difficult to state, with certainty, all of the grounds upon which a Judge would be justified in refusing the writ in the exercise of his discretionary right, such grounds are indeed broad and extensive. No doubt the learned Chambers Judge felt that to grant mandamus in this case would lead to confusion and disorder in the potash industry. That this conclusion is sound is evident from the fact that all other potash producers opposed the application for mandamus. In my opinion, such a reason would be a valid one for the exercise of the learned Chambers Judge's discretion.

102 Other courts have presumed that the Court retains an inherent discretion to refuse mandatory relief in certain circumstances. In Fitzgerald v. Muldoon, [1976] 2 N.Z.L.R. 615 (S.C.) the then recently elected Prime Minister of New Zealand announced the abolition of a superannuation scheme as promised during the election campaign. After the announcement, the Board stopped enforcing payment under the superannuation legislation on the assurance of the Prime Minister that repealing legislation would be forthcoming. Although the Court granted a declaration that the actions of the Prime Minister were illegal, it refused to grant a mandatory injunction compelling the

Board to collect the required contributions. Instead it adjourned the proceedings for six months with a view to seeing whether the Government fulfilled its promise to repeal the superannuation scheme.

103 On the one hand, Fitzgerald ostensively supports the principle that the executive branch of government has no power to suspend the operation of a law. To quote Marceau J.A. in Carrier-Sekani Tribal Council v. Canada (Minister of the Environment), [1992] 3 F.C. 316 (C.A.), at page 347: "It is obvious that the will of Parliament is paramount and no administrative or executive authority is entitled to contravene it, whether directly or indirectly." However, by adjourning the mandamus hearing, the Court effectively suspended the operation of the law in any case.

104 In Fitzgerald, the Trial Judge was clearly motivated by the practical consequences of granting the order. Even if the superannuation scheme were reinstated immediately, it would have taken six weeks before its operation became effective while the recovery of contributions in arrears would take considerably longer. The Trial Judge concluded (at page 623):

> [I]t would be an altogether unwarranted step to require the machinery of the New Zealand Superannuation Act 1974 now to be set in motion again, when the high probabilities are that all would have to be undone again within a few months.

105 It should be noted that the evidence before the Trial Judge supported the belief that Parliament was in a position to pass such legislation within the time frame envisaged by the adjournment.

106 Having regard to the above jurisprudence, I conclude that this Court possesses the discretion to refuse mandamus on the ground of "balance of convenience". The more difficult task is to identify the criteria to be applied in determining whether to exercise this discretionary power.

(b) Criteria for the Exercise of the Discretion

107 The jurisprudence reveals three factual patterns in which the balance of convenience test has been implicitly acknowledged. First, there are those cases where the administrative cost or chaos that would follow upon the order's issue is obvious and unacceptable; see Distribution Canada Inc. v. M.N.R., supra; Re Central Canada Potash Co. Ltd. et al. and Minister of Mineral Resources for Saskatchewan, supra; and Fitzgerald v. Muldoon, supra. It is noteworthy that in most of these cases the duty in question was owed to the public at large rather than the individual applicant. In this sense, the law of mandamus and the law of standing may be said to intersect. This relationship was implicitly acknowledged by Desjardins J.A. in Distribution Canada v. M.N.R., supra, at page 39:

> I am, for my part, inclined to think that with the addition of the Finlay case, the jurisprudence does not clearly exclude the possibility of extending standing to a proceeding in mandamus where there is public interest to be expressed and there is no other reasonable way for it to be brought to court.

Whether the "balance of convenience" test may be employed as an ostensive vehicle by which standing requirements may be further relaxed I leave for another day.

108 The second, if more speculative, ground for denying mandamus appears to arise in instances where potential health and safety risks to the public are perceived to outweigh an individual's right to pursue personal or economic interests; see Martinoff v. Gossen, supra; Lemyre v. Trudel, supra; and Wimpey Western Ltd. and W-W-W Developments Ltd. v. Director of Standards and Approvals of the Department of the Environment Minister of the Environment and Province of Alberta, supra.

109 In this case, there is no issue that an order of mandamus would precipitate administrative chaos. It is true that such an order may well have the effect of encouraging other generic drug manufacturers who submitted NDSs before Bill C-91 and the Patented Medicines Regulations came into effect to file for mandamus. However, as only those manufacturers who meet the traditional mandamus requirements will be successful, this is not a case in which arguments in favour of administrative efficiency are particularly persuasive. Further, as Apo-Enalapril has met the safety and efficacy requirements under the FDA Regulations, no issue with respect to public health and safety arises. This leaves us with the line of authority as represented by Boyd Builders.

(c) Boyd Builders

110 Merck argues that the Boyd Builders principle enables this Court to exercise its discretion to deny mandamus since in that case the Court adjourned a mandamus hearing to allow a new regulatory regime to be implemented. In my view, this principle is misconceived. Indeed, even the interpretation forwarded by Merck does not advance its case.

111 Boyd Builders applied for a building permit at a time when the extant zoning by-law would have allowed for the proposed development. News of the proposed development generated adverse public reaction in response to which the city initiated the passage of a by-law amendment to thwart the developer's project. Prior to Boyd Builders, an application for a building permit could be defeated by the passage of a by-law amendment by the Municipal Council any time up to the issuing of the permit; see Toronto Corporation v. Roman Catholic Separate Schools Trustees, [1926] A.C. 81 (P.C.). On application for mandamus the city of Ottawa sought an adjournment until such time as the Ontario Municipal Board had the opportunity to approve or reject the by-law amendment. The Supreme Court set out a tri-partite test in determining whether to grant the adjournment: (1) the municipality must establish a pre-existing intent to rezone the property prior to the application for a permit; (2) the municipality must have acted in good faith; and (3) the municipality must have acted with dispatch in seeking passage and approval of the amending by-law.

112 It is now well established that the prima facie right of a property owner to utilize his or her property in accordance with existing zoning regulations is not to be disturbed unless an intent to rezone is shown to exist prior to the application for the permit. Of course, strict application of the Boyd Builders principle does not advance Merck's case. Apotex's application for a NOC preceded

Parliament's intent to introduce amending legislation by a period exceeding two years. Leaving that aside, it is my opinion that the Supreme Court was not inviting courts to become embroiled in the daily political skirmishes surrounding land use planning decisions by balancing the so-called "equities": it merely sought to establish a principle by which it could be determined whether a property owner had acquired a vested right to a building permit pending approval of a by-law amendment.

113 The current state of municipal law is that if a prior intent to rezone cannot be established, then the property owner can make claim to a vested right to a building permit. This principle cannot be invoked to support the exercise of the Court's discretion in issuing mandamus by balancing competing interests. Admittedly, there are those who argue that the judiciary should play a greater role in "balancing the equities", even in planning law (see Makuch, Canadian Municipal and Planning Law, (Toronto: Carswell, 1983), at pages 251-261), and undoubtedly cases in which courts have been willing to become embroiled in the politics of land use can be found in the reports; e.g., Re Hall and City of Toronto et al. (1979), 23 O.R. (2d) 86 (C.A.). But that, in my view, does not undermine the proper application of Boyd Builders.

114 In effect, the balance of convenience test authorizes the Court to use its discretion to displace the law of relevant considerations and the doctrine of vested rights. It should therefore be used only in the clearest of circumstances and not be perceived as a panacea for bridging legislative gaps. Unless courts are prepared to be drawn into the forum reserved for those elected to office, any inclination to engage in a balancing of interests must be measured strictly against the rule of law.

115 The argument that social or economic costs outweigh the rights of Apotex obfuscates what is essentially a private law issue. In the end, I conclude that the principle set out in Boyd Builders is of no relevance to the case before us, nor to the issue of the Court's discretion to refuse mandamus in this case on the ground of "balance of convenience." Accordingly, there is no legal basis upon which the "balance of convenience" test can be applied to deny Apotex the order which it seeks. I turn now to consider whether Apotex's vested right to the NOC was divested by BilI C-91 and the Patented Medicines Regulations.

(6) Retroactive or Retrospective

116 Merck argued that if Apotex acquired a vested right prior to March 12, 1993, such right was divested by subsections 5(1) and (2) of the Patented Medicines Regulations:

> 5. (1) Where a person files or, before the coming into force of these Regulations, has filed a submission for a notice of compliance in respect of a drug and wishes to compare that drug with, or make reference to, a drug that has been marketed in Canada pursuant to a notice of compliance issued to a first person in respect of which a patent list has been submitted, the person shall, in the submission, with respect to each patent on the patent list,

. . .

(2) Where, after a second person files a submission for a notice of compliance, but before the notice of compliance is issued, a patent list is submitted or amended in respect of a patent pursuant to subsection 4(5), the second person shall amend the submission to include, in respect of that patent, the statement or allegation that is required by subsection (1). [Emphasis added.]

117 Leaving aside the question of the impact of the "balance of convenience" arguments on retrospective legislation, Merck proffers three distinct submissions.

118 Merck's first submission is policy-based. It asserts that Apotex created a "window of opportunity" for itself by obtaining a NOC notwithstanding the current legislation. Merck also maintains that Apotex is in effect seeking the assistance of this Court to facilitate patent infringement. (Illegality was not raised as an equitable bar to granting relief.) The relevant paragraphs from Merck's Memorandum state (appellants' memorandum of fact and law, paragraphs 87-89):

87. The Courts were not oblivious to patent rights when dealing with NOCs even under the former law. NOCs and patent rights have never occupied unrelated juristic solitudes. Under the former law, the Courts constantly emphasized that it was the compulsory license that affected the patent owners rights, and that the NOC merely enabled the generic drug company to exercise its rights under the compulsory license. The Court is now clearly confronted with a situation where Parliament has linked NOCs to protection of patent rights and the Court's assistance is being invoked to facilitate patent infringement.

. . .

88. Neither the Minister (nor the Court) should turn a blind eye to the fact that from and after February 4, 1993 the "compulsory license" provisions had been repealed, and the "property interests" of patent owners such as Merck were directly and expressly referenced in Bill C-91 and the Patented Medicines (Notice of Compliance) Regulations. Parliament could hardly make clearer the mischief it intended to address in these enactments.

89. Apotex seeks to create a "window of opportunity" for itself between the former statutory regime (where patent rights were dealt with under the compulsory licence provisions) and the present statutory regime (where issuance of an NOC is tied to patent protection). The President, CEO and COO of Apotex, Bernard Sherman, has repeatedly testified in these proceedings that he intends to market enalapril across Canada as soon as possible, notwithstanding the fact that the Merck patent does not expire until October 16, 2007.

119 While NOCs and patent rights are linked, they have never been mutually dependent. One of the purposes of the compulsory licensing scheme was to avoid costly and protracted litigation surrounding possible patent infringement provided that the generic was willing to pay royalties. This reality, however, does not lead inevitably to the conclusion that all generic products infringe patents. In my view all that can be said is that Apo-Enalapril is a "safe" drug. To refuse mandamus on the basis of Merck's argument would be to essentially prejudge the patent issue.

120 Practically speaking, Merck is seeking an interlocutory injunction against Apotex with respect to possible patent infringement without having to satisfy the conditions precedent imposed at law to the granting of such relief. (How section 6 of the Patented Medicines Regulations will be interpreted is another matter.) In the circumstances, an order in the nature of mandamus cannot reasonably be viewed as an instrument which "facilitates" patent infringement. This Court should not close the window of opportunity by ignoring the fact that Parliament had at its disposal an effective legislative tool for divesting Apotex of what the law holds to be an acquired right. Nor can this Court turn a blind eye to the availability of conventional legal procedures to thwart patent infringement.

121 Merck's second submission is premised on the Patented Medicines Regulations being "procedural" in nature. Unquestionably, if those regulations are so characterized then it is clear that Apotex's NDS would be subject to the new statutory regime; see Howard Smith Paper Mills Ltd. et al. v. The Queen, [1957] S.C.R. 403, per Cartwright J., at pages 419-420, quoting with approval Lord Blackburn in Gardner v. Lucas (1878), 3 App. Cas. 582 (H.L.), at page 603. However, the question we must address "is not simply whether the enactment is one affecting procedure but whether it affects procedure only and does not affect substantial rights of the parties": DeRoussy v. Nesbitt (1920), 53 D.L.R. 514 (Alta. C.A.), at page 516, per Harvey C.J., cited with approval in Angus v. Sun Alliance Insurance Co., [1988] 2 S.C.R. 256, at page 265, per La Forest J.

122 In the instant case, we are not dealing with procedural regulations per se. The imposition of a criterion that a NOC cannot issue with respect to a patent-linked NDS is clearly a substantive change in the law and hence subject to the rules of statutory construction applicable to legislation purporting to affect vested rights.

123 Merck's third submission is that the intended scope of subsection 5(1) is unambiguous. If that premise is valid then it necessarily follows that there is no room to invoke the canons of statutory construction designed to assist in the interpretation of ambiguous enactments. Merck seeks to avoid the application of the presumption against retroactive operation of statutes and the presumption of non-interference with vested rights, which: "only appl[y] where the legislation is in some way ambiguous and reasonably susceptible of two constructions"; Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, [1977] 1 S.C.R. 271, at page 282, per Dickson J. (as he then was). In my view, subsections 5(1) and (2) do not manifestly seek to divest persons of acquired rights. They are at best ambiguous.

124 At this juncture the issue can be tackled in one of two ways. The first invokes an extensive analysis of the law dealing with retroactivity and retrospectivity. Critical to that analysis is the need to distinguish between the principle of non-retroactivity of statutes and the principle of non-interference with vested rights. Today, it is well recognized that a statutory enactment which is forward looking but which also impairs or affects vested rights is not necessarily retroactive. The distinctions are addressed in three Supreme Court decisions:[13] Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, supra; Attorney General of Quebec v. Expropriation Tribunal et al., [1986] 1 S.C.R. 732; and Venne v. Quebec (Commission de protection du territoire agricole), [1989] 1 S.C.R. 880 (see also Lorac Transport Ltd. v. Atra (The), [1987] 1 F.C. 108 (C.A.), per Hugessen J.A., at page 117). The second approach is much simpler and reinforces my opinion that in the circumstances of this case both interpretative presumptions are applicable and that Parliament had not intended subsections 5(1) and (2) of the Patented Medicines Regulations to intrude upon vested rights.

125 For the sake of argument, assume that subsection 5(1) expressly applies to all NOCs "in the pipeline", including those to which applicants have a vested right. No one can question the fact that Parliament has the authority to pass retroactive legislation, thereby divesting persons of an acquired right. It is equally clear, however, that vested rights cannot be divested by the Patented Medicines Regulations unless the enabling legislation, that is the Patent Act or Bill C-91, implicitly or explicitly authorize such encroachments; see generally Côté, supra, at page 152. The Supreme Court endorsed this approach to regulatory interpretation in A.G. for British Columbia et al. v. Parklane Private Hospital Ltd., [1975] 2 S.C.R. 47, at page 60, per Dickson J. (as he then was):

> If intra vires, Order in Council 4400 would serve to extinguish retrospectively the entire claim of Parklane, but in my view it fails to have that effect. The Lieutenant Governor in Council is empowered to enact regulations for the purposes of carrying into effect the provisions of the Act, but nothing expressly or by necessary implication contained in the Act authorizes the retrospective impairment by regulation of existing rights and obligations. [Emphasis added.]

126 It is one thing for a provision of an Act of Parliament to attempt to affect vested rights and quite another for a subsection of a regulation to do the same. With one exception, I could find no provision in the Bill C-91 specifically authorizing regulations to interfere with existing or vested rights. Certainly, subsection 55.2(4) of the Patent Act, the regulation-making provision, does not expressly or implicitly authorize regulations of a retroactive nature. This explains why the legislative draftsperson did not craft subsection 5(1) of the Patented Medicines Regulations so as to embrace all NDSs "in the pipeline" by referring specifically to those in which the applicant had acquired a vested right. In my estimation, the draftsperson knew that such formulation would be ultra vires the Governor in Council.

127 By contrast, subsection 12(1) of Bill C-91 expressly extinguishes all compulsory licences granted after December 20, 1991. Like the learned Trial Judge, I am driven to the conclusion that

Parliament could have done the same for NOCs "in the pipeline". A purposive interpretation of subsection 5(1) of the Patented Medicines Regulations and an appreciation of the ejusdem generis canon of statutory interpretation reveal that it only applies to NDSs which had not reached the point where the Minister's discretion was spent as of March 12, 1993.

(7) Jurisdiction of the Court

128 The final issue is whether the jurisdiction of this Court to grant judicial review has been "ousted" by the paramountcy provision in Bill C-91. Subsection 55.2(5) [of the Patent Act] reads:

55.2 . . .

(5) In the event of any inconsistency or conflict between

(a) this section or any regulations made under this section, and
(b) any Act of Parliament or any regulations made thereunder,

this section or the regulations made under this section shall prevail to the extent of the inconsistency or conflict. [Emphasis added.]

129 Merck's novel argument is succinctly outlined in its memorandum (at paragraphs 91-95 inclusive):

91. As previously discussed, the Patented Medicines (Notice of Compliance) Regulations on their face expressly apply to NOC applications pending before the Minister on March 12, 1993.
92. As of March 12, 1993 accordingly, Parliament had put in place a new procedure to govern disputes about the issuance or non-issuance of NOCs. The new procedure is set out in Sections 6 and 8 of the Patented Medicines (Notice of Compliance) Regulations.
93. The constitutional basis for the Federal Court Act is s. 101 of the Constitution Act 1867 which is directed to "the better Administration of the Laws of Canada".
94. The prohibition against issuance of an NOC in s. 7 of the Regulations until the procedure set out in ss. 6 and 8 of the Regulations has been complied with is as much "a law of Canada" as is s. 18 of the Federal Court Act. Indeed, and more importantly, Parliament has declared in s. 55.2(5) of the Regulations that the prohibition in the Regulations is paramount to s. 18 of the Federal Court Act and every other federal statute.

95. Accordingly, when this matter came on for a hearing on June 21, 1993, the Court had no more jurisdiction to issue mandamus to the Minister to issue an NOC than the Minister had jurisdiction on his own behalf to issue an NOC in the face of the prohibition in s. 7 of the Regulations.

130 I fail to see how subsection 55.2(5) or any other regulation thereunder can be said to be paramount to section 18 of the Federal Court Act [R.S.C., 1985, c. F-7 (as am. by S.C. 1990, c. 8, s. 4)]: see generally Friends of the Oldman River Society v. Canada (Minister of Transport), supra, per La Forest J., at pages 38-39. Am I to assume that as the Supreme Court of Canada is a statutory Court, it too lacks jurisdiction in this matter? The answer to this submission is self-evident. There is no paramountcy issue. We have been asked to determine whether the Patented Medicines Regulations are applicable. Subsection 55.2(5) cannot be construed as a privative clause insulating the Minister and the relevant legislation from judicial review. This submission is without merit.

CONCLUSION

131 The appeal and cross-appeal should be dismissed with costs.

132 Mahoney J.A.:-- I agree.

133 McDonald J.A.:-- I agree.

1 On January 5, 1993, Apotex attempted unsuccessfully to cause the Federal Court of Canada to enjoin Parliament from enacting the Bill.

2 On September 20, 1991, Merck sued Apotex for exporting enalapril to the United States and the Caribbean. Those patent infringement proceedings are still pending.

3 On appeal, Apotex encouraged this Court to infer from the Minister's refusal to disclose the substance of these opinions that they must support Apotex's legal position. I wish only to point out that I can think of a number of valid reasons why the Minister might not want a legal opinion, either favourable or unfavourable to the respective litigants, released.

4 I think it important to note that when counsel for the Minister sought the adjournment, he was not aware that the Patented Medicines Regulations would come into effect on March 12, 1993. No one, including counsel for Apotex, implied otherwise.

5 I am aware, however, that Apotex did allude to this matter; see memorandum by cross-appeal, Apotex, at p. 6, subparas. 8(c)(vi) and (vii).

6 Generally, the rule is that mandamus cannot issue with respect to a duty owed to the Crown. Historically, this issue has been framed as one concerning standing to bring a mandamus application. The Supreme Court has considerably loosened the requirements for standing over the decades; see Thorson v. Attorney General of Canada et al., [1975] 1 S.C.R. 138; Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265; Minister of Justice of Canada et al. v. Borowski, [1981] 2 S.C.R. 575; Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607. For a discussion of the application of these cases to mandamus proceedings, see Distribution Canada Inc. v. M.N.R., supra, per Desjardins J.A. at pp. 38-39.

7 These paragraphs of the Interpretation Act are narrower in scope than the common law principles which they essentially codify: see P.-A. Côté, The Interpretation of Legislation in Canada, 2nd ed. (Cowansville, Que.: Yvon Blais, 1991), at p. 94.

8 Merck vigorously disputed the application of ss. 43(c) and 44(c) of the Interpretation Act to this appeal. It argued that since the Patented Medicines Regulations constitute a legislative enactment rather than a repeal, the provisions of the Interpretation Act which ostensibly concern the repeal of an enactment are irrelevant. In my view a change in the law effected by the addition of a further criterion is equivalent to the repeal and replacement of the previous criteria. S. 10 of the Interpretation Act directs that substance prevail over form.

9 It is arguable that Pfizer undermines Merck's legal standing to seek an order of prohibition. In that case, Pfizer, an innovator drug manufacturer, sought to have this Court set aside a decision of the Minister to issue a NOC to Apotex for the drug Piroxicam. Apotex successfully had the application quashed since, inter alia, Pfizer was not a person directly affected by the decision of the Minister. Similarly, in Glaxo Canada, supra, Glaxo's application for an interlocutory injunction to restrain the Minister from issuing Apotex a NOC for the drug Ranitidine was dismissed for lack of standing. It follows that what one cannot do directly cannot be done indirectly. In this case, the issue of standing may have been subject to one of the numerous applications preceding the appeal. In the circumstances, I assume that Merck has the requisite standing.

10 See also case annotation, Peter P. Mercer, at pp. 248-251 [of (1983), 3 Admin. L.R. 248].

11 The only other case I am aware of is Haines v. Attorney General of Canada (1979), 32 N.S.R. (2d) 271 (C.A.). The facts of that case are too singular to be of use in this appeal.

12 Under English law it is said that mandamus may not issue where it would cause administrative chaos and public inconvenience despite conflicting authorities on this point (see Halsbury's Laws of England, 4th ed. reissue, Vol. 1(1): Administrative Law, para. 130, and conflicting cases gathered at note 12).

13 The distinction had been drawn earlier by this Court; see Northern & Central Gas Corp. v. National Energy Board, [1971] F.C. 149 (T.D.); Minister National Revenue v. Gustavson

Drilling (1964) Ltd., [1972] F.C. 92 (T.D.); and Zong v. Commissioner of Penitentiaries, [1976] 1 F.C. 657 (C.A.).

Indexed as:

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (Re R. v. Carson)

Canadian Broadcasting Corporation, appellant;
v.
The Attorney General for New Brunswick, His Honour Douglas Rice and Gerald Carson, respondents, and The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Saskatchewan and the Attorney General for Alberta, interveners.

[1996] 3 S.C.R. 480

[1996] S.C.J. No. 38

File No.: 24305.

Supreme Court of Canada

1996: March 29 / 1996: October 31.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Constitutional law -- Charter of Rights -- Freedom of expression -- Freedom of the press -- Trial judge excluding public and media from courtroom during part of accused's sentencing proceedings -- Whether s. 486(1) of Criminal Code infringes freedoms of expression and of the press -- If so, whether s. 486(1) justifiable in a free and democratic society -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b) -- Criminal Code, R.S.C., 1985, c. C-46, s. 486(1).

Criminal law -- Exclusion of public from court -- Trial judge excluding public and media from courtroom during part of accused's sentencing proceedings -- Whether trial judge exceeded his jurisdiction in making such order -- Criminal Code, R.S.C., 1985, c. C-46, s. 486(1).

The accused pleaded guilty to two charges of sexual assault and two charges of sexual interference involving young female persons. On a motion by the Crown, consented to by defence counsel, the trial judge ordered the exclusion of the public and the media from those parts of the sentencing proceedings dealing with the specific acts committed by the accused, pursuant to s. 486(1) of the Criminal Code. The order was sought on the basis of the nature of the evidence, which the court had not yet heard and which purportedly established that the offence was of a "very delicate" nature. The exclusion order remained in effect for approximately 20 minutes. Afterwards, following a request by the CBC, the trial judge gave reasons for making the exclusion order, stating that it had been rendered in the interests of the "proper administration of justice"; it would avoid "undue hardship on the persons involved, both the victims and the accused". The CBC challenged the constitutionality of s. 486(1) before the Court of Queen's Bench. The court held that s. 486(1) constituted an infringement on the freedom of the press protected by s. 2(b) of the Canadian Charter of Rights and Freedoms but that the infringement was justifiable under s. 1 of the Charter. The court also held that the trial judge had not exceeded his jurisdiction in making the exclusion order. The Court of Appeal affirmed the judgment.

Held: The appeal should be allowed.

(1) Constitutional law issue

The open court principle is one of the hallmarks of a democratic society, fostering public confidence in the integrity of the court system and understanding of the administration of justice. This principle is inextricably tied to the rights guaranteed by s. 2(b) of the Charter. The freedom to express ideas and opinions about the operation of the courts and the right of members of the public to obtain information about them are clearly within the ambit of s. 2(b). As well, s. 2(b) protects the freedom of the press to gather and disseminate this information. Members of the public in general rely and depend on the media to inform them and, as a vehicle through which information pertaining to courts is transmitted, the press must be guaranteed access to the courts in order to gather information. Measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press guaranteed by s. 2(b). To the extent that such measures prohibit public access to the courts and to information about the courts, they may also be said to restrict freedom of expression in so far as it encompasses the freedom of listeners to obtain information that fosters public criticism of the courts. The recognition of the importance of public access to the courts as a fundamental aspect of our democratic society should not be understood, however, as affirming a right to be physically present in the courtroom; there may be a shortage of space. Nor should it be seen as extending public access to all venues within which the criminal law is administered. By its facial purpose, s. 486(1) of the Code restricts expressive activity, in particular the free flow of ideas and information, in providing a discretionary bar on public and media access to the courts. This is sufficient to ground a violation of s. 2(b).

The exclusion of the public under s. 486(1) of the Code is a means by which the court may control the publicity of its proceedings with a view to protecting the innocent and safeguarding privacy interests and thereby afford a remedy to the underreporting of sexual offences. This provision constitutes a reasonable limit on the freedoms guaranteed by s. 2(b) of the Charter. Section 486(1) is aimed at preserving the general principle of openness in criminal proceedings to the extent that openness is consistent with and advances the proper administration of justice. In situations where openness conflicts with the proper administration of justice, s. 486(1) purports to further the proper administration of justice by permitting covertness where necessary. This objective is of sufficient importance to warrant overriding a constitutional freedom. Section 486(1) is also proportionate to the legislative objective. First, the means adopted -- a discretionary power in the trial judge to exclude the public where it is in the interests of the proper administration of justice -- is rationally connected to the objective. The trial judge must exercise his discretion in conformity with the Charter and the grant of this judicial discretion necessarily ensures that any order made under s. 486(1) will serve the objective of furthering the administration of justice. If it is not rationally connected to the objective, then the order will constitute an error of law. Second, s. 486(1) impairs the rights under s. 2(b) as little as reasonably possible in order to achieve the objective. The discretion conferred on trial judges by s. 486(1) is not overbroad. Section 486(1) provides an intelligible and workable standard -- the proper administration of justice -- according to which the judiciary can exercise the discretion conferred. It also arms the judiciary with a useful and flexible interpretative tool to accomplish its goal of preserving the openness principle, subject to what is required by the proper administration of justice. Again, since the discretion must be exercised in a manner that conforms with the Charter, the discretionary aspect of s. 486(1) guarantees that the impairment is minimal. An order that fails to impair the rights at stake as little as possible will constitute an error. Third, the salutary effects of s. 486(1) outweigh the deleterious effects. Parliament has attempted to balance the different interests affected by s. 486(1) by ensuring a degree of flexibility in the form of judicial discretion, and by making openness the general rule and permitting exclusion of the public only when public accessibility would not serve the proper administration of justice. The discretion necessarily requires that the trial judge weigh the importance of the interests the order seeks to protect against the importance of openness and specifically the particular expression that is limited. In this way, proportionality is guaranteed by the nature of the judicial discretion. In deciding whether to order exclusion of the public pursuant to s. 486(1), a trial judge should bear in mind whether the type of expression that may be impaired by the order infringes upon the core values sought to be protected.

(2) Criminal law issue

In applying s. 486(1) to order the exclusion of the public, the trial judge must exercise his discretion in conformity with the Charter. He must (a) consider available options and whether there are any other reasonable and effective alternatives available; (b) consider whether the order is limited as much as possible; and (c) weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

Additionally, the burden of displacing the general rule of openness lies on the party making the application. The applicant bears the burden of proving: that the particular order is necessary, in terms of relating to the proper administration of justice; that the order is as limited as possible; and that the salutary effects of the order are proportionate to its deleterious effects. In relation to the proportionality issue, if the order is sought to protect a constitutional right, this must be considered. There must also be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he may exercise his discretion judicially. In some cases in which the facts are not in dispute the statement of counsel will suffice. If there is insufficient evidence placed before the trial judge, or there is a dispute as to the relevant facts, the applicant should seek to have the evidence heard in camera.

Since the trial judge considering an application to exclude the public is usually in the best position to assess the demands in a given situation, where the record discloses facts that may support the trial judge's exercise of discretion, it should not lightly be interfered with. In this case, however, the trial judge erred in excluding the public from any part of the proceedings. There was insufficient evidence to support a concern for undue hardship to the complainants or to the accused. The order was unnecessary to further the proper administration of justice and its deleterious effects were not outweighed by its salutary effects. The mere fact that the victims are young females is not, in itself, sufficient to warrant exclusion. The victims' privacy was already protected by a publication ban and there was no evidence that their privacy interests required more protection. While the criminal justice system must be ever vigilant in protecting victims of sexual assault from further victimization, the record before the trial judge did not establish that undue hardship would befall the victims in the absence of a s. 486(1) order. Nor did the record reveal that there were any other reasons to justify an exception to the general rule of openness. Finally, barring exceptional cases, there is no issue of hardship to the accused arising from prejudicial publicity once the accused has pleaded guilty.

Cases Cited

Applied: Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; referred to: Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; Scott v. Scott, [1913] A.C. 419; Re Southam Inc. and The Queen (No.1) (1983), 41 O.R. (2d) 113; Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175; Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421; Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1991] 3 S.C.R. 459; Canadian Newspapers Co. v. Canada (Attorney General), [1988] 2 S.C.R. 122; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; R. v. Keegstra, [1990] 3 S.C.R. 697; Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825; R. v. Oakes, [1986] 1 S.C.R. 103; United Nurses of Alberta v. Alberta (Attorney General), [1992] 1 S.C.R. 901; B.C.G.E.U. v. British Columbia (Attorney General),[1988] 2 S.C.R. 214; Morris v. Crown Office, [1970] 1 All E.R. 1079; R. v. O'Connor, [1995] 4 S.C.R. 411; R. v. L. (D.O.), [1993] 4 S.C.R. 419; RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199; R. v. Beare, [1988] 2 S.C.R. 387; R. v. Nova Scotia

Pharmaceutical Society, [1992] 2 S.C.R. 606; Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69; R. v. Brint (1979), 45 C.C.C. (2d) 560; R. v. Lefebvre (1984), 17 C.C.C. (3d) 277, [1984] C.A. 370; R. v. McArthur (1984), 13 C.C.C. (3d) 152; R. v. Vandevelde (1994), 89 C.C.C. (3d) 161; R. v. Quesnel and Quesnel (1979), 51 C.C.C. (2d) 270.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 11(d).
Criminal Code, R.S.C., 1985, c. C-46, ss. 151 [rep. & sub. c. 19 (3rd Supp.), s. 1], 271(1)(a), 486(1) [am. c. 27 (1st Supp.), s. 203], (3) [rep. & sub. c. 23 (4th Supp.), s. 1].

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APPEAL from a judgment of the New Brunswick Court of Appeal (1994), 148 N.B.R. (2d) 161, 378 A.P.R. 161, 116 D.L.R. (4th) 506, 91 C.C.C. (3d) 560, 32 C.R. (4th) 334, dismissing the appellant's appeal from a judgment of Landry J. (1993), 143 N.B.R. (2d) 174, 366 A.P.R. 174, dismissing its application to quash an order of Rice Prov. Ct. J. excluding the public and media from part of the sentencing proceedings. Appeal allowed.

André G. Richard, Marie-Claude Bélanger-Richard and Jacques McLaren, for the appellant.
Graham J. Sleeth, Q.C., for the respondents.
Graham Garton, Q.C., and Barbara Kothe, for the intervener the Attorney General of Canada.
M. David Lepofsky and James K. Stewart, for the intervener the Attorney General for Ontario.
Deborah Carlson, for the intervener the Attorney General of Manitoba.
Galvin C. Deedman, for the intervener the Attorney General of British Columbia.
Graeme G. Mitchell, for the intervener the Attorney General for Saskatchewan.
Written submissions only by Jack Watson, Q.C., for the intervener the Attorney General for Alberta.

Solicitors for the appellant: Stewart McKelvey Stirling Scales, Moncton.
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Solicitor for the intervener the Attorney General of Canada: George Thomson, Ottawa.
Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.
Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Vancouver.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.
Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.
Solicitor for the intervener the Attorney General for Alberta: Jack Watson, Edmonton.

The judgment of the Court was delivered by

1 LA FOREST J.:-- This appeal is brought by the Canadian Broadcasting Corporation ("CBC") from the judgment of the New Brunswick Court of Appeal dismissing an appeal from a decision of Landry J. who had refused to quash an order of Rice Prov. Ct. J. restricting public access to the courtroom. The order in question was made pursuant to s. 486(1) of the Criminal Code, R.S.C., 1985, c. C-46, which reads:

> 486. (1) Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room for all or part of the proceedings, he may so order.

The order mandated the exclusion of the public and the media from the courtroom during part of the sentencing proceedings of the respondent, Gerald Carson. A pre-existing non-identification order, made pursuant to s. 486(3) of the Code, was already in effect. The CBC now seeks a declaration that s. 486(1) is of no force or effect as infringing s. 2(b) of the Canadian Charter of Rights and Freedoms and cannot be justified under s. 1 of the Charter. In the alternative, if the provision is held to be constitutionally valid, the CBC seeks a declaration that Rice Prov. Ct. J. exceeded his jurisdiction in making the exclusion order. If such a declaration is made, it further seeks an order quashing the exclusion order and a mandatory order granting access to the media and the public to a transcript of the proceedings held in camera.

I. Facts

2 The facts are straightforward. The respondent, Gerald Carson, a prominent Moncton resident, pleaded guilty to two charges of sexual assault, contrary to s. 271(1)(a) of the Code, and two charges of sexual interference, contrary to s. 151 of the Code. On motion by Crown counsel, consented to by defence counsel, Rice Prov. Ct. J. ordered the exclusion of the public and the media, with the exception of the accused, the victims, their immediate families and a victim services coordinator, from those parts of the sentencing proceedings dealing with the specific acts committed by Carson. The exclusion order remained in effect for approximately 20 minutes. The order was sought on the basis of the nature of the evidence, which the court had not yet heard, and which

purportedly established that the offence was of a "very delicate" nature. Crown counsel further pointed to the fact that the case involved young, female persons.

3 André Veniot, a CBC reporter, was excluded from the court along with the other members of the media and the public. Shortly after the public had been invited to reattend the proceedings, a lawyer retained by Veniot was granted permission to address the court. She requested that Rice Prov. Ct. J. give reasons for making the exclusion order. In maintaining his order, Rice Prov. Ct. J. stated that it had been rendered in the interests of the proper administration of justice; it would avoid undue hardship to the victims and the accused.

II. Judicial History

Court of Queen's Bench (1993), 143 N.B.R. (2d) 174

4 A constitutional challenge to s. 486(1) of the Code was then made before the Court of Queen's Bench of New Brunswick on the basis of s. 2(b) of the Charter. Landry J., who heard the matter, held that since s. 486(1) limits or prohibits the right of the public and the press to gather and publish information in court proceedings in certain instances, it constitutes an infringement on the freedom of the press protected by s. 2(b).

5 Landry J. then considered whether the infringement could be saved by s. 1 of the Charter as being reasonable and demonstrably justified in a free and democratic society. He found that s. 486(1) addressed a pressing and substantial objective since it was a mechanism to ensure the "proper administration of justice" (p. 179). He also determined that the infringement is proportionate to that objective. He stated: "There exists a rational connection between the section and the objective, the section impairs the freedom as little as possible and there is some balance between the importance of the objective and the injurious effect of the section" (p. 179). He, therefore, concluded that s. 486(1) is saved by s. 1 of the Charter.

6 In deciding whether the trial judge had exceeded his jurisdiction in ordering the exclusion of the public, Landry J. noted that the test was not whether he would have excluded the public in the same circumstances. The proper administration of justice, which Rice Prov. Ct. J. relied on, was an appropriate reason for the exercise of his discretion in this case. Landry J. further noted that the public and the press were excluded for a short period of time only and as such he found no injustice had been done to the parties involved in the proceedings. Finally, he stated (at pp. 181-82):

> It is important for the proper administration of justice to preserve the discretion provided by s. 486(1) and a Court of Appeal should not substitute its judgment for that of a judge who felt compelled to exercise a discretion as did the judge in the present case. Although this is a borderline case I find that the judge acted within his jurisdiction by excluding the public. It would, however, have been preferable if the judge had elaborated more on his reasons for excluding the public and the press.

Court of Appeal (1994), 148 N.B.R. (2d) 161

Hoyt C.J.N.B. (for the majority)

7 In the Court of Appeal, Hoyt C.J.N.B. (speaking for himself and Turnbull J.A.) expressed the view that freedom of expression, as protected by s. 2(b) of the Charter, includes the right of the media, as well as any member of the public, to attend criminal trials. He agreed with Landry J.'s finding that s. 486(1) limits freedom of expression and is, therefore, contrary to s. 2(b), but he also agreed that the provision could be saved by s. 1 of the Charter. The case, he found, illustrates why s. 486(1) can be justified; the failure to have made the order would likely have resulted in the further victimization of the complainants, by permitting details of the offences to be published and the possible identification of the complainants. And this was so notwithstanding that a non-publication order was already in effect.

8 As to the particular exercise of discretion by Rice Prov. Ct. J., he agreed with Landry J. that it was not for him to say whether he would have exercised the discretion in the same fashion. He found it was Rice Prov. Ct. J.'s belief that the young complainants in this case deserved protection. That being so, he concluded: "For this reason alone, I cannot say that he was wrong in making the order, even though, in my view, he may have taken an irrelevant factor into consideration, namely, the protection of the accused from undue hardship" (p. 169). He did not rule out the protection of the accused as a factor in other cases; however, he concluded that Rice Prov. Ct. J.'s other reasons were sufficient.

Angers J.A.

9 Angers J.A. concurred, but for different reasons. He first observed that most of the issues raised by the appellant were moot since the trial was over and the sentence had been imposed. He further noted that it would be wrong for a non-party to the proceedings to succeed in having an interlocutory order quashed or altered when the parties themselves could not appeal. He next discussed the right to a public trial as a means of protecting the accused. The right was prescribed in s. 486(1) of the Code and guaranteed by s. 11(d) of the Charter. He noted, however, that there was no express right in any legislation, including the Charter, giving the public access to trials; rather, in criminal law the right of the public to be present in court is merely a corollary of the right of the accused to a public trial. As such, it is a subordinate to, and cannot prevail over the principal right. In his view, s. 486(1) provides the necessary guidelines to permit the presiding judge to exercise his or her discretion in a judicial manner. Given the respondent Carson's consent to the order, he found that a possible infringement of the respondent's s. 11(d) right did not arise.

10 Angers J.A. stated that he could not accept that s. 2(b) of the Charter gives the media better access to court proceedings than members of the public. He added (at p. 174):

> The principle of a public trial goes beyond a particular accused and must be approached while keeping in mind the reasons that led to the right: that no

> person be convicted of a criminal offence behind closed doors or on secret and unknown evidence. It is the duty of all those involved in the administration of the criminal justice system to see that the principle is upheld. While the public, through the Attorney General, is involved in the administration of criminal justice, the media per se is not. Its interests are different. Its duty is to inform, its temptation to entertain. It was given and it should have the constitutional freedom to perform its duty to inform, but the gathering of information involves different considerations such as individual privacy, defamation, due process of law, fair trial. . . .

11 Angers J.A. concluded that s. 486(1) involves a balancing between the constitutional rights of an accused to a public trial and the protection of a certain class of witnesses or potential witnesses. It had nothing to do with, and does not infringe on any freedom of the press to publish what is legally permissible. The argument of the media that freedom to publish necessarily includes freedom to gather information was, in his view, really "misleading and fallacious" (p. 175).

III. Issues

12 The CBC then sought and was granted leave to appeal to this Court. Two major issues arise in this appeal. The first relates to the constitutionality of s. 486(1) of the Code and is conveniently set forth in the constitutional questions stated by the Chief Justice on September 18, 1995:

1. Does s. 486(1) of the Criminal Code, R.S.C., 1985, c. C-46, limit the freedom of expression of the press in whole or in part as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms?
2. If so, is the limit one that can be justified in accordance with s. 1 of the Charter?

The second issue is whether Rice Prov. Ct. J. exceeded his jurisdiction in making the order excluding members of the media and the public from a part of the sentencing proceedings, thereby committing reversible error.

13 Before turning to these issues, I propose to address some preliminary matters raised by the interveners. The first of these matters, brought to our attention by the Attorney General for Ontario, relates to the sequence in which the Court should deal with the issues. He argued that the constitutionality of the provision should not be considered until it has been determined whether Rice Prov. Ct. J. properly exercised his discretion. If he did not, then he acted without jurisdiction, and the constitutional question need not, and should not, be considered. Such an approach may certainly be appropriate in some situations, but in the present case, I am disposed to deal with the constitutional question with a view to providing guidance to courts faced with the issue in the future.

14 A second preliminary matter, raised by the Attorney General of Canada, concerns the

appropriate scope of constitutional review to be undertaken in relation to s. 486(1). Rice Prov. Ct. J. granted the order of exclusion solely on the basis of the "proper administration of justice". The Attorney General of Canada contends that the Court should not go beyond the circumstances of this case and review the constitutionality on each of the three grounds for exclusion set forth in s. 486(1).

15 This Court has in the past exhibited a reluctance to consider the constitutionality of legislative provisions in the absence of a proper factual foundation; see Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086. To accede to the appellant's contention that the other grounds be constitutionally reviewed would require us to conduct such review in the absence of a factual framework, contrary to this Court's practice. Moreover, it would be dangerous to make a determination of the constitutionality of the other two grounds for exclusion under s. 486(1) by extrapolation from the constitutional review of the proper administration of justice ground; the values and interests invoked may differ depending upon the specific legislative context. It is best, then, to leave to another day the constitutionality of the other two statutory grounds for exclusion, and to focus solely on the ground relied upon by Rice Prov. Ct. J., i.e., the proper administration of justice.

16 I come then to an analysis of the major issues, beginning with the constitutional issue.

IV. The Constitutional Issue

A. Section 2(b) of the Charter

17 This appeal engages two essential issues in relation to s. 2(b). The first is integrally linked to the concept of representative democracy and the corresponding importance of public scrutiny of the criminal courts. It involves the scope of public entitlement to have access to these courts and to obtain information pertaining to court proceedings. Any such entitlement raises the further question: the extent to which protection is afforded to listeners in addition to speakers by freedom of expression. The second issue relates to the first, in so far as it recognizes that not all members of the public have the opportunity to attend court proceedings and will, therefore, rely on the media to inform them. Thus, the second issue is whether freedom of the press protects the gathering and dissemination of information about the courts by members of the media. In particular, it involves recognition of the integral role played by the media in the process of informing the public. Both of these issues invoke the democratic function of public criticism of the courts, which depends upon an informed public; in turn, both relate to the principle of openness of the criminal courts.

18 The freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to any notion of democratic rule. The liberty to criticize and express dissentient views has long been thought to be a safeguard against state tyranny and corruption. James Mill put it this way:

> So true it is, however, that the discontent of the people is the only means of removing the defects of vicious governments, that the freedom of the press, the main instrument of creating discontent, is, in all civilized countries, among all but the advocates of misgovernment, regarded as an indispensable security, and the greatest safeguard of the interests of mankind.
>
> ("Liberty of the Press", in Essays on Government, Jurisprudence, Liberty of the Press, and Law of Nations (1825 (reprint ed. 1967)), at p. 18.)

19 This Court has had occasion to discuss the freedom to criticize encompassed in freedom of expression and its relation to the democratic process in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, where Cory J. stated that it is difficult to think of a guaranteed right more important to a democratic society than freedom of expression. At page 1336, he declared:

> Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

20 It cannot be disputed that the courts, and particularly the criminal courts, play a critical role in any democracy. It is in this forum that the rights of the powerful state are tested against those of the individual. As noted by Cory J. in Edmonton Journal, courts represent the forum for the resolution of disputes between the citizens and the state, and so must be open to public scrutiny and to public criticism of their operations.

21 The concept of open courts is deeply embedded in the common law tradition. The principle was described in the early English case of Scott v. Scott, [1913] A.C. 419 (H.L.). A passage from the reasons given by Lord Shaw of Dunfermline is worthy of reproduction for its precise articulation of what underlies the principle. He stated at p. 477:

> It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into,

> and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

22 The importance of ensuring that justice be done openly has not only survived: it has now become "one of the hallmarks of a democratic society"; see Re Southam Inc. and The Queen (No.1) (1983), 41 O.R. (2d) 113 (C.A.), at p. 119. The open court principle, seen as "the very soul of justice" and the "security of securities", acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. In Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175, openness was held to be the rule, covertness the exception, thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice.

23 The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place. Cory J. in Edmonton Journal described the equally important aspect of freedom of expression that protects listeners as well as speakers and ensures that this right to information about the courts is real and not illusory. At pages 1339-40, he states:

> That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings -- the nature of the evidence that was called, the arguments presented, the comments made by the trial judge -- in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media. [Emphasis added.]

That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this

information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the raison d'être of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. The public's entitlement to be informed imposes on the media the responsibility to inform fairly and accurately. This responsibility is especially grave given that the freedom of the press is, and must be, largely unfettered. The significance of the freedom and its attendant responsibility lead me to the second issue relating to s. 2(b).

24 Essential to the freedom of the press to provide information to the public is the ability of the press to have access to this information. In Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421, I noted that freedom of the press not only encompassed the right to transmit news and other information, but also the right to gather this information. At pp. 429-30, I stated:

> There can be no doubt, of course, that it comprises the right to disseminate news, information and beliefs. This was the manner in which the right was originally expressed, in the first draft of s. 2(b) of the Canadian Charter of Rights and Freedoms before its expansion to its present form. However, the freedom to disseminate information would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue governmental interference. [Emphasis added.]

25 It is by ensuring the press access to the courts that it is enabled to comment on court proceedings and thus inform the public of what is transpiring in the courts. To this end, Cory J. stated in Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1991] 3 S.C.R. 459, at p. 475:

> The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being.

26 From the foregoing, it is evident that s. 2(b) protects the freedom of the press to comment on the courts as an essential aspect of our democratic society. It thereby guarantees the further freedom of members of the public to develop and to put forward informed opinions about the courts. As a vehicle through which information pertaining to these courts is transmitted, the press must be guaranteed access to the courts in order to gather information. As noted by Lamer J., as he then was, in Canadian Newspapers Co. v. Canada (Attorney General), [1988] 2 S.C.R. 122, at p. 129: "Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom." Similarly, it may be said that measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press. To the extent that such measures prohibit public access to the courts and to information about the

courts, they may also be said to restrict freedom of expression in so far as it encompasses the freedom of listeners to obtain information that fosters public criticism of the courts.

27 At this point, however, I should like to make a number of caveats to the recognition of the importance of public access to the courts as a fundamental aspect of our democratic society. First of all, this recognition is not to be confused with, nor do I wish to be understood as affirming a right to be physically present in the courtroom. Circumstances may produce a shortage of physical space, such that individual members of the media and the public may be denied physical access to the courts. In such circumstances, those excluded may have to rely on those present to relay information about the proceedings.

28 To this I would add a further caveat. I do not accept that the necessary consequence of recognizing the importance of public access to the courts is the recognition of public access to all facets of public institutions. The intervener, Attorney General for Saskatchewan argues that if an open court system is to be protected under s. 2(b) of the Charter on the basis that the public has an entitlement to information about proceedings in the criminal courts, then all venues within which the criminal law is administered will have to be accessible to the public, including jury rooms, a trial judge's chambers and the conference rooms of appellate courts. The fallacy with this argument is that it ignores the fundamental distinction between the criminal courts, the subject of this appeal, and the other venues mentioned by the intervener. Courts are and have, since time immemorial, been public arenas. The same cannot be said of these other venues. Thus, to argue that constitutional protection should be extended to public access to these private places, on the basis that public access to the courts is constitutionally protected, is untenable.

29 Furthermore, this Court has noted on previous occasions that public access to certain judicial processes would render the administration of justice unworkable; see MacIntyre, supra. The importance of ensuring that the administration of justice is not rendered unworkable provides a palpable reason for prohibiting public access to many of the other types of processes of which the intervener makes mention. Indeed, as we have seen in this case, the open court principle itself must yield to circumstances that would render the proper administration of justice unworkable.

B. Does Section 486(1) of the Criminal Code Infringe Section 2(b)?

30 At common law, the rule of public access to the courts was subject to certain exceptions, primarily where it was deemed necessary for the administration of justice. In Scott, supra, Earl Loreburn, at pp. 445-46, described the basis for exclusion of the public from the courts in these terms:

> Again, the Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general. Or witnesses may be ordered to withdraw, lest they trim their evidence

by hearing the evidence of others.

31 The common law is effectively reflected in the current Canadian statutory form of the rule, s. 486(1) of the Code, which begins with "[a]ny proceedings against an accused shall be held in open court", thereby preserving and giving statutory effect to the general rule of openness. It then vests in a trial judge the discretion to make an exclusionary order for, among other reasons, the furtherance of the proper administration of justice.

32 The appellant submits that s. 486(1) infringes s. 2(b) of the Charter. Having said that s. 2(b) protects the freedom of the press to gather and disseminate information relating to court proceedings, and protects the freedom of the public to comment upon our criminal courts as an essential attribute of our democratic society, a provision that excludes the public and the media from the courtroom must infringe s. 2(b).

33 By its facial purpose, s. 486(1) restricts expressive activity, in particular the free flow of ideas and information, in providing a discretionary bar on public and media access to the courts. This is sufficient to ground a violation; any provision that has as its purpose the restriction of expression will necessarily violate s. 2(b); see Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at p. 974.

34 Admittedly, s. 486(1) only permits such restriction on freedom of expression and freedom of the press where values of superordinate importance so require. To this end, the respondents argue that s. 486(1) supports, as opposed to violates, the values of the Charter, in that it permits the courts to maintain control over their own processes, as well as advancing core values including the protection of victims and witnesses, privacy interests and inherent limitations on freedom of expression such as public order and decency. In answer to the respondents' submissions, however, it is to be noted that this Court has repeatedly favoured a balancing of competing interests at the s. 1 stage of analysis. Specifically, Dickson C.J. stated in R. v. Keegstra, [1990] 3 S.C.R. 697, that "s. 1 of the Charter is especially well suited to the task of balancing" and found that freedom of expression jurisprudence supported that view. He continued, at p. 734:

> It is, in my opinion, inappropriate to attenuate the s. 2(b) freedom on the grounds that a particular context requires such; the large and liberal interpretation given the freedom of expression in Irwin Toy indicates that the preferable course is to weigh the various contextual values and factors in s. 1. [Emphasis in original.]

35 This approach was again adopted in the recent case of Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825, where the broad, purposive interpretation to be favoured in relation to s. 2(b) is discussed. At para. 75, it is stated that "[t]he important thing is that the competing values of a free and democratic society have to be adequately weighed in the appropriate context." Thus, I conclude that s. 486(1) of the Code infringes s. 2(b) of the Charter and leave to s. 1 an assessment of the competing interests and factors tending to justify restrictions on the guaranteed freedom.

C. Section 1 Analysis

36 I turn now to an examination of whether s. 486(1) is reasonable and demonstrably justified in a free and democratic society within the meaning of s. 1 of the Charter following the analytical framework developed by this Court in R. v. Oakes, [1986] 1 S.C.R. 103. But in undertaking this task, it must be remembered, a formalistic approach must be avoided. Regard must be had to all circumstances. The Court thus described the proper approach to be taken in Ross, supra, at para. 78:

> . . . the Oakes test should be applied flexibly, so as to achieve a proper balance between individual rights and community needs. In undertaking this task, courts must take into account both the nature of the infringed right and the specific values the state relies on to justify the infringement. This involves a close attention to context. McLachlin J. in RJR-MacDonald, supra, reiterated her statement in Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232, at pp. 246-47, that conflicting values must be placed in their factual and social context when undertaking a s. 1 analysis. [Emphasis added.]

Having affirmed the flexible and contextual approach to be taken, it is apposite to examine the context within which this appeal arises in light of the specific values engaged.

37 The first such value is the power vested in courts of criminal jurisdiction to control their own process in furtherance of the rule of law. This was recognized in United Nurses of Alberta v. Alberta (Attorney General), [1992] 1 S.C.R. 901, where McLachlin J. noted that "[t]he rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect" (p. 931). Similarly, in B.C.G.E.U. v. British Columbia (Attorney General), [1988] 2 S.C.R. 214, this Court referred to the English decision of Morris v. Crown Office, [1970] 1 All E.R. 1079 (C.A.), where, at p. 1081, it was said:

> The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it.

In B.C.G.E.U., supra, Dickson C.J. affirmed the power of courts to act in furtherance of the proper administration of justice. While said in the context of discussing contempt of court, the principle of permitting a court to control its own process may be said to extend to situations, such as the one at bar, where the court is granted a discretion to act in the interests of the proper administration of justice to exclude the public from criminal proceedings.

38 Related to a court's power to control its own process is the power to regulate the publicity associated with its proceedings. As such, it has been held that a legislative provision mandating a publication ban upon request by the complainant or prosecutor in sexual assault cases is constitutional; see Canadian Newspapers, supra. This Court has also recognized a common law

discretion on the part of courts to order a publication ban; see Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835.

39 The court's power to regulate the publicity of its proceedings serves, among other things, to protect privacy interests, especially those of witnesses and victims. In MacIntyre, supra, Dickson J., as he then was, noted that "[m]any times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings" (p. 185) and in the course of weighing this interest against the interest of public access to court proceedings held that the protection of the innocent from unnecessary harm "is a valid and important policy consideration" (p. 187). Stating that the "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance" (pp. 186-87), he identified the protection of the innocent as among these values.

40 While the social interest in protecting privacy is long standing, its importance has only recently been recognized by Canadian courts. Privacy does not appear to have been a significant factor in the earlier cases which established the strong presumption in favour of open courts. That approach has generally continued to this day, and this appears inherent to the nature of a criminal trial. It must be remembered that a criminal trial often involves the production of highly offensive evidence, whether salacious, violent or grotesque. Its aim is to uncover the truth, not to provide a sanitized account of facts that will be palatable to even the most sensitive of human spirits. The criminal court is an innately tough arena.

41 Bearing this in mind, mere offence or embarrassment will not likely suffice for the exclusion of the public from the courtroom. As noted by M. D. Lepofsky in Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings (1985), at p. 35: "Proceedings cannot be closed only because the subject of the charges relates to purportedly morality-tinged topics such as sex." In the course of the balancing exercise under s. 1, the exigencies and realities of criminal proceedings must be weighed in the analysis.

42 Nonetheless, the right to privacy is beginning to be seen as more significant. Thus Cory J. in Edmonton Journal, supra, considered that the protection accorded the privacy of individuals in a legislative enactment related to a pressing and substantial concern and underlined its importance in Canadian law. In this area of the law, however, privacy interests are more likely to be protected where it affects some other social interest or where failure to protect it will cause significant harm to the victim or to witnesses. This is particularly so of sexual assault cases. As L'Heureux-Dubé J. recently put it in R. v. O'Connor, [1995] 4 S.C.R. 411, a case involving the production of complainants' medical records in relation to charges of sexual offences (at para. 158):

> This Court has already recognized that society has a legitimate interest in encouraging the reporting of sexual assault and that this social interest is furthered by protecting the privacy of complainants: [R. v. Seaboyer, [1991] 2 S.C.R. 577], at pp. 605-6. Parliament, too, has recognized this important interest

in s. 276(3)(b) of the Criminal Code.

Similar views had earlier been expressed by Lamer J., in Canadian Newspapers, supra; see also L'Heureux-Dubé J. in R. v. L. (D.O.), [1993] 4 S.C.R. 419, at pp. 441-42.

43 So far as s. 486(1) of the Code is concerned, then, exclusion of the public is a means by which the court may control the publicity of its proceedings with a view to protecting the innocent and safeguarding privacy interests and thereby afford a remedy to the underreporting of sexual offences.

44 Having set forth the relevant context, the s. 1 analysis developed in Oakes, supra, may now be undertaken. This approach requires two things to be established: the impugned state action must have an objective of pressing and substantial concern in a free and democratic society; and there must be proportionality between the objective and the impugned measure.

(1) Legislative Objective

45 To constitute a justifiable limit on a right or freedom, Oakes tells us, the objective of the impugned legislation must advance concerns that are pressing and substantial in a free and democratic society. The appellant CBC maintains that the legislative objective of s. 486(1) is "to allow the exclusion of the public in criminal proceedings if it is in the interests of: (1) the safeguard of public morals; (2) the maintenance of order; or (3) the proper administration of justice". I have already indicated my intention to confine this appeal to consideration of the third branch for exclusion, the "proper administration of justice". As to this branch, the CBC concedes its pressing and substantial nature, but notes its imprecision.

46 I would characterize the objective somewhat differently. Section 486(1) aims at preserving the general principle of openness in criminal proceedings to the extent that openness is consistent with and advances the proper administration of justice. There are situations where openness conflicts with the proper administration of justice. The provision purports to further the proper administration of justice by permitting covertness where necessary. This recharacterization of the objective leaves intact that which the appellant conceded was of a pressing and substantial nature: the exclusion of the public from criminal proceedings in three specific cases. In light of the appellant's concession, I do not intend to say more than that this objective clearly passes the first step of the s. 1 analysis.

47 The second step, or the proportionality inquiry, is broken down into three further requirements that must be established, namely: the legislative measure must be rationally connected to the objective; it must impair the guaranteed right or freedom as little as possible; and there must be proportionality between the deleterious effects of the measures and their salutary effects; see RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at para. 60.

(2) Proportionality

(a) Rational Connection

48 In an attempt to discern whether the legislative means are rationally connected to the legislative objective, McLachlin J., in RJR-MacDonald, supra, at para. 154, noted that in some cases, the relationship between the infringement of the rights and the benefit sought to be achieved may not be "scientifically measurable". In such cases, she continued, "this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective". It was also my view in RJR-MacDonald, supra, that a common-sense analysis was sufficient to satisfy the rational connection branch. In the present case, where the benefit sought to be realized by the operation of s. 486(1) is the furtherance of the administration of justice, the benefit is not scientifically measurable; nor is the relationship between the benefit and the infringement. As such, it is appropriate to proceed under the rational connection inquiry on the basis of logic and reason.

49 Whether s. 486(1) is rationally connected to the legislative objective requires a determination of whether the particular legislative means adopted -- a discretionary power in the trial judge to exclude the public where it is in the interests of the proper administration of justice -- serves the legislative objective.

50 The discretionary element of s. 486(1) is crucial to the analysis. In this respect, the Court has held discretion to be an essential feature of the criminal justice system. As was noted in R. v. Beare, [1988] 2 S.C.R. 387, at p. 410, a "system that attempted to eliminate discretion would be unworkably complex and rigid". In some cases, the Criminal Code provides no guidelines for the exercise of discretion, and yet, as was stated in Beare, supra, "[t]he day to day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion" (p. 411).

51 In Dagenais, supra, Lamer C.J. discussed the common law discretion to order a publication ban and held that a discretionary power cannot confer the power to infringe the Charter. The discretion must be exercised within boundaries set by the Charter; an exercise of discretion exceeding these boundaries would result in reversible error. The Chief Justice further held that a publication ban should only be ordered when two things are established: (1) that the ban is necessary to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (2) that the salutary effects of the ban outweigh the deleterious effects to the free expression of those affected by it. This standard, he noted, "clearly reflects the substance of the Oakes test applicable when assessing legislation under s. 1 of the Charter" (p. 878). Accordingly when a judge orders a ban that contravenes this standard, the judge commits an error of law, and the order is reviewable on that basis.

52 In applying s. 486(1), then, a court must exercise its discretion in conformity with the Charter. In this way, the judicial discretion guarantees that any order made pursuant to s. 486(1) will be rationally connected to the legislative objective of furthering the proper administration of justice. Once we accept the importance of discretion as an integral aspect of our criminal justice system,

then the case for discretion in the hands of the courts is perhaps the strongest. In R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, Gonthier J. discussed the need for limitations on law enforcement discretion. This need is met where the discretion is vested in the courts, because the exercise of discretion is reviewable.

53 Thus, the grant of judicial discretion in s. 486(1) necessarily ensures that any order made will be rationally connected to the legislative objective. If it is not, then the order will constitute an error of law; the proper course in such a case is to review the particular exercise of discretion and provide an appropriate remedy. Section 486(1) sets up a means, logically connected to the legislative objective of furthering the proper administration of justice, which permits a court to order the exclusion of the public where an open court would impede this objective.

54 The appellant contends that vesting in inferior courts the discretion to make a s. 486(1) order on the ground of the proper administration of justice is to provide insufficient guidance to courts in the exercise of their discretion. This contention is essentially an allegation that the legislation is vague or overbroad. I find it more appropriate to deal with the vagueness argument under the minimum impairment branch of the analysis. It is to this that I now turn.

(b) Minimal Impairment

55 In examining whether s. 486(1) impairs the rights under s. 2(b) as little as reasonably possible in order to achieve its objective, I begin by referring to McLachlin J.'s articulation of this requirement in RJR-MacDonald, supra, at para. 160: "The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary." However, she qualified this somewhat by noting that the tailoring process will rarely admit of perfection and thus, if the law "falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement".

56 I have noted the appellant's submission that the discretion conferred on trial judges by s. 486(1), to exclude the public from the courts in the interests of the proper administration of justice, is vague. In Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69, Sopinka J. discussed the concept of vagueness and the ways in which it could arise (at pp. 94-95):

> Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which

> passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a Charter right within reasonable limits. In this sense vagueness is an aspect of overbreadth. [Emphasis added.]

57 Allegations of overbreadth, of which allegations of vagueness are said to be an aspect, are more appropriately dealt with in relation to minimal impairment; see Osborne, supra, at p. 95. In the present case, the appellant's submission as to vagueness relates more to imprecision and generality, than to an allegation that s. 486(1) is incapable of interpretation with any degree of precision and thus not a limit prescribed by law. (I note that Gonthier J. writing in Nova Scotia Pharmaceutical Society, supra, preferred to reserve the term "vagueness" for the most serious degree of vagueness where the law could not be said to constitute a "limit prescribed by law" and to use overbreadth for the other aspect of vagueness. My use of "vagueness" in this case should be construed as meaning "overbreadth".)

58 In Osborne, Sopinka J. discussed vagueness in relation to the granting of wide discretionary powers and held that "[m]uch of the activity of government is carried on under the aegis of laws which of necessity leave a broad discretion to government officials" (p. 95). He then cited a passage from Irwin Toy, supra, at p. 983, in which this Court held that the law is rarely an exercise in absolute precision and that the question is whether there is an intelligible standard to guide the judiciary in doing its work.

59 Section 486(1) provides an intelligible standard -- the proper administration of justice -- according to which the judiciary can exercise the discretion conferred. The phrase "administration of justice" appears throughout legislation in Canada, including the Charter. Thus, "proper administration of justice", which of necessity has been the subject of judicial interpretation, provides the judiciary with a workable standard.

60 Section 486(1) arms the judiciary with a useful and flexible interpretative tool to accomplish its goal of preserving the openness principle, subject to what is required by the proper administration of justice, and the discretionary aspect of s. 486(1) guarantees that the impairment is minimal. Again relying upon the fact that the discretion must be exercised in a manner that conforms with the Charter, the discretion bestowed upon the court by s. 486(1) ensures that a particular exclusionary order accomplishes just what is necessary to advance the interests of the proper administration of justice and no more. An order may be made to exclude certain members of the public, from part or all of the proceedings, and for specific periods of time. As such, an order that fails to impair the rights at stake as little as possible will constitute an error. This is exemplified by R. v. Brint (1979), 45 C.C.C. (2d) 560 (Alta. S.C., App. Div.), where a new trial was ordered when it was found that a trial judge had ordered the entire trial to be held in camera when the facts established that the proper administration of justice only required the complainant's evidence to be taken in camera. The case illustrates that the public should only be excluded from the part of the proceedings where public access would offend against the proper administration of justice.

61 The order should be limited as much as possible. In Dagenais, supra, Lamer C.J. stated that a publication ban should only be ordered where it is necessary, and where reasonably available alternatives would not accomplish the same result. The same is true of the discretion accorded by s. 486(1) of the Code.

(c) Proportional Effects

62 The "proportional effects" stage of the analysis requires a consideration of whether the deleterious effects of s. 486(1) outweigh the salutary effects of excluding the public from the courts where it is required by the proper administration of justice. Parliament has attempted to balance the different interests affected by s. 486(1) by ensuring a degree of flexibility in the form of judicial discretion, and by making openness the general rule and permitting exclusion of the public only when public accessibility would not serve the proper administration of justice. The discretion necessarily requires that the trial judge weigh the importance of the interests the order seeks to protect against the importance of openness and specifically the particular expression that is limited. In this way, proportionality is guaranteed by the nature of the judicial discretion.

63 It is important to stress that the particular expression that is limited in a given case may impact upon the s. 1 balancing. In RJR-MacDonald, supra, I noted that the evidentiary requirements of a s. 1 analysis will vary substantially with the nature of the right infringed. In the case of freedom of expression, this Court has consistently held that the level of constitutional protection to which expression will be entitled varies with the nature of the expression. More specifically, the protection afforded freedom of expression is related to the relationship between the expression and the fundamental values this Court has identified as being the "core" values underlying s. 2(b). I put the matter this way in RJR-MacDonald, at para. 72:

> Although freedom of expression is undoubtedly a fundamental value, there are other fundamental values that are also deserving of protection and consideration by the courts. When these values come into conflict, as they often do, it is necessary for the courts to make choices based not upon an abstract, platonic analysis, but upon a concrete weighing of the relative significance of each of the relevant values in our community in the specific context. This the Court has done by weighing freedom of expression claims in light of their relative connection to a set of even more fundamental values. In Keegstra, supra, at pp. 762-63, Dickson C.J. identified these fundamental or "core" values as including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process. [Emphasis added.]

This Court has subjected state action that jeopardizes these "core" values to a "searching degree of scrutiny". Where, on the other hand, the expression in question lies far from the "centre core of the spirit" of s. 2(b), state action restricting such expression is less difficult to justify.

64 In the case of s. 486(1), the type of expression impaired will vary from case to case. This makes it difficult to consider the extent to which the expression restricted by s. 486(1) relates to the "core" values under a s. 1 analysis, in light of the fact that the expression will not always be of the same type. For example, some expression that is restricted by s. 486(1) may be connected to the "core" values. The expression may relate to the ability of the public to participate in and contribute to the democratic system. By restricting public access to the expressive content of court proceedings, s. 486(1) inhibits informed public criticism of the court system, thereby directly impeding public participation in our democratic institutions, one of the "core" values protected by s. 2(b) of the Charter. However, in other cases, s. 486(1) may be used to exclude the public from proceedings where the presence of the public would impede a witness's ability to testify, thereby impairing the attainment of truth, another "core" value; see R. v. Lefebvre (1984), 17 C.C.C. (3d) 277, [1984] C.A. 370; R. v. McArthur (1984), 13 C.C.C. (3d) 152 (Ont. H.C.). On the other hand, exclusion may be ordered from that part of the proceedings where the most lurid or violent details of the offence are recounted, such that the restricted expression would lie far from the core of s. 2(b). In the end, the important point is that in deciding whether to order exclusion of the public pursuant to s. 486(1), a trial judge should bear in mind whether the type of expression that may be impaired by the order infringes upon the core values sought to be protected.

65 In sum, it is my view that the means enacted pursuant to s. 486(1) are proportionate to the legislative objective. It must be recalled that the appropriate means of remedying a particular exclusionary order having deleterious effects outweighing its salutary effects is through judicial review of the given order.

66 From the foregoing analysis, I conclude that s. 486(1) constitutes a justifiable limit on the freedom of expression guaranteed by s. 2(b) of the Charter and is thereby saved by s. 1.

V. The Discretion

A. Manner of Exercise

67 Much of my s. 1 analysis has turned on the fact that s. 486(1) vests a discretion in the trial judge. In view of the reliance I have placed on discretion in assessing constitutional validity, I think the manner in which this discretion is to be exercised warrants some discussion beyond the simple assertion that it must comply with the Charter. In doing so, I will restrict my comments to exclusion in the interest of the "proper administration of justice".

68 In Dagenais, supra, this Court reviewed the constitutionality of a publication ban ordered pursuant to the common law rule. As I have already mentioned, Lamer C.J. stated that the common law rule governing the issuance of publication bans must comply with the principles of the Charter. As he put it: "Since the common law rule does not authorize publication bans that limit Charter rights in an unjustifiable manner, an order implementing such a publication ban is an error of law on the face of the record" (p. 865). Holding that the exercise of discretion must be consistent with the

Charter, Lamer C.J. set out a list of general guidelines for future cases. These guidelines essentially impose on the trial judge the requirements of a s. 1 balancing at the stage of determining whether or not to order a ban. These include three directives which echo the three steps of the proportionality analysis of the Oakes test.

69 The same directives are equally useful in assisting the trial judge in exercising his or her discretion within the boundaries of the Charter when exercising the judicial discretion to order exclusion of the public under s. 486(1). Stated in the context of such an order, the trial judge should, therefore, be guided by the following:

(a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
(b) the judge must consider whether the order is limited as much as possible; and
(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

70 Additionally, I provide the following for guidance on the procedure to be undertaken upon an application for a s. 486(1) order.

71 The burden of displacing the general rule of openness lies on the party making the application. As in Dagenais, supra, the applicant bears the burden of proving: that the particular order is necessary, in terms of relating to the proper administration of justice; that the order is as limited as possible; and, that the salutary effects of the order are proportionate to its deleterious effects. In relation to the proportionality issue, if the order is sought to protect a constitutional right, this must be considered.

72 There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially. In some cases in which the facts are not in dispute the statement of counsel will suffice. If there is insufficient evidence placed before the trial judge, or there is a dispute as to the relevant facts, the applicant should seek to have the evidence heard in camera. This may be done by way of a voir dire, from which the public is excluded. For example, in the present case, a voir dire could have been held to permit the Crown to disclose the facts not known to Rice Prov. Ct. J. in an effort to provide him with a more complete record from which to make his decision. The decision to hold a voir dire will be a function of what is necessary in a given case to ensure that the trial judge has a sufficient evidentiary basis upon which to act judicially.

73 A sufficient evidentiary basis permits a reviewing court to determine whether the evidence is capable of supporting the decision. In this regard, in R. v. Vandevelde (1994), 89 C.C.C. (3d) 161 (Sask. C.A.), Vancise J.A., at p. 171, referred to the concurring reasons of Kaufman J.A. in

Lefebvre, supra, at pp. 282-83 C.C.C., who stated:

> . . . public trials are the order . . . and any exceptions (as provided for in s. 442) [now s. 486(1)] must be substantiated on a case by case basis. In my respectful view, it is not good enough to say "the nature of this case is sexual", and an in camera hearing should, therefore, be imposed. Nor, with respect, is it sufficient for a judge to say that he or she would follow the "current practice".
>
> Discretion is an important element of our law. But, it can only be exercised judiciously when all the facts are known . . . . [Emphasis added by Kaufman J.A.]

74 Similarly, in the Alberta Court of Appeal's decision in Brint, supra, McGillivray C.J.A., noting that a trial in open court is "fundamental to the administration of justice in this country", stated that exclusion could only be ordered where "there are real and weighty reasons". A sufficient evidentiary basis allows the judge to determine whether such reasons exist; see R. v. Quesnel and Quesnel (1979), 51 C.C.C. (2d) 270 (Ont. C.A.), where the court found there was insufficient information before the trial judge to enable him to order any part of the Crown's case held in camera; see also Vandevelde, supra, where the court held that the party seeking the order must place sufficient evidence before the trial judge to permit a judicious exercise of discretion.

75 The information available to the trial judge must also allow a determination as to whether the order is necessary in light of reasonable and effective alternatives, whether the order has been limited as much as possible and whether the positive and negative effects of the order are proportionate.

76 Finally, I must address the exercise of judicial discretion in this case and, specifically, the order made by Rice Prov. Ct. J. In doing this, it is only fair to say that Rice Prov. Ct. J. made his order prior to this Court's decision in Dagenais, supra. He did not, therefore, have the benefit of the three-part inquiry that I have discussed above and adapted to the particular s. 486(1) context.

B. Review of Judicial Discretion

77 In reviewing the trial judge's decision to exclude the public from part of the proceedings, it must be remembered that the trial judge is usually in the best position to assess the demands of the given situation. In Lefebvre, supra, the Quebec Court of Appeal found that the trial judge had acted judicially in excluding the public where a witness might have suffered stress from the circumstances of the case rendering her incapable of testifying. It continued (at p. 280 C.C.C.):

> [Translation] [The trial judge] saw the witness and he could appreciate the stress which she was affected by. Sitting in appeal, and not having had the benefit of seeing and hearing the witness, I am of the opinion that it is not appropriate for this court to question the decision of the trial judge.

The court stated that where a victim of sexual assault does not want to give evidence because of the stress created by the presence of too many people, this could adversely affect the proper administration of justice. It concluded that the trial judge was in the best position to consider the victim's nervousness and was aware of the facts that would be revealed by that witness.

78 Where the record discloses facts that may support the trial judge's exercise of discretion, it should not lightly be interfered with. The trial judge is in a better position to draw conclusions from the facts he or she sees and hears, and upon which he or she may exercise the judicial discretion. This, however, presupposes that the trial judge has a sufficient evidentiary or factual basis to support the exercise of discretion and that the evidence is not misconstrued or overlooked.

79 In the present case, Rice Prov. Ct. J. had this to say in support of his decision to exclude the public from part of the sentencing proceedings:

> The application made under 486(1) and the ban -- I granted the order on the third ground that is for the proper administration of justice. The reason for that is that I am privy, due to documentation which I have before me, and did have before me prior to the application being made before -- by request -- I had it delivered to me prior to today's hearing which is normal. On the opinion that the proper administration of justice -- in order for the court to have at least on the court record the exact nature of the events including some of the details with regard to those events -- in order for justice to properly be done, it was necessary to do these, to -- sorry, to have these facts presented to me in the manner in which they subsequently were and that was the basis of the order. I quite often make orders in this regard. This is the first time that I have been challenged, but that's alright, you are entitled to challenge it. . . . But, however, if these facts were to be presented for the exposure to the public, it would cause I think a great undue hardship on the persons involved, both the victims and the accused, although no representations were made on behalf of the accused other than Mr. Letcher's consent to Mr. Wood's application for the exclusion, and that is the reason. I think that the important thing is that the court know what the facts -- they were presented to me in the manner in which I think would have embarrassed unnecessarily other people but I think that it was important for me to know. Thus, I think that the ground was, for the proper administration of justice, I say some of the facts I knew beforehand or some I had some idea, I didn't know exactly what the facts were thus the Order.

80 The appellant focuses upon the judge's finding that public access would have embarrassed some people, and submits that this is not a sufficient ground upon which to exclude the public, citing Quesnel, supra, in support of this submission. In Quesnel, the Ontario Court of Appeal held that the embarrassment of witnesses "alone is not reason to suppose that truth is more difficult or unlikely or that the witness will be so frightened as to be unable to testify" (p. 275). While it is true

that this would not suffice if it were the only ground for exclusion, the decision to exclude was not solely based upon a finding that a public presence would embarrass the witnesses. Rice Prov. Ct. J. also mentioned "great undue hardship on the persons involved, both the victims and the accused" among his reasons for making the order.

81 With respect to concerns relating to undue hardship, it is my view that where the circumstances and evidence support such concerns, "undue hardship on the persons involved" may, in the interests of the proper administration of justice, amount to a legitimate reason to order exclusion. The question is whether this reason is valid in the circumstances here. My conclusion with respect to this question is that the validity of these concerns is fatally impaired both in relation to the victims and to the accused.

82 I will deal first with the concerns of undue hardship to the victims. Neither the record nor the reasons provided by the Crown support a finding that the proper administration of justice required the exclusion of the public from part of the sentencing proceedings. In making his order, Rice Prov. Ct. J. had the benefit of victim impact statements and a pre-sentence report. The latter, however, was not included in the record before this Court. The victim impact statements did not disclose evidence of undue hardship that would ensue as a result of public attendance during the sentencing proceedings, nor did they disclose the circumstances of the sexual offences that were ultimately divulged during sentencing. Indeed, Rice Prov. Ct. J. expressly stated that he did not have all the facts before him in making the order: "I say some of the facts I knew beforehand or some I had some idea, I didn't know exactly what the facts were thus the Order."

83 In its submission, the Crown gave the following in support of his application for a s. 486(1) order:

> The nature of the evidence, of which the court hasn't heard, that constitutes the offence is very delicate. It involves young persons, female persons, and I would just ask maybe the court would consider invoking [s. 486(1)] for purposes of --

Most sexual assault cases involve evidence that may be characterized as "very delicate". The evidence did not establish that this case is elevated above other sexual assaults. This point was conceded by the Crown during oral submissions.

84 The mere fact that the victims are young females is not, in itself, sufficient to warrant exclusion. There were other effective means to protect them. Indeed, the privacy of the victims was already protected by a non-publication order by which their identities were withheld from the public. There was no evidence that their privacy interests required more protection. The victims were not witnesses in the proceedings, the evidence of particulars of the offences having been read in by the Crown. As such, no stress could be said to emanate from their having to testify, and the protection of witnesses was in no way jeopardized. While the criminal justice system must be ever vigilant in protecting victims of sexual assault from further victimization, it is my view that the record before Rice Prov. Ct. J. did not establish that undue hardship would befall the victims in the

absence of a s. 486(1) order. Nor did the record reveal that there were any other reasons to justify an exception to the general rule of openness.

85 The importance of a sufficient factual foundation upon which the discretion in s. 486(1) is exercised cannot be overstated, particularly where the reasons given by the trial judge in support of an exclusion order are scant. In this case, the record does not reveal that such a foundation existed or that the facts known to Rice Prov. Ct. J. established that the proper administration of justice required exclusion of the public in the interests of the victims.

86 At this point, I would pause to sympathize with the position in which the trial judge found himself. His sensitivity to the complainants cannot be overlooked, nor should it be. And where the record discloses sufficient information to legitimate concerns for undue hardship to the complainants, then exclusion of the public may be necessary for the proper administration of justice. However, in this case, exclusion cannot be justified on this ground in the absence of more than is disclosed by the record.

87 As to the concern expressed for undue hardship to the accused, barring exceptional cases, I cannot think there is any issue of hardship to the accused arising from prejudicial publicity once the accused has pleaded guilty. The publicity associated with a public trial will in almost every case cause some prejudice to the accused. The criminal justice system has addressed much of the potential for prejudice with procedural safeguards to ensure that trials do not proceed in the absence of reasonable and probable grounds, and that fairness is protected. Once an accused has pleaded guilty, however, prejudice is greatly diminished as the risk of having wrongly accused the person being tried is eliminated.

88 The fact that closure of the court was only ordered during the sentencing proceedings bears considerably upon my determination that the accused was not likely to suffer undue hardship in this case. As alleged by the intervener Attorney General for Ontario, the deterrence and public denunciation functions of sentencing are not to be undervalued. Public scrutiny of criminal sentencing advances both these functions by subjecting the process to the public gaze and its attendant condemnation. The type of expression restricted in this case, expression relating to the sentencing process, weighs in favour of maintaining open court. In any criminal case, the sentencing process serves the critically important social function of permitting the public to determine what punishment fits a given crime, and whether sentences reflect consistency and proportionality. In sexual assault cases, the importance of subjecting sentencing to public scrutiny is especially strong. "Sexual assault" in law encompasses a wide array of different types of activities, with varying penalties. It is, therefore, essential to inform the public as to what is encompassed in the term "sexual assault" and the range of punishment it may attract.

89 In this case, there was insufficient evidence to support a concern for undue hardship to the accused or to the complainants. The order was not necessary to further the proper administration of justice and the deleterious effects of the order were not outweighed by its salutary effects. On the

whole, and with some reluctance in light of the proper deference to be accorded the exercise of discretion in these types of cases, I conclude that Rice Prov. Ct. J. erred in excluding the public from any part of the proceedings.

VI. Disposition

90 Following oral argument for the appellant on the constitutional issue, the Chief Justice gave judgment for the Court that s. 486(1) of the Code was constitutionally valid. On this aspect, then, all that requires to be done is to respond to the constitutional questions.

91 On the exclusion order of Rice Prov. Ct. J., I find that he improperly exercised his discretion in the circumstances of this case.

92 Accordingly, the appeal is allowed and the judgment of the Court of Appeal on this point is reversed. I would quash the exclusion order and order access to the media and the public to the transcript of that part of the proceedings held in camera. Both constitutional questions are answered in the affirmative.

cp/d/hbb/DRS/DRS

Case Name:

Canadian Tire Corp. v. Canadian Bicycle Manufacturers Assn.

Between

Canadian Tire Corporation, Limited, applicant, and Canadian Bicycle Manufacturers Association, Raleigh Canada Limited, Groupe Procycle Inc., A. Mordo And Son Ltd., Yong Qi (Changzhou) Industrial Co., Ltd., Liyang (Shen Zhen) Machinery Co., Ltd., Liyang (Vietnam) Industries Co., Ltd., Specialized Bicycle Components Canada, Inc., Cervélo Cycles Inc., Giant Manufacturing Co., Ltd., Taiwan Bicycle Exporters' Association, Kenton Bicycle Co., Acebike Bicycle Co., Ltd., Pride International Inc., China Bicycle Association, China Chamber of Commerce For Import And Export of Machinery And Electronic Products, Bangkok Cycle Industrial Company Limited, Retail Council of Canada, Canadian Association of Specialty Bicycle Importers, Trek Bicycle Corporation, Cannondale Bicycle Corporation, Giant Bicycle Canada Inc., Astro Engineering Vietnam Co., Ltd., Asama Yuh Jium International Vietnam Co. Ltd., Always Co., Ltd., Vietnam Sheng Fa International Co., Ltd., Dragon Bicycles Vietnam Co. Ltd., Syndicat De Métallos, Genesis Cycle Inc., Laidlaw Holdings Inc./To Wheels, Duke's Cycle, Norco Products Ltd., Ryder Distribution Inc., The Government of The Kingdom of Thailand, Bicicletas Mercurio, S.A. De C.V., Italcycle Inc., Bicycle Trade Association of Canada, The Government of The United Mexican States, Giant China Co. Ltd., The Government of Taiwan, .243 Racing Inc., The Government of The Republic of Turkey, The Government of The People's Republic of China, The Government of The Republic of Philippines, The Government of The Socialist Republic of Vietnam, Smooth Shifting Sports, Inc., Brantford Cyclepath, Bayview Cycle Centre, Independent Bicycle Dealer Association, Primeau Vélo, Cycles Devinci Inc., Accessoires Pour Vélo O.G.D. Ltée and Bicycle

Sports Pacific, respondents

[2006] F.C.J. No. 204

[2006] A.C.F. no 204

2006 FCA 56

2006 CAF 56

346 N.R. 186

146 A.C.W.S. (3d) 395

Docket A-439-05

Federal Court of Appeal
Ottawa, Ontario

Nadon J.A.

Heard: February 2, 2006.
Judgment: February 10, 2006.

(16 paras.)

Administrative law -- Judicial review and statutory appeal -- Affidavits filed in support of judicial review applications must be confined to the facts within the personal knowledge of the deponent, and the deponent must not interpret evidence previously considered by a tribunal or draw legal conclusions.

Civil Evidence -- Affidavits -- Striking out -- Affidavit in support of a judicial review application struck on the grounds that it constituted opinion evidence.

Application to strike an affidavit. In September, 2005, the Canadian International Trade Tribunal issued a report after an inquiry into the importation of bicycles. It concluded that the increase in imported bicycles was the principal cause of the serious injuries suffered by domestic producers of like or directly competitive goods, and recommended to the Department of Finance that it impose a surtax. Canadian Tire Corporation commenced a judicial review application, and filed a forty-five paragraph affidavit from William Dovey in support. The Canadian Bicycle Manufacturers Association and the other respondents claimed that the affidavit was opinion evidence. Canadian Tire Corporation countered that some of the paragraphs were factual and not opinion.

HELD: Application allowed. Affidavits filed in support of judicial review applications must be confined to the facts within the personal knowledge of the deponent, and the deponent must not interpret evidence previously considered by a tribunal or draw legal conclusions. The purpose of the Dovey affidavit was to demonstrate that the conclusions reached by the Tribunal are not supported by, nor consistent with, the information contained within the Tribunal's report. While there were paragraphs that were factual statements and not opinion, they cannot be dissociated from the paragraphs which constitute opinion evidence. The affidavit is therefore struck in its entirety.

Counsel:

Riyaz Dattu, for the applicant.

Martin G. Masse and Keith Cameron, for the respondents.

REASONS FOR ORDER

1 **NADON J.A.**:-- On February 10, 2005, the Canadian International Trade Tribunal (the "CITT") commenced a Global Safeguard Inquiry into the importation of bicycles and finished painted bicycle frames, following a complaint brought by the respondents herein who alleged that the said bicycles and painted bicycle frames were being imported into Canada in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or competitive goods.

2 Following its investigation into the matter, the CITT, on September 1, 2005, issued a Report containing its determinations and recommendations. More particularly, the CITT concluded that the increase in imported bicycles was the principal cause of the serious injuries suffered by the domestic producers of like or directly competitive goods. As a result, the CITT recommended to the Department of Finance that it impose a surtax set at 30% in the first year of application, 25% in the second year, and 20% in the third year.

3 On September 29, 2005, the applicant, Canadian Tire Corporation ("Canadian Tire"), commenced a judicial review application in respect of the CITT's Report and on October 31, 2005, it filed the affidavit of William C. Dovey in support of its application.

4 On November 18, 2005, the respondents filed a motion for an order striking out the said affidavit in its entirety.

5 The Dovey affidavit is comprised of 45 paragraphs. After outlining his qualifications and experience (paragraphs 1 to 4), Mr. Dovey sets out the scope of the opinion which he intends to give (paragraphs 5 to 8), with a qualification of that opinion (paragraph 9). He then provides, at

paragraph 10, his summary comments and conclusions. He then sets out, at paragraphs 11 through 42, his approach and analysis. Finally, at paragraph 43, he sets out the specific findings which lead him to conclude as he does.

6 For the present purposes, it will suffice for me to reproduce paragraphs 8, 9, 10 and 43 of the affidavit:

> 8. In the context of the above, I was asked to address and answer from a financial and accounting point of view the following questions:
>
> > Are the determinations and recommendations by the Tribunal concerning bicycles pursuant to the Global Safeguard Inquiry consistent with and supported by the financial evidence and information set out in the Tribunal Report?
>
> 9. My opinions and comments are qualified because the scope of my review was limited to the financial and other information set out in the Tribunal Report. I understand that the Tribunal had significant additional financial information available to it that is not now available to me.
>
> I am not able to determine the extent to which such additional information, were it available to me, would have impacted on my observations and opinions set out herein.
>
> 10. Based on the scope of my review and subject to the assumptions, qualifications and restrictions noted herein, my conclusions are as follows:
>
> a) The financial evidence and information set out in the Tribunal Report is contradictory to and not supportive of certain of the Tribunal's determinations;
> b) There are alternative conclusions one can draw from the financial evidence and information set out in the Tribunal Report.
>
> [...]

43. Set out below are my summary findings based on the scope of my review and subject to the assumptions and restrictions noted herein:

i) The rate of growth in imports slowed over the five year period under review.
ii) Based on certain measures, the financial condition of domestice producers improved over the period 2000 to 2004. The improvement in gross margin percentage and reduction in losses between 2000 and 2004 suggests improvement in the overall financial condition of domestic producers despite increases in imports.
iii) The domestic producers may not have had the capacity to supply the domestic market if imports were substantially reduced.
iv) There is no support in the Tribunal Report for an assumption that, had the imports not increased, the domestic producers are now capable of a substantial production increase while maintaining existing profitability.
v) Factors other than the volume of and rate of increase in imports may be the drivers of domestic production, sales and profit.

7 For the reasons that follow, it is my view that there can be no doubt whatsoever that the affidavit must be struck in its entirety.

8 To begin with, it is clear that the Dovey affidavit constitutes opinion evidence, the purpose of which is to demonstrate to this Court that the conclusions reached by the CITT in its Report and, in particular, that the increase in the number of bicycles and finished painted bicycle frames into Canada is a principal cause of the serious injury caused to the domestic market, are not supported by, nor are they consistent with the financial evidence and information contained in the CITT Report.

9 Recently, in Ly v. Canada (Minister of Citizenship and immigration), [2003] F.C.J. No. 1496, 2003 FC 1184, dated October 10, 2003, Mr. Justice von Finkenstein, in the context of an application for judicial review of a decision of the Appeals Division of the Immigration and Refugee Board, correctly, in my view, dealt with the nature of affidavits that could be filed in support of a judicial review application. At paragraph 10 of his Reasons, the learned Judge expressed his view as follows:

> [10] Except on motions, affidavits shall be confined to facts within the personal knowledge of the deponent: Rule 81(1), Federal Court Rules, 1998. The affidavit

> must be free from argumentative materials and the deponent must not interpret evidence previously considered by a tribunal or draw legal conclusions (Deigan v. Canada (A.G.) (1996), 206 N.R. 195 (Fed. C.A.); West Region Tribal Council v. Booth (1992), 55 F.T.R. 28; First Green Park Pty. Ltd. v. Canada (A.G.), [1997] 2 F.C. 845). If an affidavit does not meet these requirements, the application can only succeed if an error is apparent on the face of the record (Turcinovica v. Canada (M.C.I.), [2002] F.C.J. No. 216, 2002 FCT 164).

10 In Deigan v. Canada, supra, to which Mr. Justice von Finkenstein refers in support of his view, this Court agreed that the Motions Judge was correct in striking out certain paragraphs of the affidavit at issue on the grounds that these paragraphs were tendentious, opinionated and argumentative.

11 Although I agree with counsel for the applicant that certain paragraphs of Mr. Dovey's affidavit are factual statements and not opinion, they cannot be dissociated from the paragraphs which, in effect, constitute Mr. Dovey's opinion. Further, some of the paragraphs, namely paragraphs 1 to 4, which set out Mr. Dovey's qualifications and experience, are of no use to this Court on their own. Indeed, the true purpose of the Dovey affidavit is not to present facts for consideration of the Court, but to present facts which are already within the existing record so as to argue that the conclusions reached by the CITT are not justified. Paragraph 8 of Mr. Dovey's affidavit, which I again reproduce, makes that perfectly clear:

> 8. In the context of the above, I was asked to address and answer from a financial and accounting point of view the following questions:
>
> > Are the determinations and recommendations by the Tribunal concerning bicycles pursuant to the Global Safeguard Inquiry consistent with and supported by the financial evidence and information set out in the Tribunal Report?

12 In other words, the purpose of the affidavit is to provide to this Court an assessment of the evidence which differs from that made by the CITT. That evidence is, in my view, not admissible in this judicial review application.

13 Another reason for striking the Dovey affidavit is that it constitutes evidence that was not before the CITT when it issued its Report. Allowing the introduction of the affidavit would have the effect of transforming the application before this Court into a de novo application. Were I to conclude that the affidavit is admissible, I would then have to grant, if they so wished, leave to the respondents to file their own "expert" affidavits in response to that of Mr. Dovey. The parties would most certainly proceed to discovery and file the transcripts of the evidence adduced thereat. In the end, this Court would be called upon to decide the issues raised by the judicial review application on evidence which the CITT had never considered.

14 In any event, as Mr. Justice MacKay of the Federal Court stated in Vancouver Island Peace Society v. Canada, [1994] 1 F.C. 102, at paragraphs 56 and 57 of his Reasons, the issues which arise in judicial review proceedings are generally of a legal nature and not issues of a scientific or technical nature in respect of which the Court is in need of help from experts.

15 For these reasons, I will allow, with costs, the respondents' motion to strike the Dovey affidavit in its entirety.

16 There remains one issue to be dealt with. At the end of their arguments, the parties informed me that Canadian Tire had not yet filed its Application Record and that, as a result, the time to do so had elapsed. The respondents were in agreement with Canadian Tire that the delay to file the Application Record should be extended. However, the respondents were of the view that a delay of 20 days was sufficient, while Canadian Tire requested a delay of 45 days. In the circumstances, I am prepared to give Canadian Tire an additional 45 days to file its Application Record.

NADON J.A.

Indexed as:

Dunsmuir v. New Brunswick

David Dunsmuir, Appellant;
v.
Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management, Respondent.

[2008] 1 S.C.R. 190

[2008] S.C.J. No. 9

2008 SCC 9

File No.: 31459.

Supreme Court of Canada

Heard: May 15, 2007;
Judgment: March 7, 2008.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

(173 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Catchwords:

Administrative law -- Judicial review -- Standard of review -- Proper approach to judicial review of administrative decision makers -- Whether judicial review should include only two standards: correctness and reasonableness.

Administrative law -- Judicial review -- Standard of review -- Employee holding office "at pleasure" in provincial civil service dismissed without alleged cause with four months' pay in lieu of

notice -- Adjudicator interpreting enabling statute as conferring jurisdiction to determine whether discharge was in fact for cause -- Adjudicator holding employer breached duty of procedural fairness and ordering reinstatement -- Whether standard of reasonableness applicable to adjudicator's decision on statutory interpretation issue -- Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, ss. 97(2.1), 100.1(5) -- Civil Service Act, S.N.B. 1984, c. C-5.1, s. 20.

Administrative law -- Natural justice -- Procedural fairness -- Dismissal of public office holders -- Employee holding office "at pleasure" in provincial civil service dismissed without alleged cause with four months' pay in lieu of notice -- Employee not informed of reasons for termination or provided with opportunity to respond -- Whether employee entitled to procedural fairness -- Proper approach to dismissal of public employees.

[page191]

Summary:

D was employed by the Department of Justice for the Province of New Brunswick. He held a position under the *Civil Service Act* and was an office holder "at pleasure". His probationary period was extended twice and the employer reprimanded him on three separate occasions during the course of his employment. On the third occasion, a formal letter of reprimand was sent to D warning him that his failure to improve his performance would result in further disciplinary action up to and including dismissal. While preparing for a meeting to discuss D's performance review the employer concluded that D was not right for the job. A formal letter of termination was delivered to D's lawyer the next day. Cause for the termination was explicitly not alleged and D was given four months' pay in lieu of notice.

D commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act* ("*PSLRA*"), alleging that the reasons for the employer's dissatisfaction were not made known, that he did not receive a reasonable opportunity to respond to the concerns, that the employer's actions in terminating him were without notice, due process or procedural fairness, and that the length of the notice period was inadequate. The grievance was denied and then referred to adjudication. A preliminary issue of statutory interpretation arose as to whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to determine the reasons underlying the province's decision to terminate. The adjudicator held that the referential incorporation of s. 97(2.1) of the *PSLRA* into s. 100.1(5) of that Act meant that he could determine whether D had been discharged or otherwise disciplined for cause. Ultimately, the adjudicator made no finding as to whether the discharge was or was not for cause. In his decision on the merits, he found that the termination letter effected termination with pay in lieu of notice and that the termination was not disciplinary. As D's employment was hybrid in character, the adjudicator held that D was entitled to and did not receive procedural fairness in the employer's decision to terminate his employment. He

declared that the termination was void *ab initio* and ordered D reinstated as of the date of dismissal, adding that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

On judicial review, the Court of Queen's Bench applied the correctness standard and quashed the adjudicator's preliminary decision, concluding that the adjudicator did not have jurisdiction to inquire into the [page192] reasons for the termination, and that his authority was limited to determining whether the notice period was reasonable. On the merits, the court found that D had received procedural fairness by virtue of the grievance hearing before the adjudicator. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the court quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice. The Court of Appeal held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter*, not correctness, and that the adjudicator's decision was unreasonable. It found that where the employer elects to dismiss with notice or pay in lieu of notice, s. 97(2.1) of the *PSLRA* does not apply and the employee may only grieve the length of the notice period. It agreed with the reviewing judge that D's right to procedural fairness had not been breached.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ.: Despite its clear, stable constitutional foundations, the system of judicial review in Canada has proven to be difficult to implement. It is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. Notwithstanding the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, any actual difference between them in terms of their operation appears to be illusory. There ought to be only two standards of review: correctness and reasonableness. [para. 32] [para. 34] [para. 41]

When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is a deferential standard which requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations [page193] that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system. [paras. 47-50]

An exhaustive analysis is not required in every case to determine the proper standard of review. Courts must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision maker with regard to a particular category of question. If the inquiry proves unfruitful, courts must analyze the factors making it possible to identify the proper standard of review. The existence of a privative clause is a strong indication of review pursuant to the reasonableness standard, since it is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. It is not, however, determinative. Where the question is one of fact, discretion or policy, or where the legal issue is intertwined with and cannot be readily separated from the factual issue, deference will usually apply automatically. Deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. While deference may also be warranted where an administrative decision maker has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context, a question of law that is of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker will always attract a correctness standard. So will a true question of *vires*, a question regarding the jurisdictional lines between two or more competing specialized tribunals, and a constitutional question regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*. [paras. 52-62]

The standard of reasonableness applied on the issue of statutory interpretation. While the question of whether the combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice is a question of law, it is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator, who was in fact interpreting his enabling statute. Furthermore, s. 101(1) of the *PSLRA* includes a full privative clause, and the nature of the regime favours the standard of reasonableness. Here, the adjudicator's [page194] interpretation of the law was unreasonable and his decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law. The employment relationship between the parties in this case was governed by private law. The combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* cannot, on any reasonable interpretation, remove the employer's right, under the ordinary rules of contract, to discharge an employee with reasonable notice or pay in lieu thereof without asserting cause. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. [paras. 66-75]

On the merits, D was not entitled to procedural fairness. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. Where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness. The principles expressed in *Knight v. Indian Head School Division No. 19* in

relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that *Knight* ignored the important effect of a contract of employment, it should not be followed. In the case at bar, D was a contractual employee in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that as a civil servant he could only be dismissed in accordance with the ordinary rules of contract. To consider a public law duty of fairness issue where such a duty exists falls squarely within the adjudicator's task to resolve a grievance. Where, as here, the relationship is contractual, it was unnecessary to consider any public law duty of procedural fairness. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of D, the adjudicator erred and his decision was therefore correctly struck down. [paras. 76-78] [para. 81] [para. 84] [para. 106] [para. 114] [para. 117]

Per Binnie J.: The majority reasons for setting aside the adjudicator ruling were generally agreed with, however the call of the majority to re-evaluate the pragmatic and functional test and to re-assess "the structure and characteristics of the system of judicial review as a whole" and to develop a principled framework that is [page195] "more coherent and workable" invites a broader reappraisal. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. Litigants find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. The Court should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case. [paras. 119-122] [para. 133] [para. 145]

The distinction between "patent unreasonableness" and reasonableness *simpliciter* is now to be abandoned. The repeated attempts to explain the difference between the two, was in hindsight, unproductive and distracting. However, a broad reappraisal of the system of judicial review should explicitly address not only administrative tribunals but issues related to other types of administrative bodies and statutory decision makers including mid-level bureaucrats and, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. [paras. 121-123] [paras. 134-135] [para. 140]

It should be presumed that the standard of review of an administrative outcome on grounds of substance is reasonableness. In accordance with the ordinary rules of litigation, it should also be presumed that the decision under review is reasonable until the applicant shows otherwise. An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision rests on an error in the determination of a legal issue not confided (or which constitutionally could not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. Questions of law outside the administrative decision maker's

home statute and closely related rules or statutes which require his or her expertise should also be reviewable on a "correctness" standard whether or not it meets the majority's additional requirement that it be "of central importance to the legal system as a whole". The standard of correctness should also apply to the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. Nobody should have his or her rights, [page196] interests or privileges adversely dealt with by an unjust process. [paras. 127-129] [paras. 146-147]

On the other hand when the application for judicial review challenges the substantive outcome of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended. [para. 130]

Abandonment of the distinction between reasonableness *simpliciter* and patent unreasonableness has important implications. The two different standards addressed not merely "the magnitude or the immediacy of the defect" in the administrative decision but recognized that different administrative decisions command different degrees of deference, depending on who is deciding what. [para. 135]

"Contextualizing" a single standard of "reasonableness" review will shift the courtroom debate from choosing between two standards of reasonableness that each represented a different level of deference to a debate within a single standard of reasonableness to determine the appropriate level of deference. [para. 139]

Thus a single "reasonableness" standard will now necessarily incorporate both the degree of deference owed to the decision maker formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, and an assessment of the range of options reasonably open to the decision maker in the circumstances. The judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose. [para. 141] [para. 149]

A single "reasonableness" standard is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making. "Contextualizing" the reasonableness standard will require a reviewing court to consider the precise nature and function of the decision maker including its expertise, the terms and objectives [page197] of the governing statute (or common law) conferring the power of decision including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred. In some cases the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant

or others directly affected weighed against the public purpose which is sought to be advanced. In each case careful consideration will have to be given to the reasons given for the decision. This list of "contextual" considerations is non-exhaustive. A reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the administrative outcome is an issue given to another forum to decide. [para. 144] [paras. 151-155]

Per Deschamps, Charron and Rothstein JJ.: Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. In the adjudicative context, decisions on questions of fact, whether undergoing appellate review or administrative law review, always attract deference. When there is a privative clause, deference is owed to the administrative body that interprets the legal rules it was created to interpret and apply. If the body oversteps its delegated powers, if it is asked to interpret laws in respect of which it does not have expertise or if Parliament or a legislature has provided for a statutory right of review, deference is not owed to the decision maker. Finally, when considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court. [paras. 158-164]

Here, the employer's common law right to dismiss without cause was the starting point of the analysis. Since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court can proceed to its own interpretation of the applicable rules and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is essential if s. 97(2.1) of the *PSLRA* is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5) of the *PSLRA*. The adjudicator's failure to inform himself of this crucial difference led him to look for a cause for the dismissal, which was not relevant. Even if deference had been owed to the adjudicator, his interpretation could not have stood. Employment security is so fundamental to an employment relationship [page198] that it could not have been granted by the legislature by providing only that the *PSLRA* was to apply *mutatis mutandis* to non-unionized employees. [paras. 168-171]

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History and Disposition:

APPEAL from a judgment of the New Brunswick Court of Appeal (Turnbull, Daigle and Robertson JJ.A.) (2006), 297 N.B.R. (2d) 151, 265 D.L.R. (4th) 609, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 2006 CLLC para. 220-030, [2006] N.B.J. No. 118 (QL), 2006 CarswellNB 155, 2006 NBCA 27, affirming a judgment of Rideout J. (2005), 293 N.B.R. (2d) 5, 43 C.C.E.L. (3d) 205, [2005] N.B.J. No. 327 (QL), 2005 CarswellNB 444, 2005 NBQB 270, quashing a preliminary ruling and quashing in part an award made by an adjudicator. Appeal dismissed.

Counsel:

J. Gordon Petrie, Q.C., and *Clarence L. Bennett*, for the appellant.

C. Clyde Spinney, Q.C., and *Keith P. Mullin*, for the respondent.

The judgment of McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ. was delivered by

BASTARACHE and LeBEL JJ.:--

I. Introduction

1 This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision [page202] makers or judicial review judges. The time has arrived for a reassessment of the question.

A. *Facts*

2 The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

3 The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

4 The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter [page203] first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

5 A second disciplinary measure occurred when, in April 2004, it came to the attention of the Assistant Deputy Minister that the appellant was being advertised as a lecturer at legal seminars offered in the private sector. The appellant had inquired previously into the possibility of doing legal work outside his employment. In February 2004, the Assistant Deputy Minister had informed him that lawyers in the public service should not practise law in the private sector. A month later, the appellant wrote a letter to the Law Society of New Brunswick stating that his participation as a non-remunerated lecturer had been vetted by his employer, who had voiced no objection. On June 3, 2004, the Assistant Deputy Minister issued to the appellant written notice of a one-day suspension with pay regarding the incident. The letter also referred to issues regarding the appellant's work performance, including complaints from unnamed staff, lawyers and members of the public regarding his difficulties with timeliness and organization. This second letter concluded with the statement that "[f]uture occurrences of this nature and failure to develop more efficient organized work habits will result in disciplinary action up to and including dismissal."

6 Third, on July 21, 2004, the Regional Director wrote a formal letter of reprimand to the appellant regarding three alleged incidents relating to his job performance. This letter, too, concluded with a warning that the appellant's failure to improve his organization and timeliness would result in further disciplinary action up to and including dismissal. The appellant responded to the letter by informing the Regional Director that he would be seeking legal advice and, until that time, would not meet with her to discuss the matter further.

7 A review of the appellant's work performance had been due in April 2004 but did not take place. The appellant met with the Regional Director on a [page204] couple of occasions to discuss backlogs and organizational problems. Complaints were relayed to her by staff but they were not documented and it is unknown how many complaints there had been. The Regional Director notified the appellant on August 11, 2004, that his performance review was overdue and would occur by August 20. A meeting had been arranged for August 19 between the appellant, the Regional Director, the Assistant Deputy Minister and counsel for the appellant and the employer. While preparing for that meeting, the Regional Director and the Assistant Deputy Minister concluded that the appellant was not right for the job. The scheduled meeting was cancelled and a termination notice was faxed to the appellant. A formal letter of termination from the Deputy Minister was delivered to the appellant's lawyer the next day. The letter terminated the appellant's employment with the Province of New Brunswick, effective December 31, 2004. It read, in relevant part:

> I regret to advise you that I have come to the conclusion that your particular skill set does not meet the needs of your employer in your current position, and that it is advisable to terminate your employment on reasonable notice, pursuant to section 20 of the *Civil Service Act*. You are accordingly hereby advised that your employment with the Province of New Brunswick will

> terminate on December 31, 2004. Cause for termination is not alleged.
> To aid in your search for other employment, you are not required to report to work during the notice period and your salary will be continued until the date indicated or for such shorter period as you require either to find a job with equivalent remuneration, or you commence self-employment.
>
> ...
>
> In the circumstances, we would request that you avoid returning to the workplace until your departure has been announced to staff, and until you have returned your keys and government identification to your supervisor, Ms. Laundry as well as any other property of the employer still in your possession ... .

8 On February 3, 2005, the appellant was removed from his statutory offices by order of the Lieutenant-Governor in Council.

[page205]

9 The appellant commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"; see Appendix), by letter to the Deputy Minister on September 1, 2004. That provision grants non-unionized employees of the provincial public service the right to file a grievance with respect to a "discharge, suspension or a financial penalty" (s. 100.1(2)). The appellant asserted several grounds of complaint in his grievance letter, in particular, that the reasons for the employer's dissatisfaction were not made known; that he did not receive a reasonable opportunity to respond to the employer's concerns; that the employer's actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate. The grievance was denied. The appellant then gave notice that he would refer the grievance to adjudication under the *PSLRA*. The adjudicator was selected by agreement of the parties and appointed by the Labour and Employment Board .

10 The adjudication hearing was convened and counsel for the appellant produced as evidence a volume of 169 documents. Counsel for the respondent objected to the inclusion of almost half of the documents. The objection was made on the ground that the documents were irrelevant since the appellant's dismissal was not disciplinary but rather was a termination on reasonable notice. The preliminary issue therefore arose of whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to assess the reasons underlying the province's decision to terminate.

Following his preliminary ruling on that issue, the adjudicator heard and decided the merits of the grievance.

B. *Decisions of the Adjudicator*

(1) Preliminary Ruling (January 10, 2005)

11 The adjudicator began his preliminary ruling by considering s. 97(2.1) of the *PSLRA*. He reasoned that because the appellant was not included in a bargaining unit and there was no collective agreement or arbitral award, the section ought to be [page206] interpreted to mean that where an adjudicator determines that an employee has been discharged for cause, the adjudicator may substitute another penalty for the discharge as seems just and reasonable in the circumstances. The adjudicator considered and relied on the decision of the New Brunswick Court of Appeal in *Chalmers (Dr. Everett) Hospital v. Mills* (1989), 102 N.B.R. (2d) 1.

12 Turning to s. 100.1 of the *PSLRA*, he noted the referential incorporation of s. 97 in s. 100.1(5). He stated that such incorporation "necessarily means that an adjudicator has jurisdiction to make the determination described in s. 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). The adjudicator noted that an employee to whom s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1 (see Appendix), applies may be discharged for cause, with reasonable notice or with pay in lieu of reasonable notice. He concluded by holding that an employer cannot avoid an inquiry into its real reasons for dismissing an employee by stating that cause is not alleged. Rather, a grieving employee is entitled to an adjudication as to whether a discharge purportedly with notice or pay in lieu thereof was in fact for cause. He therefore held that he had jurisdiction to make such a determination.

(2) Ruling on the Merits (February 16, 2005)

13 In his decision on the merits, released shortly thereafter, the adjudicator found that the termination letter of August 19 effected termination with pay in lieu of notice. The employer did not allege cause. Inquiring into the reasons for dismissal the adjudicator was satisfied that, on his view of the evidence, the termination was not disciplinary. Rather, the decision to terminate was based on the employer's concerns about the appellant's work performance and his suitability for the positions he held.

14 The adjudicator then considered the appellant's claim that he was dismissed without procedural fairness in that the employer did not inform him of the reasons for its dissatisfaction and did not give him an opportunity to respond. The adjudicator [page207] placed some responsibility on the employer for cancelling the performance review scheduled for August 19. He also opined that the employer was not so much dissatisfied with the appellant's quality of work as with his lack of organization.

15 The adjudicator's decision relied on *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, for the relevant legal principles regarding the right of "at pleasure" office holders to procedural fairness. As the appellant's employment was "hybrid in character" (para. 53) he was both a Legal Officer under the *Civil Service Act* and, as Clerk, an office holder "at pleasure" the adjudicator held that the appellant was entitled to procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered the appellant reinstated as of August 19, 2004, the date of dismissal.

16 The adjudicator added that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

C. *Judicial History*

(1) Court of Queen's Bench of New Brunswick (2005), 293 N.B.R. (2d) 5, 2005 NBQB 270

17 The Province of New Brunswick applied for judicial review of the adjudicator's decision on numerous grounds. In particular, it argued that the adjudicator had exceeded his jurisdiction in his preliminary ruling by holding that he was authorized to determine whether the termination was in fact for cause. The Province further argued that the adjudicator had acted incorrectly or unreasonably in deciding the procedural fairness issue. The application was heard by Rideout J.

18 The reviewing judge applied a pragmatic and functional analysis, considering the presence of a full privative clause in the *PSLRA*, the [page208] relative expertise of adjudicators appointed under the *PSLRA*, the purposes of ss. 97(2.1) and 100.1 of the *PSLRA* as well as s. 20 of the *Civil Service Act*, and the nature of the question as one of statutory interpretation. He concluded that the correctness standard of review applied and that the court need not show curial deference to the decision of an adjudicator regarding the interpretation of those statutory provisions.

19 Regarding the preliminary ruling, the reviewing judge noted that the appellant was employed "at pleasure" and fell under s. 20 of the *Civil Service Act*. In his view, the adjudicator had overlooked the effects of s. 20 and had mistakenly given ss. 97(2.1) and 100.1 of the *PSLRA* a substantive, rather than procedural, interpretation. Those sections are procedural in nature. They provide an employee with a right to grieve his or her dismissal and set out the steps that must be followed to pursue a grievance. The adjudicator is bound to apply the contractual provisions as they exist and has no authority to change those provisions. Thus, in cases in which s. 20 of the *Civil Service Act* applies, the adjudicator must apply the ordinary rules of contract. The reviewing judge held that the adjudicator had erred in removing the words "and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined" from s. 97(2.1). Those words limit s. 97(2.1) to employees who are not employed "at pleasure". In the view of the reviewing judge, the adjudicator did not have jurisdiction to inquire into the reasons for the termination. His authority was limited to

determining whether the notice period was reasonable. Having found that the adjudicator had exceeded his jurisdiction, the reviewing judge quashed his preliminary ruling.

20 With respect to the adjudicator's award on the merits, the reviewing judge commented that some aspects of the decision are factual in nature and should be reviewed on a patent unreasonableness standard, while other aspects involve questions [page209] of mixed fact and law which are subject to a reasonableness *simpliciter* standard. The reviewing judge agreed with the Province that the adjudicator's reasons do not stand up to a "somewhat probing examination" (para. 76). The reviewing judge held that the adjudicator's award of reinstatement could not stand as he was not empowered by the *PSLRA* to make Lieutenant-Governor in Council appointments. In addition, by concluding that the decision was void *ab initio* owing to a lack of procedural fairness, the adjudicator failed to consider the doctrine of adequate alternative remedy. The appellant received procedural fairness by virtue of the grievance hearing before the adjudicator. The adjudicator had provisionally increased the notice period to eight months that provided an adequate alternative remedy. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the reviewing judge quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice.

(2) Court of Appeal of New Brunswick (2006), 297 N.B.R. (2d) 151, 2006 NBCA 27

21 The appellant appealed the decision of the reviewing judge. The Court of Appeal, Robertson J.A. writing, held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter* and that the reviewing judge had erred in adopting the correctness standard. The court reached that conclusion by proceeding through a pragmatic and functional analysis, placing particular emphasis on the presence of a full privative clause in the *PSLRA* and the relative expertise of an adjudicator in the labour relations and employment context. The court also relied on the decision of this Court in *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28. However, the court noted that the adjudicator's interpretation of the *Mills* decision warranted no deference and that "correctness is the proper review standard when it comes to the interpretation and application of caselaw" (para. 17).

[page210]

22 Applying the reasonableness *simpliciter* standard, the court held that the adjudicator's decision was unreasonable. Robertson J.A. began by considering s. 20 of the *Civil Service Act* and noted that under the ordinary rules of contract, an employer holds the right to dismiss an employee with cause or with reasonable notice or with pay in lieu of notice. Section 20 of the *Civil Service Act* limits the Crown's common law right to dismiss its employees without cause or notice. Robertson J.A.

reasoned that s. 97(2.1) of the *PSLRA* applies in principle to non-unionized employees, but that it is only where an employee has been discharged or disciplined *for cause* that an adjudicator may substitute such other penalty as seems just and reasonable in the circumstances. Where the employer elects to dismiss with notice or pay in lieu of notice, however, s. 97(2.1) does not apply. In such circumstances, the employee may only grieve the length of the notice period. The only exception is where the employee alleges that the decision to terminate was based on a prohibited ground of discrimination.

23 On the issue of procedural fairness, the court found that the appellant exercised his right to grieve, and thus a finding that the duty of fairness had been breached was without legal foundation. The court dismissed the appeal.

II. Issues

24 At issue, firstly is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal which was seized of a grievance filed by the appellant after his employment was terminated. This appeal gives us the opportunity to re-examine the foundations of judicial review and the standards of review applicable in various situations.

25 The second issue involves examining whether the appellant who held an office "at pleasure" in the civil service of New Brunswick, had the right to procedural fairness in the employer's decision to terminate him. On this occasion, we will reassess the rule that has found formal expression in *Knight*.

[page211]

26 The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's Statutory Interpretation Determination

A. *Judicial Review*

27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of

the matters delegated to administrative bodies by Parliament and legislatures.

28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, [page212] the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

30 In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" ("Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, at p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

31 The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127 [page213]). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is

constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*:

> Where ... questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review. [pp. 237-38]

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

32 Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

[page214]

33 Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, it has become apparent that the present system must be simplified. The comments of LeBel J. in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, at paras. 190 and 195, questioning the applicability of the "pragmatic and functional approach" to the decisions and actions of all kinds of administrative actors, illustrated the need for change.

B. *Reconsidering the Standards of Judicial Review*

34 The current approach to judicial review involves three standards of review, which range from

correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review correctness and reasonableness.

35 The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*CUPE*") [page215], Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

36 *CUPE* did not do away with correctness review altogether and in *Bibeault*, the Court affirmed that there are still questions on which a tribunal must be correct. As Beetz J. explained, "the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and ... such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator" (p. 1086). *Bibeault* introduced the concept of a "pragmatic and functional analysis" to determine the jurisdiction of a tribunal, abandoning the "preliminary question" theory. In arriving at the appropriate standard of review, courts were to consider a number of factors including the wording of the provision conferring jurisdiction on the tribunal, the purpose of the enabling statute, the reason for the existence of the tribunal, the expertise of its [page216] members, and the nature of the problem (p. 1088). The new approach would put "renewed emphasis on the superintending and reforming function of the superior courts" (p. 1090). The "pragmatic and functional analysis", as it came to be known, was later expanded to determine the appropriate degree of deference in respect of various forms of administrative decision making.

37 In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, a third standard of review was introduced into Canadian administrative law. The legislative context of

that case, which provided a statutory right of appeal from the decision of a specialized tribunal, suggested that none of the existing standards was entirely satisfactory. As a result, the reasonableness *simpliciter* standard was introduced. It asks whether the tribunal's decision was reasonable. If so, the decision should stand; if not, it must fall. In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

38 The three standards of review have since remained in Canadian administrative law, the approach to determining the appropriate standard of review having been refined in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

39 The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the [page217] patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

40 The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 78, *per* LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard of reasonableness *simpliciter*. As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" ... . A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when

> the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

41 As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E.*, notwithstanding the increased [page218] clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15, at paras. 101-3). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see *C.U.P.E. v. Ontario (Minister of Labour)*). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

42 Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As [page219] LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E.*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision,

> regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness ... .

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at paras. 40-41, *per* LeBel J.

C. *Two Standards of Review*

43 The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonabless and Correctness

44 As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 U.T.L.J. 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently [page220] greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

45 We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

47 Reasonableness is a deferential standard animated by the principle that underlies the

development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree [page222] of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids

inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

51 Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

[page223]

52 The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

53 Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a

specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, [1975] 1 S.C.R. 517, where it was held that an administrative decision [page224] maker will always risk having its interpretation of an external statute set aside upon judicial review.

55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness [page225] standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

58 For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322. Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54; Mullan, *Administrative Law*, at p. 60.

59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the

jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality [page226] and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

61 Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39.

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[page227]

63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails.

Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. *Application*

65 Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

66 The specific question on this front is whether the combined effect of s. 97(2.1) and s. 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

[page228]

67 The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of ... an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain ... an adjudicator in any of its or his proceedings." The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

68 The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, at para. 58; *Voice*

Construction, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *Alberta Union of Provincial Employees v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

69 The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding [page229] settlements of disputes also imply that a reasonableness review is appropriate.

70 Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

71 Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

72 While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

73 The adjudicator considered the New Brunswick Court of Appeal decision in *Chalmers (Dr. Everett) Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve "with respect to ... disciplinary action resulting in discharge, suspension or a financial penalty" (s. 92(1)). The amended legislation grants the right to grieve "with respect to discharge, suspension or a financial penalty" (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the referential incorporation of s. 97(2.1) in s. 100.1(5) "necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). He further stated that an employer "cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), by simply stating that cause is not alleged" (*ibid.* (emphasis added)). The [page230] adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

74 The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide or even have such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

75 The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of grievances brought by non-unionized employees. [page231] The employees subject to the *PSLRA* are usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

76 The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

77 Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that have been breached. It is also concerned with general principles involving the right to answer and defence where one's rights are affected. In this case, the appellant raised in his grievance letter that the reasons for the employer's dissatisfaction were not specified and that he did not have a reasonable opportunity to respond to the employer's concerns. There was, [page232] in his view, lack of due process and a breach of procedural fairness.

78 The procedural fairness issue was dealt with only briefly by the Court of Appeal. Robertson J.A. mentioned at the end of his reasons that a duty of fairness did not arise in this case since the appellant had been terminated with notice and had exercised his right to grieve. Before this Court, however, the appellant argued that he was entitled to procedural fairness as a result of this Court's jurisprudence. Although ultimately we do not agree with the appellant, his contention raises important issues that need to be examined more fully.

A. *Duty of Fairness*

79 Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75).

80 This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder of an office "at pleasure" was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p. 683).

81 We are of the view that the principles established in *Knight* relating to the applicability of a duty of fairness in the context of public employment [page233] merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of

employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

82 This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.

83 In order to understand why a reconsideration of *Knight* is warranted, it is necessary to review the development of the duty of fairness in Canadian administrative law. As we shall see, its development in the public employment context was intimately related to the distinction between public office holders and contractual employees, a distinction which, in our view, has become increasingly difficult to maintain both in principle and in practice.

(1) The Preliminary Issue of Jurisdiction

84 Before dealing with the scope of the duty of fairness in this case, a word should be said about the respondent's preliminary objection to the jurisdiction of the adjudicator under the *PSLRA* [page234] to consider procedural fairness. The respondent argues that allowing adjudicators to consider procedural fairness risks granting them the inherent powers of a court. We disagree. We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

(2) The Development of the Duty of Fairness in Canadian Public Law

85 In Canada, the modern concept of procedural fairness in administrative law was inspired by the House of Lords' landmark decision in *Ridge v. Baldwin*, [1963] 2 All E.R. 66, a case which involved the summary dismissal of the chief constable of Brighton. The House of Lords declared the chief constable's dismissal a nullity on the grounds that the administrative body which had dismissed him had failed to provide the reasons for his dismissal or to accord him an opportunity to be heard in violation of the rules of natural justice. Central to the reasoning in the case was Lord Reid's distinction between (i) master-servant relationships (i.e. contractual employment), (ii) offices held "at pleasure", and (iii) offices where there must be cause for dismissal, which included the chief constable's position. According to Lord Reid, only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed "at pleasure" could be dismissed without reason (p. 72). As the authors Wade and Forsyth note that, after a period of retreat from imposing procedural fairness requirements on administrative

decision makers, *Ridge v. Baldwin* "marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis" (W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 438).

[page235]

86 The principles established by *Ridge v. Baldwin* were followed by this Court in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. *Nicholson*, like its U.K. predecessor, marked the return to a less rigid approach to natural justice in Canada (see Brown and Evans, at pp. 7-5 to 7-9). *Nicholson* concerned the summary dismissal of a probationary police officer by a regional board of police commissioners. Laskin C.J., for the majority, at p. 328, declared the dismissal void on the ground that the officer fell into Lord Reid's third category and was therefore entitled to the same procedural protections as in *Ridge v. Baldwin*.

87 Although *Ridge v. Baldwin* and *Nicholson* were concerned with procedural fairness in the context of the dismissal of public office holders, the concept of fairness was quickly extended to other types of administrative decisions (see e.g. *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735). In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, Le Dain J. stated that the duty of fairness was a general principle of law applicable to all public authorities:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual ... . [p. 653]
> (See also *Baker*, at para. 20.)

88 In *Knight*, the Court relied on the statement of Le Dain J. in *Cardinal v. Director of Kent Institution* that the existence of a general duty to act fairly will depend on "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the [page236] individual; and (iii) the effect of that decision on the individual's rights" (*Knight*, at p. 669).

89 The dispute in *Knight* centred on whether a board of education had failed to accord procedural fairness when it dismissed a director of education with three months' notice pursuant to his contract of employment. The main issue was whether the director's employment relationship with the school board was one that attracted a public law duty of fairness. L'Heureux-Dubé J., for the majority, held that it did attract such a duty on the ground that the director's position had a "strong 'statutory flavour'" and could thus be qualified as a public office (p. 672). In doing so, she specifically recognized that, contrary to Lord Reid's holding in *Ridge v. Baldwin*, holders of an office "at

pleasure", were also entitled to procedural fairness before being dismissed (pp. 673-74). The fact that the director's written contract of employment specifically provided that he could be dismissed with three months' notice was held not to be enough to displace a public law duty to act fairly (p. 681).

90 From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (Brown and Evans, at p. 7-3). What is less clear, however, is whether this purpose is served by imposing public law procedural fairness requirements on public bodies in the exercise of their contractual rights as employers.

(3) Procedural Fairness in the Public Employment Context

91 *Ridge v. Baldwin* and *Nicholson* established that a public employee's right to procedural fairness [page237] depended on his or her status as an office holder. While *Knight* extended a duty of fairness to office holders during pleasure, it nevertheless upheld the distinction between office holders and contractual employees as an important criterion in establishing whether a duty of fairness was owed. Courts have continued to rely on this distinction, either extending or denying procedural protections depending on the characterization of the public employee's legal status as an office holder or contractual employee (see e.g. *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790; *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (C.A.); *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151; *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83; *Hanis v. Teevan* (1998), 111 O.A.C. 91; *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70 (C.A.)) .

92 In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:

> Although the law makes such a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes "office" has long been defined as a "subsisting, permanent substantive position which has an existence independent of the person who fills it", but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.

(Wade and Forsyth, at pp. 532-33)

93 Lord Wilberforce noted that attempting to separate office holders from contractual employees

> involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural [page238] justice, according to the master and servant test, looks illogical and even bizarre.
>
> (*Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (H.L.), at p. 1294)

94 There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee's position had a "strong 'statutory flavour'" (p. 672), but as Brown and Evans observe, "there is no simple test for determining whether there is a sufficiently strong 'statutory flavour' to a job for it to be classified as an 'office'" (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a "middle manager" in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (Q.B.), aff'd (1991), 118 N.B.R. (2d) 306 (C.A.)). Similarly, physicians working in the public health system may or may not be entitled to a duty of fairness (compare *Seshia* and *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40).

95 Further complicating the distinction is the fact that public employment is for the most part now viewed as a regular contractual employment relationship. The traditional position at common law was that public servants were literally "servants of the Crown" and could therefore be dismissed at will. However, it is now recognized that most public employees are employed on a contractual basis: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199.

96 *Wells* concerned the dismissal without compensation of a public office holder whose position had been abolished by statute. The Court held that, while Wells' position was created by statute, his employment relationship with the Crown was contractual and therefore he was entitled to be compensated for breach of contract according [page239] to ordinary private law principles. Indeed, *Wells* recognized that most civil servants and public officers are employed under contracts of employment, either as members of unions bound by collective agreements or as non-unionized employees under individual contracts of employment (paras. 20-21 and 29-32). Only certain officers, like ministers of the Crown and "others who fulfill constitutionally defined state roles", do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement (*Wells*, at paras. 29-32).

97 The effect of *Wells*, as Professors Hogg and Monahan note, is that

> [t]he government's common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as

> private employment relationships. This does not mean that governments cannot provide for a right to terminate employment contracts at pleasure. However, if the government wishes to have such a right, it must either contract for it or make provision (expressly or by necessary implication) by way of statute.
>
> (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 240)

The important point for our purposes is that *Wells* confirmed that most public office holders have a contractual employment relationship. Of course, office holders' positions will also often be governed by statute and regulations, but the essence of the employment relationship is still contractual. In this context, attempting to make a clear distinction between office holders and contractual employees for the purposes of procedural fairness becomes even more difficult.

98 If the distinction has become difficult to maintain in practice, it is also increasingly hard to justify in principle. There would appear to be three main reasons for distinguishing between office holders and contractual employees and for extending procedural fairness protections only to the former, all of which, in our view, are problematic.

99 First, historically, offices were viewed as a form of property, and thus could be recovered by [page240] the office holder who was removed contrary to the principles of natural justice. Employees who were dismissed in breach of their contract, however, could only sue for damages, since specific performance is not generally available for contracts for personal service (Wade and Forsyth, at pp. 531-32). This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property.

100 A second and more persuasive reason for the distinction is that dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision (*Knight*, at p. 675; *Malloch*, at p. 1293, *per* Lord Wilberforce). In contrast, the dismissal of a contractual employee only implicates a public authority's private law rights as an employer.

101 A third reason is that, unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge. This was true of the public office holders in *Ridge v. Baldwin* and *Nicholson*. Indeed, in both cases the statutory language purported to authorize dismissal without notice. The holders of an office "at pleasure" were in an even more tenuous position since by definition they could be dismissed without notice *and* without reason (*Nicholson*, at p. 323; *Black's Law Dictionary* (8th ed. 2004), at p. 1192 "pleasure appointment"). Because of this relative insecurity it was seen to be desirable to impose minimal procedural requirements in order to ensure that office holders were not deprived of their positions arbitrarily (*Nicholson*, at pp. 322-23; *Knight*, at pp. 674-75; Wade and Forsyth, at pp. 536-37).

102 In our view, the existence of a contract of employment, not the public employee's status as an

office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.

[page241]

103 Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. For instance, in *Knight*, the director's position was terminated by a resolution passed by the board of education pursuant to statute, but it was done in accordance with the contract of employment, which provided for dismissal on three months' notice. Similarly, the appellant in this case was dismissed pursuant to s. 20 of the New Brunswick *Civil Service Act*, but that section provides that the ordinary rules of contract govern dismissal. He could therefore only be dismissed for just cause or on reasonable notice, and any failure to do so would give rise to a right to damages. In seeking to end the employment relationship with four months' pay in lieu of notice, the respondent was acting no differently than any other employer at common law. In *Wells*, Major J. noted that public employment had all of the features of a contractual relationship:

> A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment. [Emphasis added; para. 22.]

If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

104 Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right [page242] to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties (see, for example, in the context of collective agreements: *School District No. 5 (Southeast Kootenay) and B.C.T.F. (Yellowaga) (Re)* (2000), 94 L.A.C. (4th) 56). If, however, the contract of employment is silent, the fundamental terms will be supplied by the common law or the civil law, in which case dismissal may only be for just cause or on reasonable notice.

105 In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair *per se*. An employer's right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), at para. 13.3). It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 95 . But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

106 Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority cannot contract out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to [page243] a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

107 Nor is the protection of office holders a justification for imposing a duty of fairness when the employee is protected from wrongful dismissal by contract. The appellant's situation provides a good illustration of why this is so. As an office holder, the appellant was employed "at pleasure", and could therefore be terminated without notice or reason (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20). However, he was also a civil servant and, pursuant to s. 20 of the *Civil Service Act*, his dismissal was governed by the ordinary rules of contract. If his employer had dismissed him without notice and without cause he would have been entitled to claim damages for breach of contract. Even if he was dismissed with notice, it was open to him to challenge the length of notice or amount of pay in lieu of notice given. On the facts, the respondent gave the appellant four months' worth of pay in lieu of notice, which he was successful in having increased to eight months before the grievance adjudicator.

108 It is true that the remedy of reinstatement is not available for breach of contract at common law. In this regard, it might be argued that contractual remedies, on their own, offer insufficient protection to office holders (see *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at p. 187). However, it must be kept in mind that breach of a public law duty of fairness also does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (*Ridge v. Baldwin*, at p. 81). Accordingly, the employment is deemed to have never ceased and the office holder is entitled to unpaid wages and benefits from the date of the dismissal to the date of judgment (see England, at para. 17.224). However, an employer is free to follow the correct procedure and dismiss the office holder again. A

breach of the duty of fairness simply requires that the dismissal decision be retaken. It therefore is incorrect to equate it to reinstatement (see *Malloch*, at p. 1284).

[page244]

109 In addition, a public law remedy can lead to unfairness. The amount of unpaid wages and benefits an office holder is entitled to will be a function of the length of time the judicial process has taken to wend its way to a final resolution rather than criteria related to the employee's situation. Furthermore, in principle, there is no duty to mitigate since unpaid wages are not technically damages. As a result, an employee may recoup much more than he or she actually lost (see England, at para. 17.224).

110 In contrast, the private law offers a more principled and fair remedy. The length of notice or amount of pay in lieu of notice an employee is entitled to depends on a number of factors including length of service, age, experience and the availability of alternative employment (see *Wallace*, at paras. 81 ff.). The notice period may be increased if it is established that the employer acted in bad faith or engaged in unfair dealing when acting to dismiss the employee (*Wallace*, at para. 95). These considerations aim at ensuring that dismissed employees are afforded some measure of protection while looking for new employment.

111 It is important to note as well that the appellant, as a public employee employed under a contract of employment, also had access to all of the same statutory and common law protections that surround private sector employment. He was protected from dismissal on the basis of a prohibited ground of discrimination under the *Human Rights Act*, R.S.N.B. 1973, c. H-11. His employer was bound to respect the norms laid down by the *Employment Standards Act*, S.N.B. 1982, c. E-7.2. As has already been mentioned, if his dismissal had been in bad faith or he had been subject to unfair dealing, it would have been open to him to argue for an extension of the notice period pursuant to the principles laid down in *Wallace*. In short, the appellant was not without legal protections or remedies in the face of his dismissal.

(4) The Proper Approach to the Dismissal of Public Employees

112 In our view, the distinction between office holder and contractual employee for the purposes [page245] of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements. What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

113 The starting point, therefore, in any analysis, should be to determine the nature of the

employment relationship with the public authority. Following *Wells*, it is assumed that most public employment relationships are contractual. Where this is the case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

114 The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

115 The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, [page246] protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (*Wells*, at para. 31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g. New Brunswick *Interpretation Act*, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

116 A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In *Malloch*, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks' notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (*Knight*, at p. 682).

B. *Conclusion*

117 In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was

unnecessary to consider any public law duty of procedural fairness. The respondent was fully within its rights [page247] to dismiss the appellant with pay in lieu of notice without affording him a hearing. The respondent dismissed the appellant with four months' pay in lieu of notice. The appellant was successful in increasing this amount to eight months. The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

V. Disposition

118 We would dismiss the appeal. There will be no order for costs in this Court as the respondent is not requesting them.

The following are the reasons delivered by

119 BINNIE J.:-- I agree with my colleagues that the appellant's former employment relationship with the respondent is governed by contract. The respondent chose to exercise its right to terminate the employment without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, and of ss. 97(2.1) and 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The appellant was a non-unionized employee whose job was terminated in accordance with contract law. Public law principles of procedural fairness were not applicable in the circumstances. These conclusions are enough to dispose of the appeal.

120 However, my colleagues Bastarache and LeBel JJ. are embarked on a more ambitious mission, stating that:

> Although the instant appeal deals with the particular problem of judicial review of the decisions of [page248] an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole.
>
> ...
>
> ... The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable. [Emphasis added; paras. 33 and 32.]

121 The need for such a re-examination is widely recognized, but in the end my colleagues' reasons for judgment do not deal with the "system as a whole". They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two ("correctness" and "reasonableness"), but retain the pragmatic and functional analysis, although

now it is to be called the "standard of review analysis" (para. 63). A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:

> What's in a name? that which we call a rose By any other name would smell as sweet;
>
> (*Romeo and Juliet*, Act II, Scene ii)

122 I am emboldened by my colleagues' insistence that "a holistic approach is needed when considering fundamental principles" (para. 26) to express the following views. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. The words themselves are unobjectionable. The dreaded reference to "functional" can simply be taken to mean that generally speaking courts have the last word on what *they* consider the correct decision on legal matters (because deciding legal issues is their "function"), while administrators should generally have the last word within *their* function, which is to decide administrative matters. The word "pragmatic" not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by [page249] practical considerations: for example, a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers; see e.g. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

123 Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

124 On the other hand, a court is right to insist that *its* view of the correct opinion (i.e. the "correctness" standard of review) is accepted on questions concerning the Constitution, the common law, and the interpretation of a statute other than the administrator's enabling statute (the "home statute") or a rule or statute closely connected with it; see generally D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 14:2210.

125 Thus the law (or, more grandly, the "rule of law") sets the boundaries of potential administrative action. It is sometimes said by judges that an administrator acting within his or her discretion [page250] "has the right to be wrong". This reflects an unduly court-centred view of the

universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.

A. *Limits on the Allocation of Decision Making*

126 It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

127 Firstly, the Constitution restricts the legislator's ability to allocate issues to administrative bodies which s. 96 of the *Constitution Act, 1867* has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

128 Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers . This too is a simple idea. No one can exercise a power they do not possess. Whether or not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred to an administrator's conclusion of law *outside* his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail

> where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]

It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.

[page251]

129 Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the

requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. Hansard is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R. 414 (C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor [page252] Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52.

B. *Reasonableness of Outcome*

130 At this point, judicial review shifts gears. When the applicant for judicial review challenges the substantive *outcome* of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended.

131 In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, Beetz J. adopted the view that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation" (p. 1087 (emphasis deleted)). Judicial intervention in administrative decisions on grounds of substance (in the absence of a constitutional challenge) has been based on presumed legislative intent in a line of cases from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (C.A.) ("you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority" (p. 683)) to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*. ("was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation ... ?" (p. 237)). More recent examples are *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (para. 53), and *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [page253] [2001] 2 S.C.R. 281, 2001 SCC 41 (paras. 60-61). Judicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards.

C. *The Need to Reappraise the Approach to Judicial Review*

132 The present difficulty, it seems, does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision making. The objection is that our present "pragmatic and functional" approach is more complicated than is required by the subject matter.

133 People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost to the applicant. If the challenge is unsuccessful, the unhappy applicant may also [page254] face a substantial bill of costs from the successful government agency. A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.

D.

Standards of Review

134 My colleagues conclude that three standards of review should be reduced to two standards of review. I agree that this simplification will avoid some of the arcane debates about the point at which "unreasonableness" becomes "patent unreasonableness". However, in my view the repercussions of their position go well beyond administrative tribunals. My colleagues conclude, and I agree:

> Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. [para. 41]

More broadly, they declare that "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having

multiple standards of review" (para. 44), and "any actual difference between them in terms of their operation appears to be illusory" (para. 41). A test which is incoherent when applied to administrative tribunals does not gain in coherence or logic when applied to other administrative decision makers such as mid-level bureaucrats or, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. I therefore proceed on the basis that the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" has been declared by the Court [page255] to be abandoned. I propose at this point to examine what I see as some of the implications of this abandonment.

E. *Degrees of Deference*

135 The distinction between reasonableness *simpliciter* and patent unreasonableness was not directed merely to "the magnitude or the immediacy of the defect" in the administrative decision (para. 41). The distinction also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what.

136 A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be "at the extreme legislative end of the *continuum* of administrative decision-making" (*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at p. 659). On the other hand, a ministerial delegate making a deportation decision according to ministerial guidelines was accorded considerably less deference in *Baker* (where the "reasonableness *simpliciter*" standard was applied). The difference does not lie only in the judge's view of the perceived immediacy of the defect in the administrative decision. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, a unanimous Court adopted the caution in the context of counter-terrorism measures that "[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove" (para. 33). Administrative decision makers generally command respect more for their expertise than for their prominence in the administrative food chain. Far more numerous are the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits or the granting or withholding of licences, or municipal boards poring over budgets or allocating costs of local improvements. Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, or policy decisions [page256] arising out of decisions of major administrative tribunals, as in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 753, where the Court said: "The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council."

137 Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on "public convenience and necessity" (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322) or simply to take a decision in the "public interest" is necessarily accorded more room to manoeuvre than is a

professional body, given the task of determining an appropriate sanction for a member's misconduct (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20).

138 In our recent jurisprudence, the "nature of the question" before the decision maker has been considered as one of a number of elements to be considered in choosing amongst the various standards of review. At this point, however, I believe it plays a more important role in terms of substantive review. It helps to define the range of reasonable outcomes within which the administrator is authorized to choose.

139 The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another [page257] without any overall saving to motorists in time or expense.

140 That said, I agree that the repeated attempts to define and explain the difference between reasonableness *simpliciter* and "patent" unreasonableness can be seen with the benefit of hindsight to be unproductive and distracting. Nevertheless, the underlying issue of degrees of deference (which the two standards were designed to address) remains.

141 Historically, our law recognized "patent" unreasonableness before it recognized what became known as reasonableness *simpliciter*. The adjective "patent" initially underscored the level of respect that was due to the designated decision maker, and signalled the narrow authority of the courts to interfere with a particular administrative *outcome* on substantive grounds. The reasonableness *simpliciter* standard was added at a later date to recognize a reduced level of deference. Reducing three standards of review to two standards of review does not alter the reality that at the high end "patent" unreasonableness (in the sense of manifestly indefensible) was not a bad description of the hurdle an applicant had to get over to have an administrative decision quashed on a ground of substance. The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

F. *Multiple Aspects of Administrative Decisions*

142 Mention should be made of a further feature that also reflects the complexity of the subject [page258] matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the

general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11). In the jargon of the judicial review bar, this is known as "segmentation".

G. *The Existence of a Privative Clause*

143 The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor amongst others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. A single standard of "reasonableness" cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must be shown. Chief Justice Laskin during argument once memorably condemned the quashing of a labour board decision protected by a strong privative clause, by saying "what's wrong with these people [the judges], can't they read?" A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of *outcome* on substantive grounds unless the applicant can show that the [page259] clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.

H. *A Broader Reappraisal*

144 "Reasonableness" is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making.

145 The theory of our recent case law has been that once the appropriate standard of review is selected, it is a fairly straightforward matter to apply it. In practice, the criteria for selection among "reasonableness" standards of review proved to be undefinable and their application unpredictable. The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the "real" nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere *preparation* for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some

presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case.

146 The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single "correct" outcome. It should also be [page260] presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.

147 An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case, command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.

148 When, then, should a decision be deemed "unreasonable"? My colleagues suggest a test of *irrationality* (para. 46), but the editors of de Smith point out that "many decisions which fall foul of [unreasonableness] have been coldly rational" (*de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, where the Minister's appointment of retired judges with little experience in labour matters to chair "interest" arbitrations (as opposed to "grievance" arbitrations) between hospitals and hospital workers was "coldly rational" in terms of the Minister's own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.

149 Reasonableness rather than rationality has been the traditional standard and, properly interpreted, it works. That said, a single "reasonableness" standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter, and* an assessment [page261] of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the "reasonableness" standard.

I. *Judging "Reasonableness"*

150 I agree with my colleagues that "reasonableness" depends on the context. It must be calibrated to fit the circumstances. A driving speed that is "reasonable" when motoring along a four-lane interprovincial highway is not "reasonable" when driving along an inner city street. The

standard ("reasonableness") stays the same, but the reasonableness assessment will vary with the relevant circumstances.

151 This, of course, is the nub of the difficulty. My colleagues write:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

I agree with this summary but what is required, with respect, is a more easily applied framework into which the judicial review court and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance (i.e. leaving aside errors of fairness or law which lie within the supervising "function" of the courts), the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the decision maker under its grant of authority, usually a statute. "[T]here is always a perspective", observed Rand J., "within which a statute is intended [by the legislature] to operate": *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140. How is that "perspective" to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including [page262] the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.

152 Some of these indicia were included from the outset in the pragmatic and functional test itself (see *Bibeault*, at p. 1088). The problem, however, is that under *Bibeault*, and the cases that followed it, these indicia were used to choose among the different standards of review, which were themselves considered more or less fixed. In *Law Society of New Brunswick v. Ryan*, for example, the Court *rejected* the argument that "it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances" (para. 43). It seems to me that collapsing everything beyond "correctness" into a single "reasonableness" standard will require a reviewing court to do exactly that.

153 The Court's adoption in this case of a single "reasonableness" standard that covers both the degree of deference assessment and the reviewing court's evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered [page263] together. Asking courts to have regard to more than one variable is not asking too much, in my opinion. In other disciplines, data are routinely plotted simultaneously along both an *X* axis and a *Y* axis, without traumatizing the participants.

154 It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the "pragmatic and functional" test, we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits.

155 That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single "reasonableness" standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.

J. *Application to This Case*

156 Labour arbitrators often have to juggle different statutory provisions in disposing of a grievance. The courts have generally attached great importance to their expertise in keeping labour peace. In this case, the adjudicator was dealing with his "home statute" plus other statutes intimately linked to public sector relations in New Brunswick. He was working on his "home turf", and the legislature has made clear in the privative clause that it intended the adjudicator to determine the outcome of the appellant's grievance. In this field, quick and cheap justice (capped by finality) advances the achievement of the legislative scheme. Recourse to judicial review is discouraged. I would therefore apply a reasonableness standard to the adjudicator's [page264] interpretation of his "home turf" statutory framework.

157 Once under the flag of reasonableness, however, the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.

The reasons of Deschamps, Charron and Rothstein JJ. were delivered by

158 DESCHAMPS J.:-- The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

159 By virtue of the Constitution, superior courts are the only courts that possess inherent jurisdiction. They are responsible both for applying the laws enacted by Parliament and the legislatures and for insuring that statutory bodies respect their legal boundaries. Parliament and the legislatures cannot totally exclude judicial oversight without overstepping the division between legislative or executive powers and judicial powers. Superior courts are, in the end, the protectors of the integrity of the rule of law and the justice system. [page265] Judicial review of administrative action is rooted in these fundamental principles and its boundaries are largely informed by the roles of the respective branches of government.

160 The judicial review of administrative action has, over the past 20 years, been viewed as involving a preliminary analysis of whether deference is owed to an administrative body based on four factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. The process of answering this preliminary question has become more complex than the determination of the substantive questions the court is called upon to resolve. In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on "the nature of the question", to use what has become familiar parlance, it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.

161 Questions before the courts have consistently been identified as either questions of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology -- "palpable and overriding error" versus "unreasonable decision" -- does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge's findings of fact: *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

162 Questions of law, by contrast, require more thorough scrutiny when deference is evaluated, [page266] and the particular context of administrative decision making can make judicial review

different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature's intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

163 However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to overstep its delegated powers. Moreover, if such a body is asked to interpret laws in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body's core expertise are interpreted correctly. This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly and consistently. Consistency of the law is of prime societal importance. Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.

164 The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.

[page267]

165 In addition, Parliament or a legislature may confer a discretionary power on an administrative body. Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its mandate.

166 In summary, in the adjudicative context, the same deference is owed in respect of questions of fact and questions of mixed fact and law on administrative review as on an appeal from a court decision. A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.

167 I would be remiss were I to disregard the difficulty inherent in any exercise of deference. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, LeBel J. explained why a distinction between the standards of patent unreasonableness and unreasonableness *simpliciter* is

untenable. I agree. The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word "deference" to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word "reasonableness" concerns the decision. However, neither the concept of reasonableness nor that of deference is particular to the field of administrative law. These concepts are also found in the context of criminal and civil appellate review of court decisions. Yet, the exercise of the judicial supervisory role in those fields has not given rise to the complexities encountered in administrative law. The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying intervention should not be more [page268] complex in the administrative law context than in the criminal and civil law contexts.

168 In the case at bar, the adjudicator was asked to adjudicate the grievance of a non-unionized employee. This meant that he had to identify the rules governing the contract. Identifying those rules is a question of law. Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, incorporates the rules of the common law, which accordingly become the starting point of the analysis. The adjudicator had to decide whether those rules had been ousted by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"), as applied, *mutatis mutandis*, to the case of a non-unionized employee (ss. 97(2.1), 100.1(2) and 100.1(5)). The common law rules relating to the dismissal of an employee differ completely from the ones provided for in the *PSLRA* that the adjudicator is regularly required to interpret. Since the common law, not the adjudicator's enabling statute, is the starting point of the analysis, and since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court does not have to defer to his decision on the basis of expertise. This leads me to conclude that the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized employee's contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness.

169 It is clear from the adjudicator's reasoning that he did not even consider the common law rules. He said:

> An employee to whom section 20 of the *Civil Service Act* and section 100.1 of the *PSLR Act* apply may be discharged for cause, with reasonable notice or with severance pay in lieu of reasonable notice. A discharge for cause may be for disciplinary or non-disciplinary reasons. [p. 5]

170 The employer's common law right to dismiss without cause is not alluded to in this key passage of the decision. Unlike a unionized employee, a non-unionized employee does not have employment security. His or her employment may be terminated without cause. The corollary of the [page269] employer's right to dismiss without cause is the employee's right to reasonable notice or to compensation in lieu of notice. The distinction between the common law rules of employment

and the statutory rules applicable to a unionized employee is therefore essential if s. 97(2.1) is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5). The adjudicator's failure to inform himself of this crucial difference led him to look for a cause, which was not relevant in the context of a dismissal without cause. In a case involving dismissal without cause, only the amount of the compensation or the length of the notice is relevant. In a case involving dismissal for cause, the employer takes the position that no compensation or notice is owed to the employee. This was not such a case. In the case at bar, the adjudicator's role was limited to evaluating the length of the notice. He erred in interpreting s. 97(2.1) in a vacuum. He overlooked the common law rules, misinterpreted s. 100.1(5) and applied s. 97(2.1) literally to the case of a non-unionized employee.

171 This case is one where, even if deference had been owed to the adjudicator, his interpretation could not have stood. The legislature could not have intended to grant employment security to non-unionized employees while providing only that the *PSLRA* was to apply *mutatis mutandis*. This right is so fundamental to an employment relationship that it could not have been granted in so indirect and obscure a manner.

172 In this case, the Court has been given both an opportunity and the responsibility to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.

[page270]

173 On the issue of natural justice, I agree with my colleagues. On the result, I agree that the appeal should be dismissed.

* * * * *

APPENDIX

Relevant Statutory Provisions

Civil Service Act, S.N.B. 1984, c. C-5.1

> **20** Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25

> **92**(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to
>
> > (*a*) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or
> >
> > (*b*) disciplinary action resulting in discharge, suspension or a financial penalty, and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, as amended

> **97**(2.1) Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.
>
> ...
>
> **100.1**(2) An employee who is not included in a bargaining unit may, in the manner, form and within such time as may be prescribed, present to the employer a [page271] grievance with respect to discharge, suspension or a financial penalty.
>
> **100.1**(3) Where an employee has presented a grievance in accordance with subsection (2) and the grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to the Board who shall, in the manner and within such time as may be prescribed, refer the grievance to an adjudicator appointed by the Board.
>
> ...

100.1(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.

...

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Solicitors:

Solicitors for the appellant: Stewart McKelvey, Fredericton.

Solicitor for the respondent: Attorney General of New Brunswick, Fredericton.

cp/e/qllls

Public Servants Disclosure Protection Tribunal Canada
Tribunal de la protection des fonctionnaires divulgateurs Canada

Decision No.: 2012-PT-01

Issued at: Ottawa, Ontario
February 8, 2012

In the Matter of an Application by the Public Sector Integrity Commissioner of Canada to the Public Servants Disclosure Protection Tribunal

BETWEEN:

CHARBEL EL-HELOU
Complainant

-and-

OFFICE OF THE PUBLIC SECTOR INTEGRITY COMMISSIONER
Commissioner

-and-

COURTS ADMINISTRATION SERVICE
Employer

-and-

DAVID POWER
Individual Respondent

-and-

ÉRIC DELAGE
Individual Respondent

DECISION ON THE TWO MOTIONS TO CONTINUE THE INTERIM CONFIDENTIALITY ORDER

[1] This decision disposes of two motions brought by the two individual respondents and three interested parties. Both motions relate to the continuation of the interim confidentiality order, issued by the Public Servants Disclosure Protection Tribunal (the Tribunal), dated June 10, 2011.

[2] The continuation of this confidentiality order is being requested in relation to the hearing of an Application launched by the Public Sector Integrity Commissioner (the Commissioner) under subsection 20.4 of the *Public Servants Disclosure Protection Act*, SC 2005, c 46 (the Act) before the Tribunal.

[3] The individual respondents are David Power and Éric Delage. The interested parties are Laurent Francoeur, Eric Cloutier and Francine Côté. The individual respondents and the interested parties are the moving parties on these motions. They filed their motions on July 15, 2011 and request that this Tribunal continue its June 10, 2011 interim confidentiality order.

[4] On August 12, 2011 the employer states that it supported the motion for the continuation of the interim confidentiality order. On the same date, the Commissioner indicates that he does not oppose the motion for a confidentiality order, subject to a number of comments.

[5] In his response, dated August 12, 2011, the complainant opposes the motion.

I. BACKGROUND

[6] The complainant filed his initial complaint with the Office of the Public Sector Integrity Commissioner (OPSIC), dated July 3, and July 9, 2009. He identified four allegations of reprisal relating to the solicitation of negative feedback about him from his subordinates; a change in his employment responsibilities through a temporary transfer; the withholding of his security certificate; and harassment. The OPSIC investigator withdrew the issue of harassment, with the complainant's consent, after the commencement of the investigation.

[7] The OPSIC determined that it would deal with the complaint. The Senior Investigator concluded that there were reasonable grounds for believing that reprisal was taken against the complainant with respect to one allegation only, relating to withholding his Top Secret security clearance. The Commissioner accepted the findings and recommendations contained in the report of the Senior Investigator, dated April 14, 2011.

[8] On May 16, 2011, the Commissioner filed an Application to the Tribunal (the Application) for a determination as to whether reprisal was taken against the complainant. In the Application, the Commissioner determined that there were sufficient grounds to proceed with only one of the three allegations that were investigated. The Application also stated that, should the Tribunal find that a reprisal was taken against the complainant, the Commissioner intends to seek an order respecting a remedy in favour of the complainant, and an order respecting disciplinary action against the person or persons alleged to have taken a reprisal.

Commissioner's request for an interim confidentiality order

[9] The request for an interim confidentiality order was initially filed by the Commissioner and not from the moving parties in this matter (i.e. the individual respondents and the interested parties). On the date that he filed the Application, the Commissioner also filed a notice of motion for an order declaring certain parts of the Application confidential, namely Appendices A and B. These appendices contain documents provided to OPSIC by the complainant with regard to the reprisal complaint, including allegations that were not filed in the Application itself. They contain allegations made against persons whose conduct was found not to be at fault by the Commissioner. In addition, they contain references to a security investigation conducted by the employer with regard to threats made against a member of the judiciary. The motion for an order of confidentiality from the Commissioner requested that the two appendices of the Application be filed in a sealed envelope and marked as confidential evidence.

[10] On June 1, 2011, Laurent Francoeur, Francine Côté and Eric Cloutier brought a notice of motion for interested party status with respect to the Commissioner's motion for an order of confidentiality. These three individuals were mentioned in the appendices and were not found to be at fault in the Application filed by the Commissioner.

[11] On June 2, 2011, the individual respondents responded to the Commissioner's motion and requested a reformulation of the third paragraph of the proposed order. (That paragraph stated that the order would not affect any right of the complainant, by virtue of his having been the original author of those documents.)

[12] On June 6, 2011, the complainant responded to the Commissioner's motion for an order of confidentiality, opposing it. He disputed the need for a blanket confidentiality order. He did not object to an order that would ensure that the name of the member of the judiciary be kept confidential and stated that the most effective way to accomplish this would be through redaction in the documents already filed in the proceedings and in any other documents. He submitted however, that the request for a confidentiality order is too broad.

Commissioner's request for a publication ban

[13] On June 6, 2011, the Commissioner filed his statement of particulars and a second notice of motion, this time for a publication ban on any information that could identify both the member of the judiciary and the person or persons suspected of making threats or alleged to have made threats against the member of the judiciary. The Commissioner clarified that the motion for a publication ban is an additional request. It is not a replacement for the earlier motion for a confidentiality order.

Tribunal orders prior to this motion

[14] On June 10, 2011, the Tribunal granted interested party status to Francine Côté, Laurent Francoeur and Eric Cloutier with respect to the motion for an interim confidentiality order. The Tribunal also granted an interim publication ban on any information that could identify the member of the judiciary and the person or persons suspected of making threats or alleged to have made threats.

[15] On June 10, 2011, the Tribunal also issued the following interim confidentiality order. As detailed in the section below, the moving parties request a continuation of the terms of this particular order. It reads as follows:

1) The documents marked as Appendices A and B to the Commissioner's Notice of Application to the Tribunal, dated April 18, 2011 and filed with the Tribunal on May 17, 2011, shall be kept sealed and separate from the public records and not be disclosed to anyone other than the Members and Staff of the Tribunal and the parties and their counsel, until the Commissioner's motion can be disposed of by the Tribunal or until such time as the Tribunal orders otherwise; and

2) The Tribunal may rescind, amend or vary this interim order at any time for cause upon the initiative of the Tribunal or on motion.

Moving parties request for the continuation of the interim confidentiality order

[16] On July 4, 2011, the OPSIC notified the parties to this matter of its intention to withdraw the motion for a confidentiality order at the hearing pertaining to jurisdiction, which was to be held on August 31, 2011. The individual respondents subsequently filed a notice of motion for the continuation of the terms of that order, dated June 10, 2011. Mr. Francoeur, Ms. Côté and Mr. Cloutier, the interested parties in relation to the Commissioner's motion for an interim confidentiality order, also filed a motion requesting the continuation of the terms of the order.

[17] The Commissioner stated that it did not oppose the motion, though he made some observations with regard to it. The employer stated that it consented to the motion in respect of

the continuation of the interim confidentiality order. It also stated that it consented to the Commissioner's motion for the continuation of the publication ban.

[18] The complainant opposed this motion for the continuation of the interim confidentiality order. He stated that the moving parties failed to provide sufficient evidence to establish its necessity and could not to justify limiting the open court principle, protected by the *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982, c11* (the *Charter*).

Tribunal's issuance of a publication ban and order for interested parties' status

[19] On August 23, 2011, the Tribunal also issued an order for the status of interested parties in relation to the motion for the continuation of the interim confidentiality order to Laurent Francoeur, Eric Cloutier and Francine Côté.

[20] While not part of the present motion, it is important to remember that on August 23, 2011 the Tribunal issued a publication ban, which is still in effect. That ban pertained to materials relating to a member of the judiciary, and a person suspected of making threats against this person.

II. ARGUMENTS OF THE PARTIES

[21] The moving parties refer to Rule 5(c) of the *Interim Rules of the Tribunal*, now Rule 5(c) of the *Public Servants Disclosure Protection Tribunal Rules of Procedure,* SOR/2011-170 (the Tribunal Rules). That rule states that the original complaint must be submitted with the Application.

[22] They state that the complaint refers to alleged wrongdoings that are not within the OPSIC's authority to investigate; to numerous allegations of reprisal by various individuals; and to extensive documentation that the complainant believed was relevant to his complaint. They note that only one of the allegations of reprisal was referred to the Tribunal.

[23] They submit that privacy and confidentiality obligations apply to this situation because Appendices A and B raise questions as to the conduct of the interested parties and the two individual respondents. In addition, they submit that the information in the complaint is personal information because it is identifiable information that is recorded in any form, including the views or opinions of another individual about the identifiable individual. They argue therefore, that the Tribunal has an obligation to comply with legislative requirements pertaining to personal information and that a confidentiality order is necessary. They state that, as government institutions, both the Registry of the Public Servants Disclosure Protection Tribunal and the OPSIC are subject to the *Privacy Act*, RSC, 1985, c P-21 (*Privacy Act*).

[24] They refer to section 8 of the *Privacy Act*, which provides that personal information under the control of a government institution shall not be disclosed by that institution without the consent of the individual to whom the personal information relates, subject to enumerated exceptions. They argue that the enumerated exceptions under the *Privacy Act* do not apply. They submit, for example, that disclosure by OPSIC or by the Tribunal of any personal information contained in the complaint that relates only to unfounded allegations cannot be considered disclosure for the purposes for which the information was obtained. Referring to subparagraph

8(2) (m) of the *Privacy Act*, they also argue that the public interest in disclosure of the personal information contained in Appendices A and B does not outweigh the invasion of privacy that would result from such disclosure.

[25] The moving parties state that the personal information in question is not relevant and would be of limited value in the public interest in open court. They also refer to the fact that they are career public servants, and that the disclosure of the complainant's views of them may have indeterminable negative consequences on their reputations.

[26] Alternatively, they submit that even if the *Privacy Act* does not require the continuation of the interim confidentiality order, well-established reasonable limits to the open court principle apply and the salutary effects of a confidentiality order outweigh its deleterious effects (*Dagenais v Canadian Broadcasting Corp*, [1994] 2 SCR 835; *R v Mentuck* [2001] 3 SCR 442; *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522).

[27] The moving parties state that there is a serious risk to an important interest because there is the potential for damage to the personal and professional reputations of the interested parties. They state that the Commissioner's obligation under the Tribunal Rules, to provide a copy of the complaint, must be read in the context of the commitment to maintaining confidentiality to the extent possible for all persons involved in the disclosure process.

[28] They argue that confidentiality is a key component of the Act. They refer to subsection 22(e) of the Act, which requires the Commissioner to protect the identity of persons involved in

the disclosure process, including that of persons making decisions, witnesses and persons alleged to be responsible for wrongdoing. They also highlight section 44, which requires that the Commissioner and every person acting on his behalf, not disclose any information that comes to their knowledge in the performance of their duties under the Act.

[29] They submit that the order in question is narrow, with no reasonable alternatives. They state for example, that expunging the content at issue would be impractical and would not allow for a readable and redacted version of the document in question. They state that the order sought pertains only to allegations that were submitted by the complainant but which were not found to be valid by the Commissioner and which are irrelevant to the proceedings before the Tribunal. In support of the motion, the moving parties include several documents in the form of affidavits.

[30] The complainant opposes the motion. Although he takes the position that he would not object, in principle, to steps to protect certain confidential information, he argues that these steps must be shown to be necessary and not to outweigh the negative effect of such measures. He submits that in the present case the interested parties have failed to provide sufficient evidence to justify the order.

[31] He asserts that the order represents a sweeping incursion upon the interest of both the public and the parties and that this cannot outweigh the significant public interest in open proceedings under the Act. He asserts that the parties' reliance on concerns with respect to their personal and professional reputations and future career opportunities are speculative.

[32] The complainant also states that the Act was passed for the express purpose of fostering transparency and furthering the public interest in maintaining and enhancing public confidence in the integrity of the public service. He refers to the preamble, which states that the Act is intended to protect the public interest and play a central role in the protection and promotion of Canadian parliamentary democracy, in encouraging employees to disclose wrongdoing and in discouraging processes that might otherwise be employed to cover up wrongdoing or prevent disclosure.

[33] The complainant disputes a blanket prohibition of disclosure of information as "a rare and blunt instrument", to be used only in the clearest of cases. He refers to the open court principle and the test applied to determine whether to limit this fundamental aspect of the justice system (*Mentuck*; *Sierra Club*; *Singer v Canada (Attorney General)*, 2011 FCA 3 (*Singer*); and *Named Person v Vancouver Sun*, [2007] 3 SCR 253 (*Named Person*). He argues that the courts have repeatedly held that the confidentiality of proceedings will not be ordered based on bald assertions of the need for such protection. Parties requesting an order for confidentiality bear a heavy onus and must present evidence demonstrating a clear need for such an order (*Rivard Instruments Inc v Ideal Instruments Inc*, 2006 FC 1338 at paragraph 2 (*Rivard*); *Canada (Attorney General) v Almalki*, 2010 FC 733 at paragraph 17 (*Almalki*). The complainant also refers to *John Doe v Canada (Minister of Justice)* 2003 FCT 117 (*John Doe 2003*) and *John Doe v Canada (Minister of Justice)*, 2008 FC 916 (*John Doe 2008*) in support of his position that the evidence to support a confidentiality order is insufficient.

[34] He disputes the argument that public disclosure could compromise an investigation and that there is a great likelihood that the publication of the complainant's allegations would cause

damage to personal and professional reputations. He also refers to *Mentuck*, where the Supreme Court of Canada emphasized the high societal value placed on the presumption that courts should be open; that their proceedings should be uncensored; and that the judge must have a convincing basis in evidence for issuing a ban.

[35] He also notes that in *Mentuck*, the Court was faced with an argument that specific aspects of an undercover police operation might be disclosed in the trial process. In that case, far more serious than the present one, in the complainant's view, the ban was not granted. In *Mentuck*, the Court also noted that the Crown's affidavit evidence was only able to positively identify one example of a negative impact resulting from a publication ban.

[36] The complainant reiterates that the Tribunal is intended to address incidents of reprisal where persons disclose wrongdoing in the federal public service. The issues raised by a case under the Act are of the highest public importance. He argues that not only must the outcome be fair and substantively proper, but that it must also be seen to be fair and proper.

[37] He emphasizes that the two documents which the interested parties seek to maintain as confidential comprise the complainant's actual complaint of reprisal. He asserts that these documents are akin to a statement of claim or a notice of application or a similar originating process or pleading which sets out the essence of the case. Referring to *Mentuck*, which arose in the context of a criminal proceeding, he submits that the public interest in the nature and outcome of these proceedings is no different.

[38] He states that the type of order sought is highly unusual and extraordinary, and points to the fact that individuals who are the subject of allegations are routinely referred to by name in many proceedings, even where those allegations have been dismissed on a final basis. In the complainant's view, it is an error to state that allegations submitted by the complainant, but which were not found to be substantiated by the Commissioner, are irrelevant to the proceedings before the Tribunal. Evidence of context, he argues, may be relevant and admissible. In addition, he submits that the position of the moving party is premature.

[39] The complainant submits that the *Privacy Act* does not compel the Tribunal to abandon its own statutory purpose of fostering transparency for the purposes of the public interest. He states that exceptions under the *Privacy Act* apply, including subparagraph 8(2)(a) (consistent use exception), subparagraph 8(2)(b) (in accordance with an Act of Regulation authorizing its disclosure), and subparagraph 8(2)(m) (public interest exception).

[40] The Commissioner does not oppose the motion brought by the interested parties, but makes some qualified statements as to his support. He notes that he filed a motion for a similar order on May 17, 2011 and that interim order was granted by the Tribunal on June 10, 2011. The Commissioner states that his primary concern was with prejudicial information being made public without a proper evidentiary and contextual basis. In his response the Commissioner states that his Statement of Particulars and disclosure of evidence, including the investigation report, provide a more comprehensive context to the public and the information is less likely to harm the individuals concerned.

[41] He also notes that he advised the Tribunal and the parties that he would be withdrawing his motion on July 4, 2011. He affirms the importance of public and media access to the Tribunal. Referring to sections 22(e) and 44 of the Act, he observes that the filing of information that would otherwise be confidential is permitted for the purpose of making an Application to the Tribunal. However, he states that he generally agrees with the formulation of the *Dagenais/Mentuck* test as stated in the Notice of Motion in support of the confidentiality order.

III. ANALYSIS

Overview

[42] In the present motion, the individual respondents and the interested parties seek a continuation of the terms of the interim confidentiality order, issued by this Tribunal. They argue that the *Privacy Act* applies to limit the disclosure of material in Appendices A and B. In the alternative, they submit that this Tribunal ought to exercise its discretion, in accordance with the principles enunciated in *Dagenais*, *Mentuck* and *Sierra Club*, to limit the open court principle and to allow the terms of the order to continue.

[43] Both the Commissioner and the employer indicate their support of the motions brought by the moving parties. The complainant opposes them. He submits that the open court principle applies, with only limited exceptions. He refers to the purpose of the Act to support his position that there is insufficient evidence upon which to limit the principle in this case. He also submits that the basis upon which the order is requested is speculative.

[44] The open court principle is considered a cornerstone of a democratic society.

Nonetheless, it is not absolute. Protective orders that limit openness can come in a variety of forms: confidentiality orders, publication bans, orders for redacted or depersonalized versions of a pleading or other document supporting a legal proceeding, a requirement that a document be "for counsel's eyes only", an order requiring that a proceeding be held *in camera*, and informant privilege.

[45] In this decision, the Tribunal is requested to continue an interim confidentiality order, which would also have the effect of limiting the openness of its proceedings. Important interests are at the heart of this question. In order to provide a context for why these motions must be denied, this Tribunal will review the basic precepts of the open court principle in relation to judicial and quasi-judicial proceedings, in relation to sensitivities with personal information in the public domain, and in relation to the nature of this Act and the mandate of this Tribunal in disclosure and reprisal complaints.

The open court principle

[46] The open court principle has been repeatedly recognized in Canadian courts. Long before the passage of the *Charter*, the Supreme Court of Canada conveyed the importance of openness in court proceedings. Covertness in proceedings is an exception, and to be exercised with care. Justice must not only be done, but also must be seen to be done. Hence, there is a presumption that court proceedings should be a matter of public record. (See for example *Dagenais*; *Mentuck*; *Sierra Club*; *Named Person*; and *Almalki.* See also *Nova Scotia (Attorney General) v MacIntyre,* [1982] 1 SCR 175, which is referred to in *Almalki*)

[47] The courts do not operate in secret, as Justice Rothstein, as he then was, stated in *Sulco Industry Ltd v Jim Scharf Holdings Ltd* (1997), 69 CPR (3d) 71 at page 73 (*Sulco Industry*). The courts must exercise restraint in granting orders that limit information before the court, although there will be exceptions (involving, for example, trade secrets and other types of confidential information that may require a sealing order) (See *John Doe 2003* at paragraph 3, which refers to *Sulco Industry*). Where the confidentiality of proceedings is ordered without justification, the integrity of judicial proceedings can be compromised, essentially throwing the court back into the times of the notorious Star Chamber Court (See *John Doe 2003* at paragraphs 2 and 3).

[48] One of the critical objectives of the open court principle is to foster the pursuit of truth. An open examination of witnesses' oral testimony is "more conducive to the clearing up of truth than the private and secret examination taken down in writing before an officer, or his clerk." (*Blackstone Commentaries on the Laws of England* (1768) cited in *Named Person* at paragraph 82). As noted by Wigmore, (*Wigmore on Evidence*, vol. 6 (Chadbourn rev. 1976), § 1834, at pp. 435-36 and cited in *Named Person*, at paragraph 82), the operation of the open court principle improves the quality of testimony generally. It produces "in the witness' mind a disinclination to falsify; first by stimulating the instinctive responsibility to public opinion, symbolized in the audience (…)." It also objectively "secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information".

[49] Evidence, including testimony of named witnesses, is important in the proceedings, as are documents that support the testimony. Generally, witnesses and parties are identified in judicial

and quasi-judicial proceedings. This conveys the solemnity and significance of the adjudicative process in determining the truth and contributes to the transparency and accountability of proceedings.

The application of the open court principle to pleadings

[50] The open court principle applies not only to judicial proceedings, but to the publication of pleadings which were filed in those proceedings. In *Singer*, the Federal Court of Appeal reconfirmed the application of the principle in relation to court pleadings and evidence. Here, the Federal Court of Appeal addressed a confidentiality order that had an unnecessary and overreaching effect on the proceedings. The appellant argued that her social insurance number, which had been reproduced in affidavit material, was not relevant to the issues raised in the proceedings. The Federal Court directed that the affidavit materials of the respondent be sealed. The Federal Court of Appeal overturned this order because it was broader than necessary. It observed that the open court principle is a basic tenet of the legal system and that it applies to hearings, decisions, court pleadings and evidence (at paragraph 6). It found that, in this instance, alternative measures were available to achieve the same result.

[51] These principles, most recently enunciated in *Singer*, are important in the present motion. In this proceeding, the Application, the statement of particulars, and supporting documentation can be considered the foundational material before this Tribunal. As such, they can be considered in the same light as pleadings. They are therefore, potentially subject to the open court principle.

The open court principle and the media

[52] The essential role that is played by the media, as the agent of the public in adjudicative proceedings, underlies the open court principle. The media is the agent of the public who cannot attend the proceedings (*Mentuck* at paragraph 52, and see *Named Person* at paragraphs 81-85, where Justice Lebel dissents in part but conveys undisputed aspects of the open court principle). The freedom of the press to report on judicial proceedings is a core value. The constitutional nature of the open court principle is also critical to keep in mind. Jurisprudence has confirmed that the open court principle is protected by freedom of expression under subsection 2(b) the *Charter*.

The Charter and the Dagenais/Mentuck test

[53] The underpinnings of the open court principle stayed intact after the passage of the *Charter*, grounded in subsection 2(b) and the right to freedom of expression. In most instances, the decision-maker's determination as to whether the open court principle should be limited is a matter of discretion. There are only a few exceptions to this. For example, an informer's privilege is absolutely protected, and is not subject to the application of a discretionary test by the courts (*Named Person*). There may be legislated exceptions as well. Most often however, any limitation upon openness is subject to the court's discretion and is not to be applied lightly.

[54] This general approach, where the decision-maker must apply discretion, also applies to the present motion. In cases that have come after the *Charter*, the test used to come to that determination is often referred to as the *Dagenais/Mentuck* test. It is an amalgamation of two

Supreme Court of Canada decisions as to how a decision-maker should exercise his or her discretion to limit the scope of the open court. *Dagenais,* issued by the Court in 1994, addressed a publication ban requested by four accused persons who had asked for an order to prohibit the broadcast of a television programme dealing with physical and sexual abuse of young boys. The Supreme Court of Canada discussed the principles of freedom of expression and the right to a fair trial under the *Charter.*

[55] The Court confirmed that it is the individual claiming the restriction on the open court principle who has the burden of justifying the limitation on freedom of expression. It also developed a test for determining whether there was justification for doing so, which reflected the *Charter* and the substance of the "Oakes test" (from *R v Oakes*, [1986] 1 SCR 103 (*Oakes*)).

[56] In 2001, the Supreme Court rendered its decision in *Mentuck.* Here, the Court offered added flexibility to the test articulated in *Dagenais.* In this case, the accused was charged with second-degree murder. The Crown moved for a publication ban to protect the identity of officers and to protect some investigatory methods that had been used. The Court affirmed the test articulated in *Dagenais*, but changed some of its wording to ensure that it went beyond situations relating to the right of an accused so that it also applied to other situations concerning a fair trial.

[57] *MacIntyre, Dagenais* and *Mentuck* address limitations on the open court principle in the context of criminal proceedings. The Supreme Court of Canada has also endorsed this principle in the context of civil proceedings. In *Sierra Club,* the Court reversed the decision of the Federal

Court and the Federal Court of Appeal, which denied a confidentiality order in relation to summaries of commercial documents.

[58] Given that the present motion is being considered in the civil context, and not the criminal context, the *Dagenais/Mentuck* test, as it was adapted in *Sierra Club* is spelled out below (*Sierra Club* at paragraph 53). A confidentiality order should be granted when:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

The application of the open court principle to this Tribunal

[59] It is clear from the above discussion that the open court principle is broad in scope. In addition, the principle has long standing significance, rooted in the gravity of judicial proceedings. This Tribunal finds that the purpose of this principle may apply equally in the administrative tribunal context, where the tribunal is engaged in quasi-judicial functions. The fact that the open court principle is recognized under the *Charter* only strengthens its application to the quasi-judicial functions of administrative tribunals. Needless to say, these constitutional values transcend both judicial and quasi-judicial proceedings.

[60] To determine whether or not the open court principle applies to an administrative agency, it is important to adopt a functional approach. A functional approach takes into consideration

factors such as the following: the nature of the work of the tribunal, the mandate of the tribunal and the values underlining it, its adherence to the duty of fairness, whether the agency in question must weigh evidence to come to a determination, the degree to which the tribunal is otherwise engaged in quasi-judicial functions, whether or not the proceeding is adversarial in nature, and to what degree the rights and obligations of parties are at stake. Any wording of its statute that would limit that principle must also be considered, keeping in mind that the open court principle is constitutionally protected.

[61] With these factors considered, it is clear that this Tribunal must apply the open court principle. It must weigh evidence. It performs a quasi-judicial function much like that of a court of law. It adheres to the duty of fairness, and its enabling statute requires it to conduct its proceedings in accordance with the principles of natural justice (See subsection 21(1) of the Act). The Tribunal is adjudicative in nature and is an impartial decision-maker. It hears the contradictory positions of the parties and witnesses, makes findings of fact and assesses credibility. The fact that its decision-makers are federally appointed judges is not determinative, but it is significant in the context of the Act and its values. The Act creates this Tribunal as a new and specialized body. The Tribunal makes decisions that affect the rights and duties of the parties before it (See also *El-Helou v Courts Administration Service*, 2011-PT-01 at paragraphs 85-89). There is no requirement to hold a proceeding *in camera*. Conversely, the inclusion of a provision in the Act, that allows the Tribunal to determine that proceedings may be held *in camera*, makes it clear that the proceedings are presumptively open to the public (See section 21.3 of the Act.)

[62] A framework of procedural rules is in place to ensure fairness, transparency and objectivity in the decision-making process. Subsection 21(2) of the Act permits the Chairperson of the Tribunal to make rules of procedure governing practice and procedure. These include, but are not limited to, the summoning of witnesses, the production and service of documents, and discovery proceedings. The Tribunal Rules also allow a party to make a motion for a confidentiality order, as an exception to the presumptively open proceedings held by the Tribunal.

[63] The Tribunal also finds that the wording of the Act does not restrict the application of the open court principle to its proceedings. It does not support the argument advanced by the moving parties that suggests that subsection 22(e) and section 44 of the Act endorse confidentiality as a key component of the Act. Subsection 22(e) pertains to specific considerations relating to the investigation of the complaint only. Furthermore, the wording of that provision is qualified by "any other Act of Parliament" and "in accordance with the law". It states that the duties of the Commissioner include:

subject to any other Act of Parliament, **protect, to the extent possible in accordance with the law**, the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoing;	**sous réserve de toute autre loi fédérale applicable, veiller, dans toute la mesure du possible et en conformité avec les règles de droit en vigueur**, à ce que l'identité des personnes mises en cause par une divulgation ou une enquête soit protégée, notamment celle du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;

(Emphasis added)

[64] Section 44 of the Act is also qualified in its wording. It requires that the Commissioner and every person acting on behalf of or under the direction of the Commissioner not disclose any information that comes to their knowledge in the performance of their duties under the Act. However, this requirement does not apply where disclosure is required by law or permitted by the Act:

Unless the disclosure is required by law or permitted by this Act, the Commissioner and every person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties under this Act.	**Sauf si la communication est faite en exécution d'une obligation légale ou est autorisée par la présente loi,** le commissaire et les personnes agissant en son nom ou sous son autorité sont tenus au secret en ce qui concerne les renseignements dont ils prennent connaissance dans l'exercice des attributions que leur confère la présente loi.

(Emphasis added)

[65] But beyond these observations, the Tribunal notes that it must interpret the Act in light of its entire context, in the grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the legislation and the intention of Parliament (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at 1, 257-259, 264-269). The preamble highlights the importance of the federal public administration as part of the essential framework of Canadian parliamentary democracy. It also highlights the balance between the duty of loyalty owed by public servants in the course of their employment and the right to

freedom of expression guaranteed by the *Charter*. The purpose of the Act is to ensure effective procedures for the disclosure of wrongdoing and transparent processes for doing so.

[66] It could be said that the Act is designed in such a way that the public is meant to be the permanent observer or standing jury of the proceedings of the Tribunal.

The Privacy Act exceptions and the open court principle

[67] The moving parties argue that, due to the application of the *Privacy Act*, the confidentiality order should be granted. That legislation provides that personal information under the control of government institutions shall not be disclosed by that institution without the consent of the individual to whom the personal information relates.

[68] The Tribunal finds that the *Privacy Act* cannot operate to support the continuation of a confidentiality order. Exceptions under the *Privacy Act* apply in the present situation. Subparagraph 8(2)(a) allows the disclosure of personal information without consent where it is compiled or obtained by an institution for a purpose consistent with its use. The Tribunal is of the view that this information was obtained by the Commissioner pursuant to his mandate to investigate complaints under the Act. The information was referred to the Tribunal, pursuant to the Act. Therefore, this constitutes a disclosure for the purpose for which the information was obtained and, is most certainly a use consistent with that purpose.

[69] Subparagraph 8(2)(b) states that personal information may be disclosed “for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its

disclosure." The Tribunal notes that Rule 5(c) of the Tribunal Rules expressly provides that an Application made by the Commissioner under subsection 20.4(1) of the Act must contain a copy of the complaint and a summary of its content. This forms the basis upon which the Tribunal determines whether or not reprisal has been taken against the complainant due to the disclosure of wrongdoing within the meaning of the Act.

[70] The breadth and scope of the Act requires the Tribunal to conduct a proceeding that is transparent in nature. Similar to other quasi-judicial tribunals, this Tribunal receives personal information in the context of a tribunal proceeding. That information may include the Application, the statement of particulars, supporting documentary evidence, and testimony provided to it. That information fulfills a fundamental purpose: to allow the Tribunal to determine whether or not reprisal has taken place.

[71] In addition, the Tribunal is authorized by law to make this determination and it is master of its own proceedings. Therefore, the information that the Tribunal receives falls under subparagraph 8(2)(a); and subparagraph 8(2)(b) of the *Privacy Act*, which relate to a use consistent with that purpose (subparagraph 8(2)(a)); and a use of personal information for a purpose in accordance with any Act of Parliament (subparagraph 8(2)(b)).

[72] In addition, subparagraph 8(2)(m) allows the disclosure of material where the public interest in disclosure outweighs an invasion of privacy that could result from it. Disclosure is also permissible under this exception if it would clearly benefit the individual to whom it relates. With regard to this specific exception, the Tribunal cannot support the moving parties' argument

that the public interest in disclosure does not, in the present case, outweigh any invasion of privacy that could result from the disclosure. Furthermore, the Act promotes the public interest through presumptively open proceedings before the Tribunal, amongst many other avenues and there is insufficient evidence to come to any other determination, but that the public interest in transparency should prevail.

[73] The moving parties take the position that the personal information in question is not relevant and would be of limited value in open court. They submit that many of the issues raised in the complaint were found not to be appropriately before the Commission; and that certain allegations were not substantiated by the Commission for the purposes of referral to this Tribunal. On this basis, they submit that there is no basis upon which to apply the exceptions under the *Privacy Act.*

[74] The Tribunal does not agree with this argument. In this regard, the complainant's response to this point is also compelling. Individuals who are the subject of allegations are routinely referred to by name in many proceedings, even when the allegations are later dismissed.

[75] The moving parties' argument is also premature. Although it is not within the Tribunal's jurisdiction to address questions as to whether or not reprisal was taken in the context of certain components of the complaint, this does not mean that the Tribunal cannot address this information in relation to evidence. Evidence pertaining to the allegations that the Commissioner dismissed may be relevant to the proceedings related to the allegation that actually warranted the

Application before this Tribunal. In addition, the facts relating to the allegations that were dismissed might be relevant. The evidence related to the initial complaint and all of its allegations may be considered at the hearing (See also *El Helou v Courts Administration Service*, 2011-PT-01 at paragraph 97).

[76] The Tribunal does not dispute the important purpose of the *Privacy Act*. However, its purpose must be balanced with other values. This balancing is even more compelling because the open court principle is constitutionally protected. It should also be noted that tribunals, such as this tribunal, do not actively seek out and "obtain" information. Tribunals receive information from the parties in the context of a dispute that will be adjudicated. This is quite distinct from other parts of the executive who "obtain" and actively gather information for other purposes.

[77] As the complainant noted in his response to this motion, the *Privacy Act* does not "compel the Tribunal to abandon its own statutory purpose". This Tribunal agrees. Nor can the *Privacy Act* override the constitutional principles that are interwoven into the open court principle. Due to the open court principle, personal information that this Tribunal manages, and which is received as part of its quasi-judicial functions, is publicly available. Subsection 69(2) of the *Privacy Act* provides an important exception to its application in this regard. Information that is available to the public is not subject to sections 7 and 8 of the *Privacy Act.* Those provisions prohibit the use or disclosure of personal information (except in limited circumstances). Under subsection 69(2), sections 7 and 8 do not apply to personal information that is publicly available. Therefore, if this constitutionally protected principle applies to an administrative tribunal-and

this is the case here – personal information that is properly before it in its quasi-judicial functions is not subject to the *Privacy Act.*

Summary

[78] The open court principle is a cornerstone of the Canadian legal system. It applies not only to the hearing itself, but may also apply to all of the proceedings prior to the hearing. It applies to pleadings, and in this proceeding, to the Application, the statement of particulars and supporting documents that are filed in accordance with this Act and the Tribunal Rules.

[79] This principle can be limited in a few ways. For example, informer's privilege is unqualified and does not allow the court to exercise its discretion. It may also be limited by statute. Generally however, the court may exercise its discretion to limit the open court principle by applying its discretion according to the test in *Dagenais/Mentuck.* Therefore, the decision-maker would exercise his or her discretion, in its consideration of a variety of protective orders that limit access to information in the context of a proceeding. The open court principle applies to this Tribunal and it will exercise its discretion to determine whether or not the principle should be limited.

[80] The *Privacy Act* cannot have the effect of limiting the scope of the open court principle in these proceedings. Exceptions under the *Privacy Act* apply: the exception pertaining to consistent use (subparagraph 8(2)(a)); the exception pertaining to a purpose in accordance with an Act of Parliament or regulation made thereunder (subparagraph 8(2)(b)); and the exception pertaining to public interest (subparagraph 8(2)(m)). Due to the *Charter* protected open court principle and its

application to the Tribunal, personal information that is obtained in the context of this Tribunal's quasi-judicial functions is otherwise available to the public. Therefore, the broad exception under subsection 69(2) of the *Privacy Act* applies as well.

IV. APPLICATION TO THE REQUEST FOR THE CONTINUATION OF THE CONFIDENTIALITY ORDER

[81] This Tribunal must now determine whether or not Appendices A and B ought to be limited through the application of a confidentiality order. As discussed above, for several reasons, the prohibitions under the *Privacy Act* do not allow the imposition of a confidentiality order. The open court principle also renders the information before this Tribunal available to the public. The question remains as to whether or not these two Annexes can be excluded or limited by virtue of the application of the test articulated in *Dagenais*; *Mentuck* and *Sierra Club.*

[82] This Tribunal adapts these tests from the jurisprudence for the purposes of its proceedings in the following manner. A confidentiality order will be granted when:

> The order is necessary to prevent a serious risk to an important interest sought to be protected and alternative measures will not prevent this risk; and
>
> The salutary (beneficial) effect of the order outweighs it deleterious (harmful) effects on the right to freedom of expression and the public's interest in open and accessible tribunal proceedings.

[83] The moving parties argue that there is a serious risk in disclosing this information because there is the potential for damage to the personal and professional reputations of the interested parties. They also argue that the order in question is narrow and that there are no

reasonable alternatives. They note for example, that expunging the content at issue would be impractical and would not allow for a readable and redacted version of the document in question.

[84] They also note that some of the allegations in the complaint were not the subject of an investigation by the Commissioner and would not properly be the subject of such an investigation. They refer to the fact that not all the allegations form part of the Application to the Tribunal. Finally, they state that if the information in the Annexes was made public, then there is a great likelihood that this would cause damage to their personal and professional reputations. If they are not kept confidential, they will limit future career opportunities.

[85] In support of the motion, they submit several supporting affidavits, including an affidavit filed by the OPSIC investigator, dated May 13, 2011. A large number of her observations pertain to the security investigation conducted by the Courts Administration Service, relating to the safety and security of a member of the judiciary of one of its courts of law.

[86] As noted earlier in these reasons, there is a publication ban in effect that relates to the member of the judiciary in question and matters pertaining to the investigation.

[87] The contents of the other affidavits have a number of similarities. They refer to the fact that some of the allegations in the complaint were not the subject of an investigation by the Commissioner and would not properly be the subject of such an investigation. They also note that not all the allegations were found to constitute reprisal, and therefore, do not form part of the Application to the Tribunal. They state that they believe that if the allegations relating to them

were made public, there is a great likelihood that they would cause damage to reputations, both personally and professionally; and that if these contents are not kept confidential, this will limit future career opportunities.

[88] The Tribunal cannot allow a confidentiality order on the basis of these submissions and evidence. The submissions and the supporting material that were provided are mere assertions, and there is insufficient evidence to satisfy the Tribunal that there is a serious risk to the respondents and to the interested parties in the disclosure of the information in the complaint. The fact that the material contains sensitive, damaging or embarrassing material does not constitute an exception that requires a confidentiality order or sealing order. In addition, these considerations must be weighed with the integrity of the legal process (*John Doe 2003*; *John Doe 2008*; and *Rivard*).

[89] As noted earlier in these reasons, the fact that an allegation was found by the Commissioner to not constitute reprisal does not, in and of itself, establish grounds for the limitation of the open court principle. In addition, in this case, the affidavit does not provide a basis in evidence as to the great likelihood that the allegations, if made public, would cause damage to the reputation of the parties.

[90] It is also important to note that those documents filed as pleadings do not yet constitute evidence of the contents. Furthermore, the interested parties and the individual respondents are already named, either in the proceedings as a whole, or in the motions.

[91] The requirement of the first branch of the discretionary test to determine whether or not the open court principle ought to be limited has not been met. Therefore, it is unnecessary for this Tribunal to proceed to the second branch of the test. However, even if it were to do so, there is no evidence before it to demonstrate how an order that would limit the open court principle in this instance would outweigh the harmful effects on freedom of expression and the public's interest in open and accessible tribunal proceedings.

[92] The Tribunal has therefore determined that it will rescind the interim confidentiality order, effective the date of this decision.

V. OTHER MATTERS PERTAINING TO THE PUBLICATION BAN

[93] The Tribunal reminds the parties that the publication ban, issued by this Tribunal on August 23, 2011, remains in effect. The ban pertains to any information contained in the documents and records before the Tribunal or heard in these proceedings that could identify both the member of the judiciary and the person or persons suspected of making threats or alleged to have made threats against the member of the judiciary named in the confidential notice of motion and in documents filed with the Tribunal. The order remains in effect during the complete proceedings of the Tribunal and after the Tribunal has made a final decision in regard of the complaint, or until such time as the Tribunal orders otherwise.

[94] The Tribunal rescinds its interim confidentiality order, dated June 10, 2011, effective the date of this decision.

THE TRIBUNAL MAKES THE FOLLOWING DECISION:

1. The motions of the two individual respondents and of the three interested parties for the continuation of the interim confidentiality order are denied;
2. The interim confidentiality order, dated June 10, 2011, is rescinded, effective the date of this decision; and
3. The publication ban, dated August 23, 2011, remains in effect.

"Luc Martineau"
Chairperson

468

PUBLIC SERVANTS DISCLOSURE PROTECTION TRIBUNAL
PARTIES OF RECORD

DECISION NUMBER:	2012-PT-01
TRIBUNAL FILE:	T-2011-01
STYLE OF CAUSE:	Charbel El-Helou v Courts Administration Service and David Power and Éric Delage
BEFORE:	The Honourable Mr. Justice Luc Martineau

DECISION OF THE TRIBUNAL DATED: February 8, 2012

DECISION RENDERED ON THE BASIS OF THE WRITTEN ARGUMENTS AND RECORDS FILED

APPEARANCES:

Mr. Brian Radford Senior Counsel	For the Office of the Public Sector Integrity Commissioner
Mr. David Yazbeck Raven, Cameron, Ballantyne and Yazbeck LLP/s.r.l.	For the Complainant
Mr. Ronald Caza Heenan Blaikie LLP/s.r.l.	For the Employer
Mr. Stephen Bird Bird Richard LLP/s.r.l.	For the Individual Respondents and the Interested Parties

Case Name:

Germain v. Saskatchewan (Automobile Injury Appeal Commission)

Between
Elaine Germain, Plaintiff, and
Automobile Injury Appeal Commission, and Anne Phillips as Chairman and Beverly Cleveland and Joy Dobko, as Members, Defendants

[2009] S.J. No. 169

2009 SKQB 106

189 C.R.R. (2d) 1

71 C.C.L.I. (4th) 185

82 M.V.R. (5th) 234

333 Sask.R. 116

2009 CarswellSask 176

176 A.C.W.S. (3d) 306

[2009] 7 W.W.R. 509

Docket: Q.B.G. No. 148/2006

Saskatchewan Court of Queen's Bench
Judicial Centre of Regina

R.K. Ottenbreit J.

March 18, 2009.

(111 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Life, liberty and security of person -- Right not to be depicted thereof -- Principles of fundamental justice --

Protection against unreasonable search and seizure -- Application by plaintiff for injunctive and declaratory relief to prevent publication by Automobile Injury Appeal Commission of applicant's appeal before Commission dismissed -- Applicant embarrassed that her medical, income and personal information would be disclosed -- Commission's new Web Posting Policy included provisions for removal of names and other unnecessary personal information -- Charter did not prevent Commission from publishing its decision -- Commissions did not seize material from applicant and s. 8 thus not violated -- Stress associated with publication of decision bore no resemblance in degree or kind of proceedings in which s. 7 rights were held to be violated -- Canadian Charter of Rights and Freedoms, ss. 7,8.

Government law -- Access to information and privacy -- Protection of privacy -- Personal information -- Disclosure or release of information -- Purpose of disclosure or release -- Application by plaintiff for injunctive and declaratory relief to prevent publication by Automobile Injury Appeal Commission of applicant's appeal before Commission dismissed -- Applicant embarrassed that her medical, income and personal information would be disclosed -- Commission's new Web Posting Policy included provisions for removal of names and other unnecessary personal information -- Legislation or regulations did not prevent Commission from publishing decision -- Commission's new Net Policy properly balanced applicant's concerns regarding identity theft with the open courts principle.

Application by the plaintiff for injunctive and declaratory relief to prevent the publication by the Automobile Injury Appeal Commission of the results of her appeal before the Commission. The applicant was injured in a motor vehicle accident. She claimed she was wrongfully denied accident benefits and appealed to the Commissioned. She did not want the decision in her case published on the Commission's website since she was embarrassed that her medical, income and personal information would be disclosed. The Commission's new Web Posting Policy included provisions that names would be removed from the decision if necessary and initials substituted. Commission staff would also review decisions and delete potentially identifying information that was not necessary. The applicant argued that the Commission was subject to the provisions of the Health Information Protection Act and that the Commission was not exempted from the Freedom of Information and Protection of Privacy Act. She also claimed her rights under ss. 7 and 8 of the Charter were violated. The Commission argued that the provincial legislation did not preclude it from publishing its decisions. The Commission admitted that it was a government institution subject to the Freedom of Information and Protection of Privacy Act. It argued that while the Commission was also a government institution for the purposes of the Health Information Protection Act, that legislation did not apply in the same way. It argued that the Freedom of Information and Protection of Privacy Act did not apply to material that was a matter of public record and that the Commission hearings which were conducted in public would fall within these parameters.

HELD: Application dismissed. The Commission had authority to publish its decisions, including on the web, despite the absence of statutory or regulatory provisions specifically allowing it to do so. S

.196.1(9) of the Automobile Accident Insurance Act gave to the Commission any other powers that it considered necessary or incidental to carry out the intent of that part of the Act. The publication of the decisions was incidental and necessary to the proper functioning of this tribunal. The Commission was part of the administration of justice and the open courts principle mandated openness and accessibility to the decisions of the Commission. Based on the exemption outlined in s. 4(4), the Health Information Protection Act, did not preclude the Commission from disclosing the health information and therefore publishing its decisions containing health information on the Internet without the consent of the appellant. The Commission's decisions were a matter of public record under the Freedom of Information and Protection of Privacy Act, and did not require appellant's consent of to use her personal information in its decisions or restrict the publishing of the Commission's decision online. The Commission was not a state agent engaged in a search or seizure. The Commission had not ordered the applicant to produce any documents, nor did it have the power to do so. S. 8 of the Charter was not breached. The Commission's practice of publishing its decisions and the stress associated with this bore no resemblance in degree or kind of proceedings in which s. 7 rights were held to be violated. The lack of notice in this case regarding publishing decisions did not violate the principles of fundamental justice of procedural fairness. There was no violation of any principles of fundamental justice in this case. The Commission's new Net Policy properly balanced the applicant's concerns regarding identity theft with the open courts principle.

Statutes, Regulations and Rules Cited:

Automobile Accident Insurance Act, R.S.S. 1978, c. A-35, s. 158(1), s. 168, s. 193(8), s. 196.1, s. 196.1(9), s. 196.3(4), s. 196.4

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 8, s. 12

Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. F-22.01, s. 3(1), s. 17(2)(b), s. 24, s. 29(2)(a), s. 29(2)(t)

Health Information Protection Act, S.S. 1999, c. H-0.021, s. 2(h), s. 2(m), s. 2(4), s. 3(1), s. 4(4)

Personal Injury Benefits Regulations, c. A-35, Reg. 3, s. 92, s. 95(1), s. 95(2)(d)

Counsel:

Elaine Germain appearing on her own behalf assisted by.

Gordon J. K. Neill, Q.C.

Charita N. Ohashi and Richard James Fyfe for the defendants.

JUDGMENT

R.K. OTTENBREIT J.:--

INTRODUCTION

1 Elaine Germain ("Germain") applies for injunctive and declaratory relief to prevent the publication on the Internet or otherwise by the Automobile Injury Appeal Commission ("the "Commission") of the results of an appeal she has commenced before the Commission.

2 The Commission panel assigned to hear her appeal consisted of Anne Phillips, Beverly Cleveland and Joy Dobko.

THE FACTS

3 The Commission is a quasi-judicial tribunal created to hear appeals from the decision of Saskatchewan Government Insurance ("SGI") adjusters with respect to automobile injuries. It is created pursuant to s. 196.1 of *The Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35 (the "*AAIA*"). The Commission hears and determines appeals of adjuster decisions made under Part VIII of the *AAIA* regarding no fault bodily injury benefits. A claimant under the *AAIA* has the option of appealing such an adjuster decision by SGI to either the Court of Queen's Bench or to the Commission. The Commission may make rules governing its proceedings as provided at s. 196.4 of the *AAIA* subject to the *Personal Injury Benefits Regulations*, c.A-35, Reg. 3, as am. ("the *Regulations*"). The *Regulations* state in s. 92 that all hearings of the Commission are to be open to the public unless otherwise ordered by the Commission. As well s. 193(8) of the *AAIA* states all decisions of the Commission are to be in writing and provided to the claimant and SGI. The Commission is a prescribed (government institution) for the purpose of *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 ("*FOIPP*"). As such it is the subject of the legislation in relation of the collection, use and disclosure of personal information.

4 Germain was injured in a motor vehicle accident in 2001 and claimed that she was wrongfully denied benefits under the *AAIA*. Germain commenced her initial appeal before the Commission by application dated March 31, 2004. She filed additional applications on October 27th and November 8th of 2004 and on July 14th of 2005. The issues raised in all of these were consolidated with the original appeal. On August 12, 2004 the plaintiff wrote to the Commission advising that she had read decisions published on the Commission website and that she did not want the decision in her case published. The Commission publishes and broadcasts decisions on the Internet on their own website and on CanLii. On August 17, 2004 the plaintiff appeared before the Commission panel and asked that the Commission not publish any decision on its website about her or in the alternative, that her name, age, occupation and other identifying details be removed from the decision. She was

embarrassed that her medical, income and personal information would be disclosed. The appeal hearing was adjourned at Germain's request for the Commission's determination on this point. After consideration of the issue of publication and whether there was authority for it, the plaintiff was informed on December 22, 2004 that the Commission would continue to publish its full decisions on its website. The plaintiff's appeal before the Commission was continued on June 29, 2005 and November 1, 2005. The matter was adjourned to February 7, 2006 for closing arguments.

5 The statement of claim in this matter was issued on January 27, 2006. The Commission's hearing was subsequently adjourned from time to time thereafter to allow for this application. A trial date of September 18, 2007 was selected by the parties. However on June 1, 2007 The Honourable Mr. Justice T. C. Zarzeczny granted an interim order staying the Commission's proceedings respecting the plaintiff's appeal including the final hearing. This stay order was directed to continue until the matter was to be heard on September 18, 2007 by way of trial and a judgment rendered.

6 The trial of this matter was heard before Madam Justice Lynn MacDonald on the 18th day of September 2007 who reserved her decision. As a result of her illness no decision was rendered by Justice MacDonald and it was determined that a re-hearing would take place. It was agreed that on the re-hearing the matter would proceed by way of transcript and exhibits from the first trial as well as any arguments the parties wished to make. Ms. Germain was cross-examined at the first trial and testified that she did not ask for the hearings to be closed in accordance with the *Regulations*. She indicated that the hearing room was small and there was no room for the public in any event.

7 Prior to the re-hearing of this matter before me the Commission applied to adduce new evidence through the affidavit of Barbara Tomkins ("Tomkins") that it was now publishing its decisions with editing of certain details and it had formulated and adopted a new policy with respect to publication and editing of its decisions on the Internet. Tomkins affidavit attached the Web Posting Policy -- Written Decisions effective June 1, 2008. After the hearing and over the objections of Germain, I allowed the evidence to be tendered on the re-hearing including the new Web Posting Policy.

8 No notice is given of the publication or broadcast of the Commission's decisions on the website to the appellants until after the appeal is commenced. Once an appeal is commenced at the Commission it cannot be transferred to the Court of Queen's Bench which also has jurisdiction to hear the appeal.

9 The new Web Posting Policy of the Commission indicates that it attempts to strike a balance between the open courts' principle and the protection of privacy of parties in their proceedings.

10 The new policy includes provisions that names will be removed from the title page if necessary and throughout the decision and initials substituted. Commission staff will also review decisions and delete potentially identifying information that is not necessary, but such changes require the approval of the Chair or Manager of Operations. Decisions published on the Internet

prior to the implementation of the policy will be revised in accordance with the policy and the revised version substituted for the current decision. If possible and necessary, computer software which prevents a general search from linking names to cases on the website will be utilized. Germain was advised of this new policy on June 2, 2008.

POSITION OF THE PARTIES

11 Germain argues that the Commission is subject to the provisions of *The Health Information Protection Act*, S.S. 1999, c.H-0.021 as am. ("*HIPA*"). She argues that although s. 4(4) of *HIPA* provides that it does "not apply to personal health information obtained for the purposes of Part VIII of the *AAIA* that does not give the Commission the right to publish its decisions which contain health information on a website because it is not one of the purposes set out in Part VIII of the *AAIA*.

12 She argues that it is necessary to look at the purposes for which health information is obtained pursuant to Part VIII of the *AAIA*. She points out that the requirement that an insured must undergo on examination by a practitioner chosen by the insurer under s. 158(1) is a purpose which does not attract *HIPA*. She also points out s. 168 which provides that SGI can obtain from any hospital or practitioner the medical information on the person treated for injuries sustained in an accident. She argues that these are the purposes that "relate to health information obtained for the purposes of Part VIII of the *AAIA*". She argues that the exemption in s.4(4) is limited to such objects and purposes of Part VIII and is not a blanket exemption for every provision of Part VIII and to construe this section too broadly as the Commission suggests is against the intention of the legislation.

13 She argues that because *HIPA* is paramount legislation, the *AAIA* must be read restrictively and subject to it. She argues that the Commission is subject to Part II of *HIPA* which requires that consent should be given before health information is published or broadcast on the Internet. She also argues that the health information once it is given to SGI makes SGI trustees of the health information and therefore it must be kept confidential.

14 Germain argues that the *AAIA* does not support the Commission's position. For example, s. 196.3(4) does not give the Commission the power to publish and broadcast for example decisions which identify the appellant's disclosure or health or income information. Nor does s. 196.4 she argues give the Commission the right to publish its decisions. Although that section gives the Commission the power to make rules governing its proceedings, this is different than broadcasting decisions on the web. Section 92 of the *Regulations* states that hearings are to be open to the public unless the Commission otherwise orders. She argues that keeping an open door for the public is grossly different from publicizing or broadcasting the evidence that was led on the hearing over the Internet. Lastly, she argues that s. 193(8) which provides that the Commission's decisions are to be in writing and given to the claimant and SGI does not allow them to be given to the general public by the website. She argues that the words "given to the claimant and SGI" suggest and imply that they not be given to the general public. She argues by analogy that The Workers' Compensation

Board conducts hearings and appeals that always involve injuries and casualties and health information and income and personal information but they keep those records private. Additionally she argues that the courts because of privacy legislation have started protecting files from the public using initials. She argues that the Commission is not exempted from *FOIPP*. *FOIPP* and its *Regulations* do not generally exempt Part VIII of the *AAIA* from its operation. She argues that the fact that *FOIPP* does not exempt Part VIII gives support to the argument that the *HIPA* exemption applies only to the passing on of medical information for the purposes of Part VIII and it is not a blanket exception.

15 Germain also argues that *FOIPP* further protects her privacy. Although s. 3(1) of *FOIPP* states that it does not apply to material that is a matter of public record, the decision of the Commission is not stated to be and is not a public record since s. 193(8) of the *AAIA* restricts the Commission to providing written reasons for its decisions to the parties only and not the public. Although s. 95(1) and (2) of the *Regulations* directs the Commission to keep a record of its proceedings including the decision, that direction does not make it a public record. She argues that a public record is not the same as an "official record". She argues a public record is something that is legislated to be public or -- commonly public such as land titles records, assessment rolls, personal property registry documents. She argues that public records do not contain sensitive information. For example a social assistance recipient list is an official record but not a public record. She argues that official records could be public or private. Moreover, "public record" is not defined in the *FOIPP* and should be interpreted very restrictively as this is an exemption from legislation granting the public a right to privacy. She argues that the phrase "public record" which is defined in Alberta legislation applies only in Alberta and in any event only to certain government tribunal records and not all records. She also argues that the requirement that the Commission's hearings be open do not give the Commission a right or power to publish decisions.

16 She argues that if all the information filed at the Commission office could be inspected by the public that would be ludicrous and everyone could see personal information. She argues that although s. 17(2)(b) of *FOIPP* provides that the section does not apply to a record that is an official record that contains a statement of reasons for a decision that is made in the exercise of discretionary power or adjudicative function, that subsection does not authorize or permit the Commission to publish and broadcast its decisions. She argues that that section may only be related to and apply to the information listed in s. 17(1) none of which is of the type in the Commission decision and thus does not apply to the Commission or give it any right to publish its decisions.

17 She argues that in any event s. 17 deals only with the permissive and discretionary provisions when a government releases information. It is different than Part IV of the *FOIPP* and mandatory provisions protecting privacy. She argues that these provisions have to be ignored entirely to find that the Commission has the right to publish its decisions pursuant to s. 17(2)(b) of *FOIPP*.

18 She also points to s. 24 as helping her. She indicates that as a person would reasonably expect that health and income information given to the Commission for the purposes of appeal would be

kept private. It is caught by s. 24 of *FOIPP*. Germain argues that the publishing of decisions does not serve the public better by providing information or assistance since each appeal is fact sensitive and different. She also argues that an appellant is not advised that a decision containing health and personal information will be published on the Internet for all to see and that the notice that the decision be published on the website is only provided after the appeal has been brought.

19 With respect to the *Canadian Charter of Rights and* Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (the "*Charter")* relief Germain argues that the Commission's practice in publishing its decisions is contrary to s. 7 and 8 of the *Charter* and seeks an injunction or order of prohibition against the Commission under s. 24.

20 She argues that the Commission's practice of publishing decisions is a breach of her privacy rights; that the Supreme Court has held that the right to privacy is contingent on a reasonable expectation of privacy and that the court has recognized a number of kinds of privacy including information privacy. She argues that in the case of *R. v. Dyment* [1988] 2 S.C.R. 417 the court said that the notion of privacy derives from the assumption that all information about a person is in a fundamental way his own for him to communicate or retain for himself as he sees fit. She also cited *Canadian AIDS Society v. Ontario* (1995), 25 O.R. (3d) 388 (General Div.) (affirmed 1996 31 O.R. (3d) 798 C.A. leave to appeal refused 1997, [1997] S.C.C.A. 33). Germain argues that the publicizing by the Commission of private information in order to help others does not come close to the importance of her right of privacy.

21 The Commission argues that the provincial legislation does not preclude it from publishing its decisions. The Commission admits that it is a government institution for the purposes of *FOIPP* and is subject to it. It argues that while the Commission is also a government institution for the purposes of *HIPA* that legislation does not apply in the same way.

22 The Commission argues that s. 4(4) of *HIPA* exempts personal health information obtained for the purposes of Part VIII of the *AAIA* from *HIPA*'s collection, use and disclosure provisions. Therefore *HIPA* does not apply to the collection, use and disclosure of personal health information obtained by the Commission for the purposes of its hearings and it is not prevented under that Act from publishing its decision.

23 It argues that *FOIPP* does not apply to material that is a matter of public record as per s. 3(1)(b). While the term "matter of public record" is not specifically defined in *FOIPP* it argues that it is not unreasonable to conclude that the hearings which are conducted in public would fall within these parameters. It argues further that because the legislature had specifically directed that hearings be held in public that these hearings are a matter of public record and since the full evidentiary process of the Commission hearings are open to the public it is illogical to suggest that decisions arising from these hearings should not be made available to the public. It cites in support of its argument the case of *General Motors Acceptance Corporation of Canada v. Perozni* (1965),51 D.L.R. (2nd) 724 (Alta. D.C.) at paragraph 59 in relation to the definition of public records in *The*

Interpretation Act, R.S.A. 2000, c.I-8 as an analog.

24 It argues that s. 17(2)(b) of *FOIPP* specifically provides that the exemption from disclosure does not apply to an official record that contains a statement of the reasons for decision made in the function of an adjudicative decision. As well it argues that s.4(b) of *FOIPP* provides that the Act does not in any way limit access to records normally available to the public and presumably this includes decisions by tribunals whose proceedings are open to the public. They argue by analogy that other tribunals who conduct public hearings such as the Labour Relations Boards and the Saskatchewan Municipal Board make their decisions public.

25 The Commission also argues that s. 29(2)(a) of *FOIPP* permits disclosure of personal information for the purpose for which the information was compiled or used consistent with that purpose. In the case of Commission hearings, this information is compiled in a public setting for the purpose of adjudicating statutory entitlements and therefore publication of the decision disclosing information is consistent with the public forum through which the information was obtained since it may be of precedential value to others in similar circumstances.

26 Moreover s. 29(2)(t) of *FOIPP* permits disclosure for any purpose in accordance with an Act or *Regulation* or authorizes disclosure. They argue that in this case s. 92 of the *Regulations* explicitly states that Commission hearings are to be conducted in public and the written decision is the last piece of this hearing process. It argues that the principle of transparency in a judicial process is well recognized by law. While the Commission is a tribunal and not a court it has a process similar to a court in that it is a decision making body that is tasked with deciding legal rights and obligations of the parties that appear before it. The Commission cites the case of *The Attorney General of Nova Scotia and Ernest Harold Grainger. v. Linden MacIntyre v. The Attorney General of Canada, et al.* [1982] 1 S.C.R. 175 which established that while the publication of proceedings may be to the disadvantage of a particular individual concerned, it is of vast importance to the public that the proceedings of courts of justice be universally known. The Commission also cites the *Sierra Club of Canada* v. *Canada* (*Minister of Finance)* 2002 SCC 41; [2002] 2 S.C.R. 522 at paragraph 52 and *Archer v. Orange Benevolent Society* 2001 SKQB 557 (Sask. Q.B.), *Potash Corp. of Saskatchewan v. Barton* 2002 SKQB 301 (Sask. Q.B.) and *John Deere Ltd. v. Long Tractor Inc.* 2003 SKQB 24 (Sask. Q.B.).

27 The Commission argues that if the plaintiff's appeal was before the court rather than the Commission and she sought to curtail the public's access, the onus of proof in demonstrating the public accessibility should be limited would be on her. The Commission argues that her evidence in this matter does not establish either societal values of super inordinate importance or any other exceptional circumstances in issue and that Germain would not meet the test for satisfying a court that it should limit public accessibility. It is therefore difficult to see why there would be a greater expectation of privacy in proceedings before a tribunal.

28 The Commission also argued that although the *Regulations* state clearly that hearings are open

to the public unless otherwise ordered Germain did not seek to have the Commission exercise its discretion in limiting public access to the hearing process itself.

29 With respect to *Charter* rights it argues that posting decisions on the Internet does not violate Germain's rights under s. 7, 8 or 12 of the *Charter*. It argues s. 8 and 12 are not applicable.

30 It argues the case of *R. v. Dyment, supra* defined the seizure as the taking of something without that person's consent; that s. 8 is intended to protect against unreasonable and warrantless gathering of evidence by the state to investigate suspected criminal or regulatory offences. It argues that the Commission is not a state agent engaged in a search or seizure, but rather a civil adjudicative tribunal before which parties voluntarily provide materials to further their claims. The Commission does not order the plaintiff to produce any documents nor does it have the power to do so. Section 86(5) of the *Regulations* mandates that certain documentation will be required if a claimant chooses to pursue an appeal. This is to assist the Commission in assessing an appeal's merits, not to gather evidence with a view to laying criminal or regulatory charges. In short s. 8 is not violated because the Commission has not conducted a search or seizure and s. 8 does not logically apply to the matter as the plaintiff's concern is how the Commission will use the information, not how it was obtained.

31 Although not specified in her statement of claim paragraphs 2 and 4(e) of the notice pursuant to *The Constitutional Questions Act*, R.S.S., c.C-29 as am. Germain alleges that Commission's practice of posting its decision on the Internet amounts to cruel and unusual treatment. Germain has clarified that she was relying on s. 12 of the *Charter*. The Commission argues that Germain is not subject to punishment in the present matter -- terms engaged only where the state has imposed penal consequences. The Commission observes that in *Rodriguez v. British Columbia (Attorney General)* [1993] 3 S.C.R. 519 at 609 the Supreme Court indicated in *obiter* that the word "treatment" may apply outside the penal context in examples which involved direct physical intervention by state agents on individuals. The Commission argues that dissemination of the information is not treatment or punishment as it is defined by the courts. The Commission also argued that it is not an agent of the state and therefore does not approach the level of state control mentioned in *Rodriguez, supra*. Publishing its decisions is only exercising control over its process, i.e. public access to its own written decisions. It argues that at the most the Commission is exercising direct control of information, not control of individual's themselves.

32 The Commission agrees that s. 7 of the *Charter* may have application in the present matter in the sense that Germain is alleging a violation of security of the person. The security of the person can be violated by the state causing serious interference with psychological integrity as defined in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 at paragraph 66. The Supreme Court however said that not all state interference with an individual's psychological integrity will engage s. 7 and the stress must be serious and profound and the individual interest affected must be of fundamental importance. The Commission argues that the practice of publishing its decisions bears no resemblance to the kind of proceedings in which the

state interferes profoundly i.e. personal choices of an individual. The Commission argues that privacy is not a free standing s. 7 right which can invalidate law or state action and that privacy interest in the past has been used as a shield to defend an impugned law or state of law, not as a sword to attack it.

33 Even assuming the plaintiff could establish that the Commission's actions violate her security of person, Germain must establish that it is not in accordance with one or more of the principles of fundamental justice. The Commission argues that the plaintiff's reply to particulars as to what principles of fundamental justice are engaged, do not disclose any principles of fundamental justice. If proper notice is what the plaintiff is claiming as a principle of fundamental justice, the Supreme Court has held that such notice is not such a principle in *R. v. Rodgers*, 2006 SCC 15. The Commission argues that in any event social interests and other values are balanced against a claimant's rights on a s. 7 analysis and points to the Supreme Court in the case of *R. v. Mentuck*, [2001] 3 S.C.R. 442, at paragraph 39 stressing that the presumption that courts should be open and the reporting of their proceedings be uncensored. This principle has been applied to require media access to court exhibits themselves while proceedings are ongoing and this concern in the public's confidence in the proper administration of justice has been found to apply to the workings of adjudicative tribunals in *Pacific Press v. Canada Minister of Employment and Immigration* (1991), 127 N.R. 325 (F.C.A.).

RELEVANT LEGISLATION

34 The relevant legislation is as follows:

***The Automobile Accident Insurance Act*:**

> **158** (1) If requested to do so by the insurer, an insured shall undergo an examination by a practitioner chosen by the insured.
>
> ...
>
> **168** Within six days after receiving a written request from the insurer, a practitioner who or hospital that is consulted by an insured or who or that treats an insured after the accident shall provide the insurer with a written report respecting:
>
> (a) the consultation or the treatment; and
>
> (b) any finding or recommendation relating to the consultation or treatment.

...

193 (8) The appeal commission shall provide the claimant and the insurer with written reasons for its decision.

...

196.1 (1) The Automobile Injury Appeal Commission is established.

...

(9) In addition to any powers given to the appeal commission by the Lieutenant Governor in Council, this Act and the regulations, the appeal commission may exercise any other powers that it considers necessary or incidental to carry out the intent of this Part.

196.3 (4) The appeal commission shall keep any records that it considers necessary for the proper conduct of its business.

196.4 (1) Subject to the regulations, the appeal commission may make rules:

(a) governing the management and conduct of its business and the conduct of the meetings, hearings, reviews and any other proceedings of the appeal commission; and
(b) respecting forms, applications and other documents required to be used and the procedures to be followed in the conduct of its affairs.

(2) The appeal commission shall cause its rules respecting hearings that are made pursuant to subsection (1) to be published in the Gazette.
(3) If the requirements of this Act, the regulations and the rules of the appeal commission have been substantially complied with, no order or decision of the appeal commission is to be set aside by reason only of a defect, error, omission

or irregularity in any matter associated with a proceeding before the appeal commission.

The Personal Injury Benefits Regulations:

92 Unless the appeal commission orders otherwise, a hearing is open to the public.

...

95 (1) The appeal commission shall compile a record of a hearing that was held.

(2) The record of a hearing mentioned in subsection (1) is to consist of:

...

(d) the written decision of the appeal commission;

The Health Information Protection Act:

2 In this Act:

(m) **"personal health information"** means, with respect to an individual, whether living or deceased:

(i) information with respect to the physical or mental health of the individual;
(ii) information with respect to any health service provided to the individual;
(iii) information with respect to the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;
(iv) information that is collected:

(A) in the course of providing health services to the individual; or
(B) incidentally to the provision of health services to the individual; or

(v) registration information;

...

3 (1) This Act binds the Crown.

(2) This Act does not apply to:

...

(b) personal health information about an individual who has been dead for more than 30 years; or ? **[check this - note to me]**

...

4 (1) Subject to subsections (3) to (6), where there is a conflict or inconsistency between this Act and any other Act or regulation with respect to personal health information, this Act prevails.

...

4(4) Subject to subsections (5) and (6), Parts II, IV and V of this Act do not apply to personal health information obtained for the purposes of:

(a) *The Adoption Act* or *The Adoption Act, 1998*;
(b) Part VIII of *The Automobile Accident Insurance Act*;
(c) **Repealed**. 2006, c.C-1.1, s. 26.
(d) *The Child and Family Services Act*;
(e) *The Mental Health Services Act*;
(f) *The Public Disclosure Act*;
(g) *The Public Health Act, 1994*;
(g.1) *The Vital Statistics Act, 1995* or any former *Vital Statistics Act*;
(g.2) *The Vital Statistics Administration Transfer Act*;
(h) *The Workers' Compensation Act, 1979*;
(h.1) *The Youth Drug Detoxification and Stabilization Act*; or

(i) any prescribed Act or regulation or any prescribed provision of an Act or regulation.

...

5 (1) Subject to subsection (2), an individual has the right to consent to the use or disclosure of personal health information about himself or herself.

The Freedom of Information and Protection of Privacy Act:

3 (1) This Act does not apply to:

...

(b) material that is a matter of public record; or

...

(2) This Act binds the Crown.

...

4 This Act:

(b) does not in any way limit access to the type of government information or records that is normally available to the public;

...

(f) does not prevent access to a registry operated by a government institution where access to the registry is normally allowed to the public.

17 (1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

(b) consultations or deliberations involving:

(i) officers or employees of a government institution;
(ii) a member of the Executive Council; or
(iii) the staff of a member of the Executive Council;

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;
(d) plans that relate to the management of personnel or the administration of a government institution and that have not yet been implemented;
(e) contents of draft legislation or subordinate legislation;
(f) agendas or minutes of:
(i) a board, commission, Crown corporation or other body that is a government institution; or
(ii) a prescribed committee of a government institution mentioned in subclause (i); or

(g) information, including the proposed plans, policies or projects of a government institution, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.

(2) This section does not apply to a record that:

...

(b) is an official record that contains a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;

...

24 (1) Subject to subsections (1.1) and (2), "**personal information**" means personal information about an identifiable individual that is recorded in any

form, and includes:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;
(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

...

(d) any identifying number, symbol or other particular assigned to the individual, other than the individual's health services number as defined in *The Health Information Protection Act*;
(e) the home or business address, home or business telephone number or fingerprints of the individual;

...

(g) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to the correspondence that would reveal the content of the original correspondence, except where the correspondence contains the views or opinions of the individual with respect to another individual;

...

(i) information that was obtained on a tax return or gathered for the purpose of collecting a tax;
(j) information that describes an individual's finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or
(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual.

(1.1) "Personal information" does not include information that constitutes personal health information as defined in *The Health Information Protection Act*.

...

(3) Notwithstanding clauses (2)(e) and (f), "**personal information**" includes information that:

(a) is supplied by an individual to support an application for a discretionary benefit;

29 (1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:

(a) for the purpose for which the information was obtained or compiled by the government institution or for a use that is consistent with that purpose;

...

(p) where the information is publicly available;

...

(t) for any purpose in accordance with any Act or regulation that authorizes disclosure; or

The *Canadian Charter of Rights and Freedoms*

> **7** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **8** Everyone has the right to be secure against unreasonable search or seizure.
>
> ...
>
> **12** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
>
> ...
>
> **24** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

THE ISSUES

35 The issues to be determined are as follows:

> **(a) Does the Commission have the authority in its governing legislation to publish its decisions generally or on the Internet?**
> **(b) Does provincial privacy legislation preclude the Commission from publishing its decisions generally or on the Internet?**
> **(c) Is the potential publication of the decision in the plaintiff's case before the Commission a violation of her s. 7 and/or 8 *Charter* rights?**

ANALYSIS

(a) Does the Commission have the authority in its governing legislation to publish its decisions generally or on the Internet?

36 The Commission was created pursuant to s. 196.1 of the *AAIA*. The purpose of the Commission is to hear and determine appeals of decisions made by SGI under Part VIII of the *AAIA* regarding no fault bodily injury benefits.

37 There are a number of provisions in the *AAIA* as well as the *Regulations* that appear relevant

in this appeal. However, these provisions do not provide specific authority for the Commission to publish its decisions generally or on the Internet. As an example, s. 196.4 of the *AAIA* permits the Commission to make rules governing its proceedings. These rules may be made with respect to "governing the management and conduct of its business and the conduct of the meetings, hearings, reviews and any other proceedings of the appeal commission." However at the commencement of this matter there was no formalized rule respecting publishing decisions on the web and there is still no rule regarding that issue.

38 The rule making powers allows the Commission to promulgate subordinate laws which are published in the Gazette in accordance with s. 196.4(2). However the lack of a rule respecting publishing of the decision generally and publishing the decision on the web specifically is in my view not fatal given my comments which follow.

39 Section 92 of the *Regulations* provides that all hearings of the Commission are to be open to the public unless otherwise ordered by the Commission. But it also does not provide direct authority that decisions be published on the Internet.

40 Section 193(8) of the *AAIA* holds that all decisions are to be in writing and provided to the claimant and SGI. The appellant argues that this section should be restrictively interpreted to hold that the Commission is prohibited from publishing its decisions on the Internet. However, this provision is only to ensure that the parties involved in the hearing have access to the reasons for the decision and in my view does not specifically prohibit publication on the web.

41 As can be seen from the discussion above, there is nothing in the *AAIA* or the *Regulations* that provides direct authority to the Commission to publish its decisions or prohibits such publication generally or on the Net.

42 Other statutory tribunals with adjudicative functions also publish their decisions. For example, the Saskatchewan Labour Relations Board does so without specific authority under its Act or Regulations. Likewise the Saskatchewan Municipal Board established under *The Municipal Board Act* S.S. 1988-89, c. M-23.2 as am. which carries out in part a judicial function to judge at a provincial level, appeals from the general public in relation to property tax, planning and development issues and property maintenance orders, publishes its decisions on the web without a specific provision allowing it to do so. In both cases these are specialized tribunals tasked with adjudicating on specific subject matter and issues which takes the burden of adjudication off the court system. The Commission serves a similar function although an aggrieved claimant can at their option choose to access the court system for an appeal.

43 The *AAIA* augmented by the *Regulations* sets out the powers of the Commission. However as with many Statutes and Regulations even where procedures are specifically set out there are gaps. Comprehensive codes of procedure are not provided in most cases.

44 Tribunals are given latitude in setting their own procedure. Sopinka JJ. in *Prassad v. Canada*

(Minister of Employment and Immigration) [1989] 1 S.C.R. 560 in the context of a judicial review application at pp. 568 and 569 stated:

> In order to arrive at the correct interpretation of statutory provisions that are susceptible of different meanings, they must be examined in the setting in which they appear. We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion.
>
> In *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183* (1971), 22 D.L.R. (3d) 40, the Ontario Court of Appeal was asked to hold that the Labour Relations Board was obliged to adjourn when its jurisdiction was attacked by a motion for *certiorari* in the High Court. Arnup J.A., speaking for the Court, stressed that the Board was "master of its own house" (p. 49) and was not required to adjourn when served with a notice of motion for *certiorari*. The Board was free to adopt such procedures as appeared to it to be just and convenient in the particular circumstances. Arnup J.A. concluded, at p. 50:
>
> > ... it is for the Board itself to decide how it shall proceed. If procedural guide lines of a mandatory nature are to be laid down, they should come from the Legislature and not from the Court.
>
> ...

45 As well, s.196.1(9) gives to the Commission any other powers that it considers necessary or incidental to carry out the intent of that part of the *AAIA*. In my view this includes publishing their decisions, including on the web.

46 Germain argues that publishing the decision is not necessary or helpful because the cases are fact specific. While this is true to some extent, the Commission operates in the common law milieu as the courts do, and listens to and considers arguments that the case before it is either similar or dissimilar to the facts of other cases and that there should be similar or dissimilar treatment. The publication of its decisions allows others who appear before the Commission to argue precedent if they so wish. The publication of the decisions is in my view incidental and necessary to the proper functioning of this tribunal as it is to many other tribunals with an adjudicative function which consider precedent including courts and it generally assists others who appear before the

Commission. Moreover the Commission is part of the administration of justice and the open courts principle referred to later in this decision mandates openness and accessability to the decisions of the Commission.

47 I find that the Commission has authority to publish its decisions, including on the web, despite the absence of statutory or regulatory provisions specifically allowing it to do so. It has this power incidentally pursuant to s. 196.1(a) of the *AAIA* and at common law pursuant to the doctrine enunciated by Sopinka J. in *Prassad, supra*.

48 However the inquiry does not end there. These powers may be subject to other legislation which may circumscribe those powers.

(b) Does provincial privacy legislation preclude the Commission from publishing its decisions generally or on the Internet?

49 The information which the Commission gathers and may put into the decisions consists of personal medical information and personal financial, employment and other information germane to the issues with which it deals. This would include information which is normally private or confidential.

50 The Commission gathers this information either through the provisions of the *AAIA* or by way of facts provided to it by Germain in its dealings with her.

i. *HIPA*

51 *HIPA* is legislation focused on the collection, storage, use and disclosure of personal health information as defined by s. 2(m). I accept that some or all of Germain's health information with which the Commission deals falls into that definition. Section 5(1) provides that an individual has the right to consent to the use or disclosure of their personal health information subject to certain exemptions.

52 Section 4(1) says the Act prevails notwithstanding other legislation.

53 Section 4(4) of *HIPA* exempts personal health information obtained for the purposes of Part VIII of the *AAIA*. It states:

> **4** (4) Subject to subsections (5) and (6), Parts II, IV and V of this Act do not apply to personal health information obtained for the purposes of:
>
> ...
>
> (b) Part VIII of *The Automobile Accident Insurance Act*;

54 The Commission hears and determines appeals of decisions made by SGI adjusters regarding no fault bodily injury benefits. To do this, the Commission must have access to personal health information relating to the claimants and be allowed to use it for its purposes. Because the Commission was created and operates pursuant to Part VIII of the *AAIA*, personal health information with which it deals in the course of hearing and determining an appeal (its purpose) is *prima facie* exempt because of s. 4(4)(b).

55 The appellant argues that the exemption in s.4(4) is limited to the objects and purposes of Part VIII of the *AAIA*. That is, they are not bound by *HIPA* when accessing the personal health information; however, they are bound by *HIPA* when they attempt to disclose the information without the consent of the appellant. When one takes a closer look at the legislation, it appears that this argument must fail. The words "for the purposes of Part VIII" cover a wide variety of situations related to that part including the mandated collection and voluntary tendering of health information to SGI and the Commission. This is so despite the fact that there is no similar exemption in *FOIPP*. The creation of a decision after adjudication and provision of it to the public generally on the Net is in my view within the purposes of Part VIII of the *AAIA* and the incidental powers of the Commission given my previous comments that the Commission has authority generally to do so.

56 Section 4(4) exempts the Commission from Parts II, IV and V of *HIPA*. Part IV discusses the "Limits on Collection, Use and Disclosure of Personal Health Information by Trustees". The Commission is a trustee as defined by s. 2(4) of *HIPA*. It is a government institution as defined by 2(h) of *HIPA*. Government institution is defined by reference to s. 3 of the *FOIPP* and Appendix 1 thereto. With respect to disclosure, *HIPA* states:

> **27** (1) A trustee shall not disclose personal health information in the custody or control of the trustee except with the consent of the subject individual or in accordance with this section, section 28 or section 29.

This section is found in Part IV of *HIPA*. However, despite the fact that the Commission is a trustee it is specifically exempted by s. 4(4) from requiring consent to disclose. The requirement under s. 23(4) to disclose only de-identified personal health information is interestingly also exempted by s. 4(4).

57 Based on the exemption outlined in s. 4(4), it appears that the *HIPA* does not preclude the Commission from disclosing the health information and therefore publishing its decisions containing health information on the Internet without the consent of the appellant.

58 Part II of *HIPA* deals with the rights of the individual and consent for use and disclosure, the right to be informed and the right to be informed about disclosure without consent. The appellant argued that she was not informed that her decision would be made public until after she had appealed. However the Commission is exempted from s. 9(1) of *HIPA*, a Part II right which states that "[a]n individual has the right to be informed about the anticipated uses and disclosures of the individual's personal health information".

59 Part V deals with access to personal health information. The Commission is exempted from this Part as well.

60 However Part III of *HIPA* is not exempted by s. 4(4). Part III deals with a trustee's duty to protect information by establishing administrative and technical safeguards for example as detailed in s. 16. In my view this Part relates to the protection of information within the confines of the Commission itself, but does not limit or circumscribe the exemptions from the other Parts enumerated.

61 There is in my view given the broad exemption of s. 4(4) nothing in *HIPA* which would preclude the Commission from using and disclosing the information for its legitimate purposes including publishing the decision on the web.

ii. *FOIPP*

62 *FOIPP* is legislation focused on an individual's right to privacy with respect to personal information held by government institutions. Section 17 of *FOIPP* deals with the right of government to refuse to disclose certain information enumerated in ss.(1). It also eliminates that right in ss.(2) when the information is contained in the statement of reasons for a decision made as part of an adjudicative function. In my view it has no application to this case because the Commission is not seeking to keep its decision from the public.

63 Section 4(b) of *FOIPP* states the Act does not limit access to records normally available to the public. It is common ground that the decision on Germain's case could be accessed by the public even without publishing it on the web. Its publication on the web is in my view a logical extension of public access to the hard copy. Section 4(f) states that the Act does not prevent access to a registry where access to the registry is normally allowed to the public. The official record of the Commission of its decisions is in my view like a registry. It is open to the public. Publication on the net is an extension of this access.

64 Germain argues that the information contained in the decision of the Commission details her health, financial and personal situation. It is undisputed that some or all of it falls into the s. 24(1) definition. Germain argues that it is information that would assist individuals in "stealing her identity".

65 Section 29(1) prohibits the disclosure of personal information. It states:

> **29** (1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

66 Section 24(1) defines "personal information" as "personal information about an identifiable

individual that is recorded in any form" and includes categories of information which Germain complains will be disclosed by the Commission. The definition is restricted by s. 24(1.1) as follows:

> **24** (1.1) "Personal information" does not include information that constitutes personal health information as defined in *The Health Information Protection Act*.

67 In short, the privacy of health information as defined in s. 2(m) of *HIPA* is protected by *HIPA* not *FOIPP*.

68 The application of s. 29(1) of *FOIPP* which mandates consent, is in this situation restricted by s. 3. It states:

> **3** (1) This Act does not apply to:
>
> ...
>
> (b) material that is a matter of public record; or
>
> ...

69 *FOIPP* does not define what is a matter of public record. Black's Law Dictionary 8th Edition defines "public record" at p. 1279 as:

> A record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse. ! Public records are generally open to view by the public.

70 A number of cases have considered the phrase "public record". In *General Motors Acceptance Corporation of Canada v. Perozni, supra*, at para. 59, the Alberta District Court concluded that public records "refers to certain records or documents which are kept by certain government officials whose duty it is to inquire into and record permanently matters and facts about public matters. Under this definition would fall ... court and certain government tribunal records."

71 In *Sturla v. Freccia* (1880), 5 A.C. 633, at p. 643 Lord Blackburn stated:

> ... I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. ...

72 I accept all of these three definitions of "public record". The Commission is a public adjudicative body required to make and keep its decisions. Section 92 of the *Regulations* states that Commission hearings are open to the public unless the Commission orders otherwise. Its decisions are open to the public even without publishing them on the web. Further, s. 95(1) and 95(2)(d) places an obligation on the Commission to compile a record of a hearing that was held, which consists in part of the written decision of the appeal commission. It is common ground that the

decision is on file at the Commission and accessible to the public. The decision of the Commission contains information prepared by a government institution which has a duty to inquire into the issues associated with the hearing and record its findings permanently.

73 Further, it seems illogical that members of the public could sit at the hearing and listen to all of the evidence but not have access to the decision of the Commission. The written decision is the last piece of the hearing process. Public access to decisions made by the Commission is important to assist individuals in presenting their claims and understanding the decision-making process of the Commission and to further the principle of public access to adjudicative bodies.

74 Based on the analysis above, I find that the decision of the Commission are a matter of public record as set forth in s. 3(1)(b). *FOIPP* and specifically, s. 29, does not operate to require the consent of Germain for the Commission to use her personal information in its decisions nor does it restrict the publishing of the Commission's decision online. Even if consent were required I find that the Commission is covered by s. 29(2)(a), (p) and (t) since the publishing of it is consistent with its mandate as an adjudicative body.

75 There is nothing in *FOIPP* which prevents the Commission from publishing its decisions and the information they contain generally or on the Net.

(c) Is the potential publication of the decision in the plaintiff's case before the Automobile Injury Appeal Commission a violation of her s. 7 and/or 8 *Charter* rights?

i. Section 8

76 Section 8 of the *Charter* entrenched in the Canadian Constitution the right to be secure against unreasonable search and seizure. It reads as follows:

> **8.** Everyone has the right to be secure against unreasonable search or seizure.

77 In the present case, Germain alleges that s. 8 of the *Charter* was breached and her right to be secure against unreasonable search and seizure was infringed.

78 Section 8 applies to **how** information is gathered by state agents. In the present situation, Germain is not contesting how the Commission came to have the information that forms the basis of her appeal decision; she is contesting the **use** of the information, that is, whether it can be published on the Internet or not. In order to trigger s. 8, the state must have engaged in either a search or seizure. These terms have been defined as follows:

> A search is an examination, by the agents of the state, of a person's person or property in order to look for evidence. A seizure is the actual taking away, by the agents of the state, of things that could be used as evidence.

Constitutional Law of Canada, Peter Hogg (looseleaf) at 45-4

79 Seizure was further defined by the Supreme Court of Canada in *R. v. Dyment, supra* as the "taking of a thing from a person by a public authority without that person's consent."

80 The Commission is not a state agent engaged in a search or seizure. It is a civil adjudicative tribunal before which parties voluntarily provide private materials to further their claims. Indeed Germain provided that information after she was advised that the decision would be published. Germain agrees that SGI has under Part VIII the right to procure certain medical information that would normally be private. The Commission has not ordered Germain to produce any documents, nor does it have the power to do so. Subsection 86(5) of the *Regulations* mandates that certain documentation will be required if a claimant chooses to pursue an appeal. This is to assist the Commission in assessing an appeal's merits, not to gather evidence with a view to laying criminal or regulatory charges. There is no search or seizure in this case.

81 There is no s. 8 *Charter* violation.

ii. Section 7

82 Section 7 of the *Charter* provides:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

83 It is clear from the case law that the scope of s. 7 of the *Charter* can extend beyond the sphere of criminal law and apply to the present situation. As discussed in *New Brunswick (Minister of Health and Community Services) v. G. (J.), supra*, at para. 66, s. 7 applies where there is "state action which directly engages the justice system and its administration."

84 To find an infringement of s. 7 of the *Charter* there must be a real or imminent deprivation of life, liberty or security of the person that is contrary to the relevant principles of fundamental justice. *R. v. White*, [1999] 2 S.C.R. 417 at para. 38. The appellant is alleging a violation of her "security of the person" under s. 7.

1. Right to Security of the Person

85 The Supreme Court of Canada has held on a number of occasions that the right to security of the person protects "both the physical and psychological integrity of the individual": *G.(J.), supra* at para. 58. At issue in this case, is the psychological integrity of the appellant.

86 In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at para. 237 and *R. v. O'Connor*, [1995] 4 S.C.R.

411 at para. 117, Justices Wilson and L'Heureux-Dubé, respectively, stated that s. 7 includes a right to privacy. In *R. v. Mills*, [1986] 1 S.C.R. 863 at 920, Lamer J., as he then was, recognized that psychological trauma, violating security of the person, could take the form of:

> ... stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction. ...

87 It appears that the right to security of the person includes a right to privacy where the violation of privacy is sufficient to interfere with one's psychological integrity.

88 Where the psychological integrity of a person is at issue, as alleged in this case, a security of the person violation is limited to "serious state-imposed psychological stress": *Morgentaler, supra* at para. 56. The quality of the interference "need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety": *G.(J.), supra* at para. 60. Accordingly, not all government interference with an individual's psychological integrity will engage s. 7.

89 As can be seen from *Blencoe v. British Columbia*, [2000] 2 S.C.R. 307, the stress must be serious and profound and the individual interests affected must be of "fundamental importance". The right to privacy is of "fundamental importance".

90 The question then is whether the level of stress associated with the Commission publishing their decisions online is "serious and profound". Section 7 does not protect an individual who is suffering from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of being involved in an open adjudicative process. Germain has chosen to become involved in the appeal process and was aware that the process was a public one unless otherwise ordered. This included the knowledge that the information in the decision could normally be accessed by the public. The Commission's practice of publishing its decisions and the stress associated with this bears no resemblance in degree or kind of proceedings in which s. 7 rights are held to be violated: See *Morgentaler, supra*; *Rodriguez, supra*.

91 The stress in this situation is not serious or profound so as to meet the standards for a s. 7 violation.

92 Even though this stress may be increased in light of the recent explosion of online identity theft, the Commission has now instituted its Web Posting Policy when publishing their decisions on the Internet, which in my view addresses this concern and attenuates the stress and anxiety that a participant in this process may feel.

2. Principles of Fundamental Justice

93 If I am wrong in this conclusion and the appellant can establish that her s. 7 rights have been infringed, it is then necessary for her to establish that the violation is not in accordance with one or

more principles of fundamental justice. In *Rodriguez, supra*, the majority of the Supreme Court, at p. 590, held that the expression "principles of fundamental justice" in s. 7 of the *Charter* implies that there is some consensus that these principles are vital or fundamental to our societal notion of justice. At p. 591, the court went on to hold that "[t]hey must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also ... be legal principles."

94 The appellant did not refer to specific violation of a principle of fundamental justice in the brief of law filed with the court. However, in her statement of claim, the appellant appears to rely on the lack of "proper notice" as being a principle of fundamental justice that would require the Commission to give appellants better notice that it publishes its decision on the Internet. Although "proper notice" is not a principle of fundamental justice, procedural fairness is: *R. v. Rodgers, supra* at para. 47.

95 In *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, the Supreme Court said the following regarding the determination of procedural protections to which an individual is entitled to under s. 7 of the *Charter*:

> 113 This appeal requires us to determine the procedural protections to which an individual is entitled under s. 7 of the *Charter*. In doing so, we find it helpful to consider the common law approach to procedural fairness articulated by L'Heureux-Dubé J. in *Baker, [1999] 2 S.C.R. 817, supra*. In elaborating what is required by way of procedural protection under s. 7 of the *Charter* in cases of this kind, we wish to emphasize that our proposals should be applied in a manner sensitive to the context of specific factual situations. What is important are the basic principles underlying these procedural protections. The principles of fundamental justice of which s. 7 speaks, though not identical to the duty of fairness elucidated in *Baker*, are the same principles underlying that duty. As Professor Hogg has said, "The common law rules [of procedural fairness] are in fact basic tenets of the legal system, and they have evolved in response to the same values and objectives as s. 7": see P.W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.) vol. 2, at para. 44.20. In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 212-13, Wilson J. recognized that the principles of fundamental justice demand, at a minimum, compliance with the common law requirements of procedural fairness. Section 7 protects substantive as well as procedural rights: *Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, supra*. Insofar as procedural rights are concerned, the common law doctrine summarized in *Baker, supra*, properly recognizes the ingredients of fundamental justice.
>
> 114 We therefore find it appropriate to look to the factors discussed in *Baker* in

> determining not only whether the common law duty of fairness has been met, but also in deciding whether the safeguards provided satisfy the demands of s. 7 ...
>
> 115 What is required by the duty of fairness -- and therefore the principles of fundamental justice -- is that the issue at hand be decided in the context of the statute involved and the rights affected: *Baker, supra*, at para. 21; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J. More specifically, deciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself; *Baker, supra*, at paras. 23-27. This is not to say that other factors or considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness: *Baker, supra*, at para. 28. It must necessarily be so in determining the procedures demanded by the principles of fundamental justice.

96 The lack of notice in this case regarding publishing decisions did not violate the principles of fundamental justice of procedural fairness. The right of the Commission to publish its decisions is an incidental power to the hearing being of a public nature and applicants to the Commission do not have in every case a right to be heard on this issue.

97 The open court principle also applies to the Commission. This is so despite the fact that it is not a court. The principle is not restricted to courts only, but is a theme running through the administration of justice in this country.

98 Germain admits that if her matter were before a court then the decision would be published on the web. It would be anomalous to hold that just because Germain chooses the tribunal to press her claim that the adjudicative function and decision is substantially different than if she went to a court. Both forums are tasked at the choice of Germain to determine an issue which is part of the administration of justice generally and that task and determination must be public.

99 Social interests and other values are balanced against a claimant's rights within a s. 7 analysis. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 879, for example, an accused's right to a fair trial was balanced against society's interest in an open court process. In the present matter, the plaintiff's privacy interests must also be weighed against free expression values and the open court principle.

100 In *R. v. Mentuck*, [2001] 3 S.C.R. 442 at para. 39 the Supreme Court stressed the fundamental importance of open courts:

> 39 It is precisely because **the presumption** that courts should be open and **reporting of their proceedings should be uncensored** is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a [publication] ban. ... [Emphasis Added]

101 In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 the court made the following apposite comments regarding the rights of listeners to be informed of court proceedings at paras. 17, 22 and 23:

> 17 ... [Section 2(b)] involves the scope of public entitlement to have access to these courts and to obtain information pertaining to court proceedings. ... In particular, it involves recognition of the integral role played by the media in the process of informing the public. Both of these issues involve the democratic function of public criticism of the courts, which depends upon an informed public; in turn, both relate to the principle of openness of the criminal courts.
>
> ...
>
> 22 ... The open court principle, see as "the very soul of justice" and the "security of securities", acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. ...
>
> 23 ... While the freedom to express ideas and opinions about the operation of the courts is clearly within ... s. 2(*b*), so too is the right of members of the public to obtain information about the courts in the first place. ...

102 The principle has been applied to require media access to court exhibits themselves (let alone court decisions) while proceedings are ongoing.

103 The interplay between privacy and public access to judicial records is best summed up by *The Attorney General of Nova Scotia and Ernest Harold Grainger v. Linden MacIntyre, et al*, [1982] 1 S.C.R. 175 where Dickson J. stated at pp. 185-187:

> Let me deal first with the 'privacy' argument. This is not the first occasion on which such an argument has been tested in the courts. Many times it has been

urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in *R. v. Wright*, 8 T.R. 293, are apposite and were cited with approval by Duff J. in *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at p. 359:

> Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

The leading case is the decision of the House of Lords in *Scott v. Scott*, [1913] A.C. 417. In the later case of *McPherson v. McPherson*, [1936] A.C. 177, at p. 200, Lord Blanesburgh, delivering the judgment of the Privy Council, referred to "publicity" as the "authentic hall-mark of judicial as distinct from administrative procedure".

... The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. ...

... The authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial proceedings must be held in public. The editor of *Halsbury's* 4th Edition states the rule in these terms:

> In general, all cases, both civil and criminal, must be heard in open court, but in certain exceptional cases, where the administration of justice would be rendered impractical by the presence of the public, the court may sit in camera [Vol. 10, para. 705, at p. 316].

At every stage the rule should be one of public accessibility and concomitant

> judicial accountability ...
>
> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. ...

104 These dicta are still the law in Canada and in my view apply to adjudicative tribunals which although not courts, have a quasi-judicial function. The Commission is such a tribunal because it makes decisions based on Germain's legal rights under the *AAIA*. Germain's claim to privacy regarding publication on the net cannot withstand the force of the open courts principle. She has the onus of demonstrating limitations on public accessability and I agree with the Commission in this case that she has not proven societal values of superordinate importance nor any other exceptional circumstance which would warrant a limit. She has not met this onus.

105 There is no violation of any principles of fundamental justice in this case. The Commission's new Net Policy in my view properly balances Germain's concerns regarding identity theft with the open courts principle.

106 Based on the reasons outlined above, the Commission is not prohibited from publishing its decisions online on the basis of the *Charter*.

CONCLUSION

107 Nothing in the *AAIA* and its regulations, *HIPA*, *FOIPP* or the *Charter* prevent the Commission from publishing its decision regarding Germain's claim on the web or otherwise. The claim of Germain is dismissed.

108 On the issue of costs, in my view this matter would probably have been moot if the Commission would have had its policy respecting the editing of decisions in place either before Germain's court application was made or once it became alive to this issue. Rather than use Germain's request in August of 2004 to formulate a policy it took a number of years for the Commission to react.

109 The Commission tendered its new Net Policy to the court shortly before the rehearing of this matter. In my view given the contents of the policy, it could have been produced long ago. The new policy addresses many if not all of the concerns of Germain. The courts have been editing their judgments for some number of years in cases where there is sensitive information. Unfortunately the Commission's epiphany respecting this issue took some time in coming. Time which resulted in my view probably in needless effort and cost.

110 Rule 574(2)(a) provides the court discretion to order costs against a successful party. In my view because of my preceding comments, this is a case where I should exercise that discretion.

111 The Commission, but not the individual defendants shall pay Germain her party-party costs including disbursements under Column 4 for those aspects of this matter for which an order for costs has not already been made including without limiting the foregoing, the previous proceedings as well as the application whereby the Commission sought to have the new Net Policy entered in evidence. This shall include *inter alia* any disbursement that she has made for transcripts of the previous trial. If the parties cannot agree on the quantum of costs they shall be taxed.

R.K. OTTENBREIT J.

cp/e/qlcct/qlpwb/qlaxw/qlced/qlmxl/qlcas/qlcas/qljyw

Case Name:

Lukács v. Canada (Transportation Agency)

Between
Dr. Gábor Lukács, Appellant, and
Canadian Transportation Agency, Respondent

[2014] F.C.J. No. 301

2014 FCA 76

456 N.R. 186

Docket: A-279-13

Federal Court of Appeal
Halifax, Nova Scotia

Dawson and Webb JJ.A. and Blanchard J.A. (ex officio)

Heard: January 29, 2014.
Judgment: March 19, 2014.

(63 paras.)

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Reasonableness -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Administrative law -- Bodies under review -- Nature of body -- Types -- Regulatory agencies -- Powers or functions -- Types -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was

reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Statutory interpretation -- Statutes -- Construction -- By context -- Legislative intent -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Appeal by Lukacs from the Canada Transportation Agency's decision to enact a rule (the "quorum rule") that provided that in all proceedings before the Agency, one member constituted a quorum. Prior to the enactment of the quorum rule, two members of the Agency constituted a quorum. The quorum rule was not made with the approval of the Governor in Council. The appellant took the position that the rules governing the conduct of the proceedings before the Agency were regulations within the meaning of s. 36(1) of the Canada Transportation Act and as such could only be made with the approval of the Governor in Council and that as the rules were originally approved by the Governor in Council, they could not be amended without the approval of the Governor in Council. The Agency argued that the quorum rule was a rule respecting the number of members that were required to hear any matter or perform any function of the Agency and, as such, it could be enacted by the Agency pursuant to the Agency's rule-making power in s. 17 of the Act.

HELD: Appeal dismissed. The appropriate standard of review was reasonableness as the issue was whether the Agency properly interpreted its rule-making power contained in its home statute. The Agency's decision to enact the quorum rule pursuant to its rule-making power, so that the approval of the Governor in Council was not required, was reasonable. A contextual analysis of the Canada Transportation Act suggested that rules held a subsidiary position to orders or regulations, which was consistent with the view that rules were created by the Agency on its own initiative, while order came at the end of an adjudicative process and regulations must be approved by the Governor in Council. Furthermore, the interpretation of "rules" as a subset of "regulation" violated the presumption against tautology. Moreover, whenever "rule" appeared in the Act, it was in the context of internal procedural or non-adjudicative administrative matters and wherever "regulation" appeared in the Act it referred to more than internal, procedural matters. In addition, since the Act specifically required Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure but there was no express requirement for the Agency to do so, the application of the expressio unius maxim was consistent with the interpretation that the Agency's rules were not subject to that requirement. Furthermore, under the former Act, the predecessor of the Agency had the power to make rules with the approval of the Governor in Council. Interpreting

the Act so as to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) was consistent with the purpose of the Agency as envisioned in the Act. The fact that the Governor in Council had approved the Rules in 2005 did not mean that the approval of the Governor in Council was required to amend the rules. Firstly, Governor in Council approval in 2005 was an unnecessary step. Secondly, the quorum rule was new and did not rescind or vary any provision of the rules that was previously approved by the Governor in Council.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 4(1), s. 16(1), s. 17, s. 17(a), s. 17(b), s. 17(c), s. 25, s. 25.1(4), s. 29(1), ss. 34-36, s. 34(1), s. 34(2), s. 36(1), s. 36(2), s. 41, s. 54, s. 86(1), s. 86.1, s. 92(3), s. 109, s. 117(2), s. 128(1), s. 163(1), s. 169.36(1), s. 170

Canadian Transportation Agency General Rules, SOR/2005-35, Rule 2.1

Interpretation Act, R.S.C. 1985, c. I-21, s. 2(1), s. 3(3), s. 15(2)(b), s. 35(1)

National Transportation Act, 1987, c. 28 (3rd Supp.), s. 22, s. 22(1)

Statutory Instruments Act, R.S.C. 1985, c. S-22, s. 2(1)

Counsel:

Dr. Gábor Lukács, the Appellant (on his own behalf).

Simon-Pierre Lessard, for the Respondent.

The judgment of the Court was delivered by

1 DAWSON J.A.:-- This is an appeal on a question of law, brought with leave of this Court pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act). The question concerns the validity of a rule amending the *Canadian Transportation Agency General Rules*, SOR/2005-35 (Rules). The amendment added a single section to the Rules: Rule 2.1 (Quorum Rule). The Quorum Rule is brief, and states 'In all proceedings before the Agency, one member constitutes a quorum". The Quorum Rule was published in the Canada Gazette Part II as SOR/2013-133. Prior to the enactment of the Quorum Rule, two members of the Agency constituted a quorum.

2 The evidentiary basis for the appeal is simple and undisputed: the Quorum Rule was not made

with the approval of the Governor in Council.

3 The appellant argues that the rules governing the conduct of proceedings before the Agency, including the Quorum Rule, are regulations within the meaning of subsection 36(1) of the Act. As such, the Quorum Rule could only be made with the approval of the Governor in Council. Additionally, the appellant argues that the Rules were originally approved by the Governor in Council. It follows, the appellant argues, that the Rules could not be amended without the approval of the Governor in Council.

4 The Agency responds that the Quorum Rule is a rule respecting the number of members that are required to hear any matter or perform any of the functions of the Agency. Accordingly, the Agency could enact the Quorum Rule pursuant to its rule-making power found in section 17 of the Act.

5 Notwithstanding the appellant's able submissions, for the reasons that follow I have concluded that the Agency's decision to enact the Quorum Rule pursuant to its rule-making power (so that the approval of the Governor in Council was not required) was reasonable.

The Applicable Legislation

6 The Act contains a quorum provision that is expressly subjected to the Agency's rules:

> 16. (1) Subject to the Agency's rules, two members constitute a quorum.
>
> * * *
>
> 16. (1) Sous réserve des règles de l'Office, le quorum est constitué de deux membres.

7 The Agency's rule-making power is as follows:

> 17. The Agency may make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and
>
> (*c*) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament. [Emphasis added.]

* * *

17. L'Office peut établir des règles concernant :

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale. [Le souligné est de moi.]

8 The relevant provision of the Act dealing with regulations states:

36. (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.
(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

* * *

36. (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.
(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

The Standard of Review

9 The parties disagree about the standard of review to be applied.

10 The appellant argues that the issue of whether the Agency was authorized to enact the Quorum Rule without the approval of the Governor in Council is a true question of jurisdiction, or *vires*. As a result, he submits the applicable standard of review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 59). In oral argument, the appellant also argued that a quorum requirement is a question of law that is both of central importance to the legal system as a whole and outside the Agency's specialized area of expertise so that the validity of the Quorum Rule should be reviewed on the standard of correctness.

11 The respondent counters that in more recent jurisprudence the Supreme Court of Canada has held that true questions of jurisdiction are narrow and exceptional, and that an administrative

tribunal's interpretation of its own statute should be presumed to be reviewable on the standard of reasonableness (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraphs 33 and 39).

12 I agree that what is at issue is whether the Agency properly interpreted its rule-making power contained in its home statute. Pursuant to *Alberta Teachers'*, the presumption of reasonableness review applies. In my view, the presumption of reasonableness review has not been rebutted.

13 As recently discussed by the Supreme Court in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, 452 N.R. 340, at paragraphs 32 and 33, legislatures do not always speak with clarity. As a result, applying the principles of statutory interpretation may not always provide a single, clear interpretation of a provision. The resolution of unclear language in an administrative agency's home statute is usually best left to the agency, because the choice between competing reasonable interpretations will often involve policy considerations the legislature presumably wanted the agency to decide.

14 For two reasons I reject the assertion that a quorum rule raises a general question of law of central importance to the legal system outside the expertise of the Agency.

15 First, while conceptually quorum requirements are of importance to the fair administration of justice, it does not follow that the Agency's choice between a quorum of one or two members is a question of central importance to the legal system as a whole. In my view, it is not. The Quorum Rule does not seek to define quorum requirements for any other body than the Agency itself.

16 Second, the Supreme Court has rejected such a narrow view of the expertise of an administrative agency or tribunal. It is now recognized that courts may not be as well-qualified as a given agency to provide an interpretation of the agency's home statute that makes sense in the broad policy context in which the agency operates (*McLean*, at paragraphs 30 and 31, citing, among other authorities, *Council of Canadians with Disabilities v. Via Rail, Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paragraph 92 and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paragraph 25.

17 It follows that the Agency's interpretation of its rule-making authority is a question reviewable on the standard of reasonableness.

18 Before leaving the issue of the standard of review I will deal with two authorities raised by the appellant in reply, which were, as a result, the subject of supplementary written submissions.

19 The two authorities are *Council of Independent Community Pharmacy Owners v. Newfoundland and Labrador*, 2013 NLCA 32, 360 D.L.R. (4th) 286, and *Yates v. Newfoundland and Labrador (Regional Appeal Board)*, 2013 NLTD(G) 173, 344 Nfld. & P.E.I.R. 317.

20 In my view both decisions are distinguishable. At issue in the first case was whether

regulations enacted by the Lieutenant-Governor in Council were *ultra vires*. In the second case, the Court's attention was not drawn to the decisions of the Supreme Court in *Alberta Teachers'* and *McLean*. I am not persuaded either case supports the appellant's position.

The Applicable Principles of Statutory Interpretation

21 Whether rules made under section 17 of the Act must be approved by the Governor in Council depends upon the interpretation to be given to the word "regulation" as used in subsection 36(1) of the Act.

22 The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court:

> Today there is only one principle or approach, namely, 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: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

23 The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 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.

24 This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 27.

25 Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 26).

Application of the Principles of Statutory Interpretation

26 I therefore turn to the required textual, contextual and purposive analysis required to answer this question.

(i) Textual Analysis

27 The appellant argues that the definitions of"regulation" found in the *Interpretation Act*, R.S.C. 1985, c. I-21 and the *Statutory Instruments Act*, R.S.C. 1985, c. S-22 decide the meaning of "rules" under the Act. The appellant's argument relies on paragraph 15(2)(*b*) of the *Interpretation Act*, which states:

> 15. (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> [...]
>
> (*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.
>
> * * *
>
> 15. (2) Les dispositions définitoires ou interprétatives d'un texte :
>
> ...
>
> *b*) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

28 Subsection 2(1) of the *Interpretation Act* provides that:

> 2. (1) In this Act,

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(*a*) in the execution of a power conferred by or under the authority of an Act, or

(*b*) by or under the authority of the Governor in Council. [Emphasis added.]

* * *

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

"règlement" Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris :

a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

b) soit par le gouverneur en conseil ou sous son autorité. [Le souligné est de moi.]

29 Similarly, subsection 2(1) of the *Statutory Instruments Act* provides:

2. (1) In this Act,

"regulation" means a statutory instrument

(*a*) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(*b*) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

> and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament. [Emphasis added.]
>
> * * *
>
> 2. (1) Les définitions qui suivent s'appliquent à la présente loi.
>
> "règlement" Texte réglementaire :
>
> *a*) soit pris dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale;
>
> *b*) soit dont la violation est passible d'une pénalité, d'une amende ou d'une peine d'emprisonnement sous le régime d'une loi fédérale.
>
> Sont en outre visés par la présente définition les règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant un organisme judiciaire ou quasi judiciaire constitué sous le régime d'une loi fédérale, de même que tout autre texte désigné comme règlement par une autre loi fédérale. [Le souligné est de moi.]

30 In the alternative, even if the definitions of "regulation"do not formally apply to the Act, the appellant submits that they are declaratory of the usual and ordinary meaning of the word "regulation". It follows, the appellant argues, that the word "regulation" found in subsection 36(1) of the Act includes "rules" made under section 17, so that the Agency was required to obtain the Governor in Council's approval of the Quorum Rule.

31 There are, in my view, a number of difficulties with these submissions.

32 First, the definition of "regulation" in subsection 2(1) of the *Interpretation Act* is preceded by the phrase "In this Act". This is to be contrasted with subsection 35(1) of the *Interpretation Act* which contains definitions that are to be applied "[i]n every enactment". As the word "regulation" is not found in subsection 35(1), the logical inference is that the definition found in subsection 2(1) is not to be applied to other enactments.

33 Similarly, the word "regulation" is defined in the *Statutory Instruments Act* only for the

purpose of that Act.

34 Second, paragraph 15(2)(*b*) of the *Interpretation Act* is subject to the caveat "unless a contrary intention" is evidenced in the enactment under consideration. For reasons developed in the contextual analysis, I am of the view that the Act does demonstrate such a contrary intention.

35 Third, subsection 3(3) of the *Interpretation Act* states that "[n]othing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act." This further limits the application of paragraph 15(2)(*b*) of the *Interpretation Act*.

36 Notwithstanding these difficulties, I agree that there is some potential ambiguity in the plain meaning of the word "regulation"in that in some contexts it can include a "rule". Where the word "regulation"can support more than one ordinary meaning, the meaning of the word plays a lesser role in the interpretive process. I therefore turn to the contextual analysis to read the provisions of the Act as a harmonious whole.

(ii) Contextual Analysis

37 An electronic search of the Act discloses that the word "rule" is used in the order of 11 different provisions, while "regulation"is found in over 30 provisions. In no case are the words used interchangeably. For example, at subsection 4(1) of the Act, "orders and regulations" made under the Act relating to transportation matters take precedence over any "rule, order or regulation" made under any other Act of Parliament. Similarly, under section 25 of the Act, the Agency is granted all powers vested in superior courts to, among other things, enforce "orders and regulations" made under the Act. The absence of reference to "rules" in both provisions suggests rules hold a subsidiary position to orders or regulations. This interpretation is consistent with the view that rules are created by the Agency on its own initiative, while orders come at the end of an adjudicative process and regulations must be approved by the Governor in Council.

38 Other provisions relevant to the contextual analysis are sections 34 and 36 of the Act. Subsection 34(2) requires the Agency to give to the Minister notice of every rule proposed under subsection 34(1) (which deals with the fixing of license and permit fees). Subsection 36(2) similarly requires the Agency to give the Minister notice of every regulation proposed to be made under the Act. If rules are a subset of regulations, subsection 34(2) would be redundant, because the Minister must be notified of all proposed regulations. The interpretation of "rules" as a subset of "regulation" would violate the presumption against tautology, where Parliament is presumed to avoid speaking in vain *(Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée*, [1985] 1 S.C.R. 831, at page 838.

39 Moreover, whenever "rule" appears in the Act it is in the context of internal procedural or non-adjudicative administrative matters. See:

* subsection 16(1): dealing with the quorum requirement;
* subsection 17(*a*): dealing with sittings of the Agency and the carrying on of its work;
* subsection 17(*b*): concerning procedures and business before the Agency, including the circumstances in which hearings may be held in private;
* subsection 17(*c*) dealing with a number of members required to hear any matter or perform any of the functions of the Agency;
* subsection 25.1(4): dealing with the Agency's right to make rules specifying a scale under which costs are taxed;
* subsection 34(1): dealing with fixing fees for, among other things, applications, licenses and permits;
* section 109: dealing with the right of judges of the Federal Court to, with the approval of the Governor in Council, make general rules regarding the practice and procedure of the Court in relation to insolvent railways;
* subsection 163(1): providing that in the absence of agreement to the contrary, the Agency's rules of procedure apply to arbitrations; and
* subsection 169.36(1): dealing with the right of the Agency to make rules of procedure for an arbitration.

40 In contrast, the Act's use of the word"regulations" generally refers to more than merely internal, procedural matters. For example:

* subsection 86(1): the Agency can make regulations relating to air services;
* section 86.1: the Agency shall make regulations respecting advertising of prices for air services within or originating in Canada;
* subsection 92(3): the Agency can make regulations concerning the adequacy of liability insurance for a railway;
* subsection 117(2): the Agency may make regulations with respect to information to be contained in a railway tariff;
* subsection 128(1): the Agency can make regulations relating to the interswitching of rail traffic; and
* section 170: the Agency can make regulations for the purpose of eliminating undue obstacles in the transportation network to the mobility of persons with disabilities.

41 The dichotomy between internal/procedural matters on one hand and external/substantive on the other is reflected in section 54 of the Act, which provides that the appointment of receivers or managers does not relieve them from complying with the Act and with the "orders, regulations, and directions made or issued under this Act". The absence of "rules" from this listing is consistent with the interpretation that, in the context of the Act, rules only apply to procedural matters and not the substantive operations that a receiver or manager would be charged with. This interpretation also accords with the presumption of consistent expression, since it is generally inferred that "[w]hen an

Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning" (*Peach Hill Management Ltd. v. Canada*, [2000] F.C.J. No. 894, 257 N.R. 193, at paragraph 12 (F.C.A.).

42 Another relevant provision is section 109, which requires Federal Court judges to seek approval from the Governor in Council when establishing rules of procedure for matters relating to insolvent railways. Two possible conclusions may be taken from this provision. First, it could imply that the Agency's rules are also subject to Governor in Council approval. Second, it could imply that since Federal Court judges are explicitly required to seek such approval, the absence of that same requirement under section 17 is indicative of Parliament's intent that the Agency is not required to seek such approval.

43 The latter interpretation is, in my view, the better view. It is in accordance with the maxim of statutory interpretation *expressio unius exclusio alterius*, which in essence states that consistent drafting requires that some legislative silences should be seen as deliberate. While this maxim should be approached with caution, the Supreme Court has relied on similar reasoning to find Parliament's inclusion of express limitations in some sections of an act as evidence Parliament did not intend those limitations to be included in other provisions where the exceptions are not explicitly stated (*Ulybel Enterprises* at paragraph 42).

44 In the present case, since the Act specifically requires Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure, the application of the *exclusio unius* maxim is consistent with the interpretation that the Agency's rules are not subject to this requirement.

45 There is a further, final contextual aid, found in the legislative evolution of the Act. In *Ulybel Enterprises* at paragraph 33, the Supreme Court noted that prior enactments may throw light on Parliament's intent when amending or adding to a statute.

46 The predecessor to the Agency, the National Transportation Agency (NTA), was governed by the *National Transportation Act,1987*, c. 28 (3rd Supp.) (former Act).

47 Pursuant to subsection 22(1) of the former Act, the NTA had the power to make rules with the approval of the Governor in Council:

> 22. (1) The Agency may, with the approval of the Governor in Council, make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business

before the Agency, including the circumstances in which in camera hearings may be held; and

(*c*) the number of members of the Agency that are required to hear any matter or exercise any of the functions of the Agency under this Act or any other Act of Parliament.

(2) Subject to the rules referred to in subsection (1), two members of the Agency constitute a quorum. [Emphasis added.]

* * *

22. (1) L'Office peut, avec l'approbation du gouverneur en conseil, établir des règles concernant:

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent connaître des questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

(2) Sous réserve des règles visées au paragraphe (1), le quorum est constitué de deux membres. [Le souligné est de moi.]

48 In 1996, the former Act was replaced with the current regime. Section 22 of the former Act was replaced by nearly identical provisions contained in subsection 16(1) and section 17 of the current Act. There was one significant difference: the requirement to obtain Governor in Council approval for the rules was removed. In my view, this demonstrates that Parliament intended that the Agency not be required to obtain Governor in Council approval when making rules pursuant to section 17 of the Act.

49 Before leaving the contextual analysis, for completeness, I note that at the hearing of this appeal counsel for the Agency indicated that he no longer relied on the clause-by-cause analysis of section 17 of the Act as an aid to interpretation. As such, it has formed no part of my analysis.

(iii) Purposive Analysis

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.

53 Subsection 29(1) of the Act requires the Agency to make its decision in any proceeding before it as expeditiously as possible, but no later than 120 days after the originating documents are received (unless the parties agree otherwise or the Governor in Council shortens the time frame by regulation).

54 The mandate of the Agency when viewed through the lens that it must act with celerity requires an efficient decision-making process. Efficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances.

55 In my view, interpreting subsection 36(1) of the Act to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) is consistent with the purpose of the Agency as envisioned in the Act.

(iv) Conclusion of Statutory Interpretation Analysis

56 Having conducted the required textual, contextual and purposive analysis, I am satisfied the Agency's interpretation of the Act was reasonable. While there may be a measure of ambiguity in the text of the Act, the Act's context and purpose demonstrate that the Agency's interpretation fell within a range of acceptable outcomes.

57 There remains to consider the appellant's final argument.

<u>What, if anything, is the Effect of Governor in Council Approval of the Rules in 2005?</u>

58 As noted above, the appellant argues that because the Rules were approved by the Governor in Council, they could not be amended without Governor in Council approval.

59 In my view, there are two answers to this argument.

60 First, while the Regulatory Impact Analysis Statement which accompanied the Rules in 2005

stated that Governor in Council approval was required for the enactment of the Rules, such a statement does not bind this Court. Regulatory Impact Analysis Statements do not form part of the substantive enactment (*Astral Media Radio Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 16, [2011] 1 F.C.R. 347, at paragraph 23). As the Agency later reasonably concluded that Governor in Council approval was not required to enact the Quorum Rule, it follows that Governor in Council approval in 2005 was an unnecessary step that does not limit or bind the Agency now or in the future.

61 Second, the Quorum Rule is new. It does not vary or rescind any provision in the Rules that could be said to be previously approved by the Governor in Council.

Conclusion

62 For these reasons, I would dismiss the appeal. In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.

63 In the event the parties are unable to reach agreement on the disbursements, they shall be assessed.

DAWSON J.A.
WEBB J.A.:-- I agree.
BLANCHARD J.A. (*ex officio*):-- I agree.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140919

Docket: A-218-14

Citation: 2014 FCA 205

Present: **WEBB J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 19, 2014.

REASONS FOR ORDER BY: WEBB J.A.

520

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140919

Docket: A-218-14

Citation: 2014 FCA 205

Present: **WEBB J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

WEBB J.A.

[1] Dr. Gábor Lukács, on April 22, 2014, commenced "an application for judicial review in respect of:

> (a) the practices of the Canadian Transport Agency ("Agency") related to the rights of the public, pursuant to the open-court principle, to view information provided in the course of adjudicative proceedings; and

(b) the refusal of the Agency to allow the Applicant to view unredacted documents in File No. M4120-3/13-05726 of the Agency, even though no confidentiality order has been sought or made in that file."

[2] The Agency brought a motion to quash this application for judicial review pursuant to paragraph 52(a) of the *Federal Courts Act*. This paragraph provides that:

52. The Federal Court of Appeal may	52. La Cour d'appel fédérale peut :
(a) quash proceedings in cases brought before it in which it has no jurisdiction or whenever those proceedings are not taken in good faith;	a) arrêter les procédures dans les causes qui ne sont pas de son ressort ou entachées de mauvaise foi;
…	[…]

[3] The Agency does not allege that the notice of application for judicial review was not taken in good faith but rather that this Court does not have the jurisdiction to hear this application. The grounds upon which the Agency relies are the following:

1. Subparagraph 28(1)(k) of the *Federal Courts Act* provides that it has jurisdiction to hear application for judicial review made in respect of decisions of the Agency.

2. A "refusal" to disclose government information, containing personal information such as in the present case for example, is a "refusal" of the head of the institution. It is therefore not a decision of the Agency falling within the purview of section 28 of the Federal Courts Act.

3. The application for judicial review should have been filed with the Federal Court.

4. Any person who has been refused access to a record requested under the Access to Information Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Federal Court for a review of the matter within the time specified in the Access to Information Act.

5. There are three prerequisites that must be met before an access requestor may apply for Judicial Review:

    1) The applicant must have been refused access to a record

    2) The applicant must have complained to the Information Commissioner

    3) The applicant must have received an investigation report by the Information Commissioner

6. The applicant could not apply for a judicial review because (1) the applicant's request was treated informally and there is therefore no “refusal”; (2) the applicant did not complain to the Information Commissioner before filing the within judicial review application; and (3) the applicant did not receive an investigation report by the Information Commissioner.

7. Even if the application for judicial review had been filed with the appropriate Court, it would have had no jurisdiction to obtain this application.

8. Such further and other grounds as counsel may advise and this Honourable Court may permit.

[4] In *Canada (Minister of National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2013] F.C.J. No. 1155, Stratas J.A., writing on behalf of this Court, noted that:

> **(3)** Motions to strike notices of application for judicial review
>
> **47** The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" - an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf..Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
>
> **48** There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, *supra* at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, *supra*, subsection 18.1(2) and section 18.4. An unmeritorious motion - one that raises matters that should be advanced at the hearing on the merits - frustrates that objective.

[5] In this case the Agency is relying on the authority provided in section 52 of the *Federal Courts Act* to strike the notice of application for judicial review. However, the comments of Stratas J. that an application for judicial review will only be struck if the application is “so clearly improper as to be bereft of any possibility of success" are equally applicable in this case. In *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, this Court also

noted that a reason for such a high threshold is the difference between an action and an application for judicial review. As stated in paragraph 10:

> … An action involves, once the pleadings are filed, discovery of documents, examinations for discovery, and then trials with viva voce evidence. It is obviously important that parties not be put to the delay and expense involved in taking a matter to trial if it is "plain and obvious" (the test for striking out pleadings) that the pleading in question cannot amount to a cause of action or a defence to a cause of action…
>
> Further, the disposition of an application commenced by originating notice of motion does not involve discovery and trial, matters which can be avoided in actions by a decision to strike. In fact, the disposition of an originating notice proceeds in much the same way that an application to strike the notice of motion would proceed: on the basis of affidavit evidence and argument before a single judge of the Court. Thus, the direct and proper way to contest an originating notice of motion which the Agency thinks to be without merit is to appear and argue at the hearing of the motion itself…

[6] Therefore, there is a high threshold for the Agency to succeed in this motion to quash the application for judicial review.

[7] The first three grounds for quashing the application for judicial review identified by the Agency can be consolidated and summarized as a submission that there is no decision of the Agency and that this Court only has the jurisdiction under subparagraph 28(1)(k) of the *Federal Courts Act* to judicially review decisions of the Agency.

[8] Subparagraph 28(1)(k) of the *Federal Courts Act* provides that:

28. (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:	28. (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :
…	[…]

(k) the Canadian Transportation Agency established by the Canada Transportation Act;	k) l'Office des transports du Canada constitué par la Loi sur les transports au Canada;

[9] There is nothing in subsection 28(1) to suggest that an application for judicial review can only be made to this Court if there is a decision of the Agency.

[10] In *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2011] F.C.J. No. 1725, Stratas J.A. stated that:

> **23** Although the Federal Court judge and the parties focused on whether a "decision" or "order" was present, I do not take them to be saying that there has to be a "decision" or an "order" before any sort of judicial review can be brought. That would be incorrect.
>
> **24** Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.
>
> **25** As far as "decisions" or "orders" are concerned, the only requirement is that any application for judicial review of them must be made within 30 days after they were first communicated: subsection 18.1(2) of the *Federal Courts Act*.

[11] Subsection 28(2) of the *Federal Courts Act* provides that section 18 to 18.5 (except subsection 18.4(2)) apply to any matter within the jurisdiction of this Court. Therefore, a decision is not necessarily required in order for this Court to have jurisdiction under section 28 of the *Federal Courts Act*.

[12] The other grounds that are submitted for quashing the notice of application are related to the *Access to Information Act*, R.S.C., 1985, c. A-1. It is acknowledged by both Dr. Lukács and the Agency that Dr. Lukács did not submit a request for information under this *Act.* Section 41 of that *Act* would only apply if the conditions as set out in that section were satisfied. Since he did not submit a request under that *Act*, the conditions of this section are not satisfied.

[13] However, the argument of Dr. Lukács is that he has the right to the documents in question without having to submit a request for these under the *Access to Information Act*. The Agency did not refer to any provision of the *Access to Information Act* that provides that the only right to obtain information from the Agency is by submitting a request under that *Act*.

[14] The issue on this motion is not whether Dr. Lukács will be successful in this argument but rather whether his application is "so clearly improper as to be bereft of any possibility of success". I am not satisfied that the Agency has met this high threshold in this case. I agree with the comments of this Court in *David Bull Laboratories (Canada) Inc.* that "the direct and proper way to contest a [notice of application for judicial review] which the Agency thinks to be without merit is to appear and argue at the hearing of the [application] itself".

[15] The Agency's motion to quash the notice of application for judicial review in this matter is dismissed, with costs, payable in any event of the cause.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-218-14
STYLE OF CAUSE:	DR. GABOR LUKACS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	SEPTEMBER 19, 2014

WRITTEN REPRESENTATIONS BY:

Self-represented	FOR THE APPLICANT
Odette Lalumière	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Self-represented	FOR THE APPLICANT
Legal Services Branch Canadian Transportation Agency	FOR THE RESPONDENT

Indexed as:

Nova Scotia (Attorney General) v. MacIntyre

The Attorney General of Nova Scotia and Ernest Harold Grainger, appellants;
and
Linden MacIntyre, respondent;
and
The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Saskatchewan and the Attorney General for Alberta, interveners;
and
Canadian Civil Liberties Association, intervener.

[1982] 1 S.C.R. 175

File No.: 16045.

Supreme Court of Canada

1981: February 3 / 1982: January 26.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Criminal law -- Search warrants -- Right to inspect search warrants and informations on which search warrants based -- Whether access restricted to "interested parties" or open to general public -- Whether right to inspect only on execution of search warrant or whether hearings dealing with search warrants open -- Criminal Code, R.S.C. 1970, c. C-34, ss. 443, 446.

Respondent, an investigative journalist, was denied access to search warrants and supporting material by appellant Grainger, the Justice of the Peace who had issued them, because such material was not available for inspection by the general public. At trial, respondent was held entitled to a

declaration that search warrants after their execution, and the informations related to them in the control of the justice of the peace or court official, were court records available for examination by members of the general public. In dismissing an appeal, the Appeal Court declared that the public was entitled to inspect informations upon which search warrants were issued pursuant to s. 443 of the Criminal Code, and that any member of the public, including individuals about to be the subject of a search warrant, was entitled to be present in open court when the search warrants were issued.

Held (Martland, Ritchie, Beetz and Estey JJ. dissenting): The appeal should be dismissed.

Per Laskin C.J. and Dickson, McIntyre, Chouinard and Lamer JJ.: After a search warrant has been executed, and objects found during the search are brought before a justice, members of the public are entitled to inspect the warrant, and the information upon which it was issued. Curtailment of public accessibility is justified only where the need to protect other social values is of superordinate importance. In cases where a search warrant is issued but nothing is found, protection of the innocent is such an overriding social value. Furthermore, the public interest in the effective administration of justice must override public accessibility to the extent that the proceedings at which the warrant is issued can be conducted in camera. Otherwise a person whose property was to be searched could remove the goods. The need for confidentiality disappears, however, once the warrant has been executed. At this point the public as well as those who are directly interested have a right to inspect the warrant and the related information.

Per Martland, Ritchie, Beetz and Estey JJ. (dissenting): The broad declaration of the Court of Appeal, for reasons given by Dickson J., cannot be sustained. Respondent cannot assert a right to examine the search warrants and related informations on the basis that the issuance of the search warrants was a judicial act in open court with a right for the public to be present.

Proceedings before a justice under s. 443 are part and parcel of criminal investigative procedure and are not analogous to trial proceedings which are generally required to be conducted in open court. The opening to public inspection of the documents before the justice is not equivalent to the right of the public to attend and witness proceedings in court. Access to these documents should be restricted to persons who can show a direct and tangible interest in the documents. There is no general right to inspect search warrants and the informations relating thereto.

Cases Cited

Inland Revenue Commissioners v. Rossminster Ltd., [1980] 2 W.L.R. 1; R. v. Solloway Mills & Co., [1930] 3 D.L.R. 293; Realty Renovations Ltd. v. Attorney-General for Alberta et al. (1978), 44 C.C.C. (2d) 249; Southam Publishing Company v. Mack (1959-60), 2 Crim. L.Q. 119; Nixon v. Warner Communications, Inc. (1978), 98 S. Ct. 1306; R. v. Wright, 8 T.R. 293; Gazette Printing Co. v. Shallow (1909), 41 S.C.R. 339; Scott v. Scott, [1913] A.C. 417; McPherson v. McPherson, [1936] A.C. 177, referred to.

APPEAL from a judgment of the Nova Scotia Court of Appeal (1980), 110 D.L.R. (3d) 289, 52 C.C.C. (2d) 161, 38 N.S.R. (2d) 633, 69 A.P.R. 633, dismissing an appeal from a judgment of Richard J. Appeal dismissed, Martland, Ritchie, Beetz and Estey JJ. dissenting.

Reinhold M. Endres and Mollie Gallagher, for the appellants.
Robert Murrant and Gordon Proudfoot, for the respondent.
J.A. Scollin, Q.C., and S.R. Fainstein, for the intervener the Attorney General of Canada.
S. Casey Hill, for the intervener the Attorney General for Ontario.
Ronald Schacter, for the intervener the Attorney General of Quebec.
Eugene D. Westhaver, for the intervener the Attorney General for New Brunswick.
E. Robert A. Edwards, for the intervener the Attorney General of British Columbia.
Kenneth W. MacKay, for the intervener the Attorney General for Saskatchewan.
Y. Roslak, Q.C., and Lloyd Nelson, for the intervener the Attorney General for Alberta.
Alan D. Gold, for the intervener the Canadian Civil Liberties Association.

Solicitors for the appellants: Reinhold M. Endres and Mollie Gallagher, Halifax.
Solicitors for the respondent: Robert Murrant and Gordon Proudfoot, Dartmouth.

The judgment of Laskin C.J. and Dickson, McIntyre, Chouinard and Lamer JJ. was delivered by

DICKSON J.:-- The appellant, Ernest Harold Grainger, is Chief Clerk of the Provincial Magistrate's Court at Halifax and also a Justice of the Peace. In the latter capacity he had occasion to issue certain search warrants. The respondent, Linden MacIntyre, is a television journalist employed by the Canadian Broadcasting Corporation. At the material time Mr. MacIntyre was researching a story on political patronage and fund raising. Mr. MacIntyre asked Mr. Grainger to show him the search warrants and supporting material. Mr. Grainger refused, on the ground that such material was not available for inspection by the general public. Mr. MacIntyre commenced proceedings in the Supreme Court of Nova Scotia, Trial Division, for an order that search warrants and informations relating thereto, issued pursuant to s. 443 of the Criminal Code, R.S.C. 1970, c. C-34, or other related or similar statutes, are a matter of public record and may be inspected by a member of the public upon reasonable request.

I

Mr. Justice Richard of the Trial Division of the Supreme Court of Nova Scotia delivered reasons approving Mr. MacIntyre's application. He held that Mr. MacIntyre was entitled to a declaration to the effect that search warrants "which have been executed", and informations relating

thereto, which are in the control of the justice of the peace or a court official are court records available for examination by members of the general public.

An appeal brought by the Attorney General of Nova Scotia and by Mr. Grainger to the Appeal Division of the Supreme Court of Nova Scotia was dismissed. The Appeal Division proceeded on much broader grounds than Richard J. The order dismissing the appeal contained a declaration "that a member of the public is entitled to inspect informations upon which search warrants have been issued pursuant to section 443 of the Criminal Code of Canada". The Court also declared that Mr. MacIntyre was entitled to be present in open court when the search warrants were issued. This right, the Appeal Division said, extended to any member of the public, including individuals who would be the subjects of the search warrants.

This Court granted leave to appeal the judgment and order of the Appeal Division. The Attorney General of Canada and the Attorneys General of the Provinces of Ontario, Quebec, New Brunswick, British Columbia, Saskatchewan and Alberta intervened to support the appellant Attorney General of Nova Scotia. The Canadian Civil Liberties Association intervened in support of Mr. MacIntyre.

Although Mr. MacIntyre happens to be a journalist employed by the C.B.C. he has throughout taken the position that his standing is no higher than that of any member of the general public. He claims no special status as a journalist.

II

A search warrant may be broadly defined as an order issued by a justice under statutory powers, authorizing a named person to enter a specified place to search for and seize specified property which will afford evidence of the actual or intended commission of a crime. A warrant may issue upon a sworn information and proof of reasonable grounds for its issuance. The property seized must be carried before the justice who issued the warrant to be dealt with by him according to law.

Search warrants are part of the investigative pretrial process of the criminal law, often employed early in the investigation and before the identity of all of the suspects is known. Parliament, in furtherance of the public interest in effective investigation and prosecution of crime, and through the enactment of s. 443 of the Code, has legalized what would otherwise be an illegal entry of premises and illegal seizure of property. The issuance of a search warrant is a judicial act on the part of the justice, usually performed ex parte and in camera, by the very nature of the proceedings.

The search warrant in recent years has become an increasingly important investigatory aid, as crime and criminals become increasingly sophisticated and the incidence of corporate white collar crime multiplies. The effectiveness of any search made pursuant to the issuance of a search warrant will depend much upon timing, upon the degree of confidentiality which attends the issuance of the

warrant and upon the element of surprise which attends the search.

As is often the case in a free society there are at work two conflicting public interests. The one has to do with civil liberties and the protection of the individual from interference with the enjoyment of his property. There is a clear and important social value in avoidance of arbitrary searches and unlawful seizures. The other, competing, interest lies in the effective detection and proof of crime and the prompt apprehension and conviction of offenders. Public protection, afforded by efficient and effective law enforcement, is enhanced through the proper use of search warrants.

In this balancing of interests, Parliament has made a clear policy choice. The public interest in the detection, investigation and prosecution of crimes has been permitted to dominate the individual interest. To the extent of its reach, s. 443 has been introduced as an aid in the administration of justice and enforcement of the provisions of the Criminal Code.

III

The Criminal Code gives little guidance on the question of accessibility to the general public of search warrants and the underlying informations. And there is little authority on the point. The appellant Attorney General of Nova Scotia relied upon Taylor's Treatise on the Law of Evidence (11th ed. 1920), upon a footnote to Order 63, Rule 4 of the English Rules of Court, and upon Inland Revenue Commissioners v. Rossminster Ltd., [1980] 2 W.L.R. 1. These authorities indicate that under English practice there is no general right to inspect and copy judicial records and documents. The right is only exercisable when some direct and tangible interest or proprietary right in the documents can be demonstrated.

It does seem clear that an individual who is 'directly interested' in the warrant can inspect the information and the warrant after the warrant has been executed. The reasoning here is that an interested party has a right to apply to set aside or quash a search warrant based on a defective information (R. v. Solloway Mills & Co., [1930] 3 D.L.R. 293 (Alta. S.C.)). This right can only be exercised if the applicant is entitled to inspect the warrant and the information immediately after it has been executed. The point is discussed by Mr. Justice MacDonald of the Alberta Supreme Court in Realty Renovations Ltd. v. Attorney-General for Alberta et al. (1978), 44 C.C.C. (2d) 249 at pp. 253-54:

> Since the issue of a search warrant is a judicial act and not an administrative act, it appears to me to be fundamental that in order to exercise the right to question the validity of a search warrant, the interested party or his counsel must be able to inspect the search warrant and the information on which it is based. Although there is no appeal from the issue of a search warrant, a superior Court has the right by prerogative writ to review the act of the Justice of the Peace in issuing the warrant. In order to launch a proper application, the applicant should know the reasons or grounds for his application, which reasons or grounds are most likely to be found in the form of the information or warrant.

> I am unable to conceive anything but a denial of Justice if the contents of the information and warrant, after the warrant is executed, are hidden until the police have completed the investigation or until the Crown prosecutor decides that access to the file containing the warrant is to be allowed. Such a restriction could effectively delay, if not prevent review of the judicial act of the Justice in the issue of the warrant. If a warrant is void then it should be set aside as soon as possible and the earlier the application to set it aside can be heard, the more the right of the individual is protected.

The appellant, the Attorney General of Nova Scotia, does not contest the right of an 'interested party' to inspect search warrants and informations after execution. His contention is that Mr. MacIntyre, a member of the general public, not directly affected by issuance of the warrant, has no right of inspection. The question, therefore, is whether, in law, any distinction can be drawn, in respect of accessibility, between those persons who might be termed 'interested parties' and those members of the public who are unable to show any special interest in the proceedings.

There would seem to be only two Canadian cases which have addressed the point. In (1959-60), 2 Crim. L.Q., 119, reference is made to an unreported decision of Greschuk J. in Southam Publishing Company v. Mack in Supreme Court Chambers in Calgary, Alberta. Mandamus was granted requiring a magistrate to permit a reporter of the Calgary Herald to inspect the information and complaints which were in his possession relating to cases the magistrate had dealt with on a particular date.

In Realty Renovations Ltd. v. Attorney-General for Alberta, supra, MacDonald J. concluded his judgment with these words:

> I further declare that upon execution of the search warrant, the information in support and the warrant are matters of Court Record and are available for inspection on demand.

It is only fair to observe, however, that in that case the person seeking access was an "interested party" and therefore the broad declaration, quoted above, strictly speaking went beyond what was required for the decision.

American courts have recognized a general right to inspect and copy public records and documents, including judicial records and documents. Such common law right has been recognized, for example, in courts of the District of Columbia (Nixon v. Warner Communications, Inc. (1978), 98 S. Ct. 1306). In that case Mr. Justice Powell, delivering the opinion of the Supreme Court of the United States, observed at p. 1311:

> Both petitioner and respondents acknowledge the existence of a common-law right of access to judicial records, but they differ sharply over its scope and the circumstances warranting restrictions of it. An infrequent subject

> of litigation, its contours have not been delineated with any precision.

Later, at p. 1312, Mr. Justice Powell said:

> The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, see, e.g., State ex rel. Colscott v. King, 154 Ind. 621, 621-627, 57 N.E. 535, 536-538 (1900); State ex rel. Ferry v. Williams, 41 N.J.L. 332, 336-339 (1879), and in a newspaper publisher's intention to publish information concerning the operation of government, see, e.g., State ex rel. Youmans v. Owens, 28 Wis.2d 672, 677, 137 N.W.2d 470, 472 (1965), modified on other grounds, 28 Wis.2d 685a, 139 N.W.2d 241 (1966). But see Burton v. Reynolds, 110 Mich. 354, 68 N.W. 217 (1896).

By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts. The rationale of this last-mentioned consideration has been eloquently expressed by Bentham in these terms:

> 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.'
> 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.'

The concern for accountability is not diminished by the fact that the search warrants might be issued by a justice in camera. On the contrary, this fact increases the policy argument in favour of accessibility. Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversation.

In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.

IV

The appellant, the Attorney General of Nova Scotia, says in effect that the search warrants are

none of Mr. MacIntyre's business. MacIntyre is not directly interested in the sense that his premises have been the object of a search. Why then should he be entitled to see them?

There are two principal arguments advanced in support of the position of the appellant. The first might be termed the 'privacy' argument. It is submitted that the privacy rights of the individuals who have been the object of searches would be violated if persons like Mr. MacIntyre were permitted to inspect the warrants. It is argued that the warrants are issued merely on proof of 'reasonable grounds' to believe that there is evidence with respect to the commission of a criminal offence in a "building, receptacle or place". At this stage of the proceedings no criminal charge has been laid and there is no assurance that a charge ever will be laid. Moreover, search warrants are often issued to search the premises of a third party who is in no way privy to any wrongdoing, but is in possession of material necessary to the inquiry. Why, it is asked, submit these individuals to embarrassment and public suspicion through release of search warrants?

The second, independent, submission of the appellant might be termed the 'administration of justice' argument. It is suggested that the effectiveness of the search warrant procedure depends to a large extent on the element of surprise. If the occupier of the premises were informed in advance of the warrant, he would dispose of the goods. Therefore, the public must be denied access to the warrants, otherwise the legislative purposes and intention of Parliament, embodied in s. 443 of the Criminal Code, would be frustrated.

V

Let me deal first with the 'privacy' argument. This is not the first occasion on which such an argument has been tested in the courts. Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in R. v. Wright, 8 T.R. 293, are apposite and were cited with approval by Duff J. in Gazette Printing Co. v. Shallow (1909), 41 S.C.R. 339 at p. 359:

> Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

The leading case is the decision of the House of Lords in Scott v. Scott, [1913] A.C. 417. In the later case of McPherson v. McPherson, [1936] A.C. 177, at p. 200, Lord Blanesburgh, delivering the judgment of the Privy Council, referred to "publicity" as the "authentic hall-mark of

judicial as distinct from administrative procedure".

It is, of course, true that Scott v. Scott and McPherson v. McPherson were cases in which proceedings had reached the stage of trial whereas the issuance of a search warrant takes place at the pre-trial investigative stage. The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. The same policy considerations upon which is predicated our reluctance to inhibit accessibility at the trial stage are still present and should be addressed at the pretrial stage. Parliament has seen fit, and properly so, considering the importance of the derogation from fundamental common law rights, to involve the judiciary in the issuance of search warrants and the disposition of the property seized, if any. I find it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy.

The reported cases have not generally distinguished between judicial proceedings which are part of a trial and those which are not. Ex parte applications for injunctions, interlocutory proceedings, or preliminary inquiries are not trial proceedings, and yet the 'open court' rule applies in these cases. The authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial proceedings must be held in public. The editor of Halsbury's 4th Edition states the rule in these terms:

> In general, all cases, both civil and criminal, must be heard in open court, but in certain exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera [Vol. 10, para. 705, at p. 316].

At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the commission of a crime may, in some circumstances, raise issues of public importance.

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing

is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear.

VI

That brings me to the second argument raised by the appellant. The point taken here is that the effective administration of justice would be frustrated if individuals were permitted to be present when the warrants were issued. Therefore, the proceeding must be conducted in camera, as an exception to the open court principle. I agree. The effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys General have established, at least to my satisfaction, that if the application for the warrant were made in open court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless. In a process in which surprise and secrecy may play a decisive role the occupier of the premises to be searched would be alerted, before the execution of the warrant, with the probable consequence of destruction or removal of evidence. I agree with counsel for the Attorney General of Ontario that the presence in an open courtroom of members of the public, media personnel, and, potentially, contacts of suspected accused in respect of whom the search is to be made, would render the mechanism of a search warrant utterly useless.

None of the counsel before us sought to sustain the position of the Appeal Division of the Supreme Court of Nova Scotia that the issue of the search warrant is a judicial act which should be performed in open court by a justice of the peace with the public present. The respondent Mr. MacIntyre stated in paragraph 5 of his factum:

> One must note that the Respondent never sought documentation relating to unexecuted search warrants nor did he ever request to be present during the decision making process...

It appeared clear during argument that the act of issuing the search warrant is, in practice, rarely, if ever, performed in open court. Search warrants are issued in private at all hours of the day or night, in the chambers of the justice by day or in his home by night. Section 443(1) of the Code seems to recognize the possibility of exigent situations in stating that a justice may "at any time" issue a warrant.

Although the rule is that of "open court" the rule admits of the exception referred to in Halsbury, namely, that in exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera. The issuance of a search warrant is such a case.

In my opinion, however, the force of the 'administration of justice' argument abates once the warrant has been executed, i.e. after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears. The appellant concedes that at this point

individuals who are directly 'interested' in the warrant have a right to inspect it. To that extent at least it enters the public domain. The appellant must, however, in some manner, justify granting access to the individuals directly concerned, while denying access to the public in general. I can find no compelling reason for distinguishing between the occupier of the premises searched and the public. The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance.

The 'administration of justice' argument is based on the fear that certain persons will destroy evidence and thus deprive the police of the fruits of their search. Yet the appellant agrees these very individuals (i.e. those 'directly interested') have a right to see the warrant, and the material upon which it is based, once it has been executed. The appellants do not argue for blanket confidentiality with respect to warrants. Logically, if those directly interested can see the warrant, a third party who has no interest in the case at all is not a threat to the administration of justice. By definition, he has no evidence that he can destroy. Concern for preserving evidence and for the effective administration of justice cannot justify excluding him.

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.

I am not unaware that the foregoing may seem a departure from English practice, as I understand it, but it is in my view more consonant with the openness of judicial proceedings which English case law would seem to espouse.

VII

I conclude that the administration of justice argument does justify an in camera proceeding at the time of issuance of the warrant but, once the warrant has been executed, exclusion thereafter of members of the public cannot normally be countenanced. The general rule of public access must prevail, save in respect of those whom I have referred to as innocent persons.

I would dismiss the appeal and vary the declaration of the Appeal Division of the Supreme Court of Nova Scotia to read as follows:

> IT IS DECLARED that after a search warrant has been executed, and objects found as a result of the search are brought before a justice pursuant to s. 446 of the Criminal Code, a member of the public is entitled to inspect the warrant and the information upon which the warrant has been issued pursuant to s. 443 of the Code.
>
> There will be no costs in this Court.

The reasons of Martland, Ritchie, Beetz and Estey JJ. were delivered by

MARTLAND J. (dissenting):-- This appeal is from a judgment of the Appeal Division of the Supreme Court of Nova Scotia. The facts which gave rise to the case are not in dispute.

The appellant, Ernest Harold Grainger, is Chief Clerk of the Provincial Magistrate's Court at Halifax and is also a Justice of the Peace. The respondent is a television journalist employed by the Canadian Broadcasting Corporation who, at the material time, was researching a story on political patronage and fund raising. He asked the appellant, Grainger, to show him certain search warrants and supporting material and was refused on the ground that such material was not available for inspection by the general public.

The respondent gave notice to the appellants of an intended application in the Supreme Court of Nova Scotia, Trial Division, for "an Order in the nature of mandamus and/or a declaratory judgment to the effect that the search warrants and Informations relating thereto issued pursuant to Section 443 of the Criminal Code of Canada or other related or similar statutes are a matter of public record and may be inspected by a member of the public upon reasonable request".

The application was heard by Richard J. who ordered that the respondent "is entitled to a declaration to the effect that the Search Warrants and Informations relating thereto which have been executed upon and which are in the control of a Justice of the Peace or a Court Official are court records and are available for examination by members of the general public." It will be noted that this order was limited to search warrants which had been executed.

The appellants appealed unsuccessfully to the Appeal Division. The judgment dismissing the appeal contained the following declaration:

> IT IS DECLARED that a member of the public is entitled to inspect informations upon which search warrants have been issued pursuant to section 443 of the Criminal Code of Canada.

This declaration was broader in its scope than that made by Richard J. in that it was not limited to search warrants which had been executed. The basis for the Court's decision is set forth in the following paragraph of the reasons for judgment:

> In my opinion any member of the public does have a right to inspect informations upon which search warrants are based, pursuant to s. 443 of the Criminal Code, since the issue of the search warrant is a judicial act performed in open court by a justice of the peace. The public would be entitled to be present on that occasion and to hear the contents of the information presented to the justice when he is requested to exercise his discretion in the granting of the warrant. The information has become part of the record of the court as revealed at a public hearing and must be available for inspection by members of the

public.

Subsection (1) of s. 443 of the Criminal Code provides:

> 443. (1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place
>
> (a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,
> (b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
> (c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

Section 446 of the Criminal Code provides that anything seized under a search warrant issued pursuant to s. 443 and brought before a justice shall be detained by him or he may order that it be detained until the conclusion of any investigation or until required to be produced for the purpose of a preliminary inquiry or trial.

Subsection (5) of s. 446 provides:

> 446. ...
>
> (5) Where anything is detained under subsection (1), a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction may, on summary application on behalf of a person who has an interest in what is detained, after three clear days notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

The appellants, by leave of this Court, have appealed from the judgments of the Appeal Division. The two issues stated by the appellants are as follows:

(i) Are search warrants issued pursuant to Section 443 of the Criminal Code issued in open court and are they and the informations pertaining thereto consequently documents open for public inspection,

(ii) Whether there is otherwise a general right to inspect search warrants and the informations pertaining thereto.

With respect to the first issue, I am in agreement with my brother Dickson, for the reasons which he has given, that the broad declaration made by the Appeal Division cannot be sustained. That being so, the respondent cannot assert a right to examine the search warrants and the related informations on the basis that the issuance of the search warrants was a judicial act in open court with a right for the public to be present.

That brings us to the second issue defined by the appellants as to whether there is a general right to inspect search warrants and the informations pertaining thereto. This was the real basis of the submission of the respondent who did not seek to sustain the position taken by the Appeal Division. His position is that search warrants issued under s. 443 and the informations pertaining thereto are court documents which are open to general public inspection.

The respondent relies upon an ancient English statute enacted in 1372, 46 Edward III. An English translation of this Act, which was enacted in law French, appears in a note at the end of the judgment of the Court of King's Bench in Caddy v. Barlow (1827), 1 Man. & Ry. 275 at pp. 279-80. I will quote that part of the note which includes the statutory provision:

> It appears that originally all judicial records of the King's Courts were open to the public without restraint, and were preserved for that purpose. Lord Coke, in his preface to 3 Co. Rep. 3, speaking on this subject says, "these records, for that they contain great and hidden treasure, are faithfully and safely kept, (as they well deserve), in the king's treasury. And yet not so kept but that any subject may for his necessary use and benefit have access thereunto; which was the ancient law of England, and so is declared by an act of Parliament in 46 Edw. 3, in these words: Also the Commons pray, that, whereas records, and whatsoever is in the King's Court, ought of reason to remain there, for perpetual evidence and aid of all parties thereto, and of all those whom in any manner they reach, when they have need; and yet of late they refuse, in the Court of our said Lord, to make search or exemplification of any thing which can fall in evidence against the King, or in his disadvantage. May it please (you) to ordain by statute, that search and exemplification be made for all persons (fait as touts gentz) of whatever record touches them in any manner, as well as that which falls against the King as other persons. Le Roy le voet."

The respondent cites this legislation in support of the proposition that a member of the public has access to all judicial records. However, the provisions of the statute did not go that far. It referred to "whatever record touches them in any manner". (Emphasis added.) I take this as meaning that to obtain the benefit of the statute the person had to show that the document sought to be searched in some way affected his interests.

This view is supported by the portion of the footnote which precedes the quotation of the statute. Lord Coke states that any subject may have access to the records "for his necessary use and benefit".

The case of Caddy v. Barlow itself related to the admissibility, in an action for malicious prosecution, of a copy of an indictment against the plaintiff which had been granted to her brother, the co-accused.

The respondent refers to the judgment of the Court of Appeal for Ontario in The Attorney-General v. Scully (1902), 4 O.L.R. 394, in which reference is made to Caddy v. Barlow and to the English statute. That case dealt with an application made to the clerk of the peace for a copy of the indictment in a criminal charge of theft against the applicant who had been acquitted. He obviously had an interest in obtaining the document.

The Appeal Division in the present case which, as previously noted, based its decision to permit the examination of the search warrants and informations upon its conclusion that these documents were produced at a judicial hearing in open court, did deal with the assertion of a general right to examine court documents in the following passage in its reasons:

> In my opinion at common law courts have always exercised control over their process in open court and access to the records. Although the public have a right to any information they may gleam [sic] from attendance at a public hearing of a process in open court, and to those parts of the record that are part of the public presentation of the judicial proceeding in open court there have always been some parts of the court file that are available only to "persons interested" and this "interest" must be established to the satisfaction of the court. Parties to civil actions and the accused in criminal proceedings have always been held by the courts to be persons so interested. Other persons must establish their right to see particular documents before being entitled to do so.

The Appeal Division cited in its reasons paragraphs 1492 and 1493 of Taylor on Evidence, 11th ed. (The same paragraphs appear with the same numbers in the 12th edition):

> 1492. It is highly questionable whether the records of inferior tribunals are open to the inspection of all persons without distinction; but it is clear that everyone has a right to inspect and take copies of the parts of the proceedings in which he is individually interested. The party, therefore, who wishes to examine

> any particular record of one of those courts, should first apply to that court, showing that he has some interest in the document in question, and that he requires it for a proper purpose. If his application be refused, the Chancery, or the King's Bench Division of the High Court, upon affidavit of the fact, may send either for the record itself or an exemplification; or the latter court will, by mandamus, obtain for the applicant the inspection or copy required. Thus, where a person, after having been convicted by a magistrate under the game laws, had an action brought against him for the same offence, the Court of Queen's Bench held that he was entitled to a copy of the conviction; and the magistrate having refused to give him one, they granted a writ of certiorari, for the mere purpose of procuring a copy, and of thus enabling the defendant to defeat the action. So, where a party, who had been sued in a court of conscience and had been taken in execution, brought an action of trespass and false imprisonment, the judges granted him a rule to inspect so much of the book of the proceedings as related to the suit against himself.
>
> 1493. Indeed, it may be laid down as a general rule, that the King's Bench Division will enforce by mandamus the production of every document of a public nature, in which any one of his Majesty's subjects can prove himself to be interested. Every officer, therefore, appointed by law to keep records ought to deem himself a trustee for all interested parties, and allow them to inspect such documents as concern themselves,--without putting them to the expense and trouble of making a formal application for a mandamus. But the applicant must show that he has some direct and tangible interest in the documents sought to be inspected, and that the inspection is bona fide required on some special and public ground, or the court will not interfere in his favour; and therefore, if his object be merely to gratify a rational curiosity, or to obtain information on some general subject, or to ascertain facts which may be indirectly useful to him in some ulterior proceedings, he cannot claim inspection as a right capable of being enforced.

The first edition of this work was published in 1848, and so these propositions may be taken as representing the author's views of the law of England on this subject.

In Halsbury's Laws of England, 4th ed., vol. 1, para. 97, a similar statement of the law appears:

> The applicant's interest in the documents must be direct and tangible. Neither curiosity, even though rational, nor the ascertainment of facts which may be useful for furthering some ulterior object, constitutes a sufficient interest to bring an applicant within the rule on which the court acts in granting a

mandamus for the inspection of public documents.

> Although reasonable grounds must be shown for requiring inspection, it is not necessary to show as a ground for the application for a mandamus to inspect documents that a suit has been actually instituted. It will suffice to show that there is some particular matter in dispute and that the applicant is interested therein.

It is quite clear that the respondent has no direct and tangible interest in the documents which he sought to examine. He wished to examine them to further an ulterior object, i.e. for the purpose of preparing a news story. Applying the rule applicable under English law, the appellant, Grainger, was entitled to refuse his request.

It is suggested that a broader right might be recognized consonant with the openness of judicial proceedings. This suggestion requires a consideration of the nature of the proceedings provided for in s. 443. That section provides a means whereby persons engaged in the enforcement of criminal law may obtain leave, inter alia, to search buildings, receptacles or places and seize documents or other things which may afford evidence with respect to the commission of a criminal offence. A justice is empowered by the section to authorize this to be done. Before giving such authority, he must be satisfied by information on oath that there is reasonable ground for believing that there is in the building, receptacle or place anything in respect of which an offence has been committed or is suspected to have been committed; anything that there is reasonable ground to believe will afford evidence of the commission of a criminal offence; or anything that there is reasonable ground to believe is intended to be used for the commission of an offence against the person for which a person may be arrested without warrant.

The function of the justice may be considered to be a judicial function, but might more properly be described as a function performed by a judicial officer, since no notice is required to anyone, there is no opposite party before him and, in fact, in the case of a search before proceedings are instituted, no opposite party exists. There is no requirement that the justice should perform his function in court. The justice does not adjudicate, nor does he make any order. His power is to give authority to do certain things which are a part of pretrial preparation by the Crown. No provision is made in either s. 443 or s. 446 for an examination by anyone of the documents on the basis of which the justice issued a search warrant.

As the function of the justice is not adjudicative and is not performed in open court, cases dealing with the requirement of court proceedings being carried on in public, such as Scott v. Scott, [1913] A.C. 417, and McPherson v. McPherson, [1936] A.C. 177, are not, in my opinion, relevant to the issue before the Court. The documents which the respondent seeks to examine are not documents filed in court proceedings. They are the necessary requirements which enable the justice to grant permission for the Crown to pursue its investigation of possible crimes and to prepare for

criminal proceedings.

If the documents in question in this appeal are not subject to public examination prior to the execution of the search warrants, I see no logical reason why they should become subject to such examination thereafter, at least until the case in respect of which the search has been made has come to trial. It is true that a search of those documents before the search warrant has been executed might frustrate the very purpose for which the warrant was issued by forewarning the person whose premises were to be searched. The element of surprise is essential to the proper enforcement of the criminal law. There are, however, additional and important reasons why such documents should not be made public which continue even after the warrant has been executed.

The information upon oath on the basis of which a search warrant may be issued is in Form 1 contained in Part XXV of the Criminal Code. It requires a description of the offence in respect of which the search is to be made. The informant must state that he has reasonable grounds for believing that the things for which the search is to be made are in a particular place and must state the grounds for such belief. This document, which may be submitted to the justice before any charges have been laid, discloses the informant's statement that an offence has been committed or is intended to be committed.

The disclosure of such information before trial could be prejudicial to the fair trial of the person suspected of having committed such crime. Publication of such information prior to trial is even more serious.

In R. v. Fisher (1811), 2 Camp. 563, 170 E.R. 1253, a prosecution was instituted for criminal libel in consequence of the publication by the defendants of the preliminary examinations taken ex parte before a magistrate prior to the committal for trial of the plaintiff on a charge of assault with intent to rape. In his judgment, Lord Ellenborough said, at p. 570:

> If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. Is it possible they should do so, after having read for weeks and months before, ex parte statements of the evidence against the accused, which the latter had no opportunity to disprove or to controvert? ... The publication of proceedings in courts of justice, where both sides are heard, and matters are finally determined, is salutary, and therefore it is permitted. The publication of these preliminary examinations has a tendency to pervert the public mind, and to disturb the course of justice; and it is therefore illegal.

Inspection of the information and the search warrant would enable the person inspecting the documents to discover the identity of the informant. In certain types of cases this might well place the informant in jeopardy. It was this kind of risk which led to the recognition in law of the right of the police to protect from disclosure the identity of police informants. That right exists even where a

police officer is testifying at a trial. The same kind of risk arises in relation to persons who give information leading to the issuance of a search warrant. For the same reasons which justify the police in refusing to disclose the identity of an informer, public disclosure of documents from which the identity of the informant may be ascertained should not be compelled.

In his reasons, my brother Dickson has referred to the fact that in recent years the search warrant has become an increasingly important investigatory aid as crime and criminals become increasingly sophisticated and has pointed out that the effectiveness of a search pursuant to a search warrant depends, inter alia, on the degree of confidentiality which attends the issuance of the warrant. To insure such confidentiality, it is essential that criminal organizations, such as those involved in the drug traffic, should be prevented, as far as possible, from obtaining the means to discover the identity of persons assisting the police.

Apart from the protection of the identity of the person furnishing the information upon which the issuance of a search warrant is founded, it is undesirable, in the public interest, that those engaged in criminal activities should have available to them information which discloses the pattern of police activities in connection with searches. In Inland Revenue Commissioners v. Rossminster Ltd., [1980] 2 W.L.R. 1, the House of Lords considered the validity of a search warrant procured pursuant to an English statute, the Taxes Management Act 1970, 1970 (U.K.), c. 9. The warrant was obtained because of suspected tax frauds. When executed, the occupants of the premises were not told the offences alleged or the "reasonable ground" on which the judge issuing the warrant had acted. In his reasons for judgment, Lord Wilberforce said, at pp. 37-38:

> But, on the plain words of the enactment, the officers are entitled if they can persuade the board and the judge, to enter and search premises regardless of whom they belong to: a warrant which confers this power is strictly and exactly within the parliamentary authority, and the occupier has no answer to it. I accept that some information as regards the person(s) who are alleged to have committed an offence and possibly as to the approximate dates of the offences must almost certainly have been laid before the board and the judge. But the occupier has no right to be told of this at this stage, nor has he the right to be informed of the "reasonable grounds" of which the judge was satisfied. Both courts agree as to this: all this information is clearly protected by the public interest immunity which covers investigations into possible criminal offences. With reference to the police, Lord Reid stated this in these words:
>
> > "The police are carrying on an unending war with criminals many of whom are today highly intelligent. So it is essential that there should be no disclosure of anything which might give any useful information to those who organise criminal activities. And it would generally be wrong to require disclosure in a civil case of anything which might be material in a

> pending prosecution: but after a verdict has been given or it has been decided to take no proceedings there is not the same need for secrecy." (Conway v. Rimmer [1968] A.C. 910, at pp. 953-954.)

The release to the public of the contents of informations and search warrants may also be harmful to a person whose premises are permitted to be searched and who may have no personal connection with the commission of the offence. The fact that his premises are the subject of a search warrant generates suspicion that he was in some way involved in the offence. Publication of the fact that such a warrant had been issued in respect of his premises would be highly prejudicial to him.

For these reasons, I am not satisfied that there is any valid reason for departing from the rule as stated in Halsbury (supra) so as to afford to the general public the right to inspect documents forming part of the search warrant procedure under s. 443.

In summary, my conclusion is that proceedings before a justice under s. 443 being part and parcel of criminal investigative procedure are not analogous to trial proceedings, which are generally required to be conducted in open court. The opening to public inspection of the documents before the justice is not equivalent to the right of the public to attend and witness proceedings in court. Access to these documents should be restricted, in accordance with the practice established in England, to persons who can show an interest in the documents which is direct and tangible. Clearly the respondent had no such interest.

I would allow the appeal and set aside the judgments of the Court of Appeal and of Richard J. In accordance with the submission of the appellants, there should be no order as to costs.

Appeal dismissed, Martland, Ritchie, Beetz and Estey JJ. dissenting.

Case Name:

R. v. Canadian Broadcasting Corp.

Between
Canadian Broadcasting Corporation, Applicant (Appellant in Appeal), (Respondent in Cross-Appeal), and Her Majesty the Queen, Respondent (Respondent in Appeal), and Valentino Burnett, Karen Eves, Blaine Phibbs and Travis MacDonald, Respondents (Respondents in Appeal), and Waterloo Regional Police Service and The Office of the Chief Coroner, Respondents (Respondents in Appeal), and Correctional Service of Canada, Respondent (Respondent in Appeal), (Appellant in Cross-Appeal)

[2010] O.J. No. 4615

2010 ONCA 726

221 C.R.R. (2d) 242

271 O.A.C. 7

102 O.R. (3d) 673

262 C.C.C. (3d) 455

327 D.L.R. (4th) 470

Dockets: C51613, C51617

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, R.J. Sharpe and G.J. Epstein JJ.A.

Heard: September 15, 2010.
Judgment: November 1, 2010.

(55 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Fundamental freedoms -- Freedom of thought, belief, opinion and expression -- Freedom of expression -- Appeal by CBC from order imposing limitations on its right to access and copy preliminary inquiry exhibits for documentary allowed -- Cross-appeal by Correctional Service of Canada ("CSC") from order granting CBC any right to copy exhibits dismissed -- Absent finding of potential harm or injury to legally protected interest, there was nothing permitting a judge to impose his or her opinion about what did not need to be broadcast to general public -- Such an order would be inconsistent with constitutionally protected freedoms of expression and the press.

Criminal law -- Preliminary inquiry -- Publication bans and confidentiality orders -- Appeal by CBC from order imposing limitations on its right to access and copy preliminary inquiry exhibits for documentary allowed -- Cross-appeal by Correctional Service of Canada ("CSC") from order granting CBC any right to copy exhibits dismissed -- Absent finding of potential harm or injury to legally protected interest, there was nothing permitting a judge to impose his or her opinion about what did not need to be broadcast to general public -- Such an order would be inconsistent with constitutionally protected freedoms of expression and the press.

Criminal law -- Coroner's inquest or inquiry -- Procedure -- Appeal by CBC from order imposing limitations on its right to access and copy preliminary inquiry exhibits for documentary allowed -- Cross-appeal by Correctional Service of Canada ("CSC") from order granting CBC any right to copy exhibits dismissed -- Absent finding of potential harm or injury to legally protected interest, there was nothing permitting a judge to impose his or her opinion about what did not need to be broadcast to general public -- Such an order would be inconsistent with constitutionally protected freedoms of expression and the press.

Media and Communications law -- Legislative framework -- Legislation -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Appeal by CBC from order imposing limitations on its right to access and copy preliminary inquiry exhibits for documentary allowed -- Cross-appeal by Correctional Service of Canada ("CSC") from order granting CBC any right to copy exhibits dismissed -- Absent finding of potential harm or injury to legally protected interest, there was nothing permitting a judge to impose his or her opinion about what did not need to be broadcast to general public -- Such an order would be inconsistent with constitutionally protected freedoms of expression and the press.

Media and Communications law -- Broadcasting -- Television -- Canadian Broadcasting Corporation -- Content -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Freedom of expression -- Appeal by CBC from order imposing limitations on its right to access and copy preliminary inquiry exhibits for documentary allowed -- Cross-appeal by Correctional Service of Canada ("CSC") from order granting CBC any right to copy exhibits dismissed -- Absent finding of potential harm or injury to legally protected interest, there was nothing permitting a judge to impose his or her opinion about what did not need to be broadcast to general public -- Such an order would be inconsistent with constitutionally protected freedoms of expression and the press.

Appeal by CBC from an order imposing limitations on its right to access and copy preliminary inquiry exhibits. Cross-appeal by the Correctional Service of Canada ("CSC") from the order granting CBC any right to copy the exhibits. Ashley Smith, a 19-year-old from Moncton, New Brunswick, was serving a six-year sentence at the Grand Valley Institution for Women. On October 19, 2007, while under observation in an isolation cell, she strangled herself with a strip of cloth. Four correctional officers were charged with criminal negligence causing death. Those charges proceeded to a preliminary inquiry where certain exhibits were introduced into evidence. The exhibits included video recordings, one of which captured the actual circumstances of Ashley Smith's death. Part way through the preliminary inquiry, the Crown decided not to proceed with the charges and the four correctional officers were discharged. A coroner's warrant was subsequently issued for the seizure of all documents related to Ashley Smith's death, including the preliminary inquiry exhibits. CBC decided to produce an investigative documentary on Ashley Smith's life. CBC sought access to and copies of the preliminary inquiry exhibits. The preliminary inquiry judge refused CBC's request on the ground that he should not interfere with the process of the coroner's inquest. CBC sought certiorari to quash the preliminary inquiry judge's decision and an order pursuant to s. 24(1) of the Charter granting it access to and the right to copy the exhibits. The application judge found that the preliminary inquiry judge erred by refusing to deal with CBC's application on the merits, and that CBC was entitled to access the exhibits. However, he held that CBC was entitled to view and copy only those portions of the video evidence that were actually played at the preliminary inquiry, and that CBC was entitled to view but not copy the portion of the video that was played showing Ashley Smith's death.

HELD: Appeal allowed and cross-appeal dismissed. The application judge erred by limiting CBC's right of access to only those portions of the exhibits that were played in open court. Absent some countervailing consideration, the open court principle and the media's right of access to judicial proceedings extended to anything that had been made part of the record, subject to any specific order to the contrary. The application judge did not give extensive reasons for refusing CBC the right to copy the portion of the video showing the circumstances of the death of Ashley Smith, and there was nothing in the record that could be invoked to justify the limitation imposed by the application judge. The application judge's perception that the image of a person dying was not something that needed to be broadcast to the general public was not based upon a finding of potential harm or injury to a recognized legal interest. Ashley Smith's mother, who was willing to have the circumstances of her daughter's death publicly considered, asserted no claim to privacy and agreed that CBC should have access. Absent any finding of potential harm or injury to a legally protected interest, there was nothing that permitted a judge to impose his or her opinion about what did not need to be broadcast to the general public. Such an order would be inconsistent with the constitutionally protected freedoms of expression and the press. Privacy interests and the protection of the innocent did not automatically trump the public's right to access. The right to access exhibits included the right to make copies.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 2(b), s. 24(1)

Coroners Act, R.S.O. 1990, c. C.37, s. 31

Criminal Code, R.S.C. 1985, c. C-46, s. 539(1)(c)

Appeal From:

On appeal from the judgment of Justice G.E. Taylor of the Superior Court of Justice dated January 5, 2010, with reasons reported at (2010), 251 C.C.C. (3d) 414.

Counsel:

Patricia M. Latimer, for Canadian Broadcasting Corporation.

Joel Robichaud and Nancy Noble, for Correctional Service of Canada.

Lorenzo D. Policelli, for the Office of the Chief Coroner.

Gary Melanson, for Waterloo Regional Police Service.

The judgment of the Court was delivered by

1 R.J. SHARPE J.A.:-- This appeal involves consideration of the media's right to access and copy exhibits filed at a preliminary inquiry. In October 2007, Ashley Smith died in custody at the Grand Valley Institution for Women. Four correctional officers were charged with criminal negligence causing death. Those charges proceeded to a preliminary inquiry where certain exhibits were introduced into evidence. The exhibits included video recordings, one of which captured the actual circumstances of Ashley Smith's death. Part way through the preliminary inquiry, the Crown decided not to proceed with the charges and the four correctional officers were discharged. A coroner's warrant was subsequently issued for the seizure of all documents related to Ashley Smith's death including the preliminary inquiry exhibits.

2 The appellant Canadian Broadcasting Corporation ("CBC") decided to produce an investigative documentary on Ashley Smith's tragic life. CBC sought access to and copies of the preliminary inquiry exhibits. The preliminary inquiry judge refused CBC's request on the ground that he should not interfere with the process of the coroner's inquest. The application judge granted certiorari to review that order and held that CBC was entitled to access the exhibits, but he limited CBC's rights in certain respects. In particular, he held that CBC was entitled to view and copy only those portions

of the video evidence that were actually played at the preliminary inquiry, and that CBC was entitled to view but not copy the portion of the video that was played showing Ashley Smith's death.

3 CBC appeals the limitations imposed on its right to access and copy the exhibits. The Correctional Service of Canada ("CSC") cross-appeals arguing that the application judge erred by applying the *Dagenais/Mentuck* test and granting CBC any right to copy the exhibits.

FACTS

4 Ashley Smith, a 19-year-old from Moncton, New Brunswick, was serving a six-year sentence at the Grand Valley Institution for Women in Kitchener. On October 19, 2007, while under observation in an isolation cell, she strangled herself with a strip of cloth. Four correctional officers employed by CSC were charged with criminal negligence causing death. Those charges proceeded to a preliminary inquiry in November 2008. A publication ban was imposed pursuant to s. 539 of the *Criminal Code*. The exhibits entered into evidence included photographs, documents and audio and video recordings relating to CSC's management of Ashley Smith. Although these recordings were marked as exhibits in their entirety, only portions were actually played in open court. The portion of one of the video recordings showing the actual circumstances of Ashley Smith's death was played in open court.

5 Several days into the preliminary inquiry, the Crown determined that there was no reasonable prospect of any of the accused being convicted and decided not to proceed with the charges. All four accused were discharged. As the preliminary inquiry had concluded, the publication ban expired pursuant to s. 539(1)(c) of the *Criminal Code*. The exhibits were returned to the investigating police force, the Waterloo Region Police Service ("WRPS"), and then given to the Office of the Chief Coroner ("OCC") pursuant to a coroner's warrant for the purpose of a coroner's inquest into Ashley Smith's death.

6 Several CSC employees were disciplined and grievances were filed. The estate and members of Ashley Smith's family commenced a civil action against CSC.

PROCEEDINGS IN THE ONTARIO COURT OF JUSTICE AND SUPERIOR COURT OF JUSTICE

7 In July 2009, some seven months after the conclusion of the preliminary inquiry, CBC applied to the Ontario Court of Justice for access to the preliminary inquiry exhibits. CBC wanted copies of the exhibits to use in a proposed documentary on Ashley Smith's life for the series *the fifth estate*. The preliminary inquiry judge held that he retained jurisdiction over the exhibits but he refused to deal with CBC's request on the ground that he should not interfere with the process of the coroner's inquest.

8 CBC sought certiorari in the Superior Court of Justice to quash the decision of the preliminary inquiry judge and an order pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*

granting it access to and the right to copy the exhibits. The application judge found that the preliminary inquiry judge erred by refusing to deal with CBC's application on the merits, and then turned to CBC's application for a s. 24(1) *Charter* remedy.

9 The application judge held that the principles enunciated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, [2001] 3 S.C.R. 442, generally know as the "*Dagenais/Mentuck*" test, applied to CBC's request. The *Dagenais/Mentuck* test requires the party opposing media access to demonstrate that the order is necessary to prevent a serious risk to the proper administration of justice and that the salutary effects of the order sought outweigh the deleterious effects on the rights and interests of the parties and the public.

10 The application judge concluded that the respondents could not satisfy that onus and that CBC was entitled to access the preliminary inquiry exhibits subject to a number of exceptions and limitations. CBC takes no issue with the following exceptions and limitations imposed by the application judge:

* the faces of any CSC officer or any other individual who did not consent to their faces being shown was to be digitally obscured;
* the audio recordings were to be edited to remove the names of any corrections officers or other person who did not consent to their name being broadcast;
* the copying and editing of the video and audio recordings was to be done so as to maintain the integrity of the original recordings;
* the exhibits are to be used solely for use in a documentary by *the fifth estate*;
* no copies are to be made of the exhibits other than for that use;
* copies of the exhibits are not to be posted on any internet site except as part of a documentary by *the fifth estate*.

11 CBC appeals the following exceptions and limitations imposed by the application judge, namely, that it:

* is entitled to access and copy only the portions of the video recordings that were played in open court;
* is entitled to view but not copy the portion of the video showing Ashley Smith's death that was played in open court;
* is entitled to view but not to copy the portion of one video recording showing four correctional officers entering the segregation unit;
* where it is uncertain what portion of an exhibit was actually played in open court CBC was denied any access to that exhibit.

12 The application judge denied the OCC's request for an order delaying release of the exhibits until completion of the coroner's inquest.

13 On January 8, 2010, CBC aired *the fifth estate* documentary on the life of Ashley Smith which incorporated some video footage from the exhibits copied in accordance with the application judge's order.

ISSUES

14 CBC appeals the restrictions imposed by the application judge on its right to access and copy the exhibits that I have identified in para. 11 of these reasons. The respondent CSC cross-appeals the order granting CBC the right to access and copy the exhibits. The respondent OCC takes the position that the application judge should have deferred CBC's request to the coroner presiding at the coroner's inquest into Ashley Smith's death. The respondent WRPS essentially supports the order of the application judge.

15 As the cross-appeal raises the fundamental issue of whether CBC was entitled to any access to the exhibits, I will deal with that issue first. I will then turn to the issues raised by CBC's appeal as to the limitations imposed on its right to access and copy the exhibits.

16 The issues may be summarized as follows:

1. Did the application judge err by applying the *Dagenais/Mentuck* test to CBC's request?
2. Did the application judge err by limiting CBC's right to access and copy the exhibits?
3. Did the application judge err by failing to give adequate consideration to the coordinate jurisdiction of the OCC?

ANALYSIS

1. Did the application judge err by applying the Dagenais/Mentuck test to CBC's request?

17 CSC submits that the application judge erred by applying the *Dagenais/Mentuck* test to CBC's request to access and obtain copies of exhibits. CSC argues that *Vickery v. Nova Scotia Supreme Court (Prothonotary),* [1991] 1 S.C.R. 671, governs such requests and required that CBC satisfy the onus of demonstrating why it was entitled to copies of the exhibits. CSC argues that the open court principle allows the public and the media to attend court and to listen to and observe the evidence as it is given, but does not stand for the proposition that the media is entitled to obtain copies of the exhibits and to publish or broadcast the copies.

18 *Vickery* involved a media request for access to an accused's alleged confession that had been excluded at a murder trial. The accused was acquitted and a journalist sought access to the alleged confession. By a 6-3 majority, the Supreme Court denied access, essentially on the ground that the acquitted accused's privacy interest and the need to protect the innocent outweighed the public's right of access.

19 *Vickery* preceded *Dagenais* and *Mentuck.* In *Vickery*, the Supreme Court of Canada expressly refused to consider the *Charter* as the journalist seeking access had not raised the *Charter* at first instance. As *Dagenais* and *Mentuck* make clear, the *Charter* has fundamentally altered the legal landscape in relation to court orders limiting freedom of the press in relation to court proceedings. *Vickery* plainly did not take into account that fundamental legal change. And, as the application judge rightly observed at para. 14, *Vickery* did not purport "to formulate a general rule for regulating access to audio and video recordings which were made court exhibits."

20 For the Supreme Court's post-*Charter* test that applies to all discretionary decisions limiting freedom of the press in relation to court proceedings, it is to *Dagenais* and *Mentuck* that one must turn. The *Dagenais/Mentuck* test, as restated in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 at para. 26, reflects the importance of the open court principle and the rights of freedom of expression and freedom of the press in relation to judicial proceedings. Restrictions on the open court principle and freedom of the press in relation to judicial proceedings can only be ordered where the party seeking such a restriction establishes through convincing evidence that:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> (b) the salutary effects of the restriction outweigh the deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

21 While the *Dagenais/Mentuck* test was developed in the context of publication bans, the Supreme Court has stated that it applies any time s. 2(b) freedom of expression and freedom of the press rights are engaged in relation to judicial proceedings: "[T]he *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings": *Toronto Star* at para. 7 (emphasis in original). See also *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at paras. 30-31.

22 The open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. The strong public policy in favour of openness and of "maximum accountability and accessibility" in respect of judicial or quasi-judicial acts pre-dates the *Charter*: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 at p. 184. As Dickson J. stated at pp. 186-187: "At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance."

23 Now recognized as a fundamental aspect of the rights guaranteed by s. 2(b) of the *Charter*, the open court principle has taken on added force as "one of the hallmarks of a democratic society" that deserves constitutional protection: *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, [1996]

3 S.C.R. 480 at para. 22.

24 The open court principle and the rights conferred by s. 2(b) of the *Charter* embrace not only the media's right to publish or broadcast information about court proceedings, but also the media's right to gather that information, and the rights of listeners to receive the information. "[T]he press must be guaranteed access to the courts in order to gather information" and "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press.": *CBC v. New Brunswick* at paras. 23-26. In *Vancouver Sun (Re)* at para. 25, the Supreme Court of Canada described the openness of the courts and judicial processes as being "necessary to maintain the independence and impartiality of courts", "integral to public confidence in the justice system" and "a principal component of the legitimacy of the judicial process".

25 I am unable to accept CSC's submission that the *Dagenais/Mentuck* test does not apply to media requests for access to exhibits. That argument has been properly and firmly rejected by two provincial appellate courts. In *R. v. Fry* (2010), 254 C.C.C. (3d) 394 at para. 65 (B.C.C.A.), a majority of the British Columbia Court of Appeal held that "the principles enunciated by the Supreme Court of Canada" in *Dagenais* and *Mentuck* "are fully applicable" to a media request for access to and the right to copy an exhibit after the conclusion of a trial. *R. v. Hogg* (2006), 208 Man. R. (2d) 244 (C.A.) is to the same effect. The Manitoba Court of Appeal applied the *Dagenais/Mentuck* test to assess the media's right to access a video recording of a statement made by an accused person that had been entered as an exhibit at a preliminary inquiry.

26 To paraphrase Fish J. in *Toronto Star* at para 30, CSC's argument that the *Dagenais/Mentuck* test does not apply to CBC's right to access and copy exhibits "is doomed to failure by more than two decades of unwavering decisions" from the Supreme Court and from provincial courts of appeal.

27 In my view, the authority of *Vickery*, post *Dagenais* and *Mentuck,* is limited. The case still stands as authority for the proposition that concern for the protection of the privacy and reputation of innocent persons are among the factors to be considered and weighed by the judge applying the *Dagenais/Mentuck* test, although under *Dagenais/Mentuck*, privacy interests and the protection of the innocent no longer automatically trump the public's right to access: *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry* (2007), 278 D.L.R. (4th) 550 at para. 42 (Ont. C.A.).

(i) Are the media's rights limited to attending court and observing and reporting on what transpires in the courtroom?

28 I do not agree with CSC's submission that the open court principle and the media's s. 2(b) *Charter* rights are limited to attending court and observing and reporting on what actually transpires in the courtroom. Even before the *Charter*, access to exhibits that were used to make a judicial determination, even ones introduced in the course of pre-trial proceedings and not at trial, was a well-recognized aspect of the open court principle: *MacIntyre.* That approach was endorsed in

Vancouver Sun at para. 27:

> [T]he principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy considerations upon which openness is predicated are the same as in the trial stage. ... [In *MacIntyre*,] Dickson J. found "it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy".

29 Likewise, in *Toronto Star*, the Supreme Court applied the *Dangenais/Mentuck* test to a Crown application to seal search warrant materials, thereby underlining that *Dagenais/Mentuck* applies to ensure the "openness of the judicial process", not only what actually transpires in open court. CSC's argument was implicitly rejected by this court in *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18, where the court held that the jurisdiction to order access to exhibits does not vanish simply because the exhibits were filed in open court.

30 In *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 S.C.R. 743 at para. 72, the Supreme Court defined the media's right to access to court records and exhibits very broadly and in terms that are inconsistent with notion of a bare right to report on what actually transpires in open court:

> [O]nce the trial begins, and except for the limited number of cases held *in camera* or subject to a publication ban, *the media will have broad access to the court records, exhibits and documents filed by the parties, as well as to the court sittings*. They have a *firm guarantee of access*, to protect the public's right to information about the civil or criminal justice systems and freedom of the press and freedom of expression. [Emphasis added.]

(ii) Does the right to access exhibits include the right to make copies?

31 In my view, absent the proof of some countervailing interest sufficient to satisfy the *Dagenais/Mentuck* test, the right to access exhibits includes the right to make copies.

32 While the Supreme Court of Canada appears not to have directly ruled on this point, there are *dicta* in at least two Supreme Court decisions supporting the proposition that the right to access exhibits includes the right to make copies.

33 In *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253 at para. 33, the court reaffirmed the holding in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at p. 1338, that the right to access exhibits includes the right to make copies as "s. 2(b) provides that the state must not interfere with an individual's ability to 'inspect and copy public records and documents, including judicial records and documents'."

34 We were referred to a long list of first instance decisions dealing with the right to make copies. While those decisions are not entirely consistent, the clear preponderance of authority applies the *Dagenais/Mentuck* test to such requests and allows for copies to be made.

35 Most, if not all, of the decisions cited by CSC in support of the argument that there is no right to copy exhibits are readily distinguishable. *R. v. Pilarinos* (2001), 158 C.C.C. (3d) 1 (B.C.S.C.), dealt with the British Columbia Supreme Court's policy banning cameras from the courtroom. Likewise, *Société Radio-Canada c. Québec (A.G.)*, 2008 QCCA 1910, dealt with restrictions on holding interviews and recording images within the courthouse and the prohibition of broadcasts of court hearings. The debate over cameras in the courtroom and the right to broadcast court proceedings raises very different issues that do not concern us in this appeal.

36 Three cases cited by CSC dealt with the impact of allowing access on fair trial rights in ongoing criminal trials. In *R. v. Sylvester* (2007), 222 C.C.C. (3d) 106 (Ont. S.C.), the trial judge refused to allow a media request to copy an exhibit, but he did so because he was satisfied (at para. 86) that "to permit dissemination to occur ... would pose a real and substantial risk to [the accused's] right to a fair trial." *R. v. Cairn-Duff* (2008), 237 C.C.C. (3d) 181 (Alta. Q.B.), also dealt with a mid-trial request to copy an exhibit. While there are certainly some statements in that case that could be taken to support CSC's position, the trial judge also referred to the need to protect the accused's right to a fair trial and the failure of the media to give notice to all persons who might be affected by allowing copies to be made.

37 *R. c. Dufour*, 2008 CarswellQue 14365 (S.C.), leave to appeal granted, [2009] S.C.C.A. No. 84, also dealt with a mid-trial application for access to a video recording of a statement made by the accused. The trial judge denied that request on the ground that Rules of Practice of the Superior Court prohibit the broadcast of the proceedings of the court.

38 In my view, the cases cited by CSC do not establish anything approaching a general rule or practice that the media are not entitled to copies of exhibits filed in judicial proceedings. In the present case, there is no fair trial interest to protect, as all four accused were discharged at the preliminary inquiry, and no suggestion that the ban on cameras in the courtroom applies.

39 On the other side of the ledger, there is a very long line of cases that permit the media to make copies of exhibits. In *R. v. Hogg*, the media sought access to a video recording of an accused that had been introduced at a preliminary inquiry. The accused pleaded guilty at trial and received a conditional sentence. The Crown successfully appealed the sentence and a custodial term was imposed. At that point, the media sought access to the video recording of the statement and the right to make a copy for purposes of broadcast. The Manitoba Court of Appeal held at para. 47 that the media were "entitled to have access to and copy the videotape subject to any condition the court officers may impose to preserve the integrity of the exhibit." For other cases allowing the right to access and copy exhibits, see e.g.: *R. v. Fry*; *R. v. Baltovich* (2008), 232 C.C.C. (3d) 445 (Ont. S.C.); *R. v. Côté* (2007), 213 Man. R. (2d) 233 (Q.B.); *R. v. Hilderman* (2006), 395 A.R. 218

(Q.B.); *R. v. Black*, 2006 BCSC 2040; *R. v. Arenburg* (1997), 38 O.T.C. 91 (Gen. Div.); *R. v. Van Seters* (1996), 31 O.R. (3d) 19 (Gen. Div.); *R. v. Stark*, [1995] B.C.J. No. 3064 (S.C.).

(iii) Conclusion: application of the Dagenais/Mentuck test.

40 I conclude that the trial judge was correct in applying the *Dagenais/Mentuck* test to CBC's request for access to and copies of the exhibits at issue in this case. If CBC is to be denied access, or to have its access limited, it is for the party seeking to assert or uphold that denial to demonstrate through convincing evidence that the two-part *Dagenais/Mentuck* test has been satisfied.

41 Accordingly, I would dismiss the cross-appeal.

2. Did the application judge err by limiting CBCs right to access and copy the exhibits?

(a) Is access and the right to copy limited to only those portions of the videos played in open court?

42 In my view, the application judge erred by limiting CBC's right of access to only those portions of the exhibits that were played in open court. While this result follows from much of what I have already said about the application of the *Dagenais/Mentuck* test, I add the following considerations.

43 When an exhibit is introduced as evidence to be used without restriction in a judicial proceeding, the entire exhibit becomes a part of the record in the case. While a party may choose to read or play only portions of the exhibit in open court, the trier of fact, whether judge or jury, is not limited to considering only those portions when deciding the case. A party who introduces an exhibit without restriction cannot limit the attention of the trier of fact to only portions of the exhibit that favour that party and that the party chooses to read out or play in open court.

44 As the entire exhibit is evidence to be used in deciding the case, I can see no principled reason to restrict access to only those portions played or read out in open court. When Dickson J. articulated and applied the open court principle to accord a journalist access to an affidavit filed in support of a search warrant application in *MacIntrye*, he was plainly confronted with material that had not been read out in open court. Yet he did not hesitate to order access. Absent some countervailing consideration sufficient to satisfy the *Dagenais/Mentuck* test, the open court principle and the media's right of access to judicial proceedings must extend to anything that has been made part of the record, subject to any specific order to the contrary.

45 Accordingly, it is my view that the application judge erred by limiting CBC's access to only those portions of the exhibits that were played in open court.

(b) Did the application judge err by refusing CBC the right to copy the portion of the video exhibit showing the actual circumstances of the death of Ashley Smith?

46 The application judge did not give extensive reasons for refusing CBC the right to copy the

portion of the video showing the circumstances of the death of Ashley Smith. He stated at para. 49:

> I have decided that the CBC should be entitled to access to the video recording of Ashley Smith's death but not to have a copy of the recording. The gruesome image of a person dying is not something that I feel needs to be broadcast to the general public. By allowing the CBC access to the recording, will permit a verbal description to be broadcast, which in my view is sufficient.

47 We have viewed the contested portion of the video and it is certainly disturbing. However, I am not persuaded that there is anything in the record before us that can be invoked to justify the limitation imposed by the application judge, whether under the *Dagenais/Mentuck* test or under any other legal rule or principle.

48 The circumstances of this case are distinguishable from *R. v. Bernardo*, [1995] O.J. No. 1472 (Gen. Div.), leave to appeal refused, [1995] S.C.C.A. No. 250, further appeal dismissed for lack of jurisdiction, 122 C.C.C. (3d) 475 (Ont. C.A.), where the trial judge made an order relating to the treatment at trial of video tape evidence depicting in explicit detail the sexual assaults and rapes of four young girls, three of who were murder victims. LeSage A.C.J.O.C. applied the *Dagenais* test and, after a careful review of the evidence and the competing *Charter* arguments, concluded that the case for restricting access had been made out. He ruled that when the evidence was played, it should be visible only to the judge, the jury, counsel, the accused and to the extent necessary, court staff. No limit was imposed on the access to the audio portion of the exhibit. LeSage A.C.J.O.C. stated at para. 121 that the evidence established that "the harm that flows from the public display of this videotape evidence far exceeds any benefit that will flow from the public exposure of sexual assault and child pornography." LeSage A.C.J.O.C. found, again at para. 121, that the families of the victims would

> ... suffer tremendous psychological, emotional and mental injury if the evidence, as the Crown has described it in the opening statement, that is rape; anal and vaginal, the forced fellatio, cunnilingus, anilingus, forcing of the neck of a wine bottle in both the vagina and anus of one of these young women, is publicly displayed.

49 There are no comparable findings in this case. The application judge's perception that "[t]he gruesome image of a person dying is not something that I feel needs to be broadcast to the general public" is not based upon a finding of potential harm or injury to a recognized legal interest. Ashley Smith's mother, willing to have the circumstances of her daughter's death publicly considered, asserts no claim to privacy and agrees that CBC should have access and no other member of Ashley Smith's family has objected.

50 With respect, absent any finding of potential harm or injury to a legally protected interest, there is nothing in the law that permits a judge to impose his or her opinion about what does not need to be broadcast to the general public. That would be inconsistent with the constitutional

protection our legal order accords freedom of expression and freedom of the press. In this case, there is no finding of harm or injury capable of overriding a constitutional guarantee, and I would set aside that part of the application judge's order.

(c) Other limitations

51 CBC also raises the issue of the propriety of the restriction the application judge imposed on copying a portion of exhibit 41 because it "is something about which the Correction Service of Canada has security concerns". The evidence in support of that contention is limited to a bald assertion and, having viewed the exhibit, it is very difficult to discern what the security concern would be. In my view, the evidence led to support this restriction on access falls well short of the "convincing evidence" required to satisfy the *Dagenais/Mentuck* test. Accordingly, I would set aside that part of the application judge's order.

3. Did the application judge err by failing to give adequate consideration to the coordinate jurisdiction of the OCC?

52 The OCC takes the position that the presiding coroner is in the best position to decide the impact of publication or broadcast of exhibits on a pending inquest and that the application judge failed to take that into account. The OCC submits that the issue of the right to access and copy the exhibits should be left to the coroner presiding at the inquest into the death of Ashley Smith.

53 I am unable to accept that submission. As specified by s. 31 of the *Coroners Act*, R.S.O. 1990, c. C.37, the coroner's jury will be prohibited from making any findings of legal responsibility in relation to Ashley Smith's death, but will be asked to make recommendations "directed to the avoidance of death in similar circumstances or respecting any other matter arising out of the inquest." There is nothing in this record to show that the order sought by CBC would interfere with the successful accomplishment of that mandate. In my view, the application judge quite properly concluded that there was no risk to the administration of justice arising from the pending coroner's inquest that would justify restricting CBC's access to the exhibits.

54 Nor, in the context of this case, does any possessory interest of the CSC, OCC or WRPS constitute a factor capable of precluding the court from exercising its jurisdiction over the exhibits and making an order in favour of CBC: see *CTV Television Inc.* at paras. 24-27.

DISPOSITION

55 For these reasons, I would allow CBC's appeal and dismiss CSC's cross-appeal. The order of the application judge should be amended in accordance with these reasons.

R.J. SHARPE J.A.
J.I. LASKIN J.A.:-- I agree.
G.J. EPSTEIN J.A.:-- I agree.

cp/e/ln/qllxr/qlhcs/qljyw/qlced

564

Case Name:

Ruby v. Canada (Solicitor General)

Clayton Charles Ruby, appellant;
v.
Solicitor General of Canada, respondent, and
Privacy Commissioner of Canada and Robert Lavigne,
interveners.

[2002] S.C.J. No. 73

[2002] A.C.S. no 73

2002 SCC 75

2002 CSC 75

[2002] 4 S.C.R. 3

[2002] 4 R.C.S. 3

219 D.L.R. (4th) 385

295 N.R. 353

J.E. 2002-2096

49 Admin. L.R. (3d) 1

22 C.P.R. (4th) 289

7 C.R. (6th) 88

99 C.R.R. (2d) 324

118 A.C.W.S. (3d) 2

File No.: 28029.

Supreme Court of Canada

Heard: April 24, 2002;
Judgment: November 21, 2002.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

(67 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

Constitutional law -- Charter of Rights -- Fundamental justice -- Security of the person -- Right to privacy -- Privacy Act providing for mandatory in camera hearing and ex parte representations where government denies applicant's request for access to personal information on grounds of national security or maintenance of foreign confidences -- Whether provisions infringe s. 7 of Canadian Charter of Rights and Freedoms -- Privacy Act, R.S.C. 1985, c. P-21, s. 51(2)(a), (3).

Constitutional law -- Charter of Rights -- Freedom of expression -- Privacy Act providing for mandatory in camera hearing and ex parte representations where government denies applicant's request for access to personal information on grounds of national security or maintenance of foreign confidences -- Provisions infringing freedom of expression -- Whether infringement constitutional -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b) -- Privacy Act, R.S.C. 1985, c. P-21, s. 51(2)(a), (3).

Privacy -- Access to personal information -- Exemptions -- Law enforcement and investigation -- Whether exemption in s. 22(1)(b) of Privacy Act limited to current investigations -- Whether notion of "injury" in s. 22(1)(b) to be extended to investigations in general -- Privacy Act, R.S.C. 1985, c. P-21, s. 22(1)(b).

Privacy -- Access to personal information -- Review by Federal Court where access refused -- Privacy Act providing for mandatory in camera hearing and ex parte representations where government denies applicant's request for access to personal information on grounds of national security or maintenance of foreign confidences -- Whether provisions constitutional -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 7, 8 -- Privacy Act, R.S.C. 1985, c. P-21, s. 51(2)(a), (3).

Costs -- Supreme Court of Canada -- Constitutional issues -- Constitutional issues raised by appellant serious, important and novel in context of access to information litigation -- Appropriate in this case to award costs of proceedings in Supreme Court and courts below to appellant even

though appeal only allowed in part -- Supreme Court Act, R.S.C. 1985, c. S-26, s. 47.

Summary:

Pursuant to s. 12(1)(*a*) of the *Privacy Act*, R made a request to be given access to personal information contained in an information bank maintained by the Canadian Security Intelligence Service ("CSIS"). CSIS would neither confirm nor deny the existence of the information but, if such information did exist, refused to disclose the information claiming the exemptions under ss. 19, 21, 22 and 26 of the Act. Section 19 provides that a government institution shall refuse to disclose personal information that was obtained in confidence from the government of a foreign state or an international organization, unless that government or organization agrees to the disclosure. Under s. 21, a government institution may refuse to disclose any personal information if such disclosure can reasonably be expected to be injurious to the conduct of international affairs or the defence of Canada. R made a complaint to the Privacy Commissioner and, after the results of the Commissioner's investigation were reported, filed an application in the Federal Court, Trial Division for a review of CSIS's refusal under s. 41 of the Act. Prior to the review hearing, R challenged the constitutionality of s. 51(2)(*a*) and (3) of the Act on the grounds that they violated ss. 2(*b*), 7, and 8 of the *Canadian Charter of Rights and Freedoms*. Under the impugned provisions, where a government institution has claimed the "foreign confidences" or the "national security" exemption, it is mandatory for a reviewing court to hold the entire hearing of a judicial review application *in camera* (s. 51(2)(*a*)) and to accept *ex parte* submissions at the request of the government institution refusing disclosure (s. 51(3)). The motions judge ruled that s. 51(2)(*a*) and (3) infringed s. 2(*b*) of the *Charter* but that the infringement was justifiable under s. 1. She also ruled that the impugned provisions did not violate s. 7 of the *Charter*. The Federal Court of Appeal affirmed the decision. R appealed to this Court and the respondent cross-appealed on an issue of interpretation of s. 22(1)(*b*) of the Act.

Held: The appeal should be allowed in part. The cross-appeal should be allowed.

Sections 51(2)(*a*) and 51(3) of the *Privacy Act* do not violate s. 7 of the *Charter*. Assuming that R has suffered a deprivation of his liberty or security interest in this case, the s. 51(3) requirement that a court accept *ex parte* submissions on request of the government institution refusing to disclose information is not, in the context of this case, contrary to the principles of fundamental justice. As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position. This general rule, however, tolerates certain exceptions as some situations require a measure of secrecy. Fairness can be met through other procedural safeguards such as subsequent disclosure, judicial review and rights of appeal. Here, the s. 7 challenge is very narrow and relates only to the lack of discretion of the court to decide whether a government institution that refuses to disclose information should be allowed to make *ex parte* submissions. Within the context of a valid statutory scheme that permits the government to refuse to disclose information when there is a legitimate exemption or to confirm or deny the existence of information, it can only follow that the

government must have the capacity to proceed *ex parte*. When a government institution claims the exemptions in ss. 19(1)(*a*) and (*b*) and 21, Parliament has seen fit, through the mandatory *ex parte* provision in s. 51(3), to assert the special sensitive nature of the information involved and has provided added protection and assurance against inadvertent disclosure. Only in these exceptional and limited circumstances will the procedural regime in s. 51 be activated. Recourse to the "national security" and "foreign confidences" exemptions is also subject to two independent levels of scrutiny: the Privacy Commissioner and the Federal Court. They both have access to the information that is being withheld in order to determine whether an exemption has been properly claimed. In enacting s. 51, Parliament attempted to balance the interests in accessing personal information held by government institutions with the state's significant and legitimate interest in national security and in maintaining foreign confidences. Given the statutory framework, the narrow basis of R's constitutional challenge and the significant and exceptional state and social interest in the protection of information involved, the mandatory *ex parte* and *in camera* provisions do not fall below the level of fairness required by s. 7 of the *Charter*. Lastly, a judicial summary of the evidence prepared by the reviewing court would not assist R for it could not provide any further detail without compromising the very integrity of the information. Indeed, the use of such a summary would increase the risk of inadvertent disclosure of the information or its source.

R's arguments presented under s. 8 of the *Charter* were entirely subsumed under s. 7 and need not be addressed independently.

To the extent that the *in camera* provision in s. 51(2)(*a*) excludes both R and the public from the proceedings, it is clear that the provision violates s. 2(*b*) of the *Charter*. The provision cannot be saved by s. 1. While the protection of information which could reasonably be expected to be injurious to Canada's national security and the preservation of Canada's supply of intelligence information from foreign sources are pressing and substantial objectives, s. 51(2)(*a*) does not meet the proportionality test. The provision is rationally connected to the objective, as *in camera* hearings reduce the risk of an inadvertent disclosure of sensitive information, but it fails on the question of minimal impairment. Section 51(2)(*a*) mandates that the hearing be held *in camera* and does not limit the *in camera* requirement to only those parts of a hearing that involve the merits of an exemption. The requirement that the entire hearing of a s. 41 application or appeal therefrom be heard *in camera* is too stringent. The appropriate remedy is to read down s. 51(2)(*a*) so that it applies only to the *ex parte* submissions mandated by s. 51(3). A reviewing court retains the discretion, pursuant to s. 46, to conduct the remainder of the hearing or any portion thereof in public, or *in camera*, or *in camera* and *ex parte*.

The exemption in s. 22(1)(*b*) of the *Privacy Act* is not limited to current investigations or an identifiable prospective investigation. Since CSIS established a reasonable expectation of probable injury to investigations in general, it was justified in claiming the exemption based on s. 22(1)(*b*).

Cases Cited

Applied: Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53; referred to: Attorney General of Manitoba v. National Energy Board, [1994] 2 F.C. 502; Royal Bank v. W. Got & Associates Electric Ltd., [1994] 5 W.W.R. 337, aff'd [1997] 6 W.W.R. 715, aff'd [1999] 3 S.C.R. 408; R. v. Dyment, [1988] 2 S.C.R. 417; R. v. Beare, [1988] 2 S.C.R. 387; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315; R. v. O'Connor, [1995] 4 S.C.R. 411; Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711; R. v. Lyons, [1987] 2 S.C.R 309; Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425; R. v. Brown, [2002] 2 S.C.R. 185, 2002 SCC 32; R. v. McClure, [2001] 1 S.C.R. 445, 2001 SCC 14; Winnipeg Child and Family Services v. K.L.W., [2000] 2 S.C.R. 519, 2000 SCC 48; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480; Ternette v. Canada (Solicitor General), [1992] 2 F.C. 75; Rubin v. Canada (Minister of Transport), [1998] 2 F.C. 430.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 7, 8.

Privacy Act, R.S.C. 1985, c. P-21, ss. 11, 12(1), 16(1), (2), 19-28, 19, 21, 22(1)(a), (b), (3), 26, 29 [am. 1992, c. 21, s. 37], 34(2), 41, 45, 46, 47, 49, 51, 52.

Supreme Court Act, R.S.C. 1985, c. S-26, s. 47.

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal, [2000] 3 F.C. 589, 187 D.L.R. (4th) 675, 256 N.R. 278, 6 C.P.R. (4th) 289, [2000] F.C.J. No. 779 (QL), upholding the decisions of Simpson J. (1994), 22 C.R.R. (2d) 324, 80 F.T.R. 81, [1994] F.C.J. No. 789 (QL), and [1996] 3 F.C. 134, 113

F.T.R. 13, 136 D.L.R. (4th) 74, [1996] F.C.J. No. 748 (QL), affirming the constitutionality of s. 51 of the Privacy Act. Appeal allowed in part.

CROSS-APPEAL from a judgment of the Federal Court of Appeal, [2000] 3 F.C. 589, 187 D.L.R. (4th) 675, 256 N.R. 278, 6 C.P.R. (4th) 289, [2000] F.C.J. No. 779 (QL), reversing the decision of MacKay J., [1998] 2 F.C. 351, 140 F.T.R. 42, 11 Admin. L.R. (3d) 132, [1997] F.C.J. No. 1750 (QL), regarding the interpretation of s. 22(1)(b) of the Privacy Act. Cross-appeal allowed.

Counsel:

Marlys A. Edwardh and Breese Davies, for the appellant.

Barbara A. McIsaac, Q.C., Gregorios S. Tzemenakis and Christopher Rupar, for the respondent.

Dougald E. Brown and Steven J. Welchner, for the intervener the Privacy Commissioner of Canada.

Robert Lavigne, on his own behalf.

The judgment of the Court was delivered by

1 **ARBOUR J.**:-- This appeal involves a constitutional challenge to a procedural section of the *Privacy Act*, R.S.C. 1985, c. P-21, that provides for mandatory *in camera* and *ex parte* proceedings where the government denies an applicant's request for access to personal information on the grounds of national security or the maintenance of foreign confidences. Specifically, the issue is whether ss. 51(2)(*a*) and 51(3) of the Act infringe or deny the appellant's rights and freedoms as guaranteed in ss. 2(*b*) and 7 of the *Canadian Charter of Rights and Freedoms*.

2 The constitutional challenge in this case is in fact very narrow. For the purposes of this appeal, the appellant does not challenge the right of a government institution to refuse to confirm or deny the existence of personal information. Nor does the appellant challenge the right of a government institution to refuse to disclose information on the basis of the exemptions enumerated in the Act. The appellant only attacks the procedural requirement under the Act that in certain narrow circumstances it is mandatory for a reviewing court to hold the entire hearing of a judicial review application *in camera* and to accept *ex parte* submissions at the request of the government institution refusing disclosure. To be clear, the appellant only challenges the mandatory nature of this provision and not the discretionary regime that applies for all other exemptions allowing a reviewing court to order a hearing *in camera* and accept *ex parte* submissions.

3 For reasons that I will expand upon below, I conclude that it is constitutional, within this statutory scheme, for the *Privacy Act* to require a reviewing court to accept submissions *ex parte*

from the government institution refusing disclosure. However, the *in camera* requirement found in s. 51(2)(*a*) is overly broad. The provision must be read down to require only the *ex parte* submissions to be held *in camera*, with the reviewing court's retaining the discretion to order the hearing or portions thereof *in camera*.

I. Legislative Scheme

4 An understanding of the legislative framework of the *Privacy Act* is essential in order to understand this case. I have reproduced all the relevant provisions of the Act as an Appendix to these reasons. I will cite them as necessary in the course of my analysis.

5 First, a brief overview of the Act. Persons have a right to access personal information held about them by a government institution by virtue of s. 12 of the Act. A government institution may refuse to disclose personal information if able to claim one of the exemptions contained in ss. 19 through 28, inclusive. Section 19 is a mandatory exemption. A government institution shall refuse to disclose personal information requested under s. 12(1) that was obtained in confidence from the government of a foreign state or an international organization, unless that government or organization agrees to the disclosure or makes the information public. This exemption is commonly referred to as the "foreign confidences" exemption. Section 21 is a discretionary exemption. A government institution may refuse to disclose any personal information requested under s. 12(1) if such disclosure can reasonably be expected to be injurious to "the conduct of international affairs, the defence of Canada or any state allied or associated with Canada ... or the efforts of Canada toward detecting, preventing or suppressing subversive or hostile activities". This exemption is commonly referred to as the "national security" exemption.

6 The Act provides for two levels of independent review when a government institution refuses a request for access to personal information: the Privacy Commissioner and the Federal Court of Canada. The Privacy Commissioner has broad powers to carry out investigations. Upon completing an investigation, if the Privacy Commissioner finds that the complaint is well-founded, the Commissioner may recommend that the information be disclosed. The Commissioner does not, however, have the power to compel disclosure. Where the Privacy Commissioner has completed an investigation and a government institution continues to refuse to disclose the personal information, the individual who has been refused access may apply to the Federal Court for judicial review of the refusal. Pursuant to s. 46(1), the reviewing judge must take every reasonable precaution to avoid the disclosure of information that, in the end, may be found to be appropriately withheld. Accordingly, s. 46(1) gives the reviewing judge the discretion to receive representations *ex parte* and to conduct hearings *in camera*.

7 Section 51 changes the discretionary regime of s. 46 to a mandatory one in circumstances where a government institution has claimed an exemption under s. 19(1)(*a*) or (*b*) or s. 21 (the "foreign confidences" and the "national security" exemptions). When an exemption has been claimed under these provisions, s. 51(2)(*a*) mandates that the Federal Court hear the judicial review

application or an appeal therefrom *in camera*. Section 51(3) provides that on the request of the head of the government institution that has refused access to material on the basis of one of these provisions , the court must receive submissions from the government institution on an *ex parte* basis.

II. Facts

8 The analysis and outcome of this case do not turn on the facts. However, the facts are useful in order to understand the history of this particular litigation and also as an example of access to information litigation in general.

9 On March 22, 1988 the appellant, Clayton Ruby, requested access to personal information held in personal information bank SIS/P-PU-010 ("Bank 010") maintained by the Canadian Security Intelligence Service ("CSIS"). The request was made pursuant to s. 12(1)(*a*) of the Act. The request to CSIS was only one of a number of access to information requests made by the appellant to the Royal Canadian Mounted Police ("RCMP") and the Department of External Affairs. Only CSIS named ss. 19 and 21 as exemptions and therefore the constitutional challenge to s. 51 involves only the request to CSIS. In the original application the respondent filed an affidavit of Robert Ian MacEwan, Director General, Counter Terrorism, CSIS. In order to describe the information contained in Bank 010, the affidavit reproduced the Personal Information Index published in 1987 in accordance with s. 11 of the Act:

> This bank contains information on individuals whose activities may, on reasonable grounds, be suspected of directly relating to espionage or sabotage that is against or is detrimental to the interests of Canada; or, activities directed toward or in support of such activity; foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada, and are clandestine or deceptive, or involve a threat to any person; activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state; and, activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of the constitutionally established system of government in Canada. This bank may also contain personal information that, in relation to the defence of Canada or to the conduct of the international affairs of Canada, pertains to the capabilities, intentions; or activities of any foreign state or group of foreign states; of any person other than a Canadian citizen or permanent resident; or, any corporation except one incorporated pursuant to the laws of Canada or of any province. Information is also held in respect to CSIS providing advice relating to the *Citizenship* or *Immigration Acts*.

10 Although the appellant's access request was with respect to personal information contained in Bank 010, CSIS took the liberty of also searching personal information bank SIS/P-PU-015 ("Bank 015"). Bank 015 is described in the Personal Information Index published in 1987 as containing information similar in nature to that in Bank 010 but of a less current and less sensitive nature.

11 CSIS responded to the appellant's request by letter dated August 12, 1988. With respect to Bank 010 CSIS would neither confirm nor deny the existence of information but if such information did exist CSIS refused to disclose the information claiming the exemptions in ss. 19, 21, 22, and 26 of the Act. With respect to information in Bank 015, CSIS disclosed 41 pages, portions of which were excised and claimed as exempt under ss. 21 and 26. CSIS disclosed a further 71 pages from a different source, or portions therefrom, claiming exemptions under s. 21 of the Act for the excised portions.

12 The appellant filed a complaint with the federal Privacy Commissioner pursuant to s. 29 of the Act regarding the refusal of CSIS to disclose information in Banks 010 and 015. Subsequent to the complaint the appellant was informed by CSIS that two more documents containing personal information about him existed in Bank 015 but were being claimed as exempt pursuant to ss. 19, 21, 22(1)(*a*)(iii), 22(1)(*b*) and 26. CSIS later amended the exemption to s. 22(1)(*a*)(ii) as opposed to s. 22(1)(*a*)(iii). As a result of the investigations by the Privacy Commissioner, CSIS disclosed an additional four pages, portions of which were excised claiming exemptions under ss. 21 and 26 of the Act.

13 The Acting Privacy Commissioner conducted an investigation and concluded that CSIS's refusal to neither confirm or deny the existence of information in Bank 010 was within the requirements of s. 16(2) of the Act and thus the complaint in regard to this refusal was not well-founded. In regards to the exemptions claimed in respect of information held in Bank 015, the Privacy Commissioner concluded that, with the exception of two documents, the undisclosed material was properly exempted under the Act. The Privacy Commissioner asked the Solicitor General to disclose two documents but the request was refused. The Commissioner informed the appellant that this was the first case in which a Minister had refused to accept a recommendation that information be disclosed. The documents were subsequently disclosed, with portions excised, after the judicial review proceeding was initiated.

14 Three years after the original access request, the appellant filed an application in the Federal Court, Trial Division under s. 41 of the Act for a review of CSIS's refusal to disclose the information. Section 41 provides that where a person has requested access to information, has been denied, and has filed a complaint with the Privacy Commissioner, he or she may then apply to the Federal Court for a judicial review of the refusal.

15 CSIS released additional documents to the appellant in July 1992. CSIS disclosed 211 pages, portions of which were excised claiming exemptions under ss. 19, 21, 22(1)(*a*), 22(1)(*b*) and 26 of the Act. CSIS maintains its position of non-disclosure with respect to all documents contained in

Bank 010 and the remainder of documents in Bank 015, including the excised portions therefrom, based on disclosure exemptions in ss. 19, 21, 22 and 26 of the Act.

16 Prior to the commencement of the judicial review hearing, the appellant filed notice of intent to challenge the s. 51 mandatory procedure provision under ss. 7, 8 and 2(*b*) of the *Charter*.

17 In the application, CSIS submitted a secret affidavit of an officer of CSIS, filed on order of the court. The affidavit informed the court whether personal information about the appellant existed in Bank 010 and if it did exist, the documents were provided with an explanation of the claimed exemptions for examination by the court. The undisclosed information that was contained in Bank 015 was also provided for examination by the court with an explanation of the exemption claimed.

18 Both the Trial Division and appellate level of the Federal Court ruled that s. 51(2)(*a*) and (3) violated s. 2(*b*) of the *Charter* but that they were saved by s. 1. Both levels of the Federal Court also found that the mandatory procedure in s. 51 did not violate s. 7, however they differed with respect to their characterizations of a right to privacy under s. 7.

19 The appellant appeals to this Court on the issues as to whether s. 7 of the *Charter* is engaged by s. 51(3), whether the violation of s. 2(*b*) is justifiable under s. 1 and costs. The Solicitor General cross-appeals on an issue of interpretation of s. 22(1)(*b*) of the Act and whether "injury" contemplated in that section is restricted to injury to current ongoing or identifiable prospective investigations .

III. Judgments Below

20 The constitutional validity of s. 51 and the merits of the exemptions claimed by CSIS were determined separately in the Federal Court, Trial Division. The Court of Appeal consolidated the appeals on the constitutional question and the merits of the exemptions.

A. *Federal Court, Trial Division* (1994), 80 F.T.R. 81
and
[1996] 3 F.C. 134

21 Simpson J. ruled in the preliminary proceeding on the constitutional validity of s. 51. She held that any privacy rights protected by the *Charter* were not engaged by s. 51. She did, however, find that s. 51 was contrary to s. 2(*b*) of the *Charter* but that such violation was saved by s. 1.

B. *Federal Court of Appeal*, [2000] 3 F.C. 589

22 The Federal Court of Appeal held that the mandatory *in camera* and *ex parte* provisions did not engage the liberty interest enshrined in s. 7. The court agreed with the decision of Simpson J. that the provisions are procedural in nature and do not interfere with the right of access granted by the *Privacy Act*. The Solicitor General did not appeal Simpson J.'s finding that the mandatory

provisions in s. 51 violate s. 2(*b*). The Court of Appeal held that the provisions were saved by s. 1.

IV. Constitutional Questions

23 The following constitutional questions were stated by Order of this Court on June 21, 2001:

1. Do ss. 51(2)(*a*) and 51(3) of the *Privacy Act*, R.S.C. 1985, c. P-21, as amended, infringe or deny the appellant's rights or freedoms guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?
2. If the answer to Question 1 is in the affirmative, are ss. 51(2)(*a*) and 51(3) of the *Privacy Act* reasonable limits, prescribed by law, that can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?
3. Does s. 51(3) of the *Privacy Act* infringe or deny the appellant's rights and freedoms guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?
4. If the answer to Question 3 is in the affirmative, is s. 51(3) of the *Privacy Act* a reasonable limit, prescribed by law, that can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

V. Analysis

24 It is important to clarify at the outset the meaning and effect of the mandatory *in camera* and *ex parte* provisions. Section 51 reads:

> **51.** (1) Any application under section 41 or 42 relating to personal information that the head of a government institution has refused to disclose by reason of paragraph 19(1)(*a*) or (*b*) or section 21 ... shall be heard and determined by the Associate Chief Justice of the Federal Court or by such other judge of the Court as the Associate Chief Justice may designate to hear the applications.
>
> (2) An application referred to in subsection (1) or an appeal brought in respect of such application shall
>
> (*a*) be heard *in camera*; and
>
> (*b*) on the request of the head of the government institution concerned, be heard and determined in the National Capital Region described in the

schedule to the *National Capital Act*.

(3) During the hearing of an application referred to in subsection (1) or an appeal brought in respect of such application, the head of the government institution concerned shall, on the request of the head of the institution, be given the opportunity to make representations *ex parte*.

Section 51 requires a court, in an application for judicial review brought under s. 41 of the Act, to hear the application or any appeal therefrom *in camera*. Simpson J., in her s.1 analysis, noted that there was a judicial practice of reading down s. 51 as requiring only those portions of the hearing in which the *ex parte* submissions are received to be *in camera*. I will discuss this practice later in my reasons. Suffice it to say, at this point, however, that such an interpretation cannot be reasonably supported on a plain reading of the Act. The provision is clear that the entire hearing and any appeal therefrom, are to be held *in camera*.

25 *Ex parte*, in a legal sense, means a proceeding, or a procedural step, that is taken or granted at the instance of and for the benefit of one party only, without notice to or argument by any adverse party: *Attorney General of Manitoba v. National Energy Board*, [1974] 2 F.C. 502 (T.D.). The circumstances in which a court will accept submissions *ex parte* are exceptional and limited to those situations in which the delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given. For instance, temporary injunctions are often issued *ex parte* in order to preserve the *status quo* for a short period of time before both parties can be heard (to prevent the demolition of a building, for example).

26 *Ex parte* proceedings need not be held *in camera*. Indeed, *ex parte* submissions are often made in open court (in interlocutory matters, for example). In fact, an order will still be considered *ex parte* where the other party happens to be present at the hearing but does not make submissions (for instance, because of insufficient notice): *Royal Bank v. W. Got & Associates Electric Ltd.*, [1994] 5 W.W.R. 337 (Alta. Q.B.), at para. 10, aff'd [1997] 6 W.W.R. 715 (Alta. C.A.), aff'd (without reference to this point) [1999] 3 S.C.R. 408. On the other hand, other *ex parte* proceedings are, by necessity, not held in public. An application for a wiretap authorization, for instance, must be made both *ex parte* and *in camera*.

27 In all cases where a party is before the court on an *ex parte* basis, the party is under a duty of utmost good faith in the representations that it makes to the court. The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld: *Royal Bank, supra*, at para. 11. Virtually all codes of professional conduct impose such an ethical obligation on lawyers. See for example the *Alberta Code of Professional Conduct*, c. 10, r. 8.

28 Section 51 of the *Privacy Act* contemplates the following: where a "foreign confidence" or "national security" exemption is claimed by a government institution, the hearing must be held *in camera* (s. 51(2)(*a*)). This means that the hearing is not open to the public but the applicant is not

excluded and may participate. In the course of that *in camera* hearing, the government institution may request that the applicant be excluded and, in such a case, the court must hear the government *ex parte* (s. 51(3)) (and, of course, still *in camera*). Therefore it is only through the operation of ss. 51(2)(*a*) and 51(3) together that the appellant is excluded from the proceeding.

29 Properly understood, the constitutional challenge on the basis of s. 7 relates essentially to the appellant's exclusion from the hearing as a result of the operation of ss. 51(2)(*a*) and 51(3) together, resulting in portions of the government's submissions being *ex parte* and *in camera* and therefore unavailable to the appellant. It is the exclusion of the appellant from portions of the government's submissions that is alleged to be contrary to the principles of fundamental justice. As for the s. 2(*b*) challenge, it relates to the statutory requirement that the entire hearing be *in camera*, inclusive of the *ex parte* submissions. It is the mandatory exclusion of the public and the media, (of which the appellant is a member) from the proceedings that the appellant alleges violates s. 2(*b*) of the *Charter*.

A. *Section 7*

30 In addition to his claim under s. 7, the appellant also argued a violation of s. 8 of the *Charter*. The arguments presented under s. 8 are entirely subsumed under s. 7 and need not be addressed independently.

31 The appellant argues that the right to security of the person protected by s. 7 of the *Charter* protects the right to privacy in a biographical core of information to which an individual would wish to control access. This biographical core of information includes information which tends to reveal intimate details of lifestyle and individual personal or political choices. This right to privacy is said to include a concomitant right of access to personal information in the hands of government in order that an individual may know what information the government possesses. This, in turn, will ensure that government action in the collection of personal information can be scrutinized and inaccuracies in the information collected may be corrected. Any limit on this right to access must accord with the principles of fundamental justice. Following this argument, the appellant submits that the procedural provisions in s. 51 directly affect an individual's ability to "control such information in the hands of the state" and for that reason the procedural unfairness created by s. 51 violates s. 7 of the *Charter*.

32 The Federal Court of Appeal, citing *R. v. Dyment*, [1988] 2 S.C.R. 417, *R. v. Beare*, [1988] 2 S.C.R. 387, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, and *R. v. O'Connor*, [1995] 4 S.C.R. 411, observed that there is an emerging view that the liberty interest in s. 7 of the *Charter* protects an individual's right to privacy. They accepted the appellant's view that in order for the right to informational privacy to have any substantive meaning it must be concerned both with the acquisition and the subsequent use of personal information. Recognizing that one has a legitimate interest in ensuring that information has been properly collected and is being used for the proper purpose, the Court of Appeal held that the right to privacy includes the

ability to control the dissemination of personal information obtained by the government. To this end the court stated (at para. 169):

> In a case such as this where an individual may not be fully aware of the information collected and retained by the government, the ability to control the dissemination of personal information is dependent on a corollary right of access, if only to verify the information's accuracy. In short a reasonable expectation of access is a corollary to the reasonable expectation of privacy.

33 In my view, it is unnecessary to the disposition of this case to decide whether a right to privacy comprising a corollary right of access to personal information triggers the application of s. 7 of the *Charter*. Assuming, for the purposes of this analysis, that the appellant has suffered a deprivation of his liberty or security of the person interest, that deprivation is not contrary to the principles of fundamental justice. In order to determine whether an alleged deprivation of the right to life, liberty and security of the person is or is not in accordance with the principles of fundamental justice, it is necessary to appreciate the exact nature of the deprivation. Here, without deciding if there is a deprivation of a liberty or security interest, we can take the alleged deprivation to be as stated by the appellant: he claims that he has a right to access personal information already in the hands of government in order to correct inaccurate information and ensure that the information was collected lawfully. He then asserts that this component of his liberty and security interest is infringed by the mandatory secrecy of some of the government's submissions.

34 The appellant stresses that it is the mandatory nature of s. 51(3) that does not comply with the principles of fundamental justice. Because the provisions are mandatory, the court does not have the discretion to control what information should be provided to an applicant in order to enable him or her to challenge effectively the government's refusal to disclose information and the legitimacy of the exemption claimed. The appellant submits that a provision permitting *ex parte* and *in camera* proceedings must contain a judicial discretion to provide the applicant with sufficient information in order to answer the government's case effectively. This could be accomplished, the appellant submits, through the use of judicial summaries similar to those that are used in wiretap proceedings.

35 I agree with the view expressed by the Federal Court of Appeal that there is a disharmony between the appellant's proposed solution of judicial summaries and the alleged *Charter* violation brought about by the mandatory *ex parte* submissions at the request of a government institution . Section 46 of the Act provides a court with the authority to receive representations *ex parte* and conduct hearings *in camera* in order to guard against the inadvertent disclosure of information the government institution may have legitimately refused to confirm exists, as well as information that may be found to be properly exempted:

> **46.** (1) In any proceedings before the Court arising from an application under section 41, 42 or 43, the Court shall take every reasonable precaution, including, when appropriate, receiving representations *ex parte* and conducting

> hearings *in camera*, to avoid the disclosure by the Court or any person of
>
> > (*a*) any information or other material that the head of a government institution would be authorized to refuse to disclose if it were requested under subsection 12(1) or contained in a record requested under the *Access to Information Act*; or
> >
> > (*b*) any information as to whether personal information exists where the head of a government institution, in refusing to disclose the personal information under this *Act*, does not indicate whether it exists.
>
> (2) The Court may disclose to the appropriate authority information relating to the commission of an offence against any law of Canada or a province on the part of any officer or employee of a government institution, if in the opinion of the Court there is evidence thereof.

When a court exercises its discretion under s. 46 to receive evidence *ex parte*, either through a confidential affidavit or otherwise, there is no obligation to provide the applicant with a judicial summary. The *Privacy Act* does not impose an obligation on a court to prepare a judicial summary of evidence in any circumstance. The appellant has not challenged the discretionary power of a court to accept *ex parte* submissions under s. 46. The alternative to the mandatory *in camera* and *ex parte* provisions in s. 51 is therefore the discretion conferred on the court under s. 46 to order proceedings *in camera* or accept submissions *ex parte*.

36 In any event, I fail to see how a judicial summary of the evidence would assist the appellant. Where the institution body has refused to confirm or deny the existence of information a judicial summary is simply inappropriate. Where the existence of information is known to the appellant, the use of judicial summaries would not appreciably increase the amount of information already available to the appellant through the public affidavits. The public affidavits outline the purpose of the exemption, its importance and the risk associated with disclosure. The secret affidavit and the *ex parte* submissions directly involve the information exempted, if any exists. I accept the respondent's claim that a judicial summary could not provide any further detail without compromising the very integrity of the information.

37 Furthermore, the use of judicial summaries would increase the risk of inadvertent disclosure of the information or its source. Parliament has seen fit, in those cases involving national security or foreign confidences, to provide for the maximum protection against disclosure. For a court to embark upon preparing summaries of confidential information would imperil confidentiality without adding much to the transparency requested by the appellant.

38 It remains to determine whether the requirement in s. 51(3) that a court accept *ex parte* submissions on request of the government institution refusing to disclose information is contrary to the principles of fundamental justice. As I have already noted, the circumstances in which a court will accept *ex parte* submissions are exceptional . The circumstances in which a court will be obliged to hear *ex parte* submissions at the request of one party are even more exceptional . The question is whether, in the context of this case, such a provision is consistent with the principles of fundamental justice. I believe that it is.

39 The principles of fundamental justice are informed in part by the rules of natural justice and the concept of procedural fairness. What is fair in a particular case will depend on the context of the case: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 21; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 743. As stated by La Forest J. for the majority in *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361, and quoted with approval in *Chiarelli, supra*, at p. 743:

> It is clear that, at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness (see, e.g., the comments to this effect of Wilson J. in *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 212-13). It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.

In assessing whether a procedure accords with the principles of fundamental justice, it may be necessary to balance the competing interests of the state and individual: *Chiarelli, supra*, at p. 744, citing *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 539. It is also necessary to consider the statutory framework within which natural justice is to operate. The statutory scheme may necessarily imply a limit on disclosure. "The extent of the disclosure required by natural justice may have to be weighed against the prejudice to the scheme of the Act which disclosure may involve": W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 509. See also *Baker, supra*, at para. 24.

40 As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position: see generally Wade and Forsyth, *supra*, at p. 506; S. A. de Smith, J. Jowell and H. Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at p. 441; D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (3rd ed. 1999), at p. 261. The exclusion of the appellant from portions of the government's submissions is an exceptional departure from this general rule. The appellant operates in an informational deficit when trying to challenge the legitimacy of the exemptions claimed by the government. However, the general rule does tolerate

certain exceptions. As indicated earlier, some situations require a measure of secrecy, such as wiretap and search warrant applications. In such circumstances, fairness is met through other procedural safeguards such as subsequent disclosure, judicial review and rights of appeal. In other cases, for instance where a privilege is successfully asserted, the content of the disputed information may never be revealed (see *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14).

41 The context of this case is therefore critical. As I indicated earlier, the constitutional challenge is very narrow. The s. 7 challenge relates only to the lack of discretion of the court to decide whether a government institution which refuses to disclose information should be allowed to make *ex parte* submissions. Section 51(3) requires a court to hear submissions *ex parte* at the request of a government institution. The appellant is not challenging the right of a government institution, when faced with an access to information request under s. 12 of the Act, to refuse to disclose certain information on the basis of the exemptions enumerated in the Act. The appellant also does not challenge the right of the government under s. 16(2) to refuse to confirm or deny the existence of personal information when claiming an exemption. Within the context of a valid statutory scheme that permits the government to refuse to confirm or deny the existence of information (we must assume that it is valid since it is not challenged) and where the judicial review may conclude that the information was properly withheld and must therefore not be disclosed, it necessarily follows that a government institution must be able to make submissions *ex parte*. Accepting that it is appropriate for the government to refuse to disclose information when there is a legitimate exemption and accepting that it is not inappropriate for the government, when claiming an exemption, to refuse to confirm or deny the existence of information, it can only follow that the government must have the capacity to proceed *ex parte*.

42 For all the exemptions in the Act other than s. 19(1)(*a*) or (*b*) or s. 21 the government's ability to make *ex parte* submissions is subject to the discretion of the reviewing court. Through the mandatory *ex parte* provision in s. 51(3), Parliament has seen fit to assert the special sensitive nature of the information involved and has provided added protection and assurance against inadvertent disclosure. Even though the adversarial challenge to the claim of exemptions in such cases is limited, recourse to the Privacy Commissioner and to two levels of court who will have access to the information sought and to the evidence supporting the claimed exemption is sufficient, in my view, to meet the constitutional requirements of procedural fairness in this context.

43 The purpose of the exemption contained in s. 19(1)(*a*) and (*b*) is to prevent an inadvertent disclosure of information obtained in confidence from foreign governments or institutions. This provision is directly aimed at the state's interest in preserving Canada's present supply of intelligence information received from foreign sources. Section 21 is aimed at Canada's national security interests. The appellant acknowledges that the state's legitimate interest in protection of information which, if released, would significantly injure national security is a pressing and substantial concern. This Court recognized the interest of the state in protecting national security and the need for confidentiality in national security matters in *Chiarelli*, *supra*, at p. 745.

44 The mandatory *ex parte in camera* provision is designed to avoid the perception by Canada's allies and intelligence sources that an inadvertent disclosure of information might occur, which would in turn jeopardize the level of access to information that foreign sources would be willing to provide. In her reasons, Simpson J. reviewed five affidavits filed by the respondent from CSIS, the RCMP, the Department of National Defence ("DND"), and two from the Department of External Affairs ("DEA"). These affidavits emphasize that Canada is a net importer of information and the information received is necessary for the security and defence of Canada and its allies. The affidavits further emphasize that the information providers are aware of Canada's access to information legislation. If the mandatory provisions were relaxed, all predict that this would negatively affect the flow and quality of such information. This extract from one of the affidavits from the DEA is typical:

> Canada is not a great power. It does not have the information gathering and assessment capabilities of, for instance, the United States, the United Kingdom or France. Canada does not have the same quantity or quality of information to offer in exchange for the information received from the countries which are our most important sources. If the confidence of these partners in our ability to protect information is diminished, the fact that we are a relatively less important source of information increases our vulnerability to having our access to sensitive information cut off.
>
> ... Without these extra procedural protections [the mandatory *in camera* nature of the hearing and the right to make *ex parte* representations provided for in s. 51] the substantive protections in sections 19 and 21 are greatly diminished in value. The confidence in foreign states would be diminished because, while the Government of Canada could give assurances that a request for such information could and would be refused under Canadian law, it could not give assurances that it would necessarily be protected from inadvertent disclosure during a hearing.

45 In her reasons Simpson J. provided a brief overview of the affidavit evidence. The affidavit from CSIS stated that sensitive information is received on the understanding that neither the source nor the information will be disclosed unless the provider consents. The affidavit from the RCMP representative discussed the agreements, as for example with Interpol, which operate on the basis that information will be kept confidential. The DND affidavit predicts that increasing the number of persons with access to information during the legal review process would "almost certainly restrict, if not completely eliminate" the possibility of Canada receiving information in the future. One of the affidavits from DEA observed that international convention and practice dictates that such information is received in confidence unless there is an express agreement to the contrary. The other DEA affidavit noted first that confidentiality is necessary to protect information critical to diplomacy, intelligence, and security. This affidavit acknowledged that whether the predicted drying up of information would actually occur if the mandatory protections were loosened would be

hard to know since "you don't know what you are not getting", but he stressed his belief that under a different calculation of risks and benefits, foreign sources would likely screen information passed to Canada for fear that it would be compromised.

46 In the *Privacy Act* Parliament has recognized and attempted to balance the interests of the appellant in accessing personal information held by government institutions with the significant and legitimate interest of the state in national security and in maintaining foreign confidences. Only in the exceptional and limited circumstance where a government institution is claiming an exemption on the basis that the information involves national security and foreign confidences will the procedural regime in s. 51 requiring *ex parte in camera* proceedings be activated. The principles of fundamental justice do not require that the applicant have the most favourable proceedings. They do require that the proceedings be fair: *Lyons, supra*, at p. 362; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, at para. 130; *B. (R.), supra*, at para. 101.

47 The *Privacy Act* includes alternative procedural protections in order to protect the interests of applicants. The government does not have unrestrained use of the exemptions. The government bears the burden of establishing that the information is properly exempted (s. 47). As mentioned before, when making *ex parte* submissions to the reviewing court, the government institution is under a duty to act in utmost good faith and must make full, fair and candid disclosure of the facts, including those that may be adverse to its interest. I also stress again that recourse to these exemptions is subject to two independent levels of scrutiny: the Privacy Commissioner and the Federal Court on a judicial review application under s. 41. Both the Privacy Commissioner and the reviewing court have access to the information that is being withheld (ss. 34(2) and 45) in order to determine whether an exemption has been properly claimed. In addition, the Federal Court has the power to order the release of the personal information if the court determines that the material was not received in confidence from a foreign source or is not within the bounds of the national security exemption.

48 The appellant argues that the provision for discretion in other contexts involving national security, such as those at issue in *Chiarelli, supra*, shows that there is neither the need, nor the constitutional justification for the mandatory rule in s. 51 of the Act. It is true that s. 51(3) grants no discretion to the reviewing court to receive submissions *ex parte*. However, in order to determine whether the procedure accords with the principles of fundamental justice, in this case, it must be considered in the specific context in which it arises.

49 I agree with the observations of both Simpson J. and the Federal Court of Appeal that if the statutory scheme in s. 51 were discretionary as opposed to mandatory, it is virtually certain that a reviewing court would exercise its discretion to hear the matter *in camera* and accept submissions *ex parte* whenever the government presented appropriate evidence that the undisclosed material was received in confidence from foreign sources or involved national security.

50 It is also important to understand that the information withheld from an applicant under these

exemptions may be quite innocuous to the applicant but, rather, reveal the interest of a government institution in other persons or groups or reveal the source of information, as in the case of information received from foreign sources. Section 19 protects information received in confidence from foreign sources regardless of how innocuous it may be as it relates to the applicant.

51 In this case, given the statutory framework, the narrow basis of the appellant's constitutional challenge and the significant and exceptional state and social interest in the protection of information involved, I find that the mandatory *ex parte* and *in camera* provisions do not fall below the level of fairness required by s. 7.

B. *Section 2(b)*

52 The respondent did not appeal the finding of the motions judge (Simpson J.) that the mandatory nature of ss. 51(2)(*a*) and 51(3) infringe the appellant's rights and freedoms as guaranteed by s. 2(*b*). Simpson J. held that the appellant's rights as a reader were directly affected if the hearing was held *ex parte* and *in camera*. In such situations, members of the public, including the press, are excluded. As a member of the reading public the appellant was entitled to raise s. 2(*b*) to challenge the mandatory *ex parte* and *in camera* provision in s. 51. In support of this, Simpson J. cited *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, for the principle that freedom of expression in s. 2(*b*) protects both listeners and readers.

53 The concept of open courts is deeply embedded in our common law tradition and has found constitutional protection in s. 2(*b*) of the *Charter*. This Court confirmed in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, the importance of this principle, which is inextricably linked to the rights guaranteed by s. 2(*b*). As stated by La Forest J. at para. 23:

> Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(*b*), so too is the right of members of the public to obtain information about the courts in the first place. Cory J. in *Edmonton Journal* described the equally important aspect of freedom of expression that protects listeners as well as speakers and ensures that this right to information about the courts is real and not illusory. At pages 1339-40, he states:
>
> > That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in

> large measure upon the press to inform them about court proceedings -- the nature of the evidence that was called, the arguments presented, the comments made by the trial judge -- in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.
>
> That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the *raison d'être* of the s. 2(*b*) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press. The public's entitlement to be informed imposes on the media the responsibility to inform fairly and accurately. This responsibility is especially grave given that the freedom of the press is, and must be, largely unfettered. [Emphasis added by La Forest J.]

To the extent that the *in camera* provision excludes both the appellant and the public from the proceedings it is clear that the provision violates s. 2(*b*). The respondent did not appeal the finding of Simpson J. that the mandatory nature of ss. 51(2)(*a*) and 51(3) infringe the appellant's rights and freedoms as guaranteed by s. 2(*b*). The respondent has not challenged the appellant's standing to challenge the provision under s. 2(*b*). I therefore assume, without comment, that he has standing to do so.

54 It remains to determine whether the *in camera* provision in s. 51(2)(*a*) can be saved by s. 1 as a reasonable limit that can be demonstrably justified in a free and democratic society. I conclude that it cannot. In relation to s. 21, the appellant concedes that the protection of information which could reasonably be expected to be injurious to Canada's national security is a pressing and substantial concern. In reference to s. 19(1)(*a*) and (*b*) I agree with Simpson J. that the preservation of Canada's supply of intelligence information from foreign sources is also a pressing and substantial objective. *In camera* hearings reduce the risk of an inadvertent disclosure of sensitive information and thus the provision is rationally connected to the objective.

55 The provision fails, however, on the question of minimal impairment. Simpson J. identified a

judicial practice of reading down s. 51 as requiring only those portions of the hearing in which the *ex parte* submissions are received to be *in camera.* Indeed, it is evident from her reasons that the Solicitor General consented to proceeding on such a basis in this case ((1994), 80 F.T.R. 81, at para. 5). As an example of this judicial practice Simpson J. cited *Ternette v. Canada (Solicitor General),* [1992] 2 F.C. 75 (T.D.).

56 *Ternette* was an application under s. 41 of the Act for a review of a refusal to disclose personal information pursuant to s. 21. Although the respondent Solicitor General filed a notice of motion in advance of the hearing for the hearing to be conducted *in camera*, at the commencement of the hearing the Solicitor General proposed, with the consent of the applicant and the intervener Privacy Commissioner, that the hearing proceed in open court with the exception that the *ex parte* submissions would be made *in camera*. The motions judge acknowledged that s. 51(2) provides that in an application such as the one before him, where the refusal to disclose personal information is based on s. 21, the hearing "shall be heard *in camera*" (emphasis added). Despite this, he ordered that the hearing proceed in public, as proposed, with the opportunity for the Solicitor General to make submission *ex parte* and *in camera*. He explained the reason for his order as follows (at p. 89):

> That order was based on the principle that the Court's proceedings are open and public unless there be a particular ground urged by a party that is deemed to warrant exceptional proceedings *in camera* or *ex parte*. Such a ground exists by virtue of subsections 51(2) and (3). That provision is intended for the protection of public and private interests in information. If it is not seen as necessary for protection of those interests for the entire proceedings but only for a portion of them to be held *in camera*, by counsel representing the head of the government institution concerned, by the applicant, or by the Privacy Commissioner, in my view it would be contrary to the longstanding tradition of our judicial system and the Rules of this Court (*Federal Court Rules*, C.R.C., c. 663) for the Court *ex proprio motu* to direct that the hearing be fully *in camera*.

57 In our case, counsel for the Solicitor General informed the Court during oral argument that the hearing in this case before MacKay J. with respect to the merits of the exemptions claimed, was heard *in camera*. On the other hand, the hearings before Simpson J. on the constitutional questions were conducted in public. Counsel for the Solicitor General further represented to the Court that the Department of Justice has interpreted s. 51 narrowly, limiting the *in camera* requirement only to those portions of a hearing that concern the merits of the exemptions claimed under s. 19(1)(*a*) or (*b*) or s. 21 but allowing the Crown to consent to "collateral" issues (i.e., constitutional or procedural issues) being heard in open court.

58 Aside from the constitutional issue, the Solicitor General's interpretation of s. 51(2)(*a*) is not one that the statute can reasonably bear. Section 51(2)(*a*) mandates that the hearing of an application under s. 41 and an appeal therefrom relating to personal information that a government

institution has refused to disclose by reason of s. 19(1)(*a*) or (*b*) or s. 21 be heard *in camera*. Contrary to the apparent practice referred to by the Solicitor General, the statute does not limit the *in camera* requirement to only those parts of a hearing that involve the merits of an exemption. It is not open to the parties, even on consent, to bypass the mandatory *in camera* requirements of s. 51. Nor is open to a judge to conduct a hearing in open court in direct contradiction to the requirements of the statute, regardless of the proposal put forth by the parties. Unless the mandatory requirement is found to be unconstitutional and the section is "read down" as a constitutional remedy, it cannot otherwise be interpreted to bypass its mandatory nature.

59 The existence of this judicial practice makes clear, though, that the requirement that the entire hearing of a s. 41 application or appeal therefrom be heard *in camera*, as is required by s. 51(2)(*a*), is too stringent. The practice endorsed by the Solicitor General and courts alike demonstrates that the section is overbroad in closing the court to the public even where no concern exists to justify such a departure from the general principle of open courts.

60 I have already concluded that the *Privacy Act* validly obliges a reviewing court to accept *ex parte* submissions from a government institution, on request, in order to prevent the inadvertent disclosure of sensitive information. It follows, for the same reasons, that these *ex parte* submissions must be received *in camera*. The appropriate remedy is therefore to read down s. 51(2)(*a*) so that it applies only to the *ex parte* submissions mandated by s. 51(3). A reviewing court retains the discretion, pursuant to s. 46, to conduct the remainder of the hearing or any portion thereof, either in public, or *in camera*, or *in camera* and *ex parte*.

VI. Cross-Appeal

61 Subsequent to the decision of Simpson J. in respect of the constitutionality of the provisions, MacKay J. ruled on the applicability of the various exemptions claimed. The cross-appeal concerns the decisions of MacKay J. ([1998] 2 F.C. 351) and the Federal Court of Appeal ([2000] 3 F.C. 589) with regards to the exemption in s. 22(1)(*b*) specifically. MacKay J. held that CSIS was justified in claiming the exemption based on s. 22(1)(*b*) as they had established a reasonable expectation of probable injury to investigations in general. MacKay J. commented that the only evidence on the public record before him was the public affidavit filed by CSIS. The evidence was uncontradicted and strengthened by CSIS's secret affidavit.

62 Soon after MacKay J. issued his reasons on the merits of the exemptions, the Federal Court of Appeal released its decision in *Rubin v. Canada (Minister of Transport)*, [1998] 2 F.C. 430. *Rubin* involved the interpretation of s. 16(1)(*c*) of the *Access to Information Act*, R.S.C. 1985, c. A-1, a similar, almost identical, provision to s. 22(1)(*b*) of the Act. The court in *Rubin* held that the exemption involved was limited to circumstances where a reasonable expectation of harm could be established to a current specific investigation or identifiable prospective investigation. The Federal Court of Appeal cited *Rubin* with approval and held that MacKay J. should not have extended the notion of injury in s. 22(1)(*b*) to investigations in general. The material was ordered sent back for a

new review.

63 In light of this Court's decision in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53 , the cross-appeal must be allowed and the decision of the motions judge restored. The motions judge interpreted s. 22(1)(*b*) in a manner consistent with this Court's ruling in *Lavigne*. The exemption in s. 22(1)(*b*) is not limited to current investigations or an identifiable prospective investigation. The appellant, respondent on cross appeal, did not challenge the finding of the motions judge that the Solicitor General had established a reasonable expectation of harm. The decision of MacKay J. is therefore restored.

VII. Costs

64 The appellant requested but was not awarded costs of his original application for a declaration that s. 51 was unconstitutional. Nor was he awarded costs on his appeal to the Federal Court of Appeal dealing with the constitutionality of s. 51. He asks this Court to award him costs on this appeal, the original constitutional application before Simpson J. of the Federal Court, Trial Division and on the appeal of the constitutional issue to the Federal Court of Appeal.

65 Although routinely costs follow the outcome of a case, this Court has the discretion, pursuant to s. 47 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, to award costs on an appeal regardless of the outcome. It also has the discretion to order the payment of costs of the proceedings in the courts below.

66 The *Privacy Act* specifically contemplates an award of costs to an unsuccessful party where an important and novel issue has been raised.

> **52.**.. .
>
> (2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

The spirit and purpose of s. 52(2) is a relevant consideration for this Court in the exercise of its discretion. The constitutional issues raised by the appellant in this case were serious, important and novel in the context of access to information litigation.

VIII. Conclusion

67 The appeal is allowed in part. I am of the opinion that it is appropriate in this case to award costs of the proceedings, here and in the courts below, to the appellant. The cross-appeal is allowed with costs to the respondent, appellant on the cross-appeal. The constitutional questions are

answered as follows:

1. Do ss. 51(2)(*a*) and 51(3) of the *Privacy Act*, R.S.C. 1985, c. P-21, as amended, infringe or deny the appellant's rights or freedoms guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes, as was conceded by the respondent.

2. If the answer to Question 1 is in the affirmative, are ss. 51(2)(*a*) and 51(3) of the *Privacy Act* reasonable limits, prescribed by law, that can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No. Section 51(2)(*a*) is read down to apply to subsection (3) only.

3. Does s. 51(3) of the *Privacy Act* infringe or deny the appellant's rights and freedoms guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: Assuming without deciding that s. 7 applies, the answer is no.

4. If the answer to Question 3 is in the affirmative, is s. 51(3) of the *Privacy Act* a reasonable limit, prescribed by law, that can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: This question need not be answered.

* * * * *

APPENDIX

Relevant Constitutional and Statutory Provisions

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights

and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

...

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

...

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

Privacy Act, R.S.C. 1985, c. P-21

12. (1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of the *Immigration Act* has a right to and shall, on request, be given access to

(*a*) any personal information about the individual contained in a personal information bank; and

(*b*) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific information on the location of the information as to render it reasonably retrievable by the government institution.

...

16. (1) Where the head of a government institution refuses to give access to any personal information requested under subsection 12(1), the head of the institution shall state in the notice given under paragraph 14(*a*)

(*a*) that the personal information does not exist, or

(*b*) the specific provision of this Act on which the refusal was based or the provision on which a refusal could reasonably be expected to be based if the information existed,

and shall state in the notice that the individual who made the request has a right to make a complaint to the Privacy Commissioner about the refusal.

(2) The head of a government institution may but is not required to indicate under subsection (1) whether personal information exists.

...

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any personal information requested under subsection 12(1) that was obtained in confidence from

(*a*) the government of a foreign state or an institution thereof;

(*b*) an international organization of states or an institution thereof;

(*c*) the government of a province or an institution thereof; or

(*d*) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government.

(2) The head of a government institution may disclose any personal information requested under subsection 12(1) that was obtained from any government, organization or institution described in subsection (1) if the government, organization or institution from which the information was obtained

(*a*) consents to the disclosure; or

(*b*) makes the information public.

...

21. The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada, as defined in subsection 15(2) of the *Access to Information Act*, or the efforts of Canada toward detecting, preventing or suppressing subversive or hostile activities, as defined in subsection 15(2) of the *Access to Information Act*, including, without restricting the generality of the foregoing, any such information listed in paragraphs 15(1)(*a*) to (*i*) of the *Access to Information Act*.

22. (1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)

(*a*) that was obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

(i) the detection, prevention or suppression of crime,
(ii) the enforcement of any law of Canada or a province, or
(iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*,

if the information came into existence less than twenty years prior to the request;

(*b*) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,
(ii) that would reveal the identity of a confidential source of information, or
(iii) that was obtained or prepared in the course of an investigation; or

...

(3) For the purposes of paragraph (1)(*b*), "investigation" means an investigation that

(*a*) pertains to the administration or enforcement of an Act of Parliament;

(*b*) is authorized by or pursuant to an Act of Parliament; or

(*c*) is within a class of investigations specified in the regulations.

...

34... .

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Privacy Commissioner may, during the investigation of any complaint under this Act, examine any information recorded in any form under the control of a government institution, other than a confidence of the Queen's Privy Council for Canada to which subsection 70(1) applies, and no information that the Commissioner may examine under this subsection may be withheld from the Commissioner on any grounds.

...

41. Any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

...

45. Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 43, examine any information recorded in any form under the control of a government institution, other than a confidence of the Queen's Privy Council for Canada to which subsection 70(1) applies, and no information that the Court may examine under

this section may be withheld from the Court on any grounds.

46. (1) In any proceedings before the Court arising from an application under section 41, 42 or 43, the Court shall take every reasonable precaution, including, when appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid the disclosure by the Court or any person of

(*a*) any information or other material that the head of a government institution would be authorized to refuse to disclose if it were requested under subsection 12(1) or contained in a record requested under the *Access to Information Act*; or

(*b*) any information as to whether personal information exists where the head of a government institution, in refusing to disclose the personal information under this Act, does not indicate whether it exists.

(2) The Court may disclose to the appropriate authority information relating to the commission of an offence against any law of Canada or a province on the part of any officer or employee of a government institution, if in the opinion of the Court there is evidence thereof.

47. In any proceedings before the Court arising from an application under section 41, 42 or 43, the burden of establishing that the head of a government institution is authorized to refuse to disclose personal information requested under subsection 12(1) or that a file should be included in a personal information bank designated as an exempt bank under section 18 shall be on the government institution concerned.

...

49. Where the head of a government institution refuses to disclose personal information requested under subsection 12(1) on the basis of section 20 or 21 or paragraph 22(1)(*b*) or (*c*) or 24(*a*), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the personal information, order the head of the institution to disclose the personal information, subject to such conditions as the Court deems appropriate, to the individual who requested access thereto, or shall make such other order as the Court deems appropriate.

...

51. (1) Any application under section 41 or 42 relating to personal information that the head of a government institution has refused to disclose by reason of paragraph 19(1)(*a*) or (*b*) or section 21 ... shall be heard and determined by the Associate Chief Justice of the Federal Court or by such other judge of the Court as the Associate Chief Justice may designate to hear the applications.

(2) An application referred to in subsection (1) or an appeal brought in respect of such application shall

(*a*) be heard *in camera*; and

(*b*) on the request of the head of the government institution concerned, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.

(3) During the hearing of an application referred to in subsection (1) or an appeal brought in respect of such application, the head of the government institution concerned shall, on the request of the head of the institution, be given an opportunity to make representations *ex parte*.

52. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

(2) Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

Procureurs :

Solicitors for the appellant: Ruby & Edwardh, Toronto.

Solicitors for the respondent: McCarthy Tétrault, Ottawa; The Deputy Attorney General of Canada,

Ottawa.

Solicitors for the intervener the Privacy Commissioner of Canada: Nelligan O'Brien Payne, Ottawa.

[HOUSE OF LORDS.]

SCOTT (OTHERWISE MORGAN) AND ANOTHER . . APPELLANTS ; AND SCOTT . . . . . RESPONDENT.

H. L. (E.)* 1913 *May* 5.

Divorce—Practice—Nullity—Hearing in Camera—Publication of Proceedings after Decree—Contempt of Court—Committal—Appeal—Competency—Criminal Cause or Matter—Matrimonial Causes Act, 1857 (20 & 21 *Vict.* c. 85), *ss.* 2, 6, 22, 46—*Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 47.

The Probate, Divorce and Admiralty Division has no power, either with or without the consent of the parties, to hear a nullity suit or other matrimonial suit in camera in the interest of public decency.

Barnett v. *Barnett* (1859) 29 L. J. (P. & M.) 28, and *H.* (*falsely called C.*) v. *C.* (1859) 29 L. J. (P. & M.) 29 ; 1 Sw. & Tr. 605, followed and approved.

A. v. *A.* (1875) L. R. 3 P. & M. 230, overruled.

D. v. *D.* [1903] P. 144, considered.

Per Viscount Haldane L.C.: The general rule as to publicity must yield to the paramount duty of the Court to secure that justice is done; and it is open to a party in a matrimonial suit, upon proof that justice cannot be done otherwise, to apply for a hearing in camera, and even for the prohibition of subsequent publication of the proceedings, in exceptional cases.

Per Earl Loreburn: In cases where it is shewn that the administration of justice would be rendered impracticable by the presence of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the Court, an order for hearing a matrimonial suit in camera may be lawfully made. Subject to the above limitations rules may be made under the Matrimonial Causes Act, 1857, to regulate the hearing of causes in camera.

An order was made at the instance of the petitioner in a nullity suit, which was practically undefended, for the hearing of the cause in camera. After a decree nisi had been pronounced the petitioner, through her solicitor, obtained a transcript of the official shorthand writer's notes of the proceedings at the hearing of the cause and sent copies of this transcript to certain persons in defence of her reputation.

Upon a motion by the respondent to commit for contempt of Court the petitioner and her solicitor for publishing copies of this transcript, in contravention of the order directing that the cause should be heard in camera, Bargrave Deane J. found that the petitioner and her solicitor were guilty of a contempt of Court and ordered them to pay

* *Present:* VISCOUNT HALDANE L.C., EARL OF HALSBURY, EARL LOREBURN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

H. L. (E.)
1913
SCOTT
v.
SCOTT.

the costs of the motion, and an appeal from this order was dismissed as incompetent:—

Held, (1.) that the order to hear in camera was made without jurisdiction; (2.) that the order, assuming that there was jurisdiction to make it, did not prevent the subsequent publication of the proceedings; (3.) that the order to pay costs was not a judgment in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, so that no appeal would lie from it.

Decision of the Court of Appeal [1912] P. 241, reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Bargrave Deane J. (2)

On January 12, 1911, the appellant Annie Maria Scott, otherwise Annie Maria Morgan, filed a petition in the Probate, Divorce and Admiralty Division asking that the ceremony of marriage celebrated on July 8, 1899, at St. Mary's Church, Ealing, between herself and the respondent might be declared null and void by reason of the respondent's impotence.

The appellant Percy Braby acted as the petitioner's solicitor in this suit.

On February 14, 1911, an order was made in the cause by the registrar, on a summons issued by the petitioner, appointing medical inspectors for the examination of the parties and ordering "that this cause be heard in camera."

The petitioner attended for medical inspection in pursuance of this order and was reported to be a virgin. The respondent did not attend for inspection. The respondent had filed an answer denying that he was impotent, but the answer was by leave withdrawn.

On June 13, 1911, the cause was heard before the President in camera and a decree nisi was pronounced, the cause being undefended. On January 15, 1912, the decree nisi was made absolute. In August, 1911, the petitioner instructed her solicitor, the appellant Braby, to obtain for her from the Court a transcript of the proceedings at the hearing of the cause, and, at her instance, the solicitor had three copies made of this transcript. One copy the petitioner sent to Mr. Graham Scott, the respondent's father, the second she sent to Mrs. Westenra, a sister of the respondent, and the third to another person.

(1) [1912] P. 241. (2) [1912] P. 4.

On November 23, 1911, the respondent issued a notice of motion, intituled in the cause only, asking that the appellants might be committed to prison for their contempt of Court in circulating or otherwise publishing a copy of the transcript of the official shorthand writer's notes of the proceedings at the hearing of the cause "in contravention of an order dated the 14th day of February, 1911, directing that this cause be heard in camera."

The notice of motion further asked that the appellants might be restrained from making any similar or other communications either directly or indirectly concerning the subject-matter of the cause, and from otherwise molesting the respondent, his relatives and friends, doctors and patients and others; and that they might be directed to state on oath the names and addresses of the persons to whom similar communications had been made. The notice of motion was also addressed to Mr. Waller, Mr. Braby's partner, but at the hearing it was admitted that he had no part in the matter.

The petitioner, in an affidavit in opposition to the motion, stated that she sent the copies of the transcript to the three persons aboved named in consequence of reports issued by the respondent reflecting on her sanity and in defence of her reputation, and tendered an apology to the Court if it should be held that she had contravened the order of February 14, 1911.

On December 4, 1911, the motion was heard before Bargrave Deane J., who found that the appellants had been guilty of contempt of Court and ordered them to pay the costs of the motion.

The appellants appealed, and upon the appeal the preliminary objection was taken by the respondent that the appeal was incompetent on the ground that the order appealed from was made in a criminal cause or matter within s. 47 of the Judicature Act, 1873.

The appeal was originally argued before Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ., but it was ultimately ordered to be re-argued before the Full Court of Appeal.

The Court (Cozens-Hardy M.R., Farwell, Buckley, and Kennedy L.JJ. (Vaughan Williams and Fletcher Moulton L.JJ.

H. L. (E.) 1913

SCOTT v. SCOTT.

dissenting)) upheld the objection and dismissed the appeal as incompetent.

Having regard to the public importance of the questions involved in this appeal and to the probability that the respondent might not be represented by counsel, the Treasury, acting on the advice of the Attorney-General, provided counsel to argue the case from the respondent's point of view.

1913. March 3, 4, 7, 11. *Sir R. Finlay, K.C.*, and *Barnard, K.C.* (with them *W. O. Willis*), for the appellants. 1. The order of Bargrave Deane J., directing the appellants to pay the costs of the motion to commit, was not a judgment in a criminal cause or matter within s. 47 of the Judicature Act, 1873, so that no appeal lay from it. The form of the notice of motion shews that the respondent was really applying for civil relief. It is not intituled in the manner universally adopted in quasi-criminal proceedings, namely, in the suit and in the matter of an application to commit the respondents to the motion for contempt of Court, and, in addition to committal, it asks for an injunction and discovery. The motion was a mere step in the civil proceedings and was not a criminal matter at all.

The exception to the right of appeal in s. 47 is confined to causes or matters relating to crimes which are indictable or criminal offences which are punishable summarily. Mere disobedience to an order of the Court, though it may result in imprisonment, does not fall within the section : *Attorney-General* v. *Bradlaugh* (1); *Reg.* v. *Barnardo* (2); *O'Shea* v. *O'Shea and Parnell* (3); *In re Evans.* (4) [Upon this point they also referred to *Cox* v. *Hakes* (5); *Reg.* v. *Fletcher* (6); *Reg.* v. *Steel* (7); *Witt* v. *Corcoran* (8); *Stevens* v. *Metropolitan District Ry. Co.* (9); *Bristow* v. *Smyth* (10); *Mellor* v. *Denham* (11);

(1) 1885) 14 Q. B. D. 667, at p. 687.
(2) (1889) 23 Q. B. D. 305, at pp. 308, 309.
(3) (1890) 15 P. D. 59, at pp. 63, 64.
(4) [1893] 1 Ch. 252.
(5) (1890) 15 App. Cas. 506.
(6) (1876) 2 Q. B. D. 43.
(7) (1876) 2 Q. B. D. 37.
(8) (1876) 2 Ch. D. 69.
(9) (1885) 29 Ch. D. 60.
(10) (1885) 2 Times L. R. 36.
(11) (1880) 5 Q. B. D. 467.

Reg. v. *Whitchurch* (1); *Reg.* v. *Foote* (2); *In re Dudley* (3); *In re Hardwick* (4); *In re Freston* (5); *Seldon* v. *Wilde* (6); *Harvey* v. *Harvey* (7); *Helmore* v. *Smith* (8); *In re Johnson* (9); *Crowther* v. *Elgood* (10); *Preston* v. *Etherington* (11); *In re Wray* (12); *Reg.* v. *Jordan* (13); *Ex parte Woodhall* (14); *Hunt* v. *Clarke* (15); *Rex* v. *Tibbits* (16); *In re Ashwin* (17); *In re Eede* (18); *Ex parte Pulbrook* (19); *In re Armstrong* (20); *Attorney-General* v. *Kissane* (21); *Seaman* v. *Burley* (22); *Southwark and Vauxhall Water Co.* v. *Hampton Urban District Council* (23); *In re Edgcome* (24); *Robson* v. *Biggar* (25); *Ex parte Fernandez* (26); *Cobbett* v. *Slowman* (27); *Stark* v. *Stark*. (28)]

2. An order in a nullity suit for hearing in camera, assuming that there is jurisdiction to make it, does not prevent the subsequent publication of the proceeedings. The order of Bargrave Deane J. goes far beyond any jurisdiction ever claimed or exercised by the Ecclesiastical Courts, yet the respondent bases his case upon the practice of the Ecclesiastical Courts, which is preserved by s. 22 of the Matrimonial Causes Act, 1857, in suits which were formerly within the jurisdiction of those Courts. Take the case of an innocent man summoned to answer scandalous charges of such a nature that it is necessary that the case should be heard in camera. A bald statement of the dismissal of the action would not clear his character. Can it be said that there is a duty cast upon him not to divulge the evidence given at the hearing for the purpose of vindicating his conduct? Of course

(1) (1881) 7 Q. B. D. 534.
(2) (1883) 10 Q. B. D. 378.
(3) (1883) 12 Q. B. D. 44.
(4) (1883) 12 Q. B. D. 148.
(5) (1883) 11 Q. B. D. 545.
(6) [1911] 1 K. B. 701.
(7) (1884) 26 Ch. D. 644.
(8) (1886) 35 Ch. D. 449.
(9) (1887) 20 Q. B. D. 68.
(10) (1887) 34 Ch. D. 691.
(11) (1887) 36 W. R. 49.
(12) (1887) 36 Ch. D. 138.
(13) (1888) 36 W. R. 797.
(14) (1888) 20 Q. B. D. 832.
(15) (1889) 58 L. J. (Q.B.) 490.
(16) [1902] 1 K. B. 77.
(17) (1890) 25 Q. B. D. 271.
(18) (1890) 25 Q. B. D. 228.
(19) [1892] 1 Q. B. 86.
(20) [1892] 1 Q. B. 327.
(21) (1893) 32 L. R. Ir. 220.
(22) [1896] 2 Q. B. 344.
(23) [1899] 1 Q. B. 273.
(24) [1902] 2 K. B. 403.
(25) [1908] 1 K. B. 672.
(26) (1861) 10 C. B. (N.S.) 3; 30 L. J. (C.P.) 321.
(27) (1850) 4 Ex. 747; (1854) 9 Ex. 633.
(28) [1910] P. 190.

H. L. (E.) 1913 SCOTT v. SCOTT.

a malicious disclosure of the evidence would be restrained; but any abuse of this right of publication could be effectively dealt with by the ordinary law. If the proprietor of a newspaper published the evidence of a nullity suit which had been heard in camera he would be criminally liable for an obscene libel. In *Lawrence* v. *Ambery* (1), which is the only previous case in which this point has arisen, Sir Francis Jeune appears to have expressed an opinion that there could be no disclosure of what had been heard in camera, but that dictum was obiter only, and the motion for attachment was dismissed. The effect of the practice of the Ecclesiastical Courts, as summed up in the judgment of Fletcher Moulton L.J., is that an order for hearing in camera related only to the mode of conducting the hearing and had no reference to subsequent publication, and that the Court never assumed power in matrimonial cases to enjoin perpetual silence upon the parties or others. *Rex* v. *Clement* (2), upon which Farwell L.J. relied, really supports the appellants' contention. There several persons charged with high treason by the same indictment severed in their challenges and were consequently tried seriatim. Abbott C.J. having stated publicly that he thought it necessary to prohibit any publication of the proceedings until they were completely terminated, it was held that the proprietor of a newspaper who had published an account of the trial of two of the prisoners whilst the others remained to be tried was properly found guilty of a contempt of Court; but the basis of the decision was that the trial of all the prisoners constituted one entire proceeding. Subsequent publication may be prohibited in cases relating to trade secrets and to wards of Court and lunatics, but those cases depend upon different principles and have no bearing on the present case.

3. The Court had no jurisdiction to make the order for hearing in camera. In the Court below the Master of the Rolls relied upon the view expressed by Sir Francis Jeune in *D.* v. *D.* (3) that the Court possessed an inherent jurisdiction to hear any case in private where it was necessary for the due administration of justice. But the rule of English law is that all cases must be

(1) (1891) 91 L. T. Jo. 230. (2) (1821) 4 B. & Ald. 218.
(3) [1903] P. 144.

heard in open Court subject to certain specified classes of exceptions. This is stated explicitly by Jessel M.R. in *Nagle-Gillman* v. *Christopher* (1), where he lays it down that the High Court has no power to hear cases in private, even with the consent of the parties, except (1.) in cases affecting lunatics and wards of Court or (2.) where a public trial would defeat the whole object of the action or (3.) where the practice of the old Ecclesiastical Courts in this respect is continued. The appellants submit that the last exception is not well founded, but they rely upon the general proposition of law there stated. The first exception depends upon the quasi-paternal jurisdiction which the Court, acting as the representative of the King as parens patriæ, exercises for the protection of the lunatic or ward of Court. Accordingly, in the case of a ward of Court, it has been held that the Court, without the consent of the parties, may make an order for hearing in private—*Ogle* v. *Brandling* (2)—and may treat as a contempt of Court the subsequent publication of the proceedings: *In re Martindale.* (3) The second exception relates primarily to cases of trade secrets, and in such cases also it may be necessary to prohibit disclosure after the trial in order to prevent the destruction of the property the subject-matter of the action: *Andrew* v. *Raeburn* (4); *Mellor* v. *Thompson* (5); *Badische Anilin und Soda Fabrik* v. *Levinstein.* (6) In *Malan* v. *Young* (7), the Sherborne School libel action, Denman J., with the consent of the parties, made an order for hearing in camera, notwithstanding the protest of a barrister, but during the progress of the trial the learned judge stated that considerable doubt existed amongst the judges as to his jurisdiction to make the order and invited the parties to elect whether they would take the risk of proceeding with the case in camera or would begin de novo in open Court; and in the result the case was heard in private before the judge as arbitrator. That case therefore is not an authority in support of the inherent jurisdiction of the Court to hear cases in camera.

(1) (1876) 4 Ch. D. 173; 46 L. J. (Ch.) 60.
(2) (1831) 2 Russ. & My. 688.
(3) [1894] 3 Ch. 193.
(4) (1874) L. R. 9 Ch. 522.
(5) (1885) 31 Ch. D. 55.
(6) (1883) 24 Ch. D. 156.
(7) (1889) 6 Times L. R. 38.

H. L. (E.) 1913 SCOTT v. SCOTT.

[EARL OF HALSBURY referred to *Lord Portsmouth's Case.* (1)]

With regard to the third exception, s. 22 of the Matrimonial Causes Act, 1857, provides that in all suits other than a suit for dissolution, that is to say, in all suits which could have been entertained by the old Ecclesiastical Courts, the Court is to act upon the principles of the Ecclesiastical Courts, but subject to the provisions of the Act and the rules and orders thereunder. The proviso is important. Sect. 46 provides that, subject to any rules and regulations made under the Act, the witnesses are to be examined orally in open Court. Sect. 53 empowers the Court to make rules and regulations concerning the procedure under the Act, and by s. 67 these rules and regulations are to be laid before Parliament. The effect of these sections taken together is that all suits in the Divorce Court are to be heard in open Court, subject to any rules and regulations which may be made to the contrary. The only rule which relates to the mode of hearing is r. 205 of the Divorce Rules and Regulations, but that rule gives no authority to the Court to hear cases in camera. Therefore, if there ever was any power in the Ecclesiastical Courts to order proceedings in nullity suits to be heard in camera, that power has been taken away by the terms of the Act. The appellants admit that a practice supposed to be based upon the practice of the Ecclesiastical Courts has sprung up by which suits for nullity have been heard in camera, but it is submitted that there is no justification for that practice. In *Barnett* v. *Barnett* (2), which was decided very shortly after the passing of the Matrimonial Causes Act, 1857, Sir Cresswell Cresswell held that the Act did not confer upon the Court any power to order a matrimonial suit to be heard in camera. That was a suit for judicial separation, which could have been entertained by the Ecclesiastical Courts; and as regards the practice of the Ecclesiastical Courts there is no ground for distinguishing between a suit for nullity and any other suit which those Courts could have entertained—divorce a mensa et thoro, restitution, jactitation. That case was followed in the same year by *H. (falsely called C.)* v. *C.* (3), which was a nullity

(1) (1815) G. Coop. Ch. Ca. 106.
(2) 29 L. J. (P. & M.) 28.
(3) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.

suit, where the Full Court (Sir Cresswell Cresswell, Williams J., and Bramwell B.) held that the Divorce Court had no power to sit otherwise than with open doors. In *C.* v. *C.* (1) Lord Penzance held that he had no power to hear a suit for dissolution in camera, although he expressed the opinion obiter that nullity suits might be heard in private by virtue of s. 22 of the Matrimonial Causes Act, 1857. In *A.* v. *A.* (2) Sir James Hannen held that he had power, even without the consent of the parties, to hear a suit for restitution of conjugal rights in private, and he based his decision upon the practice of the Ecclesiastical Courts. In *D.* v. *D.* (3), where there were consolidated suits, namely, a suit by the wife for judicial separation and a suit by the husband for dissolution of marriage, Sir Francis Jeune, with the consent of the parties, ordered the suits to be heard in camera, and his judgment proceeded partly on the ground of the inherent jurisdiction of the Court, and partly on the ground that the Court had inherited the powers and practice of the Ecclesiastical Courts. Those cases are inconsistent with *H.* (*falsely called C.*) v. *C.* (4) and ought to be overruled. Further, it is a mistake to suppose that it ever was the practice of the Ecclesiastical Courts to hear nullity suits or any other matrimonial suits in private. Under that practice the witnesses on each side were examined in private, and in the absence of the parties, before an examiner, and the mode of cross-examination was by interrogatories previously delivered to the examiner by the adverse party, but after the publication of the depositions all causes were heard publicly in open Court: Shelford on Marriage and Divorce, pp. 520, 522, 524, 530. And see Conset's Ecclesiastical Practice, 3rd ed., p. 158, and Blackstone's Commentaries, 11th ed., vol. 3, pp. 448—450. Until 1843 nullity suits were reported with the full names of the parties, and until 1864 there never was any hearing of nullity suits in private. (5) The modern practice is founded upon a misapprehension of the powers of the Ecclesiastical Courts.

4. Assuming that the order of Bargrave Deane J. was within

(1) (1869) L. R. 1 P. & M. 640.
(2) L. R. 3 P. & M. 230.
(3) [1903] P. 144.
(4) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.
(5) See reporter's note to *A.* v. *A.*, 3 P. & M. at p. 232.

H. L. (E.) 1913 SCOTT v. SCOTT.

his jurisdiction, the publication was privileged, and the appellants ought not to have been ordered to pay the costs of the motion: *In re Pollard.* (1)

Sir John Simon, S.-G., and *Danckwerts, K.C.* (with them *Bayford*), for the respondent 1. As to the question of jurisdiction, the appellants' contention with regard to the practice of the Ecclesiastical Courts is clearly wrong. In a note to *Briggs* v. *Morgan* (2) reference is made to a nullity suit (August 1, 1821) the medical evidence in which was heard "in camera." That reference shews not only that the evidence was taken in private, but that the presentation to the Court was also in private. In *Deane* v. *Aveling* (reported on hearing 1 Rob. Eccl. 279) on May 13, 1845, an application was made by letter for the hearing of a nullity suit in private (3), and the letter assumes that the matter was within the discretion of the judge. It does not appear whether the application was granted. Those cases are sufficient to shew that the Ecclesiastical Courts had the power to hear nullity suits in private, although that power was not universally exercised; and the existence of this power is recognized by the text-writers: Cockburn's Clerk's Assistant in the Practice of the Ecclesiastical Courts, c. 14, s. 10; Swabey's Law of Divorce and Matrimonial Causes, 2nd ed., p. 97. This was also the view of a number of very eminent judges,—Jessel M.R., Lord Penzance, Lord Hannen, and Lord St. Helier. As regards the getting in of the evidence, it was the invariable practice of the Ecclesiastical Courts to examine the witnesses in secret: *Herbert* v. *Herbert* (4), which is the foundation for the passage in Shelford on Marriage

(1) (1868) L. R. 2 P. C. 106.

(2) (1820) 2 Hagg. Cons. at p. 332.

(3) The following is a copy of this letter:—

"Doctors Commons,
"13th May, 1845.

"Dear Sir,

"*Deane agst. Aveling.*

"As this is a case of nullity of marriage by reason of malformation to avoid unnecessary publicity of the disclosures in the evidence we shall feel obliged by your intimating our wishes to the judge that *if he shall be so pleased* it may be heard in private.

"We are, Dear Sir,
"Yours faithfully,
"W. Rothery.
"Edwd. W. Crosse.

"Jno. Shephard, Esq."

(See addendum at p. 487.)

(4) (1819) 2 Hagg. Cons. 263, at p. 267.

and Divorce on p. 522; Conset's Ecclesiastical Practice (1685), pt. iii., s. 3; pt. vi., s. 4. When the evidence was complete publication was decreed, which meant, not publication to the world, but communication to the other party to the suit: see Coote's Ecclesiastical Practice, p. 806. Then as to the hearing and judgment or sentence, it is conceded that the sentence was required to be given in open Court: Burn's Ecclesiastical Law, tit. Marriage XI. (Divorce), s. 7. That is expressly provided by canon 106 of the Canons of 1603, and canon 108 imposes penalties for the violation of this rule. The reason for that rule was obviously that it was essential that in any proceedings affecting a question of status the result should be publicly known. But there is no corresponding provision as to the hearing of the suit, and the fact that it is expressly provided that the sentence shall be in open Court lends support to the inference that no such rule existed as to the hearing. The statement in Shelford on Marriage and Divorce, p. 530, that all causes are heard publicly in open Court was conveyed without acknowledgment from the report of an Ecclesiastical Commission appointed in 1830 to inquire into the practice of the Ecclesiastical Courts, and, divorced from its context, it is misleading. The main issue to be determined by that Commission was whether the method adopted by the Common Law Courts of viva voce evidence ought not also to be adopted by the Ecclesiastical Courts, and the Commission, when, in describing the practice of the Ecclesiastical Courts, it speaks of the hearing in open Court, was using the words in connection with that issue. It was not referring to the admission or non-admission of the public, but was contrasting the method of hearing, which was before the judge in Court in the presence of the parties, with the secret examination of witnesses which it had previously described: Parliamentary Papers 1831-32, vol. 24, pp. 18, 19. Moreover the Commission was not dealing with this special class of cases, namely, nullity suits, at all. [They referred to Burn's Ecclesiastical Practice (9th ed.), vol. 3, pp. 202, 207.] Therefore the passage in Shelford is not an authority against the respondent's contention.

Assuming then that the Ecclesiastical Courts had jurisdiction to

H. L. (E.) 1913 SCOTT v. SCOTT.

hear causes in private, that power is preserved by s. 22 of the Matrimonial Causes Act, 1857. Sect. 46 is not opposed to this view. Until 1854 the Ecclesiastical Courts had no power to examine witnesses viva voce, but in that year an Act was passed (17 & 18 Vict. c. 47) conferring that power upon them. In that state of things s. 46 of the Act of 1857 says, not that the trial shall be in open Court, but that the witnesses shall be examined orally in open Court. That section is not aimed at the admission of the public to the Court, but is intended to secure that the method of taking evidence shall be by oral examination before the judge in Court as distinguished from the old method of examination in secret. But, whatever be the construction of s. 46, it is prefaced by the words "Subject to such rules and regulations as may be established as hereinafter provided" (see s. 53), and it is submitted that r. 205 of the Divorce Rules, though it contains no specific provision as to hearing in camera, is wide enough to create, if need be, the necessary exception to s. 46. As regards *H.* (*falsely called C.*) v. *C.* (1) the report contains no reference to s. 22 and the case must be read with the suspicion that that section was not before the Court. Further, Williams J., although he expresses his opinion that the Court, being a new Court, had no jurisdiction to hear cases in camera, admits that other judges had taken a different view, and he assumes that he had a discretion in the matter and declines to exercise it. Bramwell B. starts from the same point and, on the assumption that the Court is a new Court, says it has no jurisdiction to hear in private. There is, however, a stream of authority subsequent to that case shewing that the Court has such a jurisdiction. In *C.* v. *C.* (2) Lord Penzance says in terms that the Ecclesiastical Courts did hear nullity suits in private and that the Divorce Court had maintained and followed up that practice. In *A.* v. *A.* (3) Sir James Hannen puts the case higher and states that the power of the Ecclesiastical Courts was not limited to nullity suits and that the Divorce Court had the same power, and he adds that the rule laid down in *H.* (*falsely called C.*) v. *C.* (1) had not been acted upon. In

(1) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.
(2) L. R. 1 P. & M. 640.
(3) L. R. 3 P. & M. 230.

Nagle-Gillman v. *Christopher* (1) Jessel M.R. states distinctly that the practice of the Ecclesiastical Courts to hear suits for nullity or judicial separation in private was preserved by s. 22 of the Matrimonial Causes Act, 1857. Finally in *D.* v. *D.* (2) Sir Francis Jeune states not only that the Divorce Court had inherited the power of the Ecclesiastical Courts to hear cases in camera, but that the Court had an inherent power to hear a suit for dissolution in camera. He bases his decision upon the general power of the Court to hear in camera any case in which justice cannot be done otherwise and suggests that in many matrimonial cases a hearing in public would bring about a denial of justice because a modest woman would refuse to assert her rights. Such a power is required in the interests of justice and to enable the Court to maintain its own efficiency and its own dignity. Both the general rule as to hearing in open Court and the exceptions thereto are explicable upon the common principle that the Court will so conduct its business as to do justice efficiently. The gravity of the consequences of insisting upon a hearing in public in matrimonial cases may be just as great as in the case of a trade secret, for in both instances the result might be to defeat the ends of justice. Putting aside the cases of wards of Court and lunatics, hearing in camera is not confined to trade secrets, but may be ordered wherever the object of the suit would be defeated. Neither *Andrew* v. *Raeburn* (3) nor *Mellor* v. *Thompson* (4) was a case of a trade secret. It is an axiom of English law that prima facie the administration of justice should be open to all the world, but that is not an absolute rule of natural justice, and the cases which have been cited are illustrations of the general power of the Court to exclude the public wherever the interests of justice require it. See *Lewis* v. *Levy*. (5) This jurisdiction existed in the Divorce Court apart from the Judicature Act, but, if necessary, the respondent prays in aid the provisions of that Act. In the Children Act, 1908, s. 114, which expressly empowers the Court to exclude the public whilst a child or young person is giving

(1) 4 Ch. D. 173; 46 L. J. (Ch.) 60.
(2) [1903] P. 144.
(3) L. R. 9 Ch. 522.
(4) 31 Ch. D. 55.
(5) (1858) E. B. & E. 537, at p. 546, per Lord Campbell.

H. L. (E.) 1913 SCOTT v. SCOTT.

evidence in any proceedings relating to an offence against decency or morality, the Legislature has been careful to preserve to the Court any power which it might have independently to hear cases in camera. [They also referred to the Summary Jurisdiction Act, 1848, s. 12.] Further, the jurisdiction of the Court to make the order for hearing in camera was not contested by the appellants in the Court of Appeal, and therefore the point is not now open to them : *Kay* v. *Marshall.* (1)

2. As to subsequent publication, the privilege of reporting what takes place in a Court of justice is based on the fact that the hearing is in public, and the publication of the proceedings is merely enlarging the area of the Court : *Macdougall* v. *Knight* (2); and see *Popham* v. *Pickburn.* (3) It follows that in cases where the public is excluded from audience the privilege of publication goes too, since the public has no right to this secondary form of audience, which stands on no higher ground than the right to attend in Court and hear. The maxim "Cessante ratione cessat lex" applies. In cases such as nullity suits the protection accorded by an order for hearing in camera ought as a matter of common sense to be extended to the subsequent publication of the proceedings : *Lawrence* v. *Ambery* (4) and see *In re Martindale.* (5)

[LORD ATKINSON referred to *M'Leod* v. *St. Aubyn.* (6)]

3. Assuming that a contempt was committed, the question whether it was a criminal contempt within s. 47 of the Judicature Act, 1873, depends upon whether the disobedience to the order was an interference with the course of justice or was merely an interference with the rights of the parties. The order for the hearing in camera was made not to secure a private right but for the efficient administration of justice, and disobedience to such an order is a misdemeanour punishable by fine and imprisonment. *Seaward* v. *Paterson* (7) illustrates the difference between

(1) (1841) 8 Cl. & F. 245.
(2) (1889) 14 App. Cas. 194, at pp. 200, 206.
(3) (1862) 31 L. J. (Ex.) 133, at p. 136.
(4) 91 L. T. Jo. 230.
(5) [1894] 3 Ch. 193, at p. 200.
(6) [1899] A. C. 549.
(7) [1897] 1 Ch. 545.

the two kinds of contempt. When once the matter is before the Court, the question whether or not a criminal contempt has been committed cannot depend upon the form of the application to commit. The Court of Appeal was therefore right in allowing the objection to the competency of the appeal. [Upon this point, in addition to the cases cited by the appellants, they referred to Russell on Crimes, 5th ed., vol. 1., p. 561; Chitty on Criminal Law, 2nd ed., vol. 2, p. 279; *Miller* v. *Knox* (1); *In re Clement* (2); *Wellesley* v. *Mornington* (3); *Reg.* v. *Rudge* (4); *Ex parte Savarkar.* (5)]

Sir R. Finlay, K.C., replied.

The House took time for consideration.

May 5. VISCOUNT HALDANE L.C. (6) My Lords, the facts in this case are not in controversy, but questions of law of considerable public importance are raised.

The appellant Mrs. Scott filed her petition against her husband, the respondent, for a declaration that their marriage was void because of his impotence. She then took out a summons asking for the appointment of medical inspectors, and that the petition should be heard in camera, and on this summons an order was made for such hearing. The petition duly came on in camera, and the appellant obtained a decree of nullity. The petition was practically undefended, and the evidence was very simple. There was nothing to differentiate the case from many others which are heard in open Court, and so far as the public were concerned it might quite well have been so heard. The decree was subsequently, on January 15, 1912, made absolute.

In August, 1911, the appellant Mrs. Scott, and the appellant Braby, who was her solicitor, sent copies of the shorthand notes of the proceedings at the hearing to Mr. Graham Scott, the father of the respondent, and to Mrs. Westenra, the respondent's sister, and also to a third person. Mrs. Scott appears to have been under the impression that an inaccurate account had been given by the respondent of the position of the parties to the case, and of what really took place.

(1) (1838) 4 Bing. N. C. 574.
(2) (1822) 11 Price, 68.
(3) (1848) 11 Beav. 181.
(4) (1886) 16 Q. B. D. 459.
(5) [1910] 2 K. B. 1056.
(6) Read by Lord Atkinson.

H. L. (E.) 1913 SCOTT v. SCOTT. Viscount Haldane L.C.

In December, 1911, the respondent moved to commit the appellants and Mr. Waller, who was the appellant Braby's partner, for contempt in so sending the copies of the shorthand notes, in breach, as was alleged, of the order for hearing in camera, and he also moved for an injunction. The motion was heard by Bargrave Deane J., who decided that the two appellants had been guilty of contempt of Court, and ordered them to pay the costs of the motion. From this order they appealed. On the hearing of the appeal a preliminary objection was taken on behalf of the respondent that no appeal lay, inasmuch as the order of Bargrave Deane J. amounted to a judgment in a criminal cause or matter within the meaning of s. 47 of the Judicature Act of 1873. The Court of Appeal, consisting of the Master of the Rolls and Fletcher Moulton and Kennedy L.JJ., ordered the appeal to be re-argued before the Full Court of Appeal. It was in consequence so re-argued, and was finally dismissed. The Master of the Rolls and Farwell, Buckley, and Kennedy L.JJ. were of opinion that the order appealed from was right, while Vaughan Williams and Fletcher Moulton L.JJ. took a different view.

My Lords, the question which we have now to decide necessitates consideration of the jurisdiction to hear in camera in nullity proceedings, and of the power of the judge to make an order which not only excludes the public from the hearing, but restrains the parties from afterwards making public the details of what took place. Without such consideration it is not possible to arrive at a satisfactory conclusion as to whether such an order as was made in this case amounted to a judgment in a criminal cause or matter within the meaning of the section of the Judicature Act to which I have referred. We, therefore, invited counsel to address us more fully as to the history and character of the jurisdiction than appears to have been done in the Courts below.

My Lords, I think it is established that the Ecclesiastical Courts in the exercise of their jurisdiction in nullity suits, prior to the Act of 1857, which established the Divorce Court, did from time to time direct the hearing to take place in camera. But in estimating the significance of this fact it is necessary to remember that the procedure of these Courts was very

different from that of the High Court of Justice. Until shortly before the Divorce Court was set up it was not their practice to take evidence viva voce in open Court. The evidence was taken in the form of depositions before commissioners, who conducted their proceedings in private. The parties were not represented at this stage in the fashion with which we are familiar. When a witness was tendered for examination the commissioners could, in the course of taking his deposition, put to him interrogatories delivered by the other side, but there was no cross-examination, or, for that matter, examination-in-chief, of the parties. Each side could tender witnesses, but until the evidence was complete neither side was allowed to see the depositions which had been taken. After the commissioners had finished their work, what was called publication took place.

This did not mean that the evidence was published to the world, but only that the parties had access to it. The next stage was that arguments were heard by the judge of the Court, and finally he gave judgment and pronounced a sentence. So much of the proceedings took place before the commissioners that the modern distinction between hearing in camera and hearing in open Court obviously had nothing approaching to the importance which it possesses to-day. As a rule the proceedings in nullity suits, subsequent to what was called publication, appear to have been conducted in open Court. But sometimes this was not so, with the exception of the final stage at which sentence was pronounced. The sentence itself appears always to have been pronounced in open Court. As regards the arguments the Court seems to have exercised a discretion as to whether the public should be admitted while they took place.

In 1857 the jurisdiction of the Ecclesiastical Courts in matrimonial proceedings was terminated by the statute of that year, and a new Court was established with the title of the Court for Divorce and Matrimonial Causes. Decrees for judicial separation were substituted for the old decrees for divorce a mensa et thoro, and a wholly new power was given to entertain petitions for dissolution of marriage. Sect. 22 provided that in all suits and proceedings, other than proceedings for dissolution, the Court should proceed and act and give relief on

H. L. (E.) 1913 SCOTT v. SCOTT. Viscount Haldane L.C.

principles and rules which in its opinion should be as nearly as might be conformable to the principles and rules on which the Ecclesiastical Courts acted, but this was to be done subject to the provisions of the statute itself, and of the rules and orders made under it. By s. 36 the Court was empowered to direct the trial to take place with a jury. By s. 46, subject to such rules and regulations as might be established, the witnesses in all proceedings before the Court were, where their attendance could be had, to be sworn and examined orally in open Court. A proviso to this section allowed the parties to verify their cases by affidavit, but subject to cross-examination on such affidavits in open Court, if the opposite party so desired. By s. 53 power was given to the Court to make rules and regulations, and by s. 67 any such rules or regulations were to be laid before Parliament.

My Lords, I think that the effect of s. 46 of the Divorce Act was substantially to put an end to the old procedure, and to enact that the new Court was to conduct its business on the general principles as regards publicity which regulated the other Courts of justice in this country. These general principles are of much public importance, and I think that the power to make rules, conferred by ss. 46 and 53, must be treated as given subject to their observance. They lay down that the administration of justice must so far as the trial of the case is concerned, with certain narrowly defined exceptions to which I will refer later on, be conducted in open Court. I think that s. 46 lays down this principle generally, and that s. 22 is, so far as publicity of hearing is concerned, to be read as making no exception in any class of suit or proceeding save in so far as ordinary Courts of justice might have power to make it. This appears to have been the view taken in the cases of *Barnett* v. *Barnett* (1) and *H.* (*falsely called C.*) v. *C.* (2), both decided in 1859, shortly after the Divorce Act had come into operation. The second case came before the Full Court, which included Bramwell B. In giving his judgment he observes that the Divorce Court "being a new Court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its

(1) 29 L. J. (P. & M.) 28.
(2) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.

proceedings should be conducted in public." It is not easy to see how, the provision as to the making of rules notwithstanding, a different interpretation could have been put on the statute from that put by Bramwell B., and for some time this interpretation appears to have been adhered to.

In a note to the case of *A.* v. *A.* (1), decided in 1875, the reporter observes that down to July, 1864, nullity cases were always heard in open Court, but that in the case of *Marshall* v. *Hamilton* (2) the evidence was of such a character that Sir J. Wilde signified a desire that for the future such cases should be heard in camera, and, with the consent of counsel, ordered such a hearing. In *A.* v. *A.* (1), however, Sir James Hannen held that, notwithstanding the objection of the petitioner, he could direct the hearing to take place in camera, and he relied partly on a dictum in *C.* v. *C.* (3) to the effect that the Court had power, under s. 22 of the Divorce Act, to follow the old practice, and partly on a new practice which had begun to grow up.

My Lords, I think that Sir James Hannen laid down the law much too widely, for reasons which I have already given. Whatever may have been the power of the Ecclesiastical Courts, the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.

My Lords, it was not unnatural that the judges of the Divorce Court should have felt embarrassed by the want of the power which the old Ecclesiastical Courts possessed to hear in camera any case which for reasons of decency they thought ought to be so heard, and it is not surprising that Sir James Hannen's judgment was followed by Sir Francis Jeune in *D.* v. *D.* (4) But while that learned judge held, somewhat hesitatingly I think, that

(1) L. R. 3 P. & M. 230.
(2) (1864) 3 Sw. & Tr. 517.
(3) L. R. 1 P. & M. 640.
(4) [1903] P. 144.

H. L. (E.) 1913 SCOTT v. SCOTT. Viscount Haldane L.C.

the Divorce Court had in a suit for judicial separation inherited the power of the Ecclesiastical Courts to hear in camera, he went on to say that even in suits for dissolution this could be ordered if it was reasonably clear that justice could not be done unless the hearing was so conducted. My Lords, this second ground of decision is a very different one from the first. As to the proposition that the Divorce Court has inherited the power to hear in camera of the Ecclesiastical Courts, I am of opinion that, since the Divorce Act of 1857, it has been untrue of every class of case, and not merely of suits for divorce strictly so called. I am in accord with the reasoning of Bramwell B., in the case I have already referred to, which led him to the conclusion that the Court which the statute constituted is a new Court governed by the same principles, so far as publicity is concerned, as govern other Courts.

In cases in other Courts, where all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator. The right to invoke the assistance of a Court of Appeal may be thereby affected, but the parties are at liberty to do what they please with their private rights. In proceedings, however, which, like those in the Matrimonial Court, affect status, the public has a general interest which the parties cannot exclude, and I am unable to see how their consent can justify the taking of an exceptional course. But Sir Francis Jeune does not appear to have thought that it could. He proceeds, in the final reasons for his judgment, on the ground that justice could not be done in the particular case before him if it were not heard in camera. This, he thought, was a general principle which applied to all Courts.

My Lords, provided that the principle is applied with great care and is not stretched to cases where there is not a strict necessity for invoking it, I do not dissent from this view of the existing law. To exclude it would, in certain classes of litigation, mean a denial of justice. In *Andrew* v. *Raeburn* (1) Lord Cairns and James and Mellish L.JJ. appear to express themselves in its favour, but in carefully guarded terms. In

(1) L. R. 9 Ch. 522.

interpreting their decision I think that North J. in *In re Martindale* (1), which was cited to us, went much too far, and, while I agree generally with the judgment of Sir George Jessel M.R. in *Nagle-Gillman* v. *Christopher* (2), from what I have already said it will be evident that if its concluding sentence is meant to do more than raise a question as to the continuance of the practice of the Ecclesiastical Courts, I cannot concur in it. The case of wards of Court and lunatics stands on a different footing. There the judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge.

In order to make my meaning distinct, I will put the proposition in another form. While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly

(1) [1894] 3 Ch. 193. (2) 4 Ch. D. 173.

H. L. (E.) 1913 SCOTT v. SCOTT. Viscount Haldane L.C.

yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity.

I think that if the principle in cases of secret process be what I have stated, it affords guidance in other cases. In *Rex* v. *Clement* (1), where under special circumstances it was held that daily publication of the evidence in a particular criminal trial in defiance of the judge had impeded justice, and was, therefore, an offence against it, we have a different illustration of a rule which may have manifold application, and may cover cases of the class before us in this appeal. But unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is contest between parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly, and bring it up to the standard which the underlying principle requires. He may be able to shew that the evidence can be effectively brought before the Court in no other fashion. He may even be able to establish that subsequent publication must be prohibited for a time or altogether. But this further conclusion he will find more difficult in a matrimonial case than in the case of the secret process, where the objection to publication is not confined to the mere difficulty of giving testimony in open Court. In either case he must satisfy the Court that by nothing short of the exclusion of the public can justice be done. The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal Court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors.

My Lords, it may well be that in proceedings in the Divorce Court, whether the proceedings be for divorce, or for declaration

(1) 4 B. & Ald. 218.

of nullity, or for judicial separation, a case may come before the judge in which it is evident that the choice must be between a hearing in public and a defeat of the ends of justice. Such cases do not occur every day. If the evidence to be given is of such a character that it would be impracticable to force an unwilling witness to give it in public, the case may come within the exception to the principle that in these proceedings, and not the less because they involve an adjudication on status as distinguished from mere private right, a public hearing must be insisted on in accordance with the rules which govern the general procedure in English Courts of justice. A mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish is not, I repeat, enough as the law now stands. I think that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made. Whether this state of the law is satisfactory is a question not for a Court of justice but for the Legislature. I observe that in the Incest Act of 1908 the principle has been altered in cases coming under that Act, and in the report of the recent Royal Commission on Divorce recommendations are made which, if Parliament gives effect to them, will materially modify the law as I conceive it to stand to-day. But it is with that law, as I have endeavoured to define it, that we are concerned in the present case.

My Lords, in my opinion the facts before Bargrave Deane J. fell short of what was requisite to justify departure from the principle which requires the hearing, in all but exceptional cases of the class I have indicated, to take place in open Court. No doubt the petitioner and the respondent preferred to give their evidence in private. But the evidence actually given was of a brief and simple character, and it might without difficulty have been tendered in open Court. In my opinion there was no valid reason for hearing the case in camera and the order was made in reality for the benefit of the parties who concurred in asking for it, and was therefore made under a mistaken impression as to the law. And if that be the substance of the matter it disposes of the appeal. The order was wrong, and it could not effect the

H. L. (E.) 1913 SCOTT v. SCOTT. Viscount Haldane L.C.

abrogation of the prima facie right, excluded only in exceptional cases such as I have already spoken of, which the parties and the public possess to make known what takes place at the hearing and to discuss it.

Even if the order had been validly made by reason of the consent of the parties, it could have provided nothing more than an instrument for enforcing an agreement come to as to the mode in which the hearing should take place. A breach of the order would, therefore, have in substance been punishable only on the same footing as a breach of an ordinary order in a civil case for an injunction; and a punitive order made with reference to the breach falls, in such cases, outside the language of s. 47 of the Judicature Act of 1873, which provides that no appeal shall lie from a judgment of the High Court in any criminal cause or matter. If the principle which governs the jurisdiction of the Divorce Court to hear in camera is that which I have sought to explain, this conclusion is the only one which is consistent with the section and the decisions which interpret it.

I am, therefore, of opinion that the judgment of the Court of Appeal should be reversed and the order of Bargrave Deane J. discharged, and that the respondent should pay the costs here and in the Courts below. I move accordingly.

EARL OF HALSBURY. My Lords, the facts out of which this question arises have been sufficiently explained by the Lord Chancellor, and I will not waste time by repeating them; but the case raises such important issues of law that I am unwilling that there should appear to be any doubt about them.

I am of opinion that every Court of justice is open to every subject of the King. I will deal presently with what have been called exceptions to that rule, though I think it is a mistake as to some of the so-called exceptions thus to describe them, but I want in the first instance to emphasize the broad rule I believe to be the law.

I believe this has been the rule, at all events, for some centuries, but, as I will attempt to shew presently, it has been the unquestioned rule since 1857, unquestioned by anything that I can recognize as an authority. My Lords, if this were

merely an antiquarian investigation I might point to the treatise of Mr. Emlyn in 1730, as a preface to the second edition of the State Trials, in six volumes folio. "In other countries," Mr. Emlyn says (at p. iv.), "the Courts of justice are held in secret; with us publicly and in open view."

He is there speaking of criminal trials, but he certainly has no good word to say of the Ecclesiastical Courts of his time, and if he could have added that they claimed a right to sit in secret he certainly would not have omitted to do so.

Mr. Daines Barrington, writing in 1766, and suggesting that the Courts were not open as of right in the time of Edward I., even in England (1), says "In the modern sense of an open Court the Legislature could never have allowed any fees to be taken for admittance." "I do not recollect," he adds, "to have met in any of the European laws with any injunction that all Courts should be held ostiis apertis, except in those of the republic of Lucca." At all events Mr. Daines Barrington and Mr. Emlyn (both learned lawyers) were under the impression that the law of England required in their days that Courts should be open; this may be a matter for legal research, but the law as it now stands requires no such investigation. It has been settled by statute, and the exception supposed to have been introduced as to the Ecclesiastical Courts under the statute is, I think, completely disposed of by the learned exposition of the practice of those Courts by Lord Moulton in his judgment in the Court of Appeal and the instructive judgment of the noble lord, Lord Shaw, which I have had the privilege of reading.

There are three different exceptions commonly so called, though in my judgment two of them are no exceptions at all. The first is wardship and the relation between guardian and ward, and the second is the care and treatment of lunatics.

My Lords, neither of these, for a reason that hardly requires

(1) [Observations on Statutes, ed. 1796, p. 144. Barrington's comment is on the Statute of Westminster the Second, cc. 42, 44, which he seems to have misunderstood. The excessive fees there in question were taken from parties, not from the public, and "pro ingressu *vel egressu*." But Barrington wanted to air his own opinion that the idle spectators who crowded the Courts might well be kept down by a moderate fee for admission.—F. P.]

H. L. (E.) 1913 SCOTT v. SCOTT. Earl of Halsbury.

to be stated, forms part of the public administration of justice at all.

Again, the acceptance of the aid of a judge as arbitrator to deal with private family disputes has, by the express nature of it, no relation to the public administration of justice, and it will be observed how careful Lord Eldon was when intervening in such a case (*In the Matter of Lord Portsmouth* (1)) to point out that it was only by consent of the parties on both sides that he consented so to hear it, and in the Sherborne School case, *Malan* v. *Young* (2), it was clearly recognized that it was only heard in private when a regular agreement of the parties that it should be so heard was entered into.

My Lords, while I agree with the Lord Chancellor in the result which he has arrived at in this case, and generally in the principles he has laid down, I wish to guard myself against the proposition that a judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret. I do not deny it, because it is impossible to prove what cases might or might not be brought within that category, but I should require to have brought before me the concrete case before I could express an opinion upon it. Your Lordship has said that a mere desire to consider feelings of delicacy or to exclude from public hearing details which it would not be desirable to publish is not, in your Lordship's opinion, enough to prevent a public hearing, which must be insisted on in accordance with the rule which governs the general procedure in English Courts of justice, and that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment.

The difficulty I have in accepting this as a sufficient exposition of the law is that the words in which your Lordship has laid down the rule are of such wide application that individual judges may apply them in a way that, in my opinion, the law does not warrant.

I am not venturing to criticize your Lordship's language, which, as your Lordship understands it, and as I venture to say

(1) G. Coop. Cas. in Ch. 106. (2) 6 Times L. R. 38.

I myself understand it, is probably enough to secure the observance of the rule of public hearing, but what I venture to point out is that it is not so definite in its application but that an individual judge might think that, in his view, the paramount object could not be attained without a secret hearing. Although I am very far from saying that such a case may not arise, I hesitate to accede to the width of the language, which, as I say, might be applied to what, in my view, would be an unlawful extension.

I confess I am amazed to find three such learned judges as Sir Cresswell Cresswell, Williams J., and Bramwell B. (in *H. (falsely called C.)* v. *C.* (1)) overruled by any single judge, and especially when it is remembered that this was a judgment given after consultation upon this very point—after consultation with the Judge Ordinary—and determining that "the Court had no power to sit otherwise than with open doors."

My Lords, from that judgment there was no appeal, and I should have thought until it was brought before this House it would have been accepted as the law, but considering that Lord St. Helier's decision (*D.* v. *D.* (2)) has never been challenged, I do not wonder that the order was made apparently as a matter of course in this case.

My Lords, as to the injunction of perpetual secrecy, there is not a judgment of authority to justify it. The supposed analogy of trade secrets or private correspondence is no analogy at all.

In the one case the trade secret is being protected as a species of property, and, indeed, the other is in the same category. In either it might be protected by injunction, and it would be the height of absurdity as well as of injustice to allow a trial at law to protect either to be made the instrument of destroying the very thing it was intended to protect. I cannot agree with the Court of Appeal that this is a criminal case in the sense in which these words are used in the Judicature Act, and I think they ought to have heard the appeal, and I entirely agree to the motion which the Lord Chancellor has proposed.

EARL LOREBURN. My Lords, I concur in holding that the Court of Appeal had jurisdiction to entertain this case. The test

(1) 1 Sw. & Tr. 605. (2) [1903] P. 144.

H. L. (E.) 1913 SCOTT v. SCOTT. Earl Loreburn

of their jurisdiction under s. 47 of the Judicature Act is not whether criminal proceedings could (if they could) have been taken for disobedience to the order, but whether the cause or matter in which the order was made was in point of fact a criminal cause or matter. I can see nothing here except the penal enforcement of a direction for hearing in camera obtained at the request of Mrs. Scott, and for her protection, in a petition for nullity, and interpreted by the learned judge to be equivalent to an order for perpetual silence. If that is a criminal matter, then an action for assault is so also (for a man may be indicted for assault), a position which no one has ever attempted to maintain. I further think that, even assuming Bargrave Deane J. had full power to direct a hearing in camera and to treat it as an order for perpetual silence, he was wrong in treating as a contempt of Court the publication by Mrs. Scott in good faith of the true evidence in justifiable defence of her own reputation and happiness. If this be so, then the Court of Appeal ought to have heard and reversed Bargrave Deane J.'s decision, and in the circumstances of this case we ought to end the litigation by making the order which they should have made, though in ordinary circumstances, I apprehend, the case would be remitted to the Court of Appeal.

Here I would prefer to take leave of this litigation altogether, for the function of a Court is simply to do justice between the parties who come before it. But, in view of the far-reaching statements of law which are to be found in some of the judgments in the Courts below, I feel constrained to say something, as little as possible.

In the argument here and below, or in the judgments, a number of most important questions were raised. In what circumstances can a judge direct a case to be heard with closed doors? When a case has been so heard, has any one, and if so, who and to whom, and in what circumstances, a right to repeat what was said in the secrecy of the trial? What were the powers and what the practice of the old Ecclesiastical Courts in this respect, and has the present Divorce Court inherited those powers? When is contempt of Court criminal and when merely civil, so as to admit of an appeal to the Court of Appeal? Is

there any power, and over whom, to prohibit repetition of what happens in chambers as well as of what happens in a closed Court? It would require a treatise to expound the law upon all these subjects, and it would be a treatise without authority, liable to the risk of error or misconception which inevitably attends judicial efforts to declare the law at large and in general terms outside of the points really raised by the facts of the case, instead of following the method by which the common law of this country has been gradually built up into a coherent though irregular structure. I will advert only to the points raised by the facts here.

I cannot think that the High Court has an unqualified power in its discretion to hear civil proceedings with closed doors. The inveterate rule is that justice shall be administered in open Court. I do not speak of the parental jurisdiction regarding lunatics or wards of Court, or of what may be done in chambers, which is a distinct and by no means short subject, or of special statutory restrictions. I speak of the trial of actions including petitions for divorce or nullity in the High Court. To this rule of publicity there are exceptions, and we must see whether any principle can be deduced from the cases in which the exception has been allowed.

It has been held that when the subject-matter of the action would be destroyed by a hearing in open Court, as in a case of some secret process of manufacture, the doors may be closed. I think this may be justified upon wider ground. Farwell L.J. aptly cites Lord Eldon as saying, in a case of quite a different kind, that he dispensed with the presence of some of the parties "in order to do all that can be done for the purposes of justice rather than hold that no justice shall subsist among persons who may have entered into these contracts." An aggrieved person, entitled to protection against one man who had stolen his secret, would not ask for it on the terms that the secret was to be communicated to all the world. There would be in effect a denial of justice.

Again, the Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the

H. L. (E.) 1913 SCOTT v. SCOTT. Earl Loreburn.

exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general. Or witnesses may be ordered to withdraw, lest they trim their evidence by hearing the evidence of others. Or, to use the language of Fletcher Moulton L.J., in very exceptional cases, such as *D.* v. *D.* (1), where a judge finds that a portion of the trial is rendered impracticable by the presence of the public, he may exclude them so far as to enable the trial to proceed. It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.

Applying this principle to proceedings for nullity, if the Court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress, or interfere with the effective trial of the cause, in my opinion an order for hearing or partial hearing in camera may lawfully be made. But I cannot think that it may be made as a matter of course, though my own view is that the power ought to be liberally exercised, because justice will be frustrated or declined if the Court is made a place of moral torture. Very learned judges of the Divorce Court have acted upon the view that they possess peculiarly extensive powers in this respect, inherited from the old Ecclesiastical Courts. I do not think so. The 46th section of the Matrimonial Causes Act, 1857, requires evidence to be given in open Court, an expression so clear that I was surprised to hear its meaning contested, and this provision overrides the old practice of secret hearing in the Ecclesiastical Courts. I do not, however, read s. 46 of the Matrimonial Causes Act, 1857, as prohibiting a trial in camera where such considerations may require it as in other Courts equally bound to sit in public. That section almost invites the framing of rules under the Act to regulate hearings otherwise than in open Court. Such rules would, in my opinion, be valid if they did not go beyond the

(1) [1903] P. 144.

limitations indicated. But no rules to that effect have been made, and the Divorce Court is bound by the general rule of publicity applicable to the High Court and subject to the same exception. I incline to the opinion that the High Court also may make such rules, but this was not argued.

In this connection there remains one other matter upon which comment is necessary. Some passages in various judgments in this and other cases indicate that the Court has a right to close its doors in the interest of public decency. Apart from some Act of Parliament authorizing such a course in particular cases, I regret that I cannot find warrant for this opinion. However true it may be that the publicity given to obscene or bestial matter by trial in open Court stimulates and suggests imitation, as many judges have learned from experience at assizes, and however deplorable it may be that they have no power to prevent it, the remedy must be found by the Legislature or not at all. It is a great evil. And though the traditional law, that English justice must be administered openly in the face of all men, is an almost priceless inheritance, it does seem strange that it may be relaxed in order to save property, but cannot be relaxed in order to safeguard public decency against even the foulest contamination. I feel certain that considerations of this kind have influenced judges, especially in the Divorce Court, and I wish that I could agree with their view of the law.

Another main question raised by the judgments under review is, what power has the High Court to prevent or punish disclosure of what has taken place in camera after the hearing is over? It is almost an uncharted sea. Until this case hardly any direct authority can be cited. Yet nothing can be more clear than that an order for a hearing in camera of a trial involving a secret process might be utterly illusory if the evidence could be published afterwards with impunity. There must be some power to prevent that, or the undoubted assertion by the very highest authorities of a right to close the Court in such cases would be reduced to an idle mockery. I think that after such an order has been made no one has a right to be present on terms of defying the order. It is not a bargain to maintain secrecy. It is a duty to obey the order for secrecy so far as the order lawfully

H. L. (E.) 1913 SCOTT v. SCOTT. Earl Loreburn.

goes. The authority of the Court to treat disobedience in this matter as a contempt rests on the same basis as its authority to treat as a contempt the wilful intrusion of a witness after an order has been made that all witnesses shall leave the Court. But what is the degree and duration of secrecy which the Court can impose?

Confining myself for the moment simply to cases of secret process, it seems to me that the limitations of the jurisdiction to impose silence or secrecy must be commensurate with the purpose for which the jurisdiction exists. That purpose is to keep the Court available for the enforcement of rights or the redress of wrongs, and it would not be so available if it could be made a vehicle for publishing the secret after the hearing is over. I think we are driven to say that there is jurisdiction to treat as a contempt of Court any wilful and malicious publication of such a kind as that, if it were known to be allowed, ordinary sensible people would not come to the Court at all.

This conclusion appears to me the inevitable corollary once you admit that a case of trade secret can be heard in camera. And I think it is equally an inevitable corollary in any other class of case so heard. In nullity and in divorce cases it may be that justice would be frustrated as much by the terror of publicity after trial as by publicity at the hearing. But to say that all subsequent publication can be forbidden and every one can be ordained to keep perpetual silence as to what passed at the trial is far in excess of the jurisdiction, and is indeed an unwarrantable interference with the rights of the subject. It is not that a Court ought to refrain from exercising its power in such a way. It is that the Court does not possess such a power. The jurisdiction must surely be limited to wilful and malicious publications going beyond the necessity. To take the present case as an illustration. The right of this lady to tell the truth and to furnish the best evidence of the truth in defence of her own character and reputation is inalienable, and cannot lawfully be taken away by any judge. It is but an elementary right, though if the claim of right be merely put forward as a pretext to cover some malicious communication it could not prevail. There is no more difficulty in deciding whether a particular case comes

within this line or lies outside it than in deciding whether there has been express malice in uttering defamatory matter on an occasion of privilege. If the communication be made in good faith and in fulfilment of any social or moral duty to oneself or any one else, it cannot be either prohibited or punished.

I have felt very strongly in this case the duty so admirably expressed by Fletcher Moulton L.J., that Courts of justice, who are the guardians of public liberties, ought to be doubly vigilant against encroachments by themselves. But when a Court has to decide either that there shall be no justice available for people suffering under wrong or that malicious publication shall be prevented, I believe that the second is the right alternative, and that so to hold is merely to apply a principle acted upon by high authorities and indispensable in itself. There does, indeed, remain a danger that a Court may not be so jealous to do right when its proceedings are not subject to full public criticism. I acknowledge that this is always possible, and it is not an adequate answer to say that the judges can be trusted, though I believe entirely that they can be trusted. It comes to a choice between the administration of justice in some cases without the safeguard, on the one hand, and on the other hand no administration of justice in such cases at all. That is not to be considered here as a matter of policy but as a matter of law, and in my interpretation of it the law is in principle what I have endeavoured to state.

LORD ATKINSON. My Lords, I concur. The argument in this case has ranged over a very wide field: many topics have been discussed, principles of vast importance have been laid down, principles which in their application might, I think, involve a serious encroachment on the liberty of the subject, but the fundamental proposition upon which the respondent's case in the ultimate result rests is, in my view, this, that an order to hear a cause in camera enjoins perpetual silence upon everybody as to what transpired at the hearing, except perhaps the result of it. If this proposition be unsound then the respondent's whole case collapses like a house of cards; neither the petitioner nor her solicitor have been guilty of any contempt of Court, nor disobeyed any order of Court, nor committed any crime, and the order

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

of Bargrave Deane J. was not, and could not have been, made in any criminal cause or matter. In my view the proposition is unsustained by authority and is in itself unsound. Two arguments, and in reality only two, have been urged before your Lordships in support of it. The first is I think based on a false analogy, and the second involves a fallacy. Cases such as *Badische Anilin und Soda Fabrik* v. *Levinstein* (1), *Andrew* v. *Raeburn* (2), and *Mellor* v. *Thompson* (3) were cited, and it was sought to apply the principles on which they were decided to suits brought to have a marriage annulled on the ground of the impotence of one of the parties. But the first of these suits was wholly different in character and nature from a nullity suit; there is no similarity whatever between them. In it a secret process was involved. The whole value of the property in the process in most, if not all, of such cases depends on the details of the process being kept secret. If the secret be disclosed the value of the property vanishes. It would be manifestly unjust to allow a disclosure of a secret, made during the hearing of such a suit in camera, either under the compulsion of the presiding judge or at his invitation, in order to enable him to decide the points at issue, to be made use of at any time thereafter to destroy the value of the property.

Perpetual silence as to what transpired at the hearing of such a case in camera may become absolutely essential in order to avoid the perpetration of this wrong; otherwise the whole object of a suit brought to protect property might be defeated by the form of procedure adopted by the tribunal from which the relief desired was sought to be obtained.

Andrew v. *Raeburn* (2) was a suit for an injunction to restrain the publication of certain letters which passed between one or other of the plaintiffs in the suit and a third party. The application with which Lord Cairns dealt in the judgment so much relied upon was an application to hear the appeal in camera. The application was refused on the ground that the case was not one "which would cause an entire destruction of the matter in dispute."

(1) 24 Ch. D. 156. (2) L. R. 9 Ch. 522.
(3) 31 Ch. D. 55

Lord Cairns, in giving judgment, said: "If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute, I should have taken time to consider whether it was consistent with the practice of the Court to hear it in private, even without the consent of both parties, in order to prevent an entire destruction of the matter in dispute. But from the nature of the case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing." This is the very principle upon which the cases dealing with secret processes were decided. *Mellor* v. *Thompson* (1) is to the same effect. Nullity suits are not instituted to protect property. The publication of the evidence taken in camera in such a suit even after the cause has ended may, no doubt, cause pain, but it cannot render property valueless or cause the destruction of the whole matter of dispute. The relief prayed for will have been granted or refused, the issues in the suit decided, subsequent publication of the evidence could not have an effect at all resembling that mentioned in these cases respectively.

Even, therefore, if it should be held to be the law that in the former class of suits all persons should, for the special reasons indicated, be enjoined to perpetual silence touching everything disclosed during a hearing in camera, it would, in my view, be quite illegitimate to attempt to extend a practice springing in these cases from the very necessity of things, and adopted for a special and peculiar object, to suits of the latter kind, in which such a disclosure, if made after the cause had ended, could not inflict any of those wrongs the practice was designed to guard against.

These authorities, therefore, afford, in my opinion, no support to the respondent's first proposition. The second argument urged in support of it appears to me to be fallacious in this respect: it is said that it would be futile to order a nullity suit to be heard in camera if every one were free, after the hearing, to publish an account of the proceedings. The answer to that is, that this is not so; first, because the order would have secured that which is now, apparently, regarded as the great desideratum, without which, according to Sir Francis Jeune, justice cannot be

(1) 31 Ch. D. 55.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

done, namely, this, that the parties concerned, especially the woman, should be examined in private; and, secondly, because if anything which took place in camera were published it must be published without the privilege which protects the publication of a full and fair report of proceedings in public open Courts of justice, and would subject the publishers to all the risks attending the publication of anything which takes place in a private house or at a private meeting. If the matter published amounted to a libel or to a slander, the person defamed could sue for damages, or, possibly in the former case, prosecute for criminal libel. If the printed matter published were, in addition, indecent, the public authority might prosecute for the publication of an obscene libel, &c. To say, therefore, that an order to hear a cause in camera would be futile if people were left free to publish what took place there after the cause had ended involves an entirely inaccurate and misleading use of the word "free," quite as inaccurate and misleading as if one were to lay it down that according to the law of this country every man is free to libel or slander his neighbour.

An argument founded, as this appears to be, upon a lack of appreciation of the value of the privacy secured by such an order, and upon this rather misleading use of the word "free," is, to my mind, entirely unconvincing. Your Lordships have not been referred to any direct authority in support of the proposition contended for. And what makes the lack of direct authority all the more strange, if the proposition be sound, is this, that the records of the old Ecclesiastical Courts have been searched; passages from several old books on the practice of those Courts have been quoted; a parliamentary report, dealing, amongst other things, with the practice of the Ecclesiastical Courts, has been referred to; and the statements of many most distinguished judges made since 1857 have been dwelt upon, all in order to shew that not only had those Courts power to order nullity suits to be tried in camera, but that they frequently exercised that power, and yet nothing has been found to convey even the faintest suggestion that these orders when made had the perpetual operation and effect contended for in the present case. It is scarcely conceivable, I think, that if the respondent's contention

were sound, some reference to the matter would not have been found, or some case discovered where the restraint proved too much for human nature, and the transgressor who dared to speak was punished for his delinquency.

Speaking for myself I must therefore decline to give to the order of the learned judge, that this nullity suit be heard in camera, a meaning and operation for which, as I conceive, there is no true analogy, no precedent, no authority direct or implied, and no imperative necessity.

I think the order in its true interpretation means what on its face it plainly says, and nothing more, namely, this, that the place where the case is to be heard shall be a private chamber, not a public Court. All the consequences I have indicated follow from that alteration of the place of hearing. The order was, I think, spent when the case terminated, and had no further operation beyond that date. One of the strangest things in this strange case is that the case of *Rex* v. *Clement* (1) should be cited as an authority for the proposition that a Court of Assize or one of the Divisions of the High Court has power to prohibit the publication, after a trial has ended, of a report of the proceeding which took place at that trial.

That case is a weighty authority having regard to the eminence of the learned judges who decided it, but it is an authority against, rather than in favour of, the proposition in support of which it was cited. In that case Thistlewood and several others were jointly indicted for high treason. They pleaded not guilty. The issue knit on that plea between the Crown and the prisoners was whether they were guilty or not. In effect it was whether they, or any, and which of them were guilty, since it was quite competent for the jury to have acquitted some of them and convicted others. They would have been all tried together had they joined in their challenges. They severed in their challenges, however, with the consequence that of necessity this single issue was split up into several branches, and they were tried seriatim; but, to use the language of Bayley J. (2), these several trials constituted one entire proceeding. Abbott C.J., as he then was, knowing that the evidence in each trial would be very much the same, and

(1) 4 B. & Ald. 218. (2) Ibid. p. 229.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

fearing that if a report of each trial were published in the Press as it took place an opportunity would be given to the witnesses to trim their evidence, to the sacrifice, perhaps, of truth and the possible defeat of justice, made an order that no report of the proceedings should be published till all the trials had concluded. A report of the trials of Thistlewood and another who had been convicted was published by Clement in his newspaper, before the trial of any of the other prisoners had commenced. He was brought up before the Chief Justice and punished for contempt of Court in having acted "contrary to the order of this Court, and to the obstruction of public justice," not merely the first. The order prohibiting publication was impeached upon the ground that it prohibited the publication of a fair and accurate report of proceedings taking place in a public Court of justice after these proceedings had terminated, and it was successfully defended on the ground that all the trials formed together one entire proceeding, and that Clement's newspaper was published in the middle, and not at the end of that proceeding.

Bayley J. (1) is reported to have expressed himself thus: "But, it is argued, that if the Court has this power of prohibiting publication, there is no limit to it, and they may prohibit altogether any publication of the trial. I think that that does not follow. All that has been done in this case is very different; for the prohibition, here, has only been till the whole trial was completed." And Holroyd J., the only other judge who gave at length reasons for his decision, is (2) reported to have said: "The object for which it (the order) was made was clearly, as it appears to me, one within their jurisdiction, viz. the furtherance of justice in proceedings then pending before the Court; and it was made to remain in force so long, and so long only, as those proceedings should be pending before them. . . . . It appears to me, that the arguments as to a further power of continuing such orders in force for a longer period, do not apply. It is sufficient for the present case, that the Court have that power during the pendency of the proceedings."

The second proposition for which the respondent contends is,

(1) 4 B. & Ald. at p. 230. (2) Ibid. at pp. 232, 233.

as I understand it, this: that if a superior Court or a judge of such a Court should make a valid order in a civil suit prohibiting the doing of a particular act, not per se a crime, the doing of that act in disobedience to the order becomes a crime, a criminal contempt of Court. Even though the first proposition put forward by the respondent should, contrary to my view, be held to be sustainable, it would still be necessary for him to establish this second proposition in order to succeed on this appeal, because the act of the petitioner, in sending at the time she did copies of the shorthand writer's notes of the medical evidence given in camera to her father-in-law, sister-in-law, and a lady friend, even if not done, as she swears it was, in defence of her character and good repute, was not per se a crime. If it became a crime at all it must be because she was by the order of the Court prohibited from doing it. The same considerations apply to the act of her solicitor, who aided and abetted her in doing this forbidden act. Her contempt of Court does not appear to me, however, to fall within any of the classes of criminal contempt of Court mentioned by Lord Hardwicke in *Roach* v. *Garvan* (1), or by Lord Cottenham in *Lechmere Charlton's Case* (2), or by Lord Blackburn in *Skipworth's Case*. (3) It did not involve the scandalizing of a judge, such as was dealt with in *McLeod* v. *St. Aubyn* (4) or in *Reg.* v. *Gray*. (5) It did not involve the intimidation or corruption of jurors or witnesses in any pending or prospective suit, nor the prejudicing of the case of any litigant in any pending suit, such as was attempted in *O'Shea* v. *O'Shea and Parnell*. (6) Still less was it directed or calculated to interfere with the due course of justice in any pending litigation. It is not enough, I think, to bring it under this last head of criminal contempt of Court, that men or women may exist who, though their evidence and that of all their witnesses should be taken in camera, would prefer to suffer under the wrong nullity suits are designed to redress, rather

(1) (1742) 2 Atk. 469, at pp. 471, 472.
(2) (1836) 2 My. & Cr. 316, at p. 342.
(3) (1873) L. R. 9 Q. B. 230, at pp. 232, 233.
(4) [1899] A. C. 549.
(5) [1900] 2 Q. B. 36.
(6) 15 P. D. 59.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

than have that evidence published even after the case has ended. But the deterring of such people from seeking redress in a Court of justice is not the kind of interference with the course of justice which Lord Cottenham had in mind in the case above mentioned, when he said that its essence consisted in the doing of something calculated or designed to obtain a result of legal proceedings different from that which would follow in the ordinary course.

Of course, if the act prohibited be in itself a crime, the fact that it has been done in defiance of the prohibition would necessarily, one would suppose, aggravate the culprit's guilt. But if it be the law that disobedience of the order in itself constitutes a crime, then this result seems necessarily to follow, that all orders of Court punishing persons in any way for disobedience of this kind cannot be reviewed in the Court of Appeal inasmuch as each of them would have been made in "a criminal cause or matter" within the meaning of the 47th section of the Judicature Act of 1873. The following cases (in addition to those dealing with orders of justices made at sessions to be presently referred to) may be taken as fair specimens of those cited on behalf of the respondent in support of this, his second proposition: *Lord Wellesley* v. *Earl of Mornington* (1), *Seaward* v. *Paterson* (2), *Avory* v. *Andrews* (3), and *In re Freston.* (4)

It was contended that these cases shew that the disobedience of an order of Court constitutes in itself a crime, a criminal contempt of Court. Unfortunately for this contention, however, they do something more than that; they shew I think, conclusively, that if a person be expressly enjoined by injunction, a most solemn and authoritative form of order, from doing a particular thing, and he deliberately, in breach of that injunction, does that thing, he is not guilty of any crime whatever, but only of a civil contempt of Court. It would appear to me to be almost inconceivable that the law should tolerate such an absurd anomaly as this: that a principal who does an act he is expressly prohibited by injunction from doing should only be guilty of a civil contempt of Court, while a person not expressly or at all

(1) 11 Beav. 181.
(2) [1897] 1 Ch. 545.
(3) (1882) 30 W. R. 564.
(4) 11 Q. B. D. 545.

prohibited who aids and abets the principal in doing that very act should be held guilty of a crime, a criminal contempt of Court, with the result that the more flagrant transgressor of the two, the principal, would have a right to appeal to the Court of Appeal against any order punishing him for his misdeed, while the accessory would have no right of appeal from the order punishing him for aiding and abetting the principal to commit the forbidden act. The disrespect to the Court which made the order that was disobeyed, and the defiance of its authority, would seem to be greater in the case of the principal than in that of the accessory. The interference with the course of justice if that resulted would probably be the same in both. It can hardly be that the fact that the principal was named in the order he has disobeyed is to palliate rather than aggravate his guilt, and if not, on what principles are the cases to be differentiated? In the first of the before-mentioned cases, one Batley, the unnamed aider and abettor of the named principal who disobeyed the order of the Court, submitted, when brought before the Court, to answer for his contempt. The plaintiff in the suit did not press for punishment. The Master of the Rolls said that had he been pressed it would have been his duty to commit Batley, but he does not say for what form of contempt of Court, whether the civil contempt of Court for which the principal was found to have been guilty, or a criminal contempt of Court. The case is rather a blind one, therefore, on this point as to the nature of the contempt.

In *Seaward* v. *Paterson* (1), a case much relied upon by the respondent, the principal, Paterson, his agents and servants were restrained by injunction from, amongst other things, having, or permitting to be held, exhibitions of boxing on his premises. He held, or permitted to be held there, such an exhibition in breach of this injunction. One Murray, who was neither his agent nor servant, was present at the exhibition, aiding and abetting Paterson in holding it. The plaintiff moved that both principal and accessory should be committed for breach of the injunction. The whole controversy before North J. was whether Murray could be committed, as he was not a party to the suits, and was

(1) [1897] 1 Ch. 545.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

not named in the injunction. The learned judge held that he could be committed, not indeed for breach of the injunction, but for contempt of Court in aiding and abetting Paterson in doing an act which the latter was by the injunction prohibited from doing, and committed both Paterson and Murray to prison. Murray alone appealed from this order to the Court of Appeal. The appeal was entertained and the order appealed from upheld, but neither on the hearing before North J. nor in the Court of Appeal was it ever suggested that Murray's contempt of Court was a criminal contempt of Court. Sect. 47 of the Judicature Act of 1873 was not referred to. The points discussed were those raised in the Court below. Lord Lindley is, at p. 555, reported to have expressed himself thus: "A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order for the benefit of the person who got it. In the other case the Court will not allow its process to be set at naught and treated with contempt. In the one case the person who is interested in enforcing the order enforces it for his own benefit; in the other case, if the order of the Court has been contumaciously set at naught the offender cannot square it with the person who has obtained the order and save himself from the consequences of his act. The distinction between the two kinds of contempt is perfectly well known, although in some cases there may be a little difficulty in saying on which side of the line a case falls." The motive and object of the person who brings the offender before the Court may be different in the one case from the other. That, however, one would think could not change the nature of the offence. Lord Lindley did not grapple with the absurdity of a man who does a certain thing which he was not prohibited from doing thereby becoming a criminal, and a man who does the same thing, though he was prohibited from doing it, not

becoming a criminal. It is difficult to conceive that a judge of Lord Lindley's well-known knowledge, ability, and acuteness of mind would have gone through this long analysis of the subject without ever suggesting that either, or both, of the kinds of contempt of Court with which he dealt was necessarily criminal, if he had so regarded it.

In *Avory* v. *Andrews* (1) trustees of a friendly society were restrained by injunction from disposing of certain funds of the society in a certain way. They resigned, and new trustees were appointed in their stead. These latter did the prohibited act. Kay J. held they were guilty of contempt of Court because, though not named in the injunction, they stepped into the place of those who were named and did what the former were forbidden to do, but it was not suggested that the new trustees were guilty of any contempt of Court differing in kind from that of which the old trustees would have been guilty had they disobeyed the injunction, or that the new trustees, though not the old ones, were guilty of a criminal offence.

In the case of *In re Freston* (2) a solicitor (Freston) was, by an order of the Court of which he was an officer, required to deliver up certain documents, and also pay to a person named a sum of 10*l.* and the costs of an application made against himself. He delivered the documents, but refused or omitted to pay the sum of 10*l.* or the costs. Thereupon Denman J. made an order that an attachment should issue against him, and he was arrested while he was returning home from the police office, where he had been professionally engaged, and imprisoned. He applied to be discharged on the ground that at the time of his arrest he was privileged as an advocate from arrest. The Queen's Bench Division refused this application. Thereupon Freston appealed to the Court of Appeal. In this case, as in that of *Seaward* v. *Paterson* (3), the appeal was entertained. It was not suggested that under s. 47 of the Judicature Act the Court of Appeal had no power to hear the appeal. Lord Esher, at p. 554 of the report, lays down that where an attachment is issued for a breach of the law, or as a remedy for something that

(1) 30 W. R. 564. (2) 11 Q. B. D. 545.
(3) [1897] 1 Ch. 545.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson

is a breach of the law and in the nature of an offence, no privilege can be claimed, but where it is issued for the purpose of enforcing judgments in civil disputes, and where the breach of the order cannot be said to be an offence, the privilege can be claimed. He apparently relied much on the 4th sub-section of the Debtors Act of 1869 and s. 1 of the Debtors Act of 1878, and came to the conclusion that Freston's contempt was in the nature of an offence, but whether or not this was because of the disciplinary jurisdiction which Courts exercise over solicitors as their own officers it is rather difficult to discover. Later on the the same page he says: "The rights of those employing solicitors are not merely of a civil nature; and the Courts dealt with defaulting solicitors on the ground, that they had been guilty of breaches of duty and breaches of the law."

Lord Lindley, at p. 556, says, "Is this attachment simply in the nature of civil process? If it is, this solicitor ought to be discharged. In *McWilliams' Case* (1) Lord Redesdale L.C. has pointed out that all contempts are not the same; they are of different kinds; some contempts are merely theoretical, but others are wilful, such as disobedience to injunctions or to orders to deliver up documents—in these cases there is no privilege from arrest. In this case the attachment was granted for something more than a mere theoretical contempt, and therefore it was something more than merely civil process: there was therefore no privilege. This view is strengthened by the language of the Debtors Act, 1869, s. 4, sub-s. 4: it assumes that a solicitor who fails to pay a sum of money when ordered by the Court, is guilty of misconduct and also of an offence for which he may be punished by imprisonment; and this tends to shew that the attachment was not upon civil process." And Fry L.J., at p. 557, says, "The attachment was something more than process; it was punitive or disciplinary, for the Court was proceeding against its own officer." The appeal was dismissed.

There is not a suggestion in this case that Freston had done anything for which he could have been indicted, as every person can be who is guilty of criminal contempt of Court. Nothing

(1) (1803) 1 Sch. & Lef. 169, at p. 174.

would have been easier for the members of the Court than to have said that he was guilty of a crime if they had thought so. That would at once have solved the difficulty as to whether or not the attachment order was merely civil process. The fair inference is that they did not think so. I am, therefore, of opinion that this case, so far from being an authority that disobedience per se of an order of Court, irrespective of the nature of the thing ordered to be done, is a criminal offence, is an authority to the contrary. Some reliance was, in argument, placed upon authorities not cited in the Court of Appeal, such as *Reg.* v. *Ferrall* (1), to shew that the disobedience of an order made by justices of the peace constitutes an indictable offence. These cases are dealt with in Russell on Crimes, 7th ed., vol. 1, p. 543, and Chitty's Criminal Law, 2nd ed., vol. 2, p. 279, and are all collected in Archbold's Criminal Pleading and Evidence, 23rd ed., p. 1088. The orders referred to are usually made upon the treasurer of a county to pay the costs of prosecutions, or upon a person to pay under the poor law the costs of maintenance of a relative, or upon putative fathers to pay the cost of the maintenance of their illegitimate children. In *Rex* v. *Robinson* (2) Lord Mansfield lays it down broadly that disobedience of an order of sessions is an indictable offence at common law. *Rex* v. *Bristow* (3) is to a similar effect. In *Rex* v. *Johnson* (4) the order was made by the justices on the county treasurer to pay the expenses of a prosecution, and it was held this officer might be indicted if he refused or omitted to do so. The same result would apparently follow if a similar order had been made by the going judge of assize: *Rex* v. *Jeyes*. (5)

The observations of Pollock C.B. in giving judgment in *Reg.* v. *Ferrall* (6) are very significant. He says: "The authorities are clear upon the point, that an indictment will lie for a refusal to comply with an order of justices for the payment of money; and although I individually should not be disposed to hold, for the first time, that such a refusal was indictable since a like refusal to comply with an order of a superior Court is not so, yet, I feel

(1) (1850) 2 Den. C. C. 51.
(2) (1759) 2 Burr. 799, at p. 804.
(3) (1795) 6 T. R. 168.
(4) (1816) 4 M. & S. 515.
(5) (1835) 3 Ad. & E. 416.
(6) 2 Den. C. C. at p. 56.

H. L. (E.) 1913

SCOTT v. SCOTT.

Lord Atkinson.

bound by the authorities to concur with the rest of the Court in this view of the law."

This rule of the common law would appear to have sprung out of the necessities of such cases as these. The money ordered to be paid could not be sued for and recovered as a debt, specialty or simple contract, due to the person to whom it was ordered to be paid, and justices had no power to issue writs of attachment to compel obedience to their orders. Indictment was, therefore, the only remedy available. But these orders were not orders made inter partes in civil suits, such as orders to hear a civil cause in camera, and do not support in any way, in my view, the respondent's second proposition. In my opinion that proposition is unsound. The burden of establishing it lay upon the respondent. He has, I think, failed to discharge that burden. Lord Moulton, in his able and elaborate judgment in the Court of Appeal in this case at p. 268 of the report, lays down in the following passage what, in my opinion, is the true and sound principle of the law. "It is only the Legislature that can render criminal an act which is not so by the common law of the land. An order of the Court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be and in general will be punished by the Court, and in proper cases such punishment may include imprisonment. But it does no more. It does not make such disobedience a criminal act, and therefore it is that the Court of Appeal has consistently and without any exception held that orders punishing persons for disobedience to an order of the Court are subject to appeal." This view of the law is not, I think, in conflict with authority, and is logical and rational in itself.

In my opinion the cases cited in reference to wards of Court afford no assistance upon any of the points in controversy on this appeal, inasmuch as judges in these cases act as the representatives of the Sovereign as parens patriæ, and exercise on his behalf a paternal and quasi-domestic jurisdiction over the person and property of the wards for the benefit of the latter. Even if it be assumed that the Ecclesiastical Courts had jurisdiction to order nullity suits to be tried in camera, that power is now only to be exercised by the Court for Divorce and Matrimonial Causes,

according to the provisions of the 22nd section of the Matrimonial Causes Act of 1857, subject to the provisions of that Act and the rules and orders made thereunder. The words "rules and regulations" not "rules and orders" are used in the 46th and 67th sections. I think these two expressions mean the same thing. No such rules, regulations, or orders having been made, the provisions of the 46th section operate directly with their full force and effect on suits of this character. And it certainly appears to me that the hearing of these suits in camera is opposed not only to the policy of this statute, but is prohibited by the express and positive enactments of its 46th section. These provisions may to some extent be modified by "rules and orders" framed and published in the mode provided, but they cannot be modified by the order of a judge.

It is not necessary in the present case to determine whether the broad proposition laid down by Sir Francis Jeune (as he then was) in *D.* v. *D.* (1) is well founded. The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect. I am inclined to think that the practice of which the learned judge approved and in this case inaugurated would restrict this wholesome publicity more than is warranted by authority. And I desire to point out that, if the practice were adopted, and if orders to hear a cause in camera were to have the effect contended for in the present case, this rather injurious result might follow. If perpetual silence were enjoined upon every one touching what takes place at a hearing in camera, the conduct and action of the judge at the trial, his rulings, directions, or decisions on questions of law or fact, could never be reviewed in a Court of Appeal at the instance of a party aggrieved, unless indeed upon the terms that that party should consent to become a criminal

(1) [1903] P. 144.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

and render himself liable to be fined and imprisoned for criminal contempt of Court, a serious invasion of the rights of the subject.

Even if the party aggrieved might be able to obtain from the Court that made the order permission to violate it to the extent necessary to prosecute the appeal, the secrecy enjoined could only be secured by the appeal to the Court of Appeal, and, possibly, from that Court to this House, being also heard in camera, a serious alteration, I think, of the present practice.

It only remains for me to deal with the form of the proceedings adopted in this case taken in connection with the construction of the 47th section of the Judicature Act. If a certain act may be viewed in either of two aspects, the one criminal and the other simply tortious, it is, I think, essential, in order to bring a judgment or order dealing with it within this section, that it should clearly appear on the face of the judgment or order that the act is dealt with in its criminal, and not in its civil, aspect. Were it otherwise a judgment for damages in a case of wilful and deliberate assault could not be reviewed by a Court of Appeal since wilful assault is a crime. Now Lindley L.J., in *O'Shea* v. *O'Shea and Parnell* (1), is reported as having expressed himself thus: "There are obviously contempts and contempts; there is an ambiguity in the word; and an attachment may sometimes be regarded as a civil proceeding. For instance, where an order was made by the Court of Chancery in former days there was no mode of enforcing such an order but by attachment. We must not, therefore, be misled by the words 'contempt' and 'attachment,' but we must look at the substance of the thing. In the present case I have no doubt that the proceeding is a summary conviction for a criminal offence, and therefore no appeal lies." To accuse one, therefore, of being guilty of a contempt of Court does not, I think, necessarily imply that he has committed a crime, nor is the criminality of the act necessarily implied by the added allegation that the contempt consisted in the violation of an order of Court.

In this case the order alleged to have been disobeyed was

(1) 15 P. D. 59, at p. 64.

simply an order "that the cause should be heard in camera," nothing more. If one turns to the notice of November 23, 1911, of the motion upon which the order appealed from was made, it is obvious that the person who framed it never thought he was making any criminal charge whatever. The notice is not entitled in any separate cause or matter, as it should have been according to the judgment of the Court of Appeal in *O'Shea* v. *O'Shea and Parnell* (1), in order to shew that it dealt, to use the words of Lopes L.J., with something outside the cause, and was not a mere step in the cause. On the contrary it is entitled just as any notice of a motion which was a step in the cause would be entitled. The charge made was that the petitioner (a party to the suit bound by the orders made in it) and her solicitor (over whom as an officer of the Court the judge had disciplinary powers) had been guilty of contempt of Court in publishing a transcript of the shorthand writer's notes of the medical evidence in contradiction of the order of February 11, 1911, directing the cause to be heard in camera. The relief prayed for is, in substance, this: (1.) That the petitioner and her solicitor should be committed to prison; (2.) that they should be restrained from making any similar or other communication either directly or indirectly concerning or relating to the subject of the suit; (3.) that they should be restrained from molesting in this or in any other way the respondent and friends, doctors, patients, or others (the others not being identified in any way); (4.) that the petitioner and her solicitor should be required to state on oath the names and addresses of the persons to whom they have made similar communications.

All these different kinds of relief might possibly be rightly and rationally asked for (I express no opinion upon that point) if what was complained of was a civil contempt of Court, like the mere breach of an injunction, but if it was meant to charge these two persons with a criminal offence, and to ask for their summary conviction for it, the notice of motion is grotesque in its absurdity. Who ever heard of a criminal being restrained by an order similar to an injunction from the repetition of his crime, or the commission of some other and different though

(1) 15 P. D. 59.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

similar crime, not to speak of a criminal having been asked to discover on oath the evidence to secure his own conviction of the crime of which he is accused, or of some other crime of a similar character?

There is a well-known procedure in the nature of preventive justice, by which it may be sought to prevent the commission of crime, but it is not this. It consists in requiring the person likely to commit the crime to enter into recognizances to keep the peace and be of good behaviour to all His Majesty's subjects, and in default to be committed to prison. It is impossible to think that Bargrave Deane J. should have consciously taken a part in such a travesty of criminal procedure as this notice invites him to embark in. Yet he makes no allusion to the absurdities of the notice of motion. The curial part of his order runs thus: "The judge found that the petitioner and her solicitor had been guilty of contempt of Court, and thereupon ordered that the petitioner and her solicitor, Mr. Percy Braby, do pay the costs of this application." But of what kind of contempt, civil or criminal, he has found them to have been guilty the order does not disclose.

In the absence of any allegation expressed or implied to the contrary, it must, I think, be assumed that the contempt of Court for which the parties were condemned was the particular kind of contempt charged in the notice of motion. I quite admit it was competent for the learned judge to have put aside all the nonsense contained in the notice of motion, to have had its title amended, and to have had entitled his own order in conformity with the amended notice, but he has not done so. The relevant portion of his judgment leaves one still in doubt as to the sense in which he used those words, "of ambiguous meaning," according to Lord Lindley. It runs thus:

"It must be clearly understood in future that the whole object of trying these unhappy cases in camera is that they should be kept secret and private. The result may be known, but none of the details; and it is a gross contempt of Court when the Court says, 'I will try this case in my private room,' for people to go spreading about the country the shorthand notes of what took place in the private room. It must be understood in future

that anything done in chambers is private. Even summonses are not reported without leave of the Court when there is something important." (1)

It puts everything done in chambers on a level with nullity suits heard in camera, and, if the respondents are right in their first contention, announces that perpetual silence shall be enjoined in the one class of cases as well as in the other.

I concur, therefore, with Vaughan Williams L.J. in thinking that the order appealed from to the Court of Appeal was an order in a civil proceeding, and not an order in a criminal cause or matter within the meaning of the 47th section of the Judicature Act of 1873, and for this, as well as for the other reasons I have mentioned, am of opinion that this appeal should be allowed, with costs.

I am further of opinion that the decision of Bargrave Deane J. was erroneous, and that, as your Lordships have now before you all the materials necessary to enable you to do complete justice between the parties, the order should now be made which your Lordships are of opinion the Court of Appeal ought to have made had they not yielded to the preliminary objection and had heard the appeal, namely, an order that the order appealed from to the Court of Appeal be set aside and vacated, and the applicant be ordered to pay the costs of the motion to commit the petitioner to prison, and also the costs in the Court of Appeal and the costs of this appeal.

LORD SHAW OF DUNFERMLINE. (2) My Lords, the appellant, Annie Maria Scott, and the respondent, Kenneth Mackenzie Scott, were married on July 8, 1899. On January 12, 1911, the appellant instituted this suit for a declaration of nullity of marriage. On February 14 an order was pronounced, of the character familiar in such cases, for the medical examination of the parties and for report. The concluding words of that order were as follows: "And I do further order that this cause be heard in camera."

(1) This passage appears in a somewhat different form in the report of the judgment of Bargrave Deane J. in the *Law Reports*.

(2) Read by Lord Atkinson.

H. L. (E.) 1913 — SCOTT v. SCOTT. — Lord Shaw of Dunfermline.

Thereafter the respondent withdrew an answer which he had put in to the case—which accordingly proceeded undefended. The evidence was given and the hearing took place in camera, and on June 13, 1911, the President pronounced a decree nisi with costs. So far as the hearing of the case in camera was concerned, the order made was obeyed.

Towards the end of the year 1911, however, Mrs. Scott obtained an official transcript of the shorthand notes of the proceedings, and sent to the respondent's father, to his sister, and to one other person, typewritten copies thereof. She swears in her affidavit that she did this with a view to vindicate herself in the eyes of those persons, and to prevent their being prejudiced against her by false reports. There is no question in this case that the three copies issued were accurate, or that the report of the proceedings was true.

The respondent founds upon this action by the appellant as a contempt of Court, and in his notice of motion for December 4, 1911, he asks that the appellant, Annie Maria Scott, and her solicitor, Mr. Percy Braby, and his partner, Mr. Waller (who on her instructions had obtained the copies of the proceedings), be committed to prison for their contempt of Court; secondly, that they be restrained "from making any similar or other communications, either directly or indirectly, concerning or relating to the subject-matter of this cause," and, thirdly, "from otherwise molesting the respondent, his relatives and friends, doctors, patients, and others"; while fourthly, he moves that the appellants "be directed to state on oath the names of the persons and their addresses to whom similar communications have been made."

If this motion be, as was contended, a motion in a criminal cause or matter, it is manifest that it was also much more, for it was not a motion merely for commitment in respect of the alleged contempt, but it was also a motion for an injunction of perpetual silence with regard to what had transpired in the proceedings in camera. In the next place, it was an injunction against molestation; and, lastly, it was a discovery, and a discovery sought from the alleged criminals by their stating on oath the names, addresses, and particulars of their criminal contempt. These

and particularly the last, are singular accompaniments of a step in a criminal cause or matter. The last seems to be an abrogation of the elementary principle that an accused person is not bound to incriminate himself. The majority of the Court of Appeal, holding that the question arose in a criminal cause or matter, have declared a civil appeal incompetent. Against this judgment the present appeal to this House is brought.

But the argument before your Lordships was not confined to this point of competency—of civil or criminal; it ranged over the whole merits of the occurrence and was full and elaborate; it included a discussion of the powers of the old Ecclesiastical Courts and necessitated a reference to the question of the open administration of English justice as a whole.

On the actual case before the House there are two substantial matters falling to be dealt with. In the first place, did the communication of a transcript of the Court proceedings—after the actual proceedings had come to an end—constitute a contemptuous disobedience to the order that they should be heard in camera? In the second place, was that order itself properly and legitimately pronounced? Both of these matters, my Lords, appear to me to be deserving of grave and serious consideration. And I observe of both, but particularly of the latter, that I think them to be closely connected with questions of the deepest import affecting the powers of Courts of justice and the liberty of the subjects of the Crown.

After a not inconsiderable study of the authorities and history in relation to this subject, I will venture to enter, notwithstanding the dicta to which I am about to refer, my respectful protest against the assumption of any general power by the present English Courts of law to administer this branch of justice and to try suits for declaration of nullity of marriage, or indeed to hold any Courts of justice with closed doors. Nor do I confine my rejection of this assumption merely to the existing High Court under the Judicature Act of 1873, nor even to the Matrimonial Court set up by the statute of 1857. For I think it right to make some examination in the first place of the power of the old Ecclesiastical Courts, as to which I humbly think that much misapprehension has prevailed.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

My Lords, the forms of the old Ecclesiastical Courts were manifestly derived from those in use under the general body of canon law, which, as Stair expresses it in a passage adopted by the Ecclesiastical Commissioners of 1832, "extended to all persons and things belonging to the Roman Church, and separate from the Laity; to all things relating to pious uses; to the guardianship of orphans; the wills of defuncts; and matters of marriage and divorce; all which were exempted from the civil authority of the Sovereigns, who were devoted to the See of Rome. So deeply has this law been rooted, that even where the Pope's authority has been rejected, yet consideration has been had to these laws, not only as those by which Church benefices have been erected and ordered, but as likewise containing many equitable and profitable laws, which because of their weighty matter, and their being received, may more fitly be retained than rejected."

In the early stages of the suit, the Ecclesiastical Court, charging itself with the interests of both parties, took upon itself the inquiry into the facts, not in foro contentioso nor in foro aperto, but by way of obtaining, first from the one side, and then, if there was a denial or a counter case, from the other side, and from each apart from the other, the testimony of witnesses, this testimony to lie in retentis until, according to modern ideas, the real trial of the case should begin.

The true meaning of these preliminary inquiries was substantially this, that the story of each side was told without either the fear or the presence of the other, and without the knowledge or the desire to evade or mitigate the force of opposing evidence. They constituted an official precognition; I think they are referred to under that name. When these private and preliminary inquiries were ended, and after that stage of precognition was completed, the stage of "publication" was reached; and publication meant the opening of the documents—up to that point sealed—and the disclosure of their contents to the other party and to the judge. (1)

The true question to be determined as to the procedure of the

(1) [Such was also the course of the old Court of Chancery, which was founded on the "summary" ecclesiastical procedure.—F. P.]

Ecclesiastical Courts is not what had been done up to that stage, but what was done after that stage. For my own part I incline to the opinion that, after the stage of publication was reached, the Ecclesiastical Courts conducted their proceedings openly, and that there is no real ground for the suggestion that this subsequent procedure was secret. I accordingly enter my respectful dissent against observations—mostly made obiter—which have been cited from learned judges, that a continuance of the old ecclesiastical procedure justifies any inference that this department of justice was to be optionally secret.

These observations, although made from the Bench, were in point of fact cited by the learned counsel for the respondent, not as observations made in judicio but rather in testimonio. It was said that when Lord Penzance, Sir James Hannen, and Sir Francis Jeune made allusions to the old practice of the Ecclesiastical Court, they may have felt justified in their language by their own recollections. There is force in this view; although, of course, it would be improper to attach too serious weight to these references, which are, with one exception, of a slender and almost casual kind. But they have induced me, after an independent investigation, to trouble your Lordships with more than a passing reference to the practice of the Ecclesiastical Court. Its procedure is detailed with the utmost minuteness in Oughton's "Ordo Judiciorum," published in London in 1738; and it will be found from such a text-book that no support can be obtained for the view that subsequent to the stage of "publication" to which I have referred, the Ecclesiastical Courts, either as a matter of practice or in the exercise of a power, acted as secret tribunals.

But it is in truth unnecessary to go through the text-books—Conset and the others; because testimony of the greatest weight on this topic is obtained from the report of the Commissioners appointed to inquire into the practice and jurisdiction of the Ecclesiastical Courts in 1832. The personnel of the Commission gives this unanimous report the highest authority. For, in addition to the Archbishop of Canterbury and several members of the Episcopal Bench, the Commission included Lord Tenterden, Lord Wynford, and Chief Justice Tindal, together with other men

H. L. (E.) 1913

SCOTT v. SCOTT.

Lord Shaw of Dunfermline.

of great accomplishments and learning, including Mr. Stephen Lushington.

The course of proceeding of the Ecclesiastical Courts is dealt with in detail, including the mode of taking evidence by depositions, and the examination and cross-examination of witnesses by the examiners of the Court, who were employed for that purpose by the registrars. So far up to the stage of publication. The report then proceeds as follows :—

"The evidence on both sides being published, the cause is set down for hearing. All the papers, the pleas, exhibits, interrogatories and depositions, are delivered to the judge; who, having them in his possession for some days before the cause is opened, has a full opportunity of perusing, and carefully considering, the whole evidence, and all the circumstances of the case, and of preparing himself for hearing it fully discussed by counsel. All causes are heard publicly, in open Court; and on the day appointed for the hearing, the cause is opened by the counsel on both sides, who state the points of law and fact which they mean to maintain in argument; the evidence is then read, unless the judge signifies that he has already read it, and even then particular parts are read again, if necessary, and the whole case is argued and discussed by the counsel.

"The judgment of the Court is then pronounced upon the law and facts of the case; and in discharging this very responsible duty, the judge publicly, in open Court, assigns the reasons for his decisions, stating the principles and authorities on which he decides the matters of law, and reciting or adverting to the various parts of the evidence from which he deduces his conclusions of fact; and thus the matter in controversy between the parties becomes adjudged. Reports of decisions in the Ecclesiastical Courts were not in former times laid before the public, like those of the Courts of Westminster Hall; but for the last twenty years and upwards, the judgments of these Courts have been regularly reported. These reports are not only useful in the jurisdiction itself, and the inferior Courts, but they also serve to explain to the Temporal Courts the principles of ecclesiastical decisions, so as to enable them to form a more correct

judgment of the proceedings, when they may have occasion to refer to them."

My Lords, accepting, as I do, this account of ecclesiastical procedure in England, I do not entertain any real doubt that the Ecclesiastical Courts, from the moment when they sat to open the depositions of the witnesses, and throughout the whole course of the trial thereafter, were open Courts of the realm. They did not presume to pursue a practice or exercise a power inconsistent with that fact.

This state of matters may, no doubt, have been occasionally, and perhaps with increasing frequency, in the fourth and fifth decades of last century, departed from; but it was, I incline to believe, never departed from under challenge, and this undermining of what was, in my view, a sound and very sacred part of the constitution of the country and the administration of justice did not take place under legislative sanction, nor did it do so by the authority of the judges, on any occasion where the point of power to exclude the public was argued pro and contra.

And so far as regards even cases thus tried in camera by request or without objection, the large body of Consistorial Reports forms a comprehensive and complete refutation of the suggestion that such an order for a private trial was equivalent to a decree of perpetual silence on the subject of what had transpired within the doors of a Court thus closed. Until this case occurred I never suspected that parties, witnesses, solicitors, or counsel were put under such a disability or restraint; nor did it ever occur to me that the learned reporters of consistorial causes have by a series of contempts of Court continued to instruct the world.

My Lords, I am aware that the view which I now put forward as to the old practice and power of the Ecclesiastical Courts is not shared to the full by the judges of the Court below, but after the full argument at your Lordships' Bar I see no reason to doubt its substantial accuracy. I think the state of matters when the Divorce and Matrimonial Causes Act of 1857 became law was what I have ventured to describe. Occasional lapses had occurred from the wholesome rule of open justice in this country—lapses accounted for in all possibility sometimes by a

H. L. (E.) 1913

SCOTT v. SCOTT.

Lord Shaw of Dunfermline.

feeling of delicacy, and sometimes, I do not myself doubt, by the idea that the rule of open justice might be occasionally obscured in the interests of judicial decorum. I mention this last idea because its recrudescence, even after the statute of 1857, is one of the striking historical developments of this branch of the law.

By s. 22 of the statute of 1857 it was provided, "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act." My Lords, there is nothing in that section which sanctions the idea that the Ecclesiastical Court had either a principle or a rule of sitting with closed doors. It had undoubtedly a principle of having the witnesses interrogated by examiners representing the Court registrars, but beyond that, and from the stage of publication onwards, there was no principle or rule for a secret tribunal.

The new Court set up would have remained accordingly free to deal with the taking of evidence itself as a preliminary and in private. But this was specifically the subject of s. 46, which is to the following effect: "Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court: Provided that parties, except as hereinafter provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed."

This section of the Act of 1857, my Lords, although no doubt it may have been meant incidentally as a useful corrective to dangerous ideas which were appearing to invade little by little the open administration of justice, was substantially a declaratory

section, for, once the preliminary inquiries had been brought within the range of judicial proceedings, then the proceedings as a whole were by a statute declared to be in open Court throughout.

I may observe that, although the law and practice of Scotland are far less dependent on statute than in England, yet in the particular under discussion Scotland had anticipated the Act of 1857 by express statutory enactment passed in the year 1693. The two Acts of June 12 of that year were in truth a part of the emphatic testimony borne to the determination of the nation to reap the full fruit of the Revolution Settlement and to secure against judges, as well as against the Sovereign, the liberties of the realm. The one Act affects civil procedure; the other statute affecting criminal procedure is to the same effect, with an excepting declaration applicable to cases "of rapt, adultery, and the like."

And, my Lords, in my humble opinion these sections of the Act of 1857 were declaratory in another sense. They brought the matrimonial and divorce procedure exactly up to the level of the common law of England. I cannot bring myself to believe that they prescribed a standard of open justice for these cases either higher or lower than that for all other causes whatsoever. And it is to this point accordingly that the discussion must come. The historical examination clears the ground. So that the tests of whether we are in the region of constitutional right or of judicial discretion—of openness or of optional secrecy in justice —are general tests.

As to the Act of 1857, my Lords, I repeat that I make no excuse for founding upon the terms of these two sections—ss. 22 and 46—in combination. For if the view which I have taken be correct, namely, that all was open in the Ecclesiastical Courts except the examination of witnesses, then these two sections put together mean this, that all was to be open in future in the Ecclesiastical Courts, without any such exception whatsoever. When a cause is begun in the Divorce Court a contract of litis contestatio is entered into in short upon the ordinary terms. The old private examination of witnesses is abolished; the new system is an open system.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

I am of opinion that the order to hear this case in camera was beyond the power of the judge to pronounce. I am further of opinion that, even on the assumption that such an order had been within his power, it was beyond his power to impose a suppression of all reports of what passed at the trial after the trial had come to an end. But in order to see the true gravity of what has occurred, these two things must be taken together. So taken, my Lords, they appear to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security. The Court of Appeal has by its majority declared a review of this judgment by it to be incompetent. I therefore make no apology for treating the situation thus reached as most serious for the citizens of this country.

Consider for a moment the position of the appellants. The case of *Scott* v. *Scott* was heard in camera. All interruption or impediment either to the elucidation of truth, or the dignity or decorum of the proceedings,—conceived to be possible by the presence of the public—had been avoided. The Court had passed judgment in private and the case was at an end. And now judgment has been passed upon the appellants in respect of disclosing what transpired in Court by exhibiting an accurate transcript of what had actually occurred, and the appellants are enjoined to perpetual silence. And against this—which is a declaration that the proceedings in an English Court of justice shall remain for ever shrouded in impenetrable secrecy—there is, it is said, no appeal. I candidly confess, my Lords, that the whole proceeding shocks me. I admit the embarrassment produced to the learned judge of first instance and to the majority of the Court of Appeal by the state of the decisions; but those decisions, in my humble judgment, or rather,—for it is in nearly all the instances only so,—these expressions of opinion by the way, have signified not alone an encroachment upon and suppression of private right, but the gradual invasion and undermining of constitutional security. This result, which is declared by the Courts below to have been legitimately reached under a free Constitution, is exactly the same result which would have been achieved

under, and have accorded with, the genius and practice of despotism.

What has happened is a usurpation—a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.

It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

I myself should be very slow indeed (I shall speak of the exceptions hereafter) to throw any doubt upon this topic. The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary—and they appear to me still to demand of it—a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure,

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of the law.

To begin with it was not so. No encroachment upon the broad stipulations of the statute of 1857 may have at first occurred. But two years after the Act was passed the cases of *Barnett* v. *Barnett* (1) and of *H.* (*falsely called C.*) v. *C.* (2) were tried. In the former, which was a suit by a wife for judicial separation on the ground of cruelty, her counsel asked that the evidence might be taken before an examiner. The meaning of that, my Lords, was that it was a motion almost in express terms that the secret procedure which had been ended by Parliament should be resumed by the Court. The motion was refused by Sir Cresswell Cresswell. In the latter, which was a suit to declare a nullity of marriage, on the same ground as in the present case, counsel asked that the cause might be heard in camera. The cause came on for hearing before the Full Court, namely, Sir Cresswell Cresswell, the Judge Ordinary, Williams J., and Bramwell B. The judgment of Bramwell B. was conclusive, none the less so that he indicates that he knew already that the practice, which he was condemning as illegal, was already creeping in. The learned judge said: "If this had been the first application of the kind, I also should have thought it perfectly clear that this being a new Court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its proceedings should be conducted in public. Upon that question I should not have felt the slightest doubt; and the only doubt I now entertain is in consequence of this Court having since it was established, on two occasions, sat in private. But in those cases I understand that that course was adopted with the consent of both parties, and that no discussion took place. In my opinion the Court possesses no such power."

My Lords, I think it would have been better had those

(1) 29 L. J. (P. & M.) 28. (2) 29 L. J. (P. & M.) 29.

attempts to evade the publicity commanded by the statute then ceased and the judgment of Bramwell B. been accepted as law. But the respondents found upon expressions of opinion such as those to which I now refer. In *C.* v. *C.* (1), in the year 1869, Lord Penzance, dealing with a case which was not a suit for nullity, made this observation: "The only causes which have been heard in private are suits for nullity of marriage, and in doing so, the Court has followed the practice of the Ecclesiastical Courts, which it is expressly empowered to do in such suits by the 22nd section of 20 & 21 Vict. c. 85." My Lords, that point was not a point of decision. I do not see that any argument upon the subject was presented to the Court. I cannot take the learned judge as having laid down that the practice of the Ecclesiastical Court was anything other than what is recorded with much authority by the Ecclesiastical Commissioners in the passage which I have cited.

The next expression founded upon is that by Sir James Hannen. (2) It is clear that that learned judge was much exercised upon the subject; for, having cited the judgments of Sir Cresswell Cresswell and Williams J. and Bramwell B., to which I have just referred, "that the Court had no power to sit otherwise than with open doors," the learned judge adds: "It would seem, however, that that rule has not been acted upon. On the contrary, such cases have been heard in camera both by my predecessor and myself, and I therefore think it must be taken that the impression which was entertained by Sir Cresswell Cresswell was afterwards abandoned." I must say, my Lords, that, accepting this as historically accurate, it appears to me to be a confession of a progressive departure from the law. No doubt it bound the learned judge, but it is an illustration of that to which I have already alluded, namely, the liability, unless the most vigorous vigilance is practised, to have constitutional rights, and even the imperative of Parliament, whittled away by the practice of the judiciary. It was no wonder that in the later case in 1876 (3) even the Master of the Rolls, Jessel, made an exception to the rule of open Courts of justice of "those cases

(1) L. R. 1 P. & M. 640. (2) *A.* v. *A.*, L. R. 3 P. & M. 230.
(3) *Nagle-Gillman* v. *Christopher*, 4 Ch. D. 173.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

where the practice of the old Ecclesiastical Courts in this respect is continued." But it is perfectly manifest that the practice of the old Ecclesiastical Courts was not continued. Taking evidence under private examination was stopped. What was continued was the remainder of the practice, which was open, and the closed portion was by statute declared also to be open. But while this observation was made by Sir George Jessel, obiter in that case, his judgment upon the main question was one that must command respect. He "considered that the High Court of Justice had no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of Court, or where a public trial would defeat the object of the action." These, my Lords, constitute the exceptions, definite in character and founded upon definite principles, to which I shall in a little allude.

But in the year 1903, in *D.* v. *D.* (1), Sir Francis Jeune brought these dicta to this culmination: "I believe that the reason why the Ecclesiastical Courts were accustomed to hear suits for nullity in private was not merely because they were suits for nullity; but because, in the exercise of the general powers which those Courts possessed, they were of opinion that those suits ought not to be heard in public. In my view, they might have heard every suit in private." My Lords, I respectfully differ from this dictum. It appears to me to be historically and legally indefensible.

I cannot do justice to this subject without a reference to two cases which were much discussed. One of these was a test case which occurred so late as the year 1889. I refer to *Malan* v. *Young*. (2) By this time undoubtedly the occasional usurpation —for I call it no less—by the Courts of a power to hear cases in camera was beginning to grow into at least the semblance of a practice; and Denman J. held that he had power to hear the Sherborne School case in camera. Mr. Gould, a member of the Bar, objected to leave the Court, and only retired therefrom upon express order by the judge and under protest. But the case had a sequel which is described in the judgment of Vaughan Williams L.J., who ratifies with his authority and on his own knowledge and recollection the following account in the Annual

(1) [1903] P. 144. (2) 6 Times L. R. 38.

Practice of 1912:—"The following subsequent occurrence is, however, unreported:—The trial proceeded in camera on 11th, 12th, and 13th November, 1889, and was adjourned to 15th January, 1890, when the judge stated that, in view of the fact that there was considerable doubt among the judges as to the power to hear cases in camera, even by consent, he would ask the parties to elect to take the risk of going on with the case before him in camera, or begin it de novo in public. The parties elected to go on with the case before the judge as arbitrator, and to accept his decision as final, subject to the condition that judgment should be given in public, which was done (extracted from the Associate's recorded note of the case)."

The other case referred to was that of *Andrew* v. *Raeburn*. (1) But, my Lords, there was there no decision whatsoever of the point to be now determined. It was an action to prevent the disclosure of documents alleged to be private and confidential. In the course of his judgment Earl Cairns said: "If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute," (a matter not of the rule but of an exception to the rule, as I shall hereafter explain) "I should have taken time to consider whether it was consistent with the practice of the Court to hear it in private even without the consent of both parties, in order to prevent such entire destruction of the matter in dispute. But from the nature of this case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing." Thus far for the decision. But in a concluding sentence the learned Earl said, "Under these circumstances I do not think it would be right to deviate from what has undoubtedly been the practice of the Court—not to hear a case in private except with the consent of both parties." To infer from this sentence, not adopted or concurred in by either James L.J. or Sir John Mellish, that it was open to the judges of England to turn their Courts into secret tribunals, if both parties to any suits asked or consented to that being done, is to make an inference from which I feel certain that the noble Earl would himself have shrunk, and against which, indeed, my belief is that he

(1) L. R. 9 Ch. 522.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

would have strongly protested. For myself, I think such an inference to be contrary to one of the elements which constitute our true security for justice under the Constitution, and to form no warrant for an invasion and inversion of that security, such as has been made in the present case.

My Lords, it is very necessary, indeed, to make, in the matter of contempts of Court, clear distinctions. One has, for instance, to distinguish acts external to the administration of justice and truly subversive of it. These are essentially of a criminal character. They tend to prejudice a party to a suit in the eyes of the public, the Court, or the jury, or to intimidate witnesses, or interfere with the course or achievement of justice in a pending action. The case of *O'Shea* (1) was of this class. One has also to distinguish acts—also essentially criminal in their nature—acts of disturbance, or riot, which prevent the business of a Court of justice being duly or decorously conducted.

In both of these cases a Court can protect its administration and all those who share or are convened to its labours. And in both cases the authors of the prejudice or intimidation, on the one hand, or the participators in the disturbance or riot, on the other, are guilty of a contempt: and a Court of justice can protect itself against these things both by suppression and by punishment.

But here, my Lords, the question affects not such a power, namely, to see to it that justice shall be conducted in order and without interruption or fear, but a power—for that is what is really claimed—to make the proceedings of an English Court of justice secret because of something in the nature of the case before it.

Upon this head it is true that to the application of the general rule of publicity there are three well recognized exceptions which arise out of the nature of the proceedings themselves.

The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention—trade secrets—is of the essence of the cause. The first two of these

(1) 15 P. D. 59.

cases, my Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriæ. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs. The third case—that of secret processes, inventions, documents, or the like—depends upon this: that the rights of the subject are bound up with the preservation of the secret. To divulge that to the world, under the excuse of a report of proceedings in a Court of law, would be to destroy that very protection which the subject seeks at the Court's hands. It has long been undoubted that the right to have judicial proceedings in public does not extend to a violation of that secret which the Court may judicially determine to be of patrimonial value and to maintain.

But I desire to add this further observation with regard to all of these cases, my Lords, that, when respect has thus been paid to the object of the suit, the rule of publicity may be resumed. I know of no principle which would entitle a Court to compel a ward to remain silent for life in regard to judicial proceedings which occurred during his tutelage, nor a person who was temporarily insane—after he had fully recovered his sanity and his liberty—to remain perpetually silent with regard to judicial proceedings which occurred during the period of his incapacity. And even in the last case, namely, that of trade secrets, I should be surprised to learn that any proceedings for contempt of Court could be taken against a person for divulging what had happened in a litigation after the secrecy or confidentiality had been abandoned and the secrets had become public property.

The present case, my Lords, is not within any of these exceptions, and is not within the ratio or principle which underlies them. The learned judge himself, following certain encroachments of authority, made a general exercise of power concerning proceedings of a certain nature in his Court, and really bringing the denial of the open administration of this part of the law within the range of ordinary judicial discretion.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

For the reasons which I have given, I am of opinion that the judgment of Bargrave Deane J. cannot be sustained. It was, in my opinion, an exercise of judicial power violating the freedom of Mrs. Scott in the exercise of those elementary and constitutional rights which she possessed, and in suppression of the security which by our Constitution has been found to be best guaranteed by the open administration of justice. I think, further, that the order to hear the case in camera was not only a mistake, but was beyond the judge's power; while, on the other hand, the extension of the restrictive operation of any ruling—that a case should be heard in camera—to the actions of parties, witnesses, counsel, or solicitors, in a case, after that case has come to an end, seems to me to have really nothing to do with the administration of justice. Justice has been done and its task is ended; and I know of no warrant for such an extension beyond the time when that result has been achieved. It is no longer possible to interfere with it, to impede it, to render its proceedings nugatory. To extend the powers of a judge so as to restrain or forbid a narrative of the proceedings either by speech or by writing, seems to me to be an unwarrantable stretch of judicial authority.

I may be allowed to add that I should most deeply regret if the law were other than what I have stated it to be. If the judgments, first, declaring that the cause should be heard in camera, and, secondly, finding Mrs. Scott guilty of contempt, were to stand, then an easy way would be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic, and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country, and I do not think it has any warrant in our law. Had this occurred in France, I suppose Frenchmen would have said that the age of Louis Quatorze and the practice of lettres de cachet had returned.

There remains this point. Granted that the principle of openness of justice may yield to compulsory secrecy in cases involving patrimonial interest and property, such as those affecting trade secrets, or confidential documents, may not the fear of giving evidence in public, on questions of status like the present, deter

witnesses of delicate feeling from giving testimony, and rather induce the abandonment of their just right by sensitive suitors? And may not that be a sound reason for administering justice in such cases with closed doors? For otherwise justice, it is argued, would thus be in some cases defeated. My Lords, this ground is very dangerous ground. One's experience shews that the reluctance to intrude one's private affairs upon public notice induces many citizens to forgo their just claims. It is no doubt true that many of such cases might have been brought before tribunals if only the tribunals were secret. But the concession to these feelings would, in my opinion, tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keeps us secure: and it must further be remembered that, in questions of status, society as such—of which marriage is one of the primary institutions—has also a real and grave interest as well as have the parties to the individual cause.

The cases of positive indecency remain; but they remain exactly, my Lords, where statute has put them. Rules and regulations can be framed under s. 53 by the judges to deal with gross and highly exceptional cases. Until that has been done, or until Parliament itself interferes, as it has done in recent years by the Punishment of Incest Act, and also in the Children Act, both of the year 1908, Courts of justice must stand by constitutional rule. The policy of widening the area of secrecy is always a serious one; but this is for Parliament, and those to whom the subject has been consigned by Parliament, to consider. As an instance of the watchful attention of the Legislature in regard to any possible exceptions to the rule of publicity, s. 114 of the latter Act may be referred to. It provides for the exclusion of the general public in the trial of offences contrary to decency or morality, but this exclusion is to be only during the giving of evidence of a child or young person, and under this proviso, that "nothing in this section shall authorise the exclusion of bona fide representatives of a newspaper or news agency." I may add that for myself I could hardly conceive it a likely thing that a general rule consigning a simple and inoffensive case like the present to be tried in camera could ever be made; but that is a consideration which is beyond our range as a Court administering

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

the existing law. Upon the basis of that law I am humbly of opinion that the judgments of the Courts below cannot stand.

My Lords, I am relieved to think that in the opinion of all your Lordships the judgment of Bargrave Deane J. was not pronounced in a criminal cause or matter. For, notwithstanding all the discussion, I confess even yet to some inability to understand what is meant. The learned Solicitor-General, in answer to a question by me, answered from the Bar that his case implied that not only was the conduct of the appellants criminal, but that his argument demanded that he should say it was indictable. My Lords, the breach by a party of an order made against him or her in the course of a civil case is a perfectly familiar thing. Cases for breach of injunction are tried every day. But I have never yet heard that they were anything but subject to trial by the civil judges as in a civil cause or matter. And in the course of that trial it is open to the person accused of breach to establish upon the facts that what has been done was not a breach in fact, but was a legitimate and defensible action. That is precisely analogous to the present case. Mrs. Scott, for instance, maintains that, even granted that the order for hearing the case in camera was properly made, it was an order only that the trial should be conducted in camera, and that she was guilty of no violation of that order whatsoever. The proper Court to try that was undoubtedly the Court which tried the civil proceeding and made the order. As I say, my difficulty still remains of understanding how these two things can be differentiated, and what, in an infringement of patent case or the like would be notoriously a civil matter, becomes a step in a criminal cause or matter in a case like the present.

I will only add that, if the respondent's argument and the judgment of the majority of the Court of Appeal were right, this singular result would follow: In the year 1908 Parliament interposed to give a right of appeal in criminal causes. The Court of Appeal in the present case has held that no appeal lies from the judgment of Bargrave Deane J., because the decision of the learned judge is in a criminal cause or matter. Grant, accordingly, that this is so; yet, nevertheless, the Criminal Appeal Act, 1907, affords no remedy to the unfortunate appellants.

Under the argument against them they have been denied a civil appeal because their conduct was indictable, and under the Act of 1907 they can obtain no remedy by way of criminal appeal because they have not been convicted on indictment. In juggles of that kind the rights of the citizen are lost.

I concur.

Sir John Simon, S.-G., asked whether in the peculiar circumstances of this case the House would not depart from its ordinary rule and allow the appeal without costs.

EARL OF HALSBURY, in moving that the order appealed from be reversed and that the respondent do pay the costs both here and below, said that in his opinion the ordinary order should be made, but intimated that that which was most properly done by the Treasury and by the Attorney-General ought not to be at the expense of the private parties, because the judgment had established a most important principle and one which it was most important the public should have the benefit of, and therefore private individuals should not be at the expense of establishing it.

Order of the Court of Appeal reversed: the respondent to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, May 5, 1913.

Solicitors for appellants: *Braby & Waller.*

Solicitors for respondent: *Treasury Solicitor* (1); *W. S. Jerome.*

ADDENDUM.

Mr. Harold Moore, of the Divorce Registry, during the course of the hearing in the House of Lords looked up the papers in the Registry in a number of nullity cases from 1820 to 1857. In a letter to the Treasury Solicitor he stated the result of his search as follows: "The papers in cases tried in the Consistory Court of London were handed over to the Probate and Divorce Court in the last-named year and we have an index of them. My search established the fact that it was the practice to hear such suits in camera and that informal application was made to the judge or his clerk by the proctors concerned either by letter or verbally. I think I found three letters—the cases are not very numerous—and in one instance where there was no letter there was a pencil note 'to be heard in the dining hall by order of the judge.'"

(1) The Treasury Solicitor was put on the record, after the appeal was presented, to enable him to instruct counsel.

Case Name:

Sherman v. Canada (Minister of National Revenue - M.N.R.)

Between
David M. Sherman, appellant, and
The Minister of National Revenue, respondent

[2004] F.C.J. No. 136

[2004] A.C.F. no 136

2004 FCA 29

2004 CAF 29

236 D.L.R. (4th) 546

317 N.R. 84

30 C.P.R. (4th) 149

2004 D.T.C. 6591

[2004] G.S.T.C. 6

129 A.C.W.S. (3d) 258

Docket A-387-02

Federal Court of Appeal
Ottawa, Ontario

Desjardins, Létourneau and Evans JJ.A.

Heard: In writing.
Judgment: January 23, 2004.

(17 paras.)

Civil Procedure -- Parties -- Representation of -- Self-representation -- Costs -- Assessment or fixing of costs -- Considerations -- Tariffs

Motion brought by appellant taxpayer for costs awarded on an appeal which was successful against the respondent federal government.The respondent contended that the bill of costs tendered ought not to have exceeded an award for party and party costs. The appellant had been awarded a moderate allowance to recognize the time and effort he spent representing himself at trial and on the appeal.

Motion allowed in part. The taxpayer was a reputable tax expert. His award for costs should not have exceeded the amount to which he would have been entitled if he had been represented by counsel. A moderate allowance only permitted partial, not full, indemnity of the taxpayer's cost.

Statutes, Regulations and Rules Cited:

Federal Court Rules, Tariff B, Tariff B Column III, Rules 369, 397, 403.

Counsel:

Written representations by:
David M. Sherman, the appellant, on his own behalf.
Sointula Kirkpatrick and Louis L'Heureux, for the respondent.

The judgment of the Court was delivered by

1 **LÉTOURNEAU J.A.**:-- In a judgment dated May 6, 2003, this Court concluded in part:

> The appellant is entitled to disbursements and a moderate allowance for the time and effort he devoted to preparing and presenting his case before the Trial and the Appeal Divisions of this Court on proof that, in so doing, he incurred an opportunity cost by foregoing remunerative activity.

2 By motion made under Rule 369, the appellant requests that this Court fix the award of costs at $30,528.00 for his time spent and $684.18 for disbursements plus costs of his motion in the amount of $5,760.00 plus disbursements for the twelve hours he spent to prepare and file his motion for costs. The appellant filed an affidavit to his motion detailing his costs. He submits that he worked 66.1 hours on the trial and the appeal. He calculates one half of the opportunity costs of his time at the rate of $550.00 an hour, the other half at $600.00 per hour. He discounted the total figure by 20% in order to meet the requirement that the allowance be moderate.

3 The respondent does not dispute the appellant's request for $684.08 in disbursements but otherwise opposes both his other requests. I should add that the appellant kept a detailed account of the time spent and effort devoted to the preparation and defence of his case. I do not think that the number of hours is unreasonable or subject to argument.

4 The objection is based on two grounds. Firstly, the respondent says that the appellant did not indicate the provisions on which the motion is based, except for Rule 369, which is procedural. The appellant is long out of time to bring his motion either under Rule 397 or under Rule 403 and has not asked for an extension.

5 Secondly, the respondent claims that it is implicit in this Court's judgment and reasons for judgment that the appellant was awarded party and party costs to be calculated according to Tariff B, the applicable tariff under the Rules.

6 This Court's decision, issued on May 6, 2003, was based on case law on which the Court relied to award to the appellant "a moderate allowance for the time and effort devoted to preparing and presenting the case". Rule 397 does not apply as there are no grounds for reconsideration.

7 The appellant could have sought an extension of time and brought a motion under Rule 403 for directions to the taxation officer. In the part of its order dealing with costs, this Court intended not to fix the actual quantum of the costs awarded, but to leave it to a taxation officer to determine such quantum within the parameters of the reasons for the costs order. However, since the Court is now seized with the issue, which is novel, and in view of the wide gap separating the parties with respect to the meaning of a "moderate allowance", it would be better for this Court to rule on it than merely to issue directions. Consequently, the appellant's bill of costs was appropriately brought under Rule 369.

8 The purpose of the costs rules is not to reimburse all the expenses and disbursements incurred by a party in the pursuit of litigation, but to provide partial compensation. The costs awarded, as a matter of principle, are party-and-party costs. Unless the Court orders otherwise, Rule 407 requires that they be assessed in accordance with column III of the table to Tariff B. As the Federal Court properly said in Apotex Inc. v. Wellcome Foundation Ltd. (1998), 159 F.T.R. 233, Tariff B represents a compromise between compensating the successful party and burdening the unsuccessful party.

9 Column III of the table to Tariff B is intended to address a case of average complexity: Apotex Inc. v. Syntex Pharmaceuticals International Ltd., [2001] F.C.J. No. 727, 2001 FCA 137. The Tariff includes counsel fees among the judicial costs. Since it applies uniformly across Canada, it obviously does not reflect a counsel's actual fees as lawyers' hourly rates vary considerably from province to province, from city to city and between urban and rural areas.

10 There is no doubt that the appellant, who was unrepresented, expended time and effort in the pursuit of his claims. However, as the Alberta Court of Appeal pointed out in Dechant v. Law

Society of Alberta, [2001] A.J. No. 373, 2001 ABCA 81, "represented litigants also sacrifice a considerable amount of their own time and effort for which no compensation is paid". Furthermore, their lawyers' fees are not fully reimbursed. I agree that "applying an identical cost schedule to both represented and unrepresented litigants will work an inequity against the represented litigant who, even with an award of costs, will be left with some legal fees to pay and no compensation for a personal investment of time": ibid, paragraph 16. It could also promote self-litigation as an occupation: ibid, paragraph 17; see also Lee v. Anderson Resources Ltd., 2002 ABQB 536, (2002) 307 A.R. 303 (Alta Q.B.).

11 In the present instance, if the appellant had been represented, he would have been awarded party and party costs according to column III of the table to Tariff B. I believe that his award of costs as an unrepresented litigant can, at best, equal, but should not exceed, what would have otherwise been paid to him if he had been represented by counsel. I should add that the unrepresented litigant enjoys no automatic right to the full amount contemplated by the tariff. The amount of the award is in the discretion of the Court. The concept of a "moderate allowance" is an indication of a partial indemnity although, as previously mentioned, I accept that, in appropriate but rare cases, the amount of that indemnity could be equal to what the tariff would grant to a represented litigant.

12 Like Registrar Doolan in City Club Development (Middlegate) Corp. v. Cutts (1996) 26 B.C.L.R. (3d) 39, Registrar Roland of the Supreme Court of Canada concluded in Metzner v. Metzner, [2000] S.C.C.A. No. 527, that the "reasonably competent solicitor approach was unworkable when assessing special costs awarded to a lay litigant": S.C.C. Bulletin 2001, p. 1158. She endorsed the conclusion that the only reasonable approach was to make an award on a quantum meruit basis.

13 In Clark v. Taylor [2003] N.W.T.J. No. 67, Vertes J. of the Northwest Territories Supreme Court was called upon to assess costs for an unrepresented female litigant. At paragraph 12 of the decision, he wrote:

> In considering what would be a "reasonable" allowance for the applicant's loss of time in preparing and presenting her case, I am not convinced that it is at all appropriate to simply apply what she herself would charge for her hourly fees to a client. The reality is that any litigation will eat up time and expenses whether one is represented or not.

14 He went on to add that the tariff can provide useful benchmarks, even if costs are not assessed on the tariff basis. I agree. The hourly rate claimed by the appellant in the present case is not the benchmark to be used in determining the quantum of a moderate allowance. It is much in excess of the allocation rate contemplated by the tariff.

15 In the present case, this Court was of the view that the appellant, who is a reputable tax expert, raised new issues of public interest as regards the interpretation of an international tax convention

and the right to access the information obtained and exchanged pursuant to that Convention: see paragraph 44 of the decision. The work submitted by the appellant was of good quality . The submissions to the Court were well documented and helpful. There is no doubt that his attendance at the hearing before the Federal Court and our Court was necessary and caused him to lose time from work. Furthermore, the appellant behaved with great propriety throughout the litigation.

16 Bearing all these factors in mind, including the legitimate purpose pursued by the appellant and the fact that costs under Tariff B would have amounted to some $7,200.00, I would fix the moderate allowance at $6,000.00 plus disbursements in the undisputed amount of $684.08. As for the costs and disbursements of bringing this motion, I would allow the sum of $350.00.

17 It would have been useful if the parties, or at least the respondent who was opposing the bill of costs, had given us some of the existing jurisprudence relating to the interpretation and application of the "moderate allowance" notion.

LÉTOURNEAU J.A.
DESJARDINS J.A.:-- I concur.
EVANS J.A.:-- I agree.

cp/e/qw/qlaim/qlhcs

Indexed as:

Southam Inc. v. Canada (Minister of Employment and Immigration)

Southam Inc., Julian Beltrame and Canadian Newspapers Company Limited (Applicants)
v.
Minister of Employment and Immigration (Benoît Bouchard), Chief of Adjudicators for Quebec and the Atlantic Region (Michel Meunier), Attorney General of Canada and Department of Employment and Immigration (Respondents)

[1987] 3 F.C. 329

[1987] F.C.J. No. 658

Court File No. T-1588-87

Federal Court of Canada - Trial Division

Rouleau J.

Ottawa, July 27, 1987.

Constitutional law -- Charter of Rights -- Fundamental freedoms -- Freedom of the press -- Applications for prohibition to prevent conduct of detention review hearings under Immigration Act, 1976 until applicants granted access or right to be heard, or for mandamus directing respondent to consider merits of excluding applicants in each case -- Charter s. 2(b) guaranteeing freedom of press -- Freedom of press including access to judicial proceedings -- Detention review hearings of judicial or quasi-judicial nature according to tests in Minister of National Revenue v. Coopers and Lybrand, and part of administration of justice -- Understanding of operations of such tribunals necessary for legitimacy of authority and achieved by public access -- Right of access limited when conficts with competing rights -- Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), s. 2(b) -- Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 29(3) (as am. by S.C. 1985, c. 26, s. 112), 104(6), 119.

Immigration -- Practice -- Detention review hearings of judicial or quasi-judicial nature according to criteria in Minister of National Revenue v. Coopers and Lybrand -- Charter, s. 2(b) guarantee of freedom of press including access to judicial proceedings -- Prohibition and mandamus ordered to prevent adjudicators from conducting hearings in absence of applicants unless right of access limited in particular case by competing right -- Applicants to have right to make submissions if objections to public access raised -- Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), s. 2(b) -- Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 29(3) (as am. by S.C. 1985, c. 26, s. 112), 104(6), 119.

Practice -- Commencement of proceedings -- Applications for declarations under Charter s. 24(1) for public access to [page330] detention review hearings under Immigration Act, 1976, or for right to make submissions on issue of access -- Applications by originating motion -- Applications dismissed -- Declarations may be sought by action only unless respondent expressly consents -- Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), s. 24(1).

The Chief of Adjudicators ordered that the media not be allowed access to certain immigration detention review hearings unless the particular migrant consented. The applicants moved for declarations pursuant to the Charter, subsection 24(1) directing that the Chief of Adjudicators conduct the hearings in public, or allow the applicants to make submissions on a case-by-case basis in support of its application to have access to and report on the proceedings; prohibition to prevent the conduct of the hearings until the applicants are granted the right to be present or the right to be heard before being excluded; and mandamus directing the respondent to consider in each case the merits of excluding the applicants.

Held, the application for mandamus and prohibition should be allowed.

The applications for declarations under the Charter, subsection 24(1) cannot be allowed because the applicants proceeded by means of an originating motion. Declarations may be sought only by way of an action unless the respondent expressly consents, and not merely acquiesces with no objection. The respondent did not expressly consent to this form of proceedings.

The Immigration Act, 1976 is silent with respect to public access to detention review hearings. Where the enabling legislation is silent on a point of procedure, a statutory decision-maker is the master of his own proceedings and may determine the procedure to be followed. However, paragraph 2(b) of the Charter guarantees the freedom of "expression, including freedom of the press and other media of communication." Freedom of the press encompasses a right of access to judicial proceedings. The hearings in question involved a statutory body rather than a court and it had to be determined if they are judicial or quasi-judicial and by implication subject to accessibility. The four tests set out by Dickson J. [as he then was] in Minister of National Revenue v. Coopers and Lybrand to determine if a proceeding is judicial or quasi-judicial were met by the detention review hearings. It is not unreasonable to extend to proceedings of such decision-makers the application of

the principle of public accessibility. Statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the "administration of justice". The legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained and this can only be done if their proceedings are open to the public. The applicants have a prima facie right of access to the [page331] detention review proceedings which may, however, be limited when it conflicts with competing rights or interests.

Cases Judicially Considered

Applied:
Minister of National Revenue v. Coopers and Lybrand, [1979] 1 S.C.R. 495.

Considered:
Re Southam Inc. and The Queen (No. 1) (1983), 3 C.C.C. (3d) 515 (Ont. C.A.).

Referred to:
Wilson v. Minister of Justice, [1985] 1 F.C. 586 (C.A.).
Lussier v. Collin, [1985] 1 F.C. 124 (C.A.).
Groupe des éleveurs de volailles de l'est de l'Ontario v. Canadian Chicken Marketing Agency, [1985] 1 F.C. 280 (T.D.).
Pacific Salmon Industries Inc. v. The Queen, [1985] 1 F.C. 504 (T.D.).
Millward v. Public Service Commission, [1974] 2 F.C. 530 (T.D.).
St-Louis v. Treasury Board, [1983] 2 F.C. 332 (C.A.).
Re Southam Inc. and The Queen (1986), 26 D.L.R. (4th) 479 (Ont. C.A.); aff'g (1985), 14 D.L.R. (4th) 683 (Ont. H.C.).

Counsel:

Richard G. Dearden and Alan D. Reid, Q.C., for the applicants.
Brian R. Evernden, for the respondents.
P. M. Jacobsen, for the intervenor (applicant).

Solicitors:

Gowling and Henderson, Ottawa, for the applicants.
Deputy Attorney General of Canada, for the respondents.
Paterson, MacDougall, Toronto, for the intervenor (applicant).

The following are the reasons for order delivered orally in English by

1 ROULEAU J.:-- The applicants seek, by way of originating motion, a number of orders. In essence their motion concerns freedom of the press and the public's right of access to immigration detention [page332] review hearings presently being pursued in Halifax, Nova Scotia.

2 The facts in this case have not been made entirely clear, but those that are germane to the ultimate underlying issue in dispute are sufficiently clear. They are set out in point form as follows:

- On July 12, 1987, 174 passengers on the M.V. Amelie arrived in Nova Scotia and claimed to be refugees from India. (The passengers hereinafter shall be referred to as "migrants".)
- On July 15, 1987, the migrants were ordered detained, pursant to the Immigration Act, 1976 [S.C. 1976-77, c. 52] in the gymnasium building at the Canadian Armed Forces Base Stadacona in Halifax.
- On July 20, 1987, immigration adjudicators began conducting inquiries. Pursuant to subsection 29(3) [as am. by S.C. 1985, c. 26, s. 112] of the Act, an adjudicator allowed an application by the Canadian Broadcasting Corporation that an inquiry be conducted in public.
- On July 21, 1987, three similar applications, in respect of three other inquiries, were allowed by three more adjudicators.
- Pursuant to subsection 104(6) of the Act, the continued detention of a migrant must be reviewed by an adjudicator at least once during each seven-day period. Since these migrants had been detained as of July 15, 1987, their continued detention had to be reviewed by July 22, 1987. As a result of the deadline approaching, during the evening of July 21, 1987, the adjudicators ceased conducting inquiries and began conducting detention review hearings. The Chief Adjudicator ordered that the media not be allowed access to these hearings unless the particular migrant consented; no submissions respecting the media's access were presented by their counsel (whether there was a specific request to be heard and a specific denial by the [page333] Chief of Adjudicators is not clear from the evidence).
- The Immigration Act, 1976 is silent on the point of whether detention review hearings are to be held in public or in camera.
- During the evening of July 21, 1987 and throughout July 22, 1987, the adjudicators conducted detention review hearings.
- In response to the Chief of Adjudicators decision that the detentions be reviewed in camera, the applicants moved in this Court for several orders. The four major ones, which comprise the substantive issues of this case, are the following:

  (1) an Order pursuant to section 24 of the Canadian Charter of Rights

and Freedoms directing that the Respondent, MICHEL MEUNIER conduct the proceedings under section 104(6) of the Immigration Act, 1976, the continued detention of persons, allegedly being Indian migrants transported on board the M.V. Amelie, in a manner consistent with section 2b) of the Charter, thereby permitting the Applicants and members of the public to exercise the fundamental freedom to be present at all proceedings brought pursuant to section 104(6) of the Immigration Act, 1976;

(2) in the alternative, an order pursuant to section 24 of the Canadian Charter of Rights and Freedoms directing that the Respondent, MICHEL MEUNIER conduct the aforesaid proceedings in a manner consistent with section 2(b) of the said Charter by allowing the said Applicants to make submissions on a case by case basis in support of its application to have access to and report on the proceedings pursuant to section 104(6) of the Immigration Act, 1976;

(3) an order in the nature of prohibition to prevent the Respondent. MICHEL MEUNIER from conducting a review pursuant to section 104(6) of the Immigration Act, 1976 in the aforesaid proceedings until he has extended to the Applicants the right to be present at such proceedings, or, in the alternative, the right to be heard before being excluded from those proceedings;

(4) an order in the nature of mandamus directing the Respondent MICHEL MEUNIER to exercise his duty [page334] under the Immigration Act, 1976 to consider in each case, when exercising his authority under section 104(6) of the said Act, the merits of excluding the Applicants from the aforementioned proceedings.

3 It will be convenient to deal with the first two together and the last two as another section.

I. Re: Charter, Subsection 24(1) Declarations:

4 This requested relief can be considered quite summarily because of a technical procedural problem. The applicants seek these two declarations by way of an originating motion. This Court has consistently held, however, that declarations may be sought only by way of an action unless the respondent expressly consents, and not merely acquiesces with no objection [Wilson v. Minister of Justice, [1985] 1 F.C. 586 (C.A.); Lussier v. Collin, [1985] 1 F.C. 124 (C.A.); Groupe des éleveurs de volailles de l'est de l'Ontario v. Canadian Chicken Marketing Agency, [1985] 1 F.C. 280 (T.D.); and Pacific Salmon Industries Inc. v. The Queen, [1985] 1 F.C. 504 (T.D.)]. This rule serves to ensure that the Court will not have to issue declaratory judgments in a factual vacuum. Here the respondent did not expressly consent to this form of proceedings, and indeed some facts were in dispute, or at least uncertain. Consequently, no declarations, pursuant to subsection 24(1) of the Charter [Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982,

Schedule B, Canada Act 1982, 1982, c. 11 (U.K.)], can issue. This, though, does not end the discussion of the Charter in this case; it still must be considered in the alternative prayers for relief in the context of administrative law.

II. Re: Prerogative Writs of Prohibition and Mandamus:

5 In requesting these two orders, the applicants in effect seek an order prohibiting the adjudicators from conducting the detention review hearings in [page335] camera, or at least requiring the adjudicators in each case to hear submissions from the applicants on the issue of their access to the hearings.

6 The adjudicators exercise the authority and powers conferred upon them by the Immigration Act, 1976. This Act is silent with respect to the procedural point of public access to the detention review hearings. Where the enabling legislation is silent on a point of procedure, a statutory decision maker is the master of his own proceedings and may determine the procedure to be followed [Millward v. Public Service Commission, [1974] 2 F.C. 530 (T.D.) and St-Louis v. Treasury Board, [1983] 2 F.C. 332 (C.A.)]. Thus, on the surface the adjudicators appear to have acted within their jurisdictional limits in ordering that the detention review hearings be held in camera.

7 However, superimposed upon that general rule of administrative law is the Canadian Charter of Rights and Freedoms. Paragraph 2(b) of the Charter guarantees everyone the freedom of "expression, including freedom of the press and other media of communication." Courts that have had to interpret this constitutional provision have held that freedom of the press encompasses a right of access to judicial proceedings [Re Southam Inc. and The Queen (No. 1) (1983), 3 C.C.C. (3d) 515 (Ont. C.A.), which was reaffirmed by the same Court in Re Southam Inc. and The Queen (1986), 26 D.L.R. (4th) 479, adopting the trial judgment of Holland J. (1985), 14 D.L.R. (4th) 683 (Ont. H.C.)]. Some comments of MacKinnon, A.C.J.O. from Re Southam (No. 1) are germane to the case at bar. At page 521, he wrote the following:

> There can be no doubt that the openness of the courts to the public is one of the hallmarks of a democratic society. Public accessibility to the courts was and is a felt necessity; it is a restraint on arbitrary action by those who govern and by the powerful.

Then, at page 525 he continued:

> It is true, as argued, that free access to the courts is not specifically enumerated under the heading of fundamental [page336] freedoms but, in my view, such access, having regard to its historic origin and necessary purpose already recited at length, is an integral and implicit part of the guarantee given to everyone of freedom of opinion and expression which, in terms, includes freedom of the press. However the rule may have had its origin, as Mr. Justice

> Dickson pointed out, the "openness" rule fosters the necessary public confidence in the integrity of the court system and an understanding of the administration of justice.

8 That decision arose in the context of a court proceeding. The detention review hearing in this case involves a statutory body exercising its functions and it is to be determined if they are judicial or quasi-judicial in nature and by implication subject to accessibility; does the openness rule apply to their proceedings. Mr. Justice Dickson, as he then was, in Minister of National Revenue v. Coopers and Lybrand, [1979] 1 S.C.R. 495 determined that a proceeding can be found to be judicial or quasi-judicial if it met certain tests and he wrote as follows, at page 504:

> (1) Is there anything in the language in which the function is conferred or in the general context in which it it exercised which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?
>
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

9 I am satisfied that these tests in the case at bar have been met and it is not at all unreasonable to extend to proceedings of such decision-makers the application of this principle of public accessibility. After all, statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the "administration of justice". The legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public.

[page337]

10 I am of the view that the applicants have a prima facie right of access to the detention review proceedings. This right, like all rights, is not absolute, however. That is to say, it may be limited when it comes into conflict with other competing rights and interests. For example, in the context of a detention review proceeding a conflicting right could be a migrant's section 7 right to life, liberty

or security of the person which could be jeopardized by the publication of his/her identity. Or, as another example, the public's interest in national security could, in some situations, constitute a section 1 reasonable limit to the openness of the hearing [e.g. section 119 of the Immigration Act, 1976 prescribes a limit upon public access to security or criminal intelligence evidence presented by the Minister and Solicitor General].

11 In accordance with the foregoing, orders of prohibition and mandamus shall issue. The adjudicators are prohibited from conducting the detention review hearings in the absence of the applicants unless the applicants' right of access is outweighed or limited in any given case by counterbalancing rights or interests; if any objections to the public's access is raised, the applicants must be given an opportunity to present submissions on this point.

cp/d/qlndn

Canada

Canadian Transportation Agency | Office des transports du Canada

Canadian Transportation Agency
www.cta.gc.ca

Decision No. 219-A-2009

May 28, 2009

MOTION by Leslie Tenenbaum for non-publication of his name and certain personal information in a decision of the Canadian Transportation Agency.

File No. U3570/08-32

Background

[1] Leslie Tenenbaum (applicant) is seeking redress from Air Canada (respondent) with respect to a travel issue. Facilitation efforts were unsuccessful. Prior to the opening of the pleadings on that issue, the applicant asked for an order that his name and certain personal information not be disclosed publicly by the Canadian Transportation Agency (Agency) or the respondent and that his initials be used in place of his name in any final Agency decision.

[2] In Decision No. LET-AT-A-145-2008, the Agency asked for further information and invited the applicant to indicate the reasons for his claim and, if any specific direct harm is asserted, the nature and extent of the harm that would likely result to him if his name and certain information were disclosed in the decision. The applicant provided no argument regarding the harm that would result.

[3] In February 2009, the Agency amended its privacy policy. The amended policy is consistent with the Agency's original policy; however, it provides more clarity as to the Agency's position on the open court principle. Therefore, to ensure the fairness of the process, the Agency, in Decision No. LET-AT-A-41-2009, provided the applicant with the opportunity to make further representations in light of the amended policy. In that Decision, the Agency also advised the applicant of the test the Agency would apply when dealing with the motion.

[4] The applicant asserts, only, a positive right to privacy under the *Privacy Act*, R.S.C., 1985, c. P-21. However, he clarified his request and asked the Agency for an order that, if his name is disclosed, there be no reference to certain personal information, or if there is reference to certain personal information, his name be substituted by his initials.

[5] The respondent opposes this request.

[6] As indicated in the reasons that follow, the Agency finds that the applicant failed to meet his burden of proof. Consequently, the applicant's motion is denied.

684

Issue

[7] This application raises the question of whether the applicant is entitled to have the protection requested. Specifically, the issue to be addressed is whether the applicant has met the burden of proving that an order is necessary to prevent a serious risk to an important interest, and that its salutary effects outweigh the deleterious effects on the freedom of expression of those affected by the order.

Positions of the parties

Applicant

[8] The applicant states that he is not making a claim for confidentiality pursuant to section 23 of the *Canadian Transportation Agency General Rules*, SOR/2005-35 (General Rules). Rather, he requests that the Agency not publicly disclose personally identifiable information, because it is unnecessary, would violate the applicant's right to privacy, and would be contrary to the Agency's obligations under the *Privacy Act*.

[9] The applicant argues that the "Open Court Principle is not absolute. It is merely a presumption, in favour of the public, that provides for public access to and/or disclosure to the public of judicial and quasi-judicial proceedings and findings."

[10] The applicant states that the Agency is governed by the *Privacy Act* and must comply with its obligations and protect the privacy of personal information gathered by the Agency as part of its complaints process.

[11] The applicant addresses subsection 8(2) of the *Privacy Act*, which describes the circumstances under which he claims the Agency is permitted to publicly disclose personal information.

[12] The applicant asserts that the public disclosure of his personal information by the Agency is not permitted under paragraph 8(2)(*a*) as this is not the purpose for which the Agency obtained or compiled the personal information of the applicant, and under paragraph 8(2)(*b*), such disclosure is not explicitly authorized by an Act of Parliament or a regulation. Furthermore the applicant maintains that under subparagraph 8(2)(*m*)(i), public disclosure of his personal information by the Agency is not permitted until it has been established by the Agency that there might be a compelling public interest in disclosure of such information which outweighs the complainant's right of privacy.

[13] The applicant states that the public disclosure of his personal information was not a precondition to the filing of a complaint, was not consented to by him, is not required in order for the Agency to accomplish its mandate, and that the Agency can successfully discharge its mandate without public disclosure of his personal information. The applicant claims that the Agency can maintain the interests of its mandate, the public, the spirit of the open court principle, and the applicant's right to privacy, if it:

- depersonalizes publication of its findings and decisions by assigning random initials in place of the applicant's name; or
- publishes only a summary of its findings and decisions without any personal information of the applicant.

[14] Finally, the applicant provided two documents which, according to him, illustrate an example of the practices of other Government of Canada agencies that do not disclose information in certain cases where the publication of matters of a private nature is at issue. The first document is a letter from the

Office of the Privacy Commissioner of Canada in which the findings of an investigation into privacy matters with a branch of Service Canada are revealed. The second document is a circulated notice from Service Canada that addresses changes to the manner in which decisions will be posted on the Internet.

[15] The applicant argues that these documents demonstrate that an appropriate balance must be struck between the open court principle and an individual's right to privacy under the *Privacy Act*, and that the determination in the latter is relevant to the applicant's complaint.

[16] The applicant emphasizes that he is not requesting an outright prohibition on the release of personal information and that he has no objection to the Agency identifying him as a complainant by name without reference to some other personal information, or identifying him as a complainant by his initials and referring to other personal information.

[17] The applicant states that most people probably regard the privacy of the type of information referred to in his application as the most important privacy right that they have, and that no one should have to relinquish the right to keep that information private when filing an application with the Agency.

Air Canada

[18] Air Canada opposes the applicant's request. It states that, as evidenced by the General Rules, the granting of a request for confidentiality is within the power of the Agency. However, what the applicant is asking for in this particular case is to render a depersonalized decision or publish a decision without any personal information on the applicant being publicly disclosed.

[19] Air Canada submits that in the absence of specific regulations, as in the applicant's case, the various decisions of the Agency are the only tools to be used by air carriers and other service providers as guidance to see how each case is determined based on its particular facts.

[20] Air Canada notes that the documents presented by the applicant refer to a recommendation of the Privacy Commissioner of Canada, which is not an adjudicative body. Air Canada points out that a recent decision by the Supreme Court of Canada (Supreme Court) analyzed the powers of the Privacy Commissioner of Canada and concluded that it was not a court.

[21] Air Canada maintains that the personal information compiled by the Agency is for a use that is consistent with the purpose and mandate of the Agency. Air Canada submits that the purpose for the publication of the decision, namely the educational and precedent components, could not be accomplished if the specifics for which a party seeks recognition are not analyzed and described in detail.

[22] According to Air Canada, the open court principle is at the core of a transparent and accessible justice system. It further states that privacy rights are to be granted equally to all parties, and the Agency's mandate would not be accomplished without full disclosure and identification of the claimant and the air carrier. Air Canada submits that the "public interest in disclosure of the identification of both parties is outweighed by any invasion of privacy that would result from this disclosure."

[23] Air Canada states that it is the practice of other tribunals to publish their decisions and to make them accessible online without any depersonalization or removal of details. Air Canada cites as examples the Canadian Human Rights Tribunal, the Quebec Commission des lésions professionnelles, and the Ontario Workplace Safety and Insurance Appeals Tribunal, all of which publish decisions that are made available and are public.

Analysis and findings

686

[24] The applicant is asking for an order that, if his name is disclosed, there be no reference to certain personal information, or if there is reference to certain personal information, his name be substituted by his initials. Both of these requests depart from the presumptive openness of judicial proceedings known as the "open court principle".

[25] Before considering the applicant's entitlement to the relief sought, the Agency will set out the rules of law and well-established principles governing this type of motion as developed by the courts as well as their application to administrative tribunals.

Canada's judicial system

[26] The *Constitution Act, 1867*, amended in 1982, is the supreme law of Canada. It recognizes that Canada's system of justice is rooted in a tradition of rule of law and democratic principle. The amended Act entrenches the *Canadian Charter of Rights and Freedoms*, R.S.C., 1985, Appendix II, No. 44, Schedule B (Charter) which guarantees individuals fundamental rights and freedoms.

[27] The judicial system is one of the pillars of our society. It is the instrument by which individuals' fundamental rights are preserved. As such, it must provide for a democratic environment and promote impartiality, transparency and accountability where each person has the knowledge and expectation that they will be treated fairly. That is why independence and transparency of the judiciary are fundamental elements of our democratic system. Linked to this concept of democracy is the importance of public scrutiny of courts. Public access to judicial proceedings and judicial records is indispensable to ensure public confidence in the system and concomitant judicial accountability.

[28] The Supreme Court has recognized that openness of the courts in Canada is an intrinsic component of the fundamental right of freedom of expression guaranteed by section 2 of the Charter, which provides that "everyone has the following fundamental freedoms: *a*) freedom of conscience and religion; *b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; *c*) freedom of peaceful assembly; and *d*) freedom of association."

[29] The following sets out the Supreme Court's interpretation and application of the "open court principle."

Freedom of Expression: the "open court principle"

[30] As indicated, openness is an intrinsic component of our judicial system. In *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, the Supreme Court indicated that the "open court principle" is a "hallmark of a democratic society". It is a principle that "has long been recognized as a cornerstone of the common law" and "necessary to maintain the independence and impartiality of courts [...] Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts." For the public to understand the judicial system, it must have access to it in order to be better informed. "Where there is no publicity there is no justice." (*Scott v. Scott* [1913] A.C. 417).

[31] On this point, the Supreme Court has linked the open court principle to the fundamental values it supports such as the public confidence in the justice system, the public's understanding of the administration of justice, and the accountability of courts and judges. "The principle of open courts is inextricably tied to the rights guaranteed by section 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings." (*Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, [1996] 3 S.C.R. 480). It permits the public to see that justice is administered in a non-arbitrary manner according to the rule of law.

[32] Under the "open court principle," parties cannot expect, as a right, that the details of their dispute remain private. However, the Supreme Court has acknowledged that in particular situations, the principle of openness must yield when the integrity of the administration of justice is at stake. The approach adopted by the Supreme Court establishes that the principle of openness is not absolute (*R. v. Mentuck*, [2001] 3 S.C.R. 442 (Mentuck decision)) and sometimes must concede to the need to protect other fundamental rights. As Bastarache J. said in *Named person v. Vancouver Sun*, [2007] 3 S.C.R. 252, "In Canada, as in any truly democratic society, the courts are expected to be open, and information is expected to be available to the public. However, from time to time, the safety or privacy interests of individuals or groups and the preservation of the legal system as a whole require that some information be kept secret."

[33] Where sensitive privacy concerns arise, courts have established that these must be contextually balanced with a view to preserving the integrity of the administration of justice. In *Toronto Star Newspapers Ltd v. Ontario*, [2005] 2 S.C.R. 188, the Supreme Court explained that "under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice."

[34] The "open court principle" is therefore not absolute. For the administration of justice to properly work it will sometimes be necessary to protect social values. A balancing exercise must be done.

Limiting the openness: A balancing exercise

[35] Since 1994, it has been held that the judicial discretion to permit a departure from the strong presumption of openness must be exercised within the general framework of a test developed by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and later adapted in the Mentuck decision, referred to as the Dagenais/Mentuck test:

> A publication ban should only be ordered when such an order is necessary to prevent a serious risk to the proper administration of justice, because reasonable alternative measures will not prevent the risk, and when the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[36] This test, developed in the context of a criminal matter, was later adapted for the issuance of confidentiality orders in a civil matter, *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522:

> A confidentiality order should only be granted when (1) such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[37] The Supreme Court then indicated that "three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial [?] Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question."

[38] The onus is on the applicant to establish, on a balance of probabilities, the need for the protective

688

order. As a general rule, embarrassment is not enough to overcome the public policy favouring openness of the court system. As was stated by Dickson J. (as he then was) in *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175:

> Many times it has been urged that the "privacy" of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.

[39] It is clear that those well-established principles are binding on judicial courts. This was noted again very recently in *A.B. v. Minister of Citizenship and Immigration*, 2009 F.C., 325. The question is, however, to which extent they apply to administrative tribunals.

Whether the rules governing openness are equally applicable to administrative tribunals

[40] Judicial tribunals are created as per the Constitution, and administrative tribunals are created by the Government for the purpose of implementing a policy. Whether the decision of an administrative tribunal is one required by law to be made on a quasi-judicial or non-quasi-judicial basis will depend upon the legislative intention. If Parliament has made it clear that the person or body is required to act judicially, in the sense of being required to afford an opportunity to be heard, the courts must give effect to that intention.

[41] There is no doubt that public scrutiny is important for both judicial and quasi-judicial decisions. In *Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, the Federal Court wrote that "[...] it is not at all unreasonable to extend to proceedings of such decision-makers the application of this principle of public accessibility. After all, statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the ‘administration of justice'."

[42] The legitimacy of any tribunal's authority requires that confidence in its integrity and understanding of its operations be maintained, and this can only occur if proceedings are open to the public. This was reaffirmed more recently by the Saskatchewan Court of Queen's Bench in *Germain v. Automobile Injury Appeal Commission*, [2009] S.J. No. 169 (Germain decision), when it concluded that "[t]he publication of the decisions is in my view incidental and necessary to the proper functioning of this tribunal as it is to many other tribunals with an adjudicative function [?] Moreover the Commission is part of the administration of justice and the open courts principle referred to later in this decision mandates openness and accessibility to the decisions of the Commission."

[43] Reviewing Courts have upheld the position that the "open court principle" applies to quasi-judicial tribunals. As noted in the Germain decision, "[t]his is so despite the fact that it is not a court. The principle is not restricted to courts only, but is a theme running through the administration of justice in this country." (See also *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration) (C.A.)*, [1991] 2 F.C. 327; *Travers v. Canada (Chief of Defence Staff) (T.D.)*, [1993] 3 F.C. 528.)

Application of the rules to the Agency

[44] The Agency is created pursuant to an act of Parliament, the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA). The Agency's purpose is to implement the national transportation policy, which is found in section 5 of the CTA. More specifically, the mandate of the Agency is to administer economic regulatory provisions of Acts of Parliament affecting modes of transport under federal jurisdiction as well as removing undue obstacles to the mobility of persons with disabilities within the federal transportation network. In its role as a quasi-judicial administrative tribunal with

court-like powers, the Agency ensures that processes are responsive, fair and transparent, and considers the interests of all parties in the national transportation system.

[45] While being subject to specific rules laid down by statutes or regulations, the Agency is also the master of its own procedures. For example, section 40 of the General Rules provides that an application to the Agency shall be made in writing and be commenced by filing with the Agency the full name, address, and telephone number of the applicant or the applicant's representative. The Agency may therefore conclude that an application is not properly filed if it lacks that information. As well, section 23 of the General Rules provides that any document filed in respect of any proceeding will be placed on its public record, unless the person filing the document makes a claim for its confidentiality. The person making the claim must indicate the reasons for the claim. The record of the proceeding will therefore be public unless a claim for confidentiality has been accepted. Section 22 of the CTA provides that the Secretary of the Agency must, on the application of any person, issue to the applicant a certified copy of a decision issued by the Agency.

[46] The Agency, being a quasi-judicial tribunal, is bound by the rules governing the "open court principle". Consequently, in order to address the motion of the applicant, it must apply the Dagenais/Mentuck test described above.

Agency's applicable policies

[47] The Agency recognizes the importance of privacy as a fundamental value in our society. In an effort to establish a fair balance between public access to its decisions and an individual's right to privacy, the Agency applies the following policies.

Canadian Judicial Council Protocol

[48] The Agency has adopted the protocol approved by the Canadian Judicial Council in March 2005 regarding the use of personal information in judgments.

Web Robot Exclusion

[49] The Agency protects personal information contained in its decisions posted on its Web site by applying instructions using the *web robots exclusion protocol* recognized by Internet search engines (e.g., Google and Yahoo), and which prevents Internet searching of full-text versions of decisions. This enables the Agency to fully achieve its statutory mandate and, at the same time, prevents unnecessary invasion into the privacy of individuals.

Privacy statement - Agency's complaint process

[50] The information regarding the Agency's privacy policy can be found on its Web site. Each applicant is also made aware at the outset that the Agency applies the open court principle and that its proceedings are public.

Application to this case

[51] In this case, the Agency required the applicant to support his motion by providing well-grounded evidence in order to meet the Dagenais/Mentuck test. The applicant, however, chose not to provide evidence. The applicant's only stated explanation for his request is premised on his positive right to privacy.

[52] The applicant has acknowledged the nature of the open court principle but is arguing that it must be juxtaposed against his corresponding rights of privacy. His main argument rests in the contention

690

that the public disclosure of personally-identifiable information is not necessary, would violate his right to privacy, and would be contrary to the Agency's obligations under the *Privacy Act*.

[53] The Agency must ask first whether an order is necessary to prevent a serious risk to an important interest, and second, whether the salutary effects outweigh the deleterious effects on the freedom of expression of those affected by the order. In other words, is an order necessary to prevent a serious risk to the applicant's interest? And, in the affirmative, is it so important that the right to freedom of expression and more specifically, the "open court principle" should be disregarded?

[54] The first element under the first branch of the test that the applicant must show is that the risk in question must be real and substantial. Second, the important interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the Agency is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the interest in question.

[55] As indicated before, the applicant alleges that his right to privacy is in accordance with the *Privacy Act*. He argues that the public disclosure of his personal information in the Agency's decision is not permitted under paragraphs 8(2)(*a*), (*b*) and (*m*) of the *Privacy Act* and that public disclosure is not the purpose for which the Agency obtained or compiled his personal information.

[56] The applicant notes, in particular, that there is no Act of Parliament or regulation authorizing the Agency to disclose personal information. The applicant asserts that it is up to the Agency to show a compelling public interest in disclosure that will outweigh his right to privacy. The applicant also argues that the Agency's mandate can be discharged without public disclosure of personal information.

[57] Section 3 of the *Privacy Act* broadly defines personal information under subsection (1) as "information about an identifiable individual that is recorded in any form". Paragraphs 3(*j*) through (*m*) provide exceptions to what is included in the definition of "personal information".

[58] Subsection 8(2) of the *Privacy Act* provides for situations where personal information may be disclosed. Of particular relevance to the present application is:

> (*a*) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
> (*b*) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;
> [...]
> (*m*) for any purpose where, in the opinion of the head of the institution,
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure.

[59] The applicant's interpretation of this scheme of the *Privacy Act* cannot stand as is. In deciding a case and explaining the reasons for the decision, the Agency is using personal information in a way that is consistent with the purpose for which it was obtained. More importantly, the Agency associates names with personal identifiers only when it is necessary for a proper and complete understanding of the issues at stake. The Agency concludes that the right to privacy alleged by the applicant is not found in the *Privacy Act*.

[60] However, as indicated above, during judicial proceedings, the rule of openness may come into conflict with other competing rights, such as the right to privacy. The privacy argument has been tested many times by the courts. In fact, the Supreme Court has interpreted privacy rights as being constitutionally protected under sections 7 and 8 of the Charter.

Liberty interests: Right to privacy

[61] Although the Charter does not explicitly attribute a right to privacy, the Supreme Court has developed the concept of privacy and recognized the right to privacy as a fundamental right enshrined in the Charter. For example, in *Hunter v. Southam Inc.*, [1984] 2 S.C.R 145, the Supreme Court has interpreted sections 7 and 8 of the Charter as protecting against unreasonable invasion of privacy. Also, in addressing the liberty interest under section 7, the Supreme Court said that the "respect for individual privacy is an essential component of what it means to be free." (*R. v. O'Connor*, [1995] 4 S.C.R. 411) The right to privacy would be violated in situations where individuals have an expectation of privacy unless the intrusion is reasonable in the circumstances, minimally intrusive and authorized by law (*R. v. M. (M.R.)*, [1998] 3 S.C.R. 393).

[62] While the applicant has not argued a right to privacy as per sections 7 and 8 of the Charter, the Agency finds it necessary to address these two sections.

[63] Section 7 of the Charter provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." As indicated by the Supreme Court in *R. v. White*, [1999] 2 S.C.R. 417, to find an infringement of section 7 of the Charter, there must be a real or imminent deprivation of life, liberty and security of the person that is contrary to the relevant principles of fundamental justice. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, the Supreme Court indicated that:

> [s]tate interference with bodily integrity and serious state-imposed psychological stress constitute a breach of an individual's security of the person [...] The words ‘serious state-imposed psychological stress' delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations.

[64] With that in mind, can the Agency conclude that the level of stress associated with publishing the decision with the applicant's name is "serious"? As indicated in the Germain decision, to qualify under section 7 of the Charter, the stress suffered must be more than the "ordinary stresses and anxieties that a person of reasonable sensitivity would suffer as a result of being involved in open adjudicative process." The applicant was made aware right from the beginning of these proceedings that the process was a public one. This practice and the applicant's case do not resemble in any way the kind of proceedings in which rights were held to be violated under section 7 of the Charter.

[65] As for section 8 of the Charter, it provides that "[e]veryone has the right to be secure against unreasonable search or seizure." It applies to how the information is gathered. "In order to trigger s. 8, the state must have engaged in either a search or seizure." (Germain decision, at para. 78) As there was no search or seizure done in the present case, the Agency finds that there is no section 8 Charter violation.

[66] As indicated before, for the Agency to permit a departure from the "open court principle," the applicant must meet the following test, supported by well-grounded evidence:

- whether the order is necessary to prevent a serious risk to the important interest sought to be protected; and
- whether that interest is so important that the right to freedom of expression and more specifically, the open court principle should be disregarded.

692

[67] As indicated by the Supreme Court, in order to satisfy the first part of the test, the applicant must show that the risk in question is real and substantial. Second, the applicant must show that the important interest is one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the Agency is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the interest in question.

[68] Even though the applicant was provided with opportunities, he did not provide any evidence that there is a real and substantive risk, nor did he provide evidence that there is an important interest which can be expressed in terms of a public interest in the order sought. Therefore, the Agency does not have to determine whether there is a need to preserve the interest in question.

[69] As the applicant did not provide evidence to justify a derogation from the principle of open and accessible court proceedings, the Agency cannot grant the applicant's motion.

Conclusion

[70] The motion is denied.

Members

- Geoffrey C. Hare
- Raymon J. Kaduck

Important Notices

Top of Page

Date Modified :
2009-05-28

Case Name:

Tipple v. Deputy Head (Department of Public Works and Government Services)

Between
Douglas Tipple, Grievor, and
Deputy Head (Department of Public Works and Government Services), Respondent, and
Canadian Broadcasting Corporation, Applicant
In the matter of an individual grievance referred to adjudication
Public Service Staff Relations Act

[2009] C.P.S.L.R.B. No. 110

[2009] C.R.T.F.P.C. no 110

2009 PSLRB 110

188 L.A.C. (4th) 166

PSLRB File No. 566-02-837

Canada Public Service Labour Relations Board

Before: D.R. Quigley, adjudicator

Heard: Ottawa, Ontario, June 26 and July 6, 2009.
Decision: September 11, 2009.

(18 paras.)

Labour Arbitration -- Process and Procedure -- Arbitration -- Admission of public.

Application by the Canadian Broadcasting Corporation ("CBC") for timely access to the exhibits entered into evidence in the hearing dealing with the employee's grievance related to his termination. The CBC argued that the open court principle applied to adjudication proceedings and, therefore sought immediate access to all exhibits entered in evidence during the course of the

hearing regarding the grievor's termination.

HELD: Application allowed. The employer bore the burden of establishing the legitimacy of the limitation of the freedom of expression as provided by the Charter. In exercising his or her discretion, an adjudicator had to act within the boundaries set by the Charter. Granting the CBC access to all the exhibits, except those that were sealed, would not create a serious risk to the integrity or fairness of the remainder of the hearing.

Tribunal Summary:

Index terms:

Continuing grievance

Evidence

Term employee

Termination (non-disciplinary)

Access to exhibits -- Final decision not yet rendered on merits -- Canadian Charter of Rights and Freedoms ("the Charter") -- Open court principle -- Burden of proof.

The grievor grieved the termination of his employment and referred his grievance to adjudication -- in the course of the hearing, but after the evidence was closed, the media applied for timely access to the exhibits filed in evidence by the deputy head and the grievor -- the deputy head opposed the application -- the adjudicator found that, in exercising his discretion, he must act within the boundaries of the Charter and apply the Dagenais/Mentuck test developed by the Supreme Court of Canada -- he further found that the deputy head had not met its burden of establishing that denying the application was necessary to prevent a serious risk to an important interest in the context of adjudication -- the adjudicator found that, except for exhibits that had been sealed, granting the application would not create a serious risk to the integrity or fairness of the remainder of the hearing.

Application allowed in part.

Appearances:

For the Grievor: Stephen Victor and David Cutler, counsel.

For the Respondent: Michael Ciavaglia and Claudine Patry, counsel.

For the Applicant: Edith Cody-Rice, counsel.

REASONS FOR DECISION

I. Application before the adjudicator

1 This decision addresses an application filed on June 25, 2009 by the Canadian Broadcasting Corporation ("the CBC") in the course of an ongoing hearing dealing with a grievance filed by Douglas Tipple ("the grievor") against the termination of his employment. The CBC is requesting timely access to the exhibits entered in evidence by the grievor and the deputy head of the Department of Public Works and Government Services ("the deputy head"). In support of its application, the CBC provided the following affidavit:

...

> *I Alison Crawford, make oath and say as follows:*
>
> *I am the justice reporter by the Canadian Broadcasting Corporation and am based in Ottawa, Ontario.*
>
> *I have been employed by the Canadian Broadcasting Corporation for thirteen years. For twelve of those years, I have bee covering courts throughout Canada.*
>
> *In the course of my current work, I report on the Supreme Court of Canada and the Federal Court and the Federal Court of Appeal of Canada*
>
> *I have also extensively covered trial courts in Canada.*
>
> *The courts during the course of trial, routinely provide access to text-based, photographic, audio and video exhibits at the time that an exhibit is entered in evidence.*
>
> *The access is provided shortly after an exhibit has been tendered in evidence, either at a break in the court proceedings, at the lunch break or at the end of the day.*

Access to exhibits is provided even in cases in which there is an order excluding witnesses.

I make this affidavit in support of an application for access to exhibits in the above-mentioned case and for no improper purpose

...

[*Sic* throughout]

II. Background

2 On October 11, 2005, the grievor was hired as a special advisor to the deputy head. By letter dated August 31, 2006, the grievor was informed by the deputy head that he was laid off immediately, pursuant to subsection 64(1) of the *Public Service Employment Act*, since his services were no longer required.

3 On September 5, 2006, the grievor filed a grievance alleging that he had been wrongfully dismissed and referred the grievance to adjudication on February 13, 2007. I was appointed to hear this matter and the hearing commenced on September 24, 2007. The hearing has continued on various dates throughout the remainder of the year, as well as in 2008 and up to July 2009, and the evidentiary portion of the hearing has now been completed. Exhibits G-10, G-11 and G-24 have been sealed in the course of the hearing; they are financial statements and income tax returns relating to the grievor. I will be hearing the parties' closing arguments on October 6, 2009.

III. Arguments

4 As stated above, the CBC's application was filed on June 25, 2009. When the hearing resumed on June 26, 2009, counsel for the grievor stated that he did not wish to take a position regarding the application. Counsel for the deputy head raised an objection, stating that the exhibits should not be provided to the CBC until I render a final decision on the merits of the grievance. I adjourned the hearing until July 6, 2009, to allow the deputy head to prepare arguments to support its position.

5 The CBC's and deputy head's written submissions were filed before the oral hearing on July 6, 2009, when I heard their oral submissions. I have decided to reproduce those written arguments in full.

A. For the CBC

6 On June 26, 2009, the CBC filed the following written arguments:

...

Principles Governing Access to Exhibits

There is a presumptive right of access to exhibits that should only be curtailed with the greatest reluctance. Access to exhibits is recognized as a fundamental right attendant upon the constitutional value of openness in our courts and tribunals adjudicating the rights of Canadians.

Discretionary power relative to the release of exhibits for viewing, copying and/or publication must be exercised in accordance with the Dagenais/Mentuck principles. An order restricting access to exhibits must be supported by an evidentiary foundation that the restriction is:

1. *necessary to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk and*

2. *that the salutary effects of the restriction outweigh the deleterious effect on freedom of expression and freedom of the press.*

Section 2(b) of the Canadian Charter of Rights and Freedoms guarantees the right of the media to gather and disseminate news.

Any limitation on publication of the news, including restriction on access to exhibits, is a restriction on freedom of speech and of the press which must be justified under section 1 of the Canadian Charter of Rights and Freedoms as a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

The media represent the public and have the right of access, copying and publication of exhibits.

Argument

Freedom of Expression

In the leading case, Edmonton Journal v. Alberta (Attorney General), 1989 CanLII 20 (S.C.C.) *which concerned restrictions imposed by the Alberta Judicature Act on publishing details of matrimonial proceedings, the court, in overturning the provisions, stated per Cory J.:*

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the Charter which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.
>
> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.
>
> There is another aspect to freedom of expression which was recognized by this Court in Ford v. Quebec (Attorney General), 1988 CanLII 19 (S.C.C.), [1988] 2 S.C.R. 712. There at p. 767 it was observed that freedom of expression "protects listeners as well as speakers". That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings -- the nature of the evidence that was called, the arguments presented, the comments made by the trial judge -- in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They

as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

It is equally important for the press to be able to report upon and for the citizen to receive information pertaining to court documents. It was put in this way by Anne Elizabeth Cohen in her article "Access to Pretrial Documents Under the First Amendment" (1984), 84 Colum. L. Rev. 1813, at p. 1827:

> Access to pretrial documents furthers the same societal needs served by open trials and pretrial civil and criminal proceedings. Court officials can be better evaluated when their actions are seen by informed, rather than merely curious, spectators. [no pagination provided on CanLii]

Public Right of Access to Exhibits

The law concerning public right of access to documents related to a judicial action was expressed in the A.G. (Nova Scotia) v. MacIntyre, 1982 CanLII 14 (S.C.C.). *In granting Mr. MacIntyre, a CBC journalist, access to executed search warrants, the Supreme Court, per Dickson, J., as he then was, stated:*

> "At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the commission of a crime may, in some circumstances, raise issues of public importance.
>
> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate

> importance. One of these is the protection of the innocent.
>
> 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." [pp. 186-187]

This case was decided before the declaration of the Canadian Charter of Rights and Freedoms and therefore did not take it into account; however the position stated in MacIntyre was only strengthened by the inclusion of freedom of speech and of the press in s. 2(b) of the Charter.

An important post-Charter case concerning the copying and broadcasting of trial exhibits is Re Regina And Lortie, 21 C.C.C. (3d) 436*, a decision of the Quebec Court of Appeal. In this case, at the accused's trial on three counts of first degree murder the Crown had adduced as evidence video cassettes from cameras in the National Assembly where the killings had taken place. The cassettes had been produced without objection by the Speaker of the National Assembly. After the accused was convicted he appealed to the Court of Appeal. Pending that appeal a journalist was permitted to make copies of the tapes and now sought to broadcast the tapes. The court decided that the videotape cassettes should not be publicly shown pending the disposition of the accused's appeal, however, L'Heureux Dube J.A., as she then was, stated in her strong dissent at p. 456 -7:*

> "The records of a court in criminal matters as well as the exhibits contained therein, are accessible to the general public including the media, for the purpose of consultation in so far as there is no court order restricting access to them either at the time of the production of the exhibits, or subsequently.
>
> The production of an exhibit in a criminal case in the absence of an order restricting access to it, eliminates its private document characteristic and puts it into the public domain, not because the document becomes the property of the public as would be the case, for example, of an archive document, but in the sense that it becomes accessible to the general public

for the purpose of consultation.

A document, even one in the public domain, may be subject to restrictions for the purpose of its preservation (i.e., a prohibition against photographing or photocopying it as is the case for certain archive documents or works of art) or for the purposes of the administration of justice. On this last point, Dickson J. made the following comments (MacIntyre, supra, p. 149 C.C.C., p. 189 S.C.R):

> The "administration of justice" argument is based on the fear that certain persons will destroy evidence and thus deprive the police of the fruits of their search. Yet the appellant agrees these very individuals (i.e., those "directly interested") have a right to see the warrant, and the material upon which it is based, once it has been executed. The appellants do not argue for blanket confidentiality with respect to warrants. Logically, if those directly interested can see the warrant, a third party who has no interest in the case at all is not a threat to the administration of justice. By definition, he has no evidence that he can destroy. Concern for preserving evidence and for the effective administration of justice cannot justify excluding him.

The evolution of the jurisprudence as well as the rules of practice adopted in Quebec enable me to state that, always subject to an order excluding it, the right of consultation includes the right to take notes and to copy or photocopy these documents.

Once in possession of a copy of a document, the use that one can make of it is subject to the general rules of law which govern civil law obligations or contracts which is not an issue within the competence of this Court. If, in so doing, a person infringes copyright, there exist appropriate recourses under the Copyright Act, R.S.C. 1970, c. C-30. In addition, if, in so doing, one is guilty of defamation, there exist recourses in the civil courts to remedy it and so on. In these cases, the appropriate forum is not the present forum, and in any event, all recourses of this nature would be premature at the present stage. One cannot presume that these documents will be used in a prohibited manner, or one contrary to the statutes or regulations.

Publicity is the hallmark of justice, and trial in open Court is the instrument through which publicity is effectively attained. Closed Courts and secret trials bring back memories of the Court of Star Chamber, whose activities cast a dark stain on English law that was not either easily or quickly erased. No one wants a repetition of that or of anything tending towards that.

Dickson J., in the MacIntyre case, supra, refers to this comment by Bentham (p. 144 C.C.C., p. 183 S.C.R.):

> "In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the judge himself while trying under trial." (pp. 145-6 C.C.C., p. 185 S.C.R.):

It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the Court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in R. v. Wright, 8 T.L.R. 293, are apposite and were cited with approval by Duff J. in the Gazette Printing Co. v. Shallow (1909), 41 S.C.R. 339 at p. 359:

> '"Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.'"

The leading case is the decision of the House of Lords in Scott v. Scott, [1913] A.C. 417. In the later case of McPherson v. McPherson, [1936]

> A.C. 177 at p. 200, Lord Blanesburgh, delivering the judgment of the Privy Council, referred to "publicity" as the "authentic hall-mark of judicial as distinct from administrative procedure". (p. 147 C.C.C., pp. 186-7 S.C.R.):
>
> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent".

The seminal Supreme Court of Canada case, Dagenais v. Canadian Broadcasting Corp., 1994 CanLII 39 (S.C.C.)*, establishes that the Charter right of free expression is equal in value to the right to a fair hearing and therefore all measures must be taken to ensure the integrity of both. In that case the respondents, former and present members of a Catholic religious order, were charged with physical and sexual abuse of young boys in their care at training schools in Ontario. They applied to a superior court judge for an injunction restraining the CBC from broadcasting the mini-series* The Boys of St-Vincent*, a fictional account of sexual and physical abuse of children in a Catholic institution in Newfoundland, and from publishing in any media any information relating to the proposed broadcast of the program. At the time of the hearing, the trials of the four respondents were being heard or were scheduled to be heard in the Ontario Court of Justice (General Division) before a judge and jury... The superior court judge granted the injunction, prohibiting the broadcast of the mini-series anywhere in Canada until the end of the four trials, and granted an order prohibiting publication of the fact of the application, or any material relating to it. The Court of Appeal affirmed the decision to grant the injunction against the broadcast but limited its scope to Ontario and CBMT-TV in Montreal and reversed the order banning any publicity about the proposed broadcast and the very fact of the proceedings that gave rise to the publication ban.*

In the course of the judgment lifting the ban, the court, per Lamer C.J. stated:

> The pre-Charter common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the Charter, and in particular, the equal status given by the Charter to ss. 2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common law rule that automatically favored the rights protected by s. 11(d) over those protected by s. 2(b). A hierarchical

> approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.
>
> It is open to this Court to "develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution": Dolphin Delivery, supra, [1986] 2 S.C.R. 573, at p. 603 (per McIntyre J.). I am, therefore, of the view that it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Charter. Given that publication bans, by their very definition, curtail the freedom of expression of third parties, I believe that the common law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows:
>
> A publication ban should only be ordered when:
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.
>
> If the ban fails to meet this standard (which clearly reflects the substance of the Oakes test applicable when assessing legislation under s. 1 of the Charter), then, in making the order, the judge committed an error of law and the challenge to the order on this basis should be successful. [pp 877-878]

The Dagenais test was refined in the 2001 Supreme Court of Canada decision R. v. Mentuck, 2001 SCC 76 (CanLII). *This case involved an attempt by poolice to suppress publication of the operational methods employed by the police in a "sting" operation. In refusing a publication ban, the court set out a three pronged test to determine if a publication ban was necessary. The first branch of*

the analysis requires consideration of the necessity of the ban in relation to its object of protecting the proper administration of justice. The concept of "necessity" has several elements:

1. *the risk in question must be well-grounded in the evidence and must pose a serious threat to the proper administration of justice;*

2. *"the proper administration of justice" should not be interpreted so widely as to keep secret a vast amount of enforcement information the disclosure of which would be compatible with the public interest; and*

3. *in order to reflect the minimal impairment branch of the* Oakes *test, the judge must consider whether reasonable alternatives are available, but he must also restrict the order as far as possible without sacrificing the prevention of the risk.*

The Alberta Court of Queen's Bench directly addressed the Charter issue in Muir v. Alberta [1995] A.J. No 1656. Action No. 8903 20759. *This trial concerned the forced sterilization of individuals determined to be mentally unsound. In granting access to exhibits filed at the trial to members of the media and allowing photocopies and video reproductions to be made, the court provided a thorough rationale. Veit. J. stated the following principles in the decision:*

"Principles of access to exhibits

(a) General principles

14 The principles that apply to access to court exhibits have long been established in the common law and have recently been amplified in contemporary case law. Because there is, essentially, among the parties and the applicants no dispute about the public and the media's right to access exhibits, only the briefest outline of the law is necessary. This brief outline is made necessary only because Alberta limits its acceptance of public and media access to exhibits to this case. The case law demonstrates that access to exhibits is the general rule, whether or not the parties agree to such access.

15 Access to exhibits is presumed in an open justice system; exhibits are part of the court "record". Public scrutiny of the judicial process is key to the democratic control of that branch of government. In Alberta, the then

Deputy Attorney General of Alberta sent a circular memo to the Bar in January 1984; one paragraph of that letter read as follows:

Civil Trials: Exhibits, once entered on the Court record, are accessible for viewing by the public unless there is a statutory requirement of confidentiality, or the Court otherwise orders.

Stevenson & Cote, at p. 1517

16 In addition, Canadians, including Canadian media, have a constitutionally protected right of "freedom of expression". In order to exercise this right, the media requires access to, and the right to publish, exhibits.

17 Therefore, any restriction on either the right of access, or the freedom to speak about what has been accessed, must be made only in the clearest of circumstances. Before imposing any limitation, the court must find that some value other than open justice or freedom of expression requires protection.

18 A restriction of the usual or general right of access to exhibits is not justifiable to protect a "speculative risk" to a societal value. The burden of persuasion is on those who seek to limit access or freedom of expression. Access should not be provided only to those who have a personal or specific interest in the exhibit.

19 Indeed, any court limitation of the right of access or the freedom of expression gives rise to the potential application of s. 2(b), and perhaps other sections, of the Charter.

20 Authority for these propositions can be found in: Edmonton Journal, Re Halifax Herald, [1995] N.S.J. No. 207; Dagenais; MacIntyre; Scott...

(b) No difference between public and press

21 The media do not stand in any different position than the public: where

the public would be allowed access, the media is allowed access.

22 The media does not have any unique right of access; its rights are equal to, but not greater than, those of the public.

23 Where a young witness would be prevented from giving evidence if required to give that evidence in front of the public, the public may be prevented from being present in the courtroom. Often, in such cases, a representative of the media is allowed to stand in for the public, to be a surrogate for the public. In such situations the media are not accorded rights above those of the public generally; the media are merely exercising the public's right.

24 Authority for these propositions can be found in: Children's Aid, [1995] O.J. No. 148, Canadian Newspaper Co. Ltd, [1988] O.J. No. 126.

(c) No difference between reading and publishing

25 While some cases have held that there is no distinction between the right of access and the right to replicate and duplicate, and while that result may generally be correct, those opinions do not appear to be addressing issues of ownership in exhibits, including ownership of copyright. The issue of ownership of exhibits is discussed below.

26 Except for issues involving ownership of the exhibits, the media, as agent of the public, ought to have not only access to the exhibits but the right to copy them as part of the report of proceedings. The right of access should usually be exercised contemporaneously with the trial proceeding itself.

27 Support for these propositions can be found in: Warren, [1995] N.W.T.J. No. 9, and Vickery.

(d) No difference between document entered and document referred to by witness

28 If the exhibits are introduced into evidence and seen by the people present in the court, allowing media access to the exhibits facilitates the open justice concept by allowing those who could not be present to see the exhibits.

29 Even if the exhibits are not seen by the public present in the court, the exhibits constitute evidence on which the court - whether the court is a judge or judge and jury - will reach verdicts or make decisions. Therefore it is appropriate that the public have access to that evidence.

Limitations on rights of access

32 As the parties and the applicants have acknowledged, the right to access to court exhibits is not unlimited. Because of the Supreme Court of Canada's recent decisions on the ranking of constitutional rights, I prefer to avoid the language of "superordinate" values used in some of the earlier case law. We should merely recognize that the courts are often faced with choosing from among competing values; when that happens, the courts must consider all of the circumstances of the case to determine, for that case, how the competing interests must be weighed.

(a) Order limiting access is equivalent to publication ban

33 In this trial we have proceeded on the basis that a limitation of access to exhibits is equivalent to a publication ban. Any order limiting access to exhibits must therefore comply with the principles set out by the Supreme Court of Canada in Dagenais.

In a 2002 decision, CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region) (Registrar) et al., 2002 CanLII 41398 (ON C.A.)*the Ontario Court of Appeal allowed an appeal from the decision of an application judge who had held that the court could grant access to exhibits only where the requirement of open justice had not been met. In this case, he ruled that both the preliminary hearing and the sentencing hearing were open to the public, so the requirements of open justice were met. He held that the court had no power to*

act simply for the purpose of public access. Having based his decision on jurisdictional concerns, he declined to make a finding on the merits of the applicant's entitlement to the order sought. In allowing the appeal and referring the matter back for decision, Goudge J.A. relied upon the presumption of accessibility to exhibits and decided that jurisdiction does not end when documents are transferred by court to police at the end of the proceedings. Documents remain an integral part of the court records. He stated:

> "[13] The central issue in this appeal is the extent of the court's power or jurisdiction over its own records. To determine whether it extends to the circumstances of this case, it is important to remember that the court's jurisdiction over its own records is anchored in the vital public policy favouring public access to the workings of the courts.
>
> [14] This was made clear in the seminal case of A.G. of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175, 132 D.L.R. (3d) 385. Speaking for the majority of the court, Dickson J. upheld public access to a search warrant and the information upon which it had been issued once the warrant had been successfully executed. In doing so he eloquently described the importance of public accessibility at every stage of the process. The rule should be one of public accessibility, to be departed from only if necessary to protect what he called "social values of superordinate importance", such as the protection of the innocent. As he indicated, this approach fosters both public confidence in the integrity of the court system and public understanding of the administration of justice. At p. 189 S.C.R. of his reasons, he concluded with the following:
>
> 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.
>
> [15] Of the two important objectives served by public access referred to in MacIntyre, the court in that case emphasized judicial accountability and the consequent public confidence that results from public access to the workings of the courts.

[16] In subsequent cases the court has made equally clear how important public access is to the second objective, namely a greater public understanding of the administration of justice. Moreover, the court has underlined how important the media are in providing the medium of communication to achieve this end. For example, in Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, the court discussed the value of public access as a means of enhancing public understanding. La Forest J. said this at pp. 496-97 S.C.R.:

Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings.

It is by ensuring the press access to the courts that it is enabled to comment on court proceedings and thus inform the public of what is transpiring in the courts.

[17] In MacIntyre, the court made clear that the strong presumption in favour of public access to court records should be displaced only with the greatest reluctance and only because of considerations of very significant importance such as the protection of the innocent. In Vickery v. Nova Scotia Supreme Court (Prothonotary), [1991] 1 S.C.R. 671, 64 C.C.C. (3d) 65, the court further elaborated on the factors to be considered in deciding whether public access should be given.

[18] The issue in Vickery was whether a journalist should have access to audio and video tapes filed as exhibits at a criminal trial given that the appeal court had held that they were inadmissible, had reversed the conviction and acquitted the accused.

[19] Speaking for the majority, Stevenson J. concluded that access to the tapes was properly denied because the privacy interest of the accused as a person acquitted of a crime outweighed the public right of access to exhibits which had been held to be inadmissible against him. In reaching this conclusion, Stevenson J. reiterated the fundamental proposition in

MacIntyre that there should be maximum accessibility but not to the extent of harming the innocent.

[20] He went on to outline several other significant factors to be considered in deciding whether to accord access. He referred to the nature of exhibits as a part of the court "record" including, particularly, the proprietary interest that non-parties may have in them, and suggested that this may cut against unfettered access once the exhibits have served their purpose in the court process. He made clear that the court had the right to inquire into the use to be made of access and to regulate that use by securing appropriate undertakings to protect competing interests. He described as another important consideration whether the exhibits had been open to public scrutiny at trial. And he indicated that once the judicial proceedings had been concluded different considerations might govern, for example where the subsequent release of selected exhibits would create risks of partiality and unfairness.

[21] In the end, he decided that the privacy interest of the innocent person who had been acquitted outweighed the access interest of the journalist who sought to view and disseminate the tapes.

[22] I think it is clear from this jurisprudence that the court's jurisdiction to determine access to court records (including exhibits) rests on the premise that public accessibility should be curtailed only with the greatest reluctance, taking into account the need to protect the innocent and the other considerations described in Vickery. It is also clear that this jurisdiction does not vanish simply because it is shown that these exhibits were filed in open court. As Vickery indicates, this is not conclusive, but merely one factor for the court to consider in determining whether to depart from the presumption of public accessibility. Indeed, in the present case, where there was a publication ban during the trial, it is perhaps a factor of diminished importance.

[23] Thus, I conclude that the application judge erred in determining that he had no power to grant the appellant's request for access simply because these exhibits had been filed at the preliminary hearing and then forwarded to the sentencing court, both of which were open to the public.

[24] The Toronto Police Service also seeks to defend the decision appealed from on the basis that the exhibits sought by the appellant are no longer in the possession of the court.

[25] While in both MacIntyre and Vickery the relevant court records remained in the court's possession, in my view there can be no principled basis for terminating the court's jurisdiction to provide access to exhibits just because they have left the possession of the court. They do not lose their character as exhibits simply because they have been physically transferred to the Toronto Police Service. They remain an integral part of the court record in the Lorenz case.

[26] Moreover, the objectives that are served by the presumption of public accessibility -- namely, judicial accountability and public understanding of the administration of justice -- continue to be important even when possession passes from the court. Fostering judicial accountability in a particular case and enhancing public understanding of that case do not cease when the exhibits are transferred to the police. The policy objectives served by the court's jurisdiction to provide public access to its records thus strongly suggest that, whatever its ultimate reach, this jurisdiction does not end when the records pass out of the court's possession.

[27] As with the proprietary interest in exhibits referred to in Vickery, it may be that where they have passed into the control of another, there is a possessory interest to be considered in deciding on public access. In a case like this, however, where the exhibits have simply been returned to the police a few months after the court proceeding and the application for access has been promptly made, that interest would not seem to be significant.

[28] Finally, the Toronto Police Service argues that the existence of the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56 precludes the court from exercising its common law jurisdiction to order access to court records. The respondent says that this legislation permits the appellant to apply for access to the exhibits it seeks and sets up criteria for evaluating such a request.

> [29] In my view, the simple answer to this argument is that the regime set up under this legislation has an entirely different purpose. It is designed to regulate access to private information which, but for the regime, would not otherwise be available to the public. By contrast, the jurisdiction which the appellant seeks to engage is over court records which the common law treats as presumptively accessible to the public. There is nothing in the legislation that suggests either explicitly or by necessary implication that the court's jurisdiction at common law is being curtailed or removed. This is hardly surprising since the legislation is designed for such a different purpose. The regime it establishes is simply one which co-exists with the court's jurisdiction. It does not replace it.
>
> [30] In summary, therefore, I conclude that the court has jurisdiction to order public access to the court exhibits sought by the appellant."

The Dagenais/Mentuck Test applies to access to Exhibits.

In the recent Supreme Court of Canada case, Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41 (CanLII)*, search warrants relating to alleged violations of provincial legislation were issued. The Crown brought an* ex parte *application for an order sealing the search warrants, the informations used to obtain the warrants and related documents, claiming that public disclosure of the material could identify a confidential informant and could interfere with the ongoing criminal investigation. A court order directed that the warrants and informations be sealed. Various media outlets brought a motion for* certiorari *and* mandamus *in the Superior Court, which quashed the sealing order and ordered that the documents be made public except to the extent that the contents of the informations could disclose the identity of a confidential informant. Applying the* Dagenais/Mentuck *test, the Court of Appeal affirmed the decision to quash the sealing order but edited materials more extensively to protect informant's identity.*

The court per Fish. J., stated:

> In any constitutional climate, the administration of justice thrives on exposure to light - and withers under a cloud of secrecy.

That lesson of history is enshrined in the Canadian Charter of Rights and Freedoms. Section 2(b) of the Charter guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.

The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.

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.

This criterion has come to be known as the Dagenais/Mentuck test, after the decisions of this Court in which the governing principles were established and refined. The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings. More particularly, whether it applies to "sealing orders" concerning search warrants and the informations upon which their issuance was judicially authorized.

The Court of Appeal for Ontario held that it does and the Crown now appeals against that decision.

I would dismiss the appeal. In my view, the Dagenais/Mentuck test applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court

> principle inextricably incorporated into the core values of s. 2(b) of the Charter. [para 1-7]
>
> *It is thus clear from the case law that accessibility to exhibits is the rule and denial of access the exception. As stated by Veit J, the denial of access to exhibits is a form of publication ban. The decisions also establish that the media is the representative, that is, the eyes and ears of the public who cannot attend a court proceeding and that in normal circumstances, the media should be allowed not only access to but the right to copy exhibits. The burden of preventing access lies upon the party that would deny the access and the only justifiable reason for preventing access is to protect values of superordinate importance. Even in the case of the potential release of compromising videotapes of an individual whose conviction was overturned, three members of the Supreme Court of Canada argued for their release. Finally, the Court of Appeal of Ontario has confirmed that the right of access to exhibits does not end with the end of the trial itself. The documents remain an integral part of the court record.*
>
> *In our respectful submission, the practice of preventing access to exhibits until the decision of an adjudicator is rendered amounts to a ban on publication until the end of the hearing. If the goal is to prevent current and future witnesses from reviewing the contents of exhibits in the news, there are other ways to achieve this goal. Any witness currently being examined will have seen the exhibit and cannot be prejudiced by its publication. Future witnesses, even where there is an order excluding witnesses, may be directed by the adjudicator not to read, listen to or view media reports concerning the matter at hand, just as juries are so instructed in trials. Reporters and the public may attend open hearings and report all aspects, including the name of the exhibit being examined and details of the questioning. Access to the exhibits themselves assists the accuracy of the reporting, without otherwise prejudicing the rights of the parties or the administration of justice.*
>
> ...
>
> [*Sic* throughout]

7 The CBC filed the following supplementary written arguments on June 26, 2009:

> ...
>
> *This supplementary brief include two additional cases on the following points of law:*

- *In camera hearings are tantamount to a publication ban*
- *Access to exhibits must be provided in a timely basis.*

In Camera Hearings Are Tantamount To A Publication Ban.

In Named Person v. Vancouver Sun, [2007] 2 S.C.R. 253, 2007 SCC 43, The appellant Named Person informed the judge, during an in camera portion of extradition proceedings, that he was a confidential police informer, and on that basis requested some disclosure from the appellant Attorney General, who was acting on behalf of the state requesting the Named Person's extradition. At a subsequent hearing, media representatives applied for an order that they be allowed to review the documents prepared by an amicus curiae *upon filing undertakings of non-disclosure. The judge allowed the application and ordered that counsel for the respondents as well as specific representatives of each respondent be allowed to review the* amicus *documents on each individual filing an undertaking of confidentiality. The Supreme Court of Canada overturned that order on the basis that informer privilege is extremely broad and powerful. Once a trial judge is satisfied that the privilege exists, a complete and total bar on any disclosure of the informer's identity applies. All information which might tend to identify the informer is protected by the privilege, and neither the Crown nor the court has any discretion to disclose this information in any proceeding, at any time. The court remanded the case to the extradition judge to decide what information may be disclosed to media counsel and the media representatives In the course of its judgment, per Basterache J, the court stated however:*

96 *It will now be necessary to turn to a problem relating to the definition of the rights flowing from the open court principle. The recognition of the right of the press to inform the public on court proceedings as a corollary to the public's right to open courts tends to lead to the view that these two rights are one and the same. However, a conceptual distinction must be maintained between them in order to deal with the difficulties that the application of this principle gives rise to in the relationships between these rights and other rights without taking the relevant values into consideration. For example, in certain situations, a judge might consider it appropriate - or might be required by legislation - to order a publication ban but not to order that the proceedings be held* in camera. *Such an order would restrict the right of the press to report on what happens in court. However, it would not infringe the more general right to open courts. In this sense, an order that proceedings be held* in camera *is more drastic because, in practice, it constitutes a publication ban, whereas the converse is not true.*

97 *The difference between the two types of orders can be seen in* Canadian Newspapers*, in which this Court ruled on the constitutionality of a statutory provision compelling the trial judge to order a publication ban in certain circumstances in sexual assault cases. On that occasion, the Court agreed that such a provision limits the right to freedom of expression guaranteed by s. 2(b) of the* Charter*. It nevertheless held that the provision was justified under s. 1 of the* Charter *because,* inter alia*, it did not require the trial judge to proceed* in camera *but, on the contrary, allowed the media to be present at the hearing and report on the conduct of the hearing and the facts of the case, provided that this information did not tend to identify the complainant.*

98 *Canadian Broadcasting Corp. v. New Brunswick also illustrates the difference between the two types of orders and it shows clearly that courts should exercise caution before ordering that proceedings be heard* in camera*. In that case, which concerned sexual assaults committed against young female persons, the trial judge had ordered under s. 486(1) of the* Criminal Code *that the media and the public be excluded from a part of the sentencing proceeding dealing with the specific acts committed by the accused. The order remained in effect for only 20 minutes. Nevertheless, this Court decided that the trial judge should not have excluded the public in this manner, as there was insufficient evidence to support a concern for undue hardship to the accused or the complainants. The Court reached this conclusion because,* inter alia*, of the fact that the victims' privacy was already protected by a publication ban.*

The Media Must Be Given Timely Access To Exhibits.

In R. v. White, 2005 ABCA 435 (CanLII)*, the accused sought an order banning publication of the evidence, memoranda of argument, and the oral submissions made during a hearing for judicial interim release. The judge reviewing that order for judicial interim release convened a hearing to hear submissions from the media. At the end of the hearing the judge left the publication ban in place because s. 517 of the Criminal Code placed a mandatory ban on publication of this material which the judge felt would be rendered nugatory, if he, on judicial review of an order for interim release, were to lift the ban. In the course of his decision, however, he noted:*

> *[5] In my opinion, transparency enhances the public's knowledge of the judicial process, thereby promoting respect for the administration of justice. It follows that an application for a publication ban should be heard in open court and not in-camera. The latter will be the rare exception. That is because proceeding in private insulates the decision from meaningful appellate review, there being no readily available public record of the*

> *submissions made, nor any accessible recorded reasons for granting the publication ban.*
>
> *[6] News is a perishable commodity. Because "[n]ews, as the word implies, involves something new - something fresh." (*Triple Five Corp. v. United Western Communications Ltd. *(1994), 19 Alta. L.R. (3d) 153 at 155 (C.A.)), unjustified delay in permitting full public access will have a deleterious effect on the ability of the media to report, and, in the result, for the public to be informed. Contemporaneous access to court documents and processes allows the media to fulfil their legitimate role as the eyes and ears of the public. As Kerans, J.A. noted in* Triple Five Corp.*,"time [for the media] is always of the essence."*

In a later application to revoke bail for Mr. White, R. v. White, 2006 ABCA 65 (CanLII)*, the court found that while there was a statutory ban on publication of bail hearing proceedings if requested by the accused, there was no such limitation on bail application reviews in the Court of Appeal. The appeal court decided that there was no justification for a ban on publication of proceedings in this case.*

Conclusion

As stated in the Brief of Law, the rule is that tribunals hold hearings in public and permit public reporting of all aspects of the hearing. Any limitation on that publicity is the exception. Such measures as bans on publications and holding hearings "in camera" are exceptional and should be carefully considered, applying the Dagenais/Mentuck test. In courts the practice has been to provide access to exhibits contemporaneous with their entry into evidence [See affidavit of Alison Crawford] and the case law indicates that this should be the case. News is a perishable commodity and unjustified delay in permitting full public access has a deleterious effect on the ability of the media to report, and, in the result, for the public to be informed.

...

[*Sic* throughout]

8 The CBC submitted the following case law in support of its arguments: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Nova Scotia (Attorney General) v. MacIntyre*,

[1982] 1 S.C.R. 175; *R. v. Lortie* (1985), 21 C.C.C. (3d) 436 (Qc C.A.); *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76; *Muir v. Alberta*, [1995] A.J. No 1656 (Alta. Q.B.) (QL); *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)*, (2002), 59 O.R. (3d) 18 (Ont. C.A.); *Toronto Star Newspaper Ltd. v. Ontario*, 2005 SCC 41; *Named Person v. Vancouver Sun*, 2007 SCC 43; *R. v. White*, 2005 ABCA 435; and *R. v. White*, 2006 ABCA 65.

B. For the deputy head

9 On July 3, 2009, the deputy head filed the following written arguments:

...

OVERVIEW

1. *It is arguable that the principle of open court applies to the Public Service Labour Relations Board (the "PSLRB") when adjudicating grievances such as the one brought by the grievor, Mr. Douglas Tipple. However, administrative tribunals are different than courts and this may warrant flexibility in the way the open court principle applies. Thus, as master of its own procedure, it is for the PSLRB to decide whether to provide access to the documents entered as exhibits after a decision is rendered and not infringe on the rights guaranteed by section 2b) of the* Charter.

FACTS

2. *The grievor was hired as a Special Advisor to the Deputy Minister of Public Works and Government Services Canada ("PWGSC") in October, 2005. This was a term appointment for a period of three years made pursuant to section 8 of the* Public Service Employment Act *("*PSEA*").*

3. *By letter dated August 31, 2006, the grievor was advised by the Deputy Minister that his services were no longer be required as it was decided to integrate the function of his position with those of the Assistant Deputy Minister, Real Property. As a result, due to the discontinuance of the grievor's functions, he was laid off pursuant to section 64(1) of the* PSEA.

4. *The circumstances surrounding the termination of the grievor's term employment with PWGSC have been the subject of a hearing before the PSLRB. Evidence was heared throughout 2007, 2008 and 2009 and recently concluded with the testimony of the grievor on June 29, 2009, leaving the closing arguments for a later date.*

5. *On June 25, 2009, the Canadian Broadcasting Corporation ("CBC") brought a mo-*

tion to obtain access to the evidence entered as exhibits in the course of the hearing before the PSLRB.

ISSUES

6. *The motion brought by CBC raises the following issues:*

i. *Does the open court principle protected by section 2(b) of the* Charter *require administrative tribunals to make available to the public the exhibits presented in evidence?*

ii. *Does an administrative tribunal have a discretion to refuse to release the exhibits until a decision is rendered?*

POSITION

7. *Regardless of whether the open court principle and section 2(b) of the* Charter *applies, all courts and administrative tribunals have the discretion to make exhibits available or not and how and when they will be available. Some of the factors that can be taken into account when exercising this discretion include the continuity of exhibits, their integrity, the administrative burden, the presence of the press during a hearing and whether making copies would unfairly prejudice any of the parties.*

SUBMISSIONS

A) Applicability of the Open Court Principle to Administrative Tribunals

8. *Traditionally, and subject to contrary statutory direction, there is no general common law requirement that administrative tribunals conduct their proceedings in public. Where the enabling legislation is silent on this point of procedure, a statutory decision-maker is the master of its own proceedings and the matter of a public versus in camera hearing is left to its discretion.*

9. *Recently, the common law relating to the open court principle has been largely overtaken by s. 2(b) of the* Canadian Charter of Rights and Freedoms. *Section 2(b)*

of the Charter *protects the right to freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. The courts have held that s. 2(b) guarantees the right of members of the public to receive information pertaining to all judicial proceedings, subject to overriding public interests. However, the case law is divided as to the applicability of the open court principle under section 2(b) of the* Charter *to administrative tribunals in general.*

10. *In* Pacific Press Ltd. v. Canada (Minister of Employment and Immigration), *MacGuigan J.A. concluded that the open court principle under s. 2(b) of the* Charter *applied to all statutory tribunals exercising judicial or quasi-judicial functions. In determining whether a tribunal performs a judicial or quasi-judicial function, he relied on the four-part test set out in the Supreme Court's decision in M.N.R. v. Coopers and Lybrand.*

11. *The reasoning in* Pacific Press *did not find unanimity in subsequent cases and in the absence of clear guidance from the Supreme Court of Canada, courts are wrestling with the suggestion that the open court principle applies to all administrative tribunals performing judicial or quasi-judicial functions.*

12. *The unresolved issue is whether it is sufficient that the administrative tribunal is of a judicial or quasi-judicial nature or whether some additional finding is necessary such as a finding that the matter before the tribunal is of sufficient public importance that openness is warranted.*

13. *The PSLRB considers itself a quasi-judicial tribunal and as such would appear to be bound by the constitutionally protected open court principle.*

14. *In addition, since the PSLRB is responsible for, among other things, the interpretation of collective agreements and arbitral award, the adjudication of disciplinary actions of public servants and their demotion or termination for unsatisfactory performance or for any other non-disciplinary reasons, it is arguable that public servants have an interest in the way in which disputes over grievances are resolved by the PSLRB. There is therefore an argument to be made that the adjudication of grievances before the PSLRB is of sufficient public importance to warrant the application of the open court principle.*

B) **Whether CBC is Entitled to Exhibits Before a Decision is Rendered**

15. *As mentioned above, an administrative tribunal is master of its own proceedings and where the enabling legislation is silent on a point of procedure, the tribunal may determine the procedure to be followed.*

16. *There is nothing in the PSLRB's enabling legislation or regulations preventing it from determining how it will proceed in releasing exhibits to the public and media.*

17. *Thus, on the surface it appears that the PSLRB would be acting within its jurisdictional limit if it ordered that the exhibits be released to the media after it renders a decision. However, superimposed upon this general rule of administrative law is sec-*

tion 2(b) of the Charter.

18. *While section 2(b) of the* Charter *and the open court principle would appear to apply to the PSLRB, the degree to which the principle applies to this tribunal may not be the same as before a court. Administrative tribunals come in all shapes and sizes with some performing policy functions while others act as quasi-judicial bodies and conduct hearings. A degree of flexibility is therefore warranted in how they give expression to the open court principle. Requiring administrative decision-makers to meet the open court principle in exactly the same manner as a court could potentially make their proceedings unmanageable.*

19. *In this case, it is arguable that the open court principle has been met since the hearing has been open to the public and access to the exhibits will be possible at the latest once a decision is rendered. The media has been present during most of the presentation of the evidence and has been taking notes throughout. The media has a right to disseminate information to the public and the public has the right to receive it. There is, however, no authority that dictates that the information must be released in precisely the same form in which it was produced and presented during the hearing, or that the public have a right to copies of exhibits.*

CONCLUSION

20. *The PSLRB is master of its own procedure subject to its enabling legislation and the* Charter. *Given that the case law suggests that the open court principle does not necessarily apply to administrative decision-makers in the same manner as it does to courts and given that, it is arguable that PSLRB has a certain discretion in the manner it will release the exhibits to the public and the media.*

...

[*Sic* throughout]

10 The deputy head submitted the following precedents: *Brunswick News Inc. v. New Brunswick (Attorney General)* 2008 NBQB 289; *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495; *Canadian Broadcasting Corp. v. Summerside (City)* (1999), 173 Nfld. & P.E.I.R. 56 (P.E.I.S.C. (T.D.)); *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326*; Gordon v. Canada (Minister of National Defence)*, 2005 FC 335; *Kirchmeir v. Edmonton (City)*, 2001 ABQB 107; *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration)*, [1991] 2 F.C. 327 (C.A.); *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560; *R. v. Canadian Broadcasting Corporation*, 2007 CanLII 21124 (Ont. Sup. Ct. J.); *Robertson v. Edmonton (City) Police Service*, 2004 ABQB 519; *Southam Inc. v. Canada (Attorney General)* (1997), 36 O.R. (3d) 721 (Ont. Ct. (G.D.)); *Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329 (T.D.); *Re Vancouver Sun*, 2004 SCC 43; MacAulay and Sprague, *Practice and Procedure Before Administrative Tribunals* (2004), para 16.3; and *Adjudication*

Services (as of July 3, 2009), online: PSLRB http://pslrb-crtfp.gc.ca/adjudication/intro_e.asp.

IV. Reasons

11 The CBC argues that the open court principle applies to adjudication proceedings and, therefore requests immediate access to all exhibits entered in evidence during the course of the hearing regarding the grievor's termination.

12 The deputy head, at paragraph 18 of its written arguments, concedes that paragraph 2(*b*) of the *Charter* and the open court principle appears to apply to these proceedings. However, the deputy head, relying on the administrative law principle that an adjudicator is the master of his or her own proceedure, requests that I exercise my discretion not to grant the CBC access to the exhibits until I render a final decision on the merits of the grievance. The deputy head argues that the open court principle does not necessarily apply to administrative tribunals in the same fashion as it does to the courts.

13 In exercising his or her discretion, an adjudicator must act within the boundaries set by the *Charter*. As the Supreme Court of Canada found in *Toronto Star Newspapers Ltd.*, such boundaries, known as the *Dagenais*/*Mentuck* test, apply with regard to public access to legal proceedings. At paragraphs 4, 5 and 7, the Court wrote the following:

> ...
>
> 4 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.
>
> *5 This criterion has come to be known as the* Dagenais/Mentuck *test, after the decisions of this Court in which the governing principles were established and refined...*
>
> ...
>
> *7 ... In my view, the* Dagenais/Mentuck *test applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(*b*) of the* Charter.

[Emphasis in the original]

14 In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, the Supreme Court of Canada had reformulated the *Dagenais/Mentuck* test as follows:

...

> *(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*
>
> *(b) the salutary effects of the ... order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*

...

In this case, however, the second part of the *Dagenais/Mentuck* test has no practical application, as the deputy head has not alleged that the right to information protected by the *Charter* interferes with another important right or interest requiring protection.

15 The party seeking to restrict the public's access to these proceedings bears the burden of establishing the legitimacy of the limitation sought: *MacIntyre*. For the purpose of this decision, the deputy head must provide a sufficient evidentiary basis to establish that not granting access to the exhibits until I render a final decision on the merits of the grievance is necessary in order to prevent a serious risk to an important interest in the context of adjudication. It has produced no evidence to that effect or alluded to any risk of that kind.

16 As previously stated, the evidentiary portion of the hearing has been completed and the hearing will resume on October 6, 2009, to hear the parties' closing arguments. I therefore find that granting the CBC access to all the exhibits, except those that have been sealed, will not create a serious risk to the integrity or fairness of the remainder of the hearing.

17 For all of the above reasons, I make the following order:

V. Order

18 I declare that the CBC is entitled to immediate access to all the exhibits, except Exhibits G-10, G-11 and G-24 that have been sealed.

cp/e/qlaim/qlaxw/qlhcs/qlcas

Indexed as:

Toronto Star Newspapers Ltd. v. Ontario

Her Majesty The Queen, appellant;
v.
Toronto Star Newspapers Ltd., Canadian Broadcasting Corporation and Sun Media Corporation, respondents, and Canadian Association of Journalists, intervener.

[2005] 2 S.C.R. 188

[2005] S.C.J. No. 41

2005 SCC 41

File No.: 30113.

Supreme Court of Canada

Heard: February 9, 2005;
Judgment: June 29, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

(43 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Constitutional law -- Charter of Rights -- Freedom of expression -- Freedom of the press -- Dagenais/Mentuck test -- Search warrants -- Crown requesting order sealing warrants and informations used to obtain warrants -- Whether Dagenais/Mentuck test applicable to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings.

Criminal law -- Provincial offences -- Search warrants -- Sealing orders -- Open court principle -- Protection of confidential informant -- Crown requesting order sealing warrants and informations used to obtain warrants -- Whether Dagenais/Mentuck test applicable to sealing orders concerning search warrants and informations upon which issuance of warrants was judicially authorized -- Whether Dagenais/Mentuck test applicable at pre-charge or "investigative stage" of criminal proceedings.

[page189]

Summary:

Search warrants relating to alleged violations of provincial legislation were issued. The Crown brought an *ex parte* application for an order sealing the search warrants, the informations used to obtain the warrants and related documents, claiming that public disclosure of the material could identify a confidential informant and could interfere with the ongoing criminal investigation. A court order directed that the warrants and informations be sealed. Various media outlets brought a motion for *certiorari* and *mandamus* in the Superior Court, which quashed the sealing order and ordered that the documents be made public except to the extent that the contents of the informations could disclose the identity of a confidential informant. Applying the *Dagenais/Mentuck* test, the Court of Appeal affirmed the decision to quash the sealing order but edited materials more extensively to protect informant's identity.

Held: The appeal should be dismissed.

The *Dagenais/Mentuck* test applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings, including orders to seal search warrant materials made upon application by the Crown. Court proceedings are presumptively "open" in Canada and 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. Though applicable at every stage of the judicial process, the *Dagenais/Mentuck* test must be applied in a flexible and contextual manner, and regard must be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. [para. 4] [paras. 7-8] [paras. 30-31]

Here, the Crown has not demonstrated that the flexible *Dagenais/Mentuck* test as applied to search warrant materials is unworkable in practice, nor has it shown that the Court of Appeal failed to adopt a "contextual" approach. The evidence brought by the Crown in support of its application to delay access amounted to a generalized assertion of possible disadvantage to an ongoing investigation. A party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise [page190] investigative efficacy. The party

must, at the very least, allege a serious and specific risk to the integrity of the criminal investigation. The Crown has not discharged its burden in this case. [paras. 9-10] [paras. 34-35] [para. 39]

Cases Cited

Applied: Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Mentuck, [2001] 3 S.C.R. 442, 2001 SCC 76; referred to: Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175; Vancouver Sun (Re), [2004] 2 S.C.R. 332, 2004 SCC 43; National Post Co. v. Ontario (2003), 176 C.C.C. (3d) 432; R. v. Eurocopter Canada Ltd., [2001] O.J. No. 1591 (QL); Flahiff v. Bonin, [1998] R.J.Q. 327; Toronto Star Newspapers Ltd. v. Ontario, [2000] O.J. No. 2398 (QL).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 2(b).

Criminal Code, R.S.C. 1985, c. C-46, s. 487.3.

Provincial Offences Act, R.S.O. 1990, c. P.33.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rosenberg and Borins JJ.A.) (2003), 67 O.R. (3d) 577 (sub nom. R. v. Toronto Star Newspapers Ltd.), 232 D.L.R. (4th) 217, 178 C.C.C. (3d) 349, 17 C.R. (6th) 392, 110 C.R.R. (2d) 288, 178 O.A.C. 60, [2003] O.J. No. 4006 (QL), allowing the Crown's appeal, to a very limited extent, from an order of McGarry J. quashing the sealing order of Livingstone J. Appeal dismissed.

Counsel:

Scott C. Hutchison and Melissa Ragsdale, for the appellant.

Paul B. Schabas and Ryder Gilliland, for the respondents.

Written submissions only by John Norris, for the intervener.

The judgment of the Court was delivered by

[page191]

FISH J.:--

I

1 In any constitutional climate, the administration of justice thrives on exposure to light -- and withers under a cloud of secrecy.

2 That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.

3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.

4 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.*

5 This criterion has come to be known as the *Dagenais/Mentuck* test, after the decisions of this Court in which the governing principles were established and refined. The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings. More particularly, whether it applies to "sealing orders" concerning search warrants and the [page192] informations upon which their issuance was judicially authorized.

6 The Court of Appeal for Ontario held that it does and the Crown now appeals against that decision.

7 I would dismiss the appeal. In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(*b*) of the *Charter*.

8 The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations

that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.

9 Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.

[page193]

10 In this case, the evidence brought by the Crown in support of its application to delay access amounted to a generalized assertion of possible disadvantage to an ongoing investigation. The Court of Appeal accordingly held that the Crown had not discharged its burden. As mentioned earlier, I would not interfere with that finding and I propose, accordingly, that we dismiss the present appeal.

II

11 The relevant facts were fully and accurately set out in these terms by Doherty J.A. in the Court of Appeal for Ontario ((2003), 67 O.R. (3d) 577):

> On August 20, 2003, a justice of the peace issued six search warrants for various locations linked to the business of Aylmer Meat Packers Inc. ("Aylmer"). The informations sworn to obtain the warrants were identical. The warrants were obtained under the provisions of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 and related to alleged violations of provincial legislation regulating the slaughter of cattle. The informations were sworn by Roger Weber, an agricultural investigator with the Ministry of Natural Resources. The warrants were executed on August 21 and 22, 2003.
>
> On about August 26, 2003, the investigation by the Ministry of Natural Resources into the operation of Aylmer became the subject of widespread media reports. The suitability for human consumption of meat slaughtered and processed by Aylmer became a matter of public concern.
>
> On about August 27, 2003, the Ontario Provincial Police commenced a fraud investigation into the business affairs of Aylmer. The officers involved in that investigation were advised that Inspector Weber had applied for and

obtained the search warrants described above.

On September 2, 2003, the Crown brought an *ex parte* application in open court in the Ontario Court of Justice for an order sealing the search warrants, the informations used to obtain the warrants and related documents. The Crown claimed that public disclosure of the material could identify a confidential informant and could interfere with the ongoing criminal investigation.

[page194]

Justice Livingstone made an order directing that the warrants and informations were to be sealed along with the affidavit of Detective Sergeant Andre Clelland, dated August 30, 2003 filed in support of the application for a sealing order and a letter, dated September 2, 2003, from Roger Weber indicating that the Ministry of Natural Resources took no objection to the application. The sealing order was to expire December 2, 2003. The Clelland affidavit and Inspector Weber's letter were subsequently made part of the public record on the consent of the Crown.

The Toronto Star Newspapers Limited and other media outlets (respondents) brought a motion for *certiorari* and *mandamus* in the Superior Court. That application proceeded before McGarry J. on September 15 and 16, 2003. On September 24, 2003, McGarry J. released reasons quashing the sealing order and directing that the documents should be made public except to the extent that the contents of the informations could disclose the identity of a confidential informant. McGarry J. edited one of the informations to delete references to material that could identify the confidential informant and told counsel that the edited version would be made available to the respondents unless the Crown appealed within two days... . [paras. 1-6]

12 The Crown did, indeed, appeal -- but with marginal success.

13 The Court of Appeal for Ontario held that Livingstone J. had exceeded her jurisdiction by refusing to grant a brief adjournment to allow counsel for the media to attend and make submissions on the application for a sealing order. Speaking for the court, Doherty J.A. found that the media can legitimately be expected to play an important role on applications to prohibit their access, and that of the public they serve, to court records and court proceedings. "There was no good reason", he stated, "to deny *The London Free Press* an opportunity to make submissions" (para. 15). This

amounted, in his view, to a denial of natural justice and resulted in a loss of jurisdiction. I find it unnecessary to express a decided view on this branch of the matter, since it is not in issue before us, and find it sufficient for present purposes to refer to the guidelines on notice to the media and media standing set out in *Dagenais v. Canadian [page195] Broadcasting Corp.*, [1994] 3 S.C.R. 835, particularly at pp. 868-69 and 890-91.

14 Doherty J.A. next addressed the merits of the request for a sealing order. Applying this Court's decision in *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76, he concluded that the Crown had not displaced the presumption that judicial proceedings are open and public. Like McGarry J., Doherty J.A. recognized that the materials had to be edited to exclude information that could reveal the identity of the confidential informant and the editing he found appropriate was "somewhat more extensive than that done by McGarry J." (para. 28).

15 The order of the Court of Appeal has now become final and the factual basis for a sealing order has evaporated with the passage of time. In the absence of a stay, the edited material was released on October 29, 2003, and the proceedings have to that extent become moot.

16 The Crown nonetheless pursues its appeal to this Court with respect to the underlying question of law: What is the governing test on an application to delay public access to search warrant materials that would otherwise become accessible upon execution of the search warrant?

17 Essentially, the Crown contends that the Court of Appeal erred in law in applying the "stringent" *Dagenais/Mentuck* test without taking into account the particular characteristics and circumstances of the pre-charge, investigative phase of the proceedings.

III

18 Once a search warrant is executed, the warrant and the information upon which it is issued must be made available to the public unless an applicant seeking a sealing order can demonstrate that public [page196] access would subvert the ends of justice: *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175. "[W]hat should be sought", it was held in *MacIntyre*, "is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime" (Dickson J., as he then was, speaking for the majority, at p. 184).

19 *MacIntyre* was not decided under the *Charter*. The Court was nonetheless alert in that case to the principles of openness and accountability in judicial proceedings that are now subsumed under the *Charter*'s guarantee of freedom of expression and of the press.

20 Search warrants are obtained *ex parte* and *in camera*, and generally executed before any charges have been laid. The Crown had contended in *MacIntyre* that they ought therefore to be presumptively shrouded in secrecy in order to preserve the integrity of the ongoing investigation. The Court found instead that the presumption of openness was effectively rebutted *until* the search

warrant was executed -- but not thereafter. In the words of Dickson J.:

> ... the force of the 'administration of justice' argument abates once the warrant has been executed, *i.e.* after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears... . The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance. [pp. 188-89]

21 After a search warrant has been executed, openness was to be presumptively favoured. The party seeking to deny public access thereafter was bound to prove that disclosure would subvert the ends of justice.

[page197]

22 These principles, as they apply in the criminal investigative context, were subsequently adopted by Parliament and codified in s. 487.3 of the *Criminal Code*, R.S.C. 1985, c. C-46. That provision does not govern this case, since our concern here is with warrants issued under the *Provincial Offences Act* of Ontario, R.S.O. 1990, c. P.33. It nonetheless provides a useful reference point since it encapsulates in statutory form the common law that governs, in the absence of valid legislation to the contrary, throughout Canada.

23 Section 487.3(2) is of particular relevance to this case. It contemplates a sealing order on the ground that the ends of justice would be subverted, in that disclosure of the information would compromise the nature and extent of an ongoing investigation. That is what the Crown argued here. It is doubtless a proper ground for a sealing order with respect to an information used to obtain a provincial warrant and not only to informations under the *Criminal Code*. In either case, however, the ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled. And that, as we shall see, is what Doherty J.A. found to be lacking here.

24 Since the advent of the *Charter*, the Court has had occasion to consider discretionary actions which limit the openness of judicial proceedings in other contexts. The governing principles were first set out in *Dagenais.*

25 In that case, four accused sought a ban on publication of a television mini-series, *The Boys of St. Vincent*, which was fictional in appearance -- but strikingly similar in fact -- to the subject matter of their trial. Writing for a majority of the Court, Lamer C.J. held that a ban should only be imposed where alternative measures cannot prevent the serious risk to the interests at stake and, even then, only to the extent found by the Court to be necessary to prevent a real and substantial risk to the

fairness of the trial. In addition, a ban should only be ordered where its [page198] salutary effects outweigh its negative impact on the freedom of expression of those affected by the ban. Here, too, the presumption was said to favour openness, and the party seeking a restriction on disclosure was therefore required to justify the solicited limitation on freedom of expression.

26 The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. [para. 32]

27 Iacobucci J., writing for the Court, noted that the "risk" in the first prong of the analysis must be *real, substantial*, and *well grounded in the evidence*: "it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained" (para. 34).

28 The *Dagenais/Mentuck* test, as it has since come to be known, has been applied to the exercise of discretion to limit freedom of expression and of the press in a variety of legal settings. And this Court has recently held that the test applies to [page199] *all* discretionary actions which have that limiting effect:

> While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban ...; is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [[1996] 3 S.C.R. 480], at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41).
>
> (*Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43, at para. 31)

29 Finally, in *Vancouver Sun*, the Court expressly endorsed the reasons of Dickson J. in *MacIntyre* and emphasized that the presumption of openness *extends to the pre-trial stage of judicial proceedings*. "The open court principle", it was held, "is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein" (para. 26). It therefore applies at every stage of proceedings (paras. 23-27).

30 The Crown now argues that the open court principle embodied in the *Dagenais/Mentuck* test ought not to be applied when the Crown seeks to seal search warrant application materials. This argument is doomed to failure by more than two decades of unwavering decisions in this Court: the *Dagenais/Mentuck* test has repeatedly and consistently been applied to all discretionary judicial orders limiting the openness of judicial proceedings.

[page200]

31 It hardly follows, however, that the *Dagenais/Mentuck* test should be applied mechanistically. Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at *all* stages, is a flexible and contextual one. Courts have thus tailored it to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown-initiated applications for publication bans.

32 In *Vancouver Sun*, the Court recognized that the evidentiary burden on an application to hold an investigative hearing *in camera* cannot be subject to the same stringent standard as applications for a publication ban at trial:

> Even though the evidence may reveal little more than reasonable expectations, this is often all that can be expected at that stage of the process and the presiding judge, applying the *Dagenais/Mentuck* test in a contextual manner, would be entitled to proceed on the basis of evidence that satisfies him or her that publicity would unduly impair the proper administration of justice. [para. 43]

33 Similar considerations apply to other applications to limit openness at the investigative stage of the judicial process.

IV

34 The Crown has not demonstrated, on this appeal, that the flexible *Dagenais/Mentuck* test as applied to search warrant materials is unworkable in practice. The respondents, on the other hand, have drawn our attention to several cases in which the test was effectively and reasonably applied. Sealing orders or partial sealing orders were in fact granted, for example, in *National Post Co. v. Ontario* (2003), 176 C.C.C. (3d) 432 (Ont. S.C.J.); *R. v. Eurocopter Canada Ltd.*, [2001] O.J. No.

1591 (QL) (S.C.J.); *Flahiff v. Bonin*, [1998] R.J.Q. 327 (C.A.); and *Toronto Star [page201] Newspapers Ltd. v. Ontario*, [2000] O.J. No. 2398 (QL) (S.C.J.).

35 Nor has the Crown satisfied us that Doherty J.A. failed to adopt a "contextual" approach to the order sought in this case.

36 In support of its application, the Crown relied exclusively on the affidavit of a police officer who asserted his belief, "based on [his] involvement in this investigation that the release of the Warrants, Informations to Obtain and other documents would interfere with the integrity of the ongoing police investigation" (Appellant's Record, at p. 70). The officer stated that, should the contents of the information become public, witnesses could be fixed with information from sources other than their personal knowledge and expressed his opinion "that the release of the details contained in the Informations to Obtain [the search warrants] has the potential to make it more difficult for the Ontario Provincial Police to gather the best evidence in respect of its investigation" (Appellant's Record, at p. 72).

37 Doherty J.A. rejected these broad assertions for two reasons.

38 First, he found that they amounted to a "general proposition that pre-trial publication of the details of a police investigation risks the tainting of statements taken from potential witnesses" (para. 26). In Doherty J.A.'s view, if that general proposition were sufficient to obtain a sealing order,

> ... the presumptive rule would favour secrecy and not openness prior to trial. A general assertion that public disclosure may distract from the ability of the police to get at the truth by tainting a potential witness's statement is no more valid than the equally general and contrary assertion that public disclosure enhances the ability of the police to get at the truth by causing concerned citizens to come forward with valuable information. [para. 26]

[page202]

39 Second, Doherty J.A. found that the affiant's concern, for which he offered no specific basis, amounted to a mere assertion that "the police might have an advantage in questioning some individuals if those individuals [are] unaware of the details of the police investigation" (para. 27). In oral argument before this Court, counsel for the Crown referred to this as the "advantage of surprise". In this regard, Doherty J.A. noted Iacobucci J.'s conclusion in *Mentuck*, at para. 34, that access to court documents cannot be denied solely for the purpose of giving law enforcement officers an investigative *advantage*; rather, the party seeking confidentiality must at the very least allege a *serious and specific risk to the integrity of the criminal investigation*.

40 Finally, the Crown submits that Doherty J.A. applied a "stringent" standard -- presumably, an *excessively* stringent standard -- in assessing the merits of the sealing application. This complaint is unfounded.

41 Quite properly, Doherty J.A. emphasized the importance of freedom of expression and of the press, and noted that applications to intrude on that freedom must be "subject to close scrutiny and meet rigorous standards" (para. 19). Ultimately, however, he rejected the Crown's claim in this instance because it rested entirely on a general assertion that publicity can compromise investigative integrity.

42 At no point in his reasons did Doherty J.A. demand or require a high degree of predictive certainty in the Crown's evidence of necessity.

V

43 For all of these reasons, I propose that we dismiss the appeal, with costs to the respondents, on a party-and-party basis.

[page203]

Solicitors:

Solicitor for the appellant: Ministry of the Attorney General, Toronto.

Solicitors for the respondents: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener: Ruby & Edwardh, Toronto.

Case Name:

Toronto Star Newspapers Ltd. v. Canada

Between
Toronto Star Newspapers Limited and Kassim Mohamed,
Plaintiffs, and
Her Majesty the Queen in Right of Canada, Defendant

[2007] F.C.J. No. 165

[2007] A.C.F. no 165

2007 FC 128

2007 CF 128

[2007] 4 F.C.R. 434

[2007] 4 R.C.F. 434

308 F.T.R. 196

278 D.L.R. (4th) 99

151 C.R.R. (2d) 74

155 A.C.W.S. (3d) 564

Docket T-739-06

Federal Court
Toronto, Ontario

Lutfy C.J.

Heard: September 25 and October 18, 2006.
Judgment: February 5, 2007.

(92 paras.)

Civil evidence -- Documentary evidence -- Publication bans and confidentiality or sealing orders -- Motion by Toronto Star challenging constitutionality of ss. 38.04(4), 38.11(1) and 38.12(2) of Canada Evidence Act -- Attorney General launched proceeding pursuant to s. 38 of Canada Evidence Act to have Federal Court determine whether secret information in litigation should be disclosed -- Impugned sections denied Toronto Star access to s. 38 application and all court records associated with proceeding although all parties were present and no secret information was disclosed during such private sessions -- Motion allowed -- Infringement under s. 2(b) of Charter not justified by s. 1 -- Impugned sections read down -- Canada Evidence Act, ss. 38.04(4), 38.11(1), 38.12(2).

Constitutional law -- Constitutional validity of legislation -- Motion by Toronto Star challenging constitutionality of ss. 38.04(4), 38.11(1) and 38.12(2) of Canada Evidence Act -- Attorney General launched proceeding pursuant to s. 38 of Canada Evidence Act to have Federal Court determine whether secret information in litigation should be disclosed -- Impugned sections denied Toronto Star access to s. 38 application and all court records associated with proceeding although all parties were present and no secret information was disclosed during such private sessions -- Motion allowed -- Infringement under s. 2(b) of Charter not justified by s. 1 -- Impugned sections read down -- Canada Evidence Act, ss. 38.04(4), 38.11(1), 38.12(2).

Constitutional law -- Canadian Charter of Rights and Freedoms -- Reasonable limits -- Oakes test -- Proportionality test -- Fundamental freedoms -- Freedom of expression -- Motion by Toronto Star challenging constitutionality of ss. 38.04(4), 38.11(1) and 38.12(2) of Canada Evidence Act -- Attorney General launched proceeding pursuant to s. 38 of Canada Evidence Act to have Federal Court determine whether secret information in litigation should be disclosed -- Impugned sections denied Toronto Star access to s. 38 application and all court records associated with proceeding although all parties were present and no secret information was disclosed during such private sessions -- Motion allowed -- Infringement under s. 2(b) of Charter not justified by s. 1 -- Impugned sections read down -- Canada Evidence Act, ss. 38.04(4), 38.11(1), 38.12(2).

Motion by Toronto Star challenging constitutionality of ss. 38.04(4), 38.11(1) and 38.12(2) of Canada Evidence Act requiring all application hearings under s. 38 to be heard in private and requiring confidentiality to be maintained in respect of all applications and court records relating to s. 38 proceedings -- Plaintiff Mohamed sued Attorney General for damages due to disclosure of plaintiff's personal information to foreign security agencies -- Attorney General was informed that secret information was about to be disclosed -- Attorney General launched proceeding pursuant to s. 38 to have Federal Court determine whether secret information should be disclosed -- Existence of s. 38 proceeding disclosed to the public -- Proceeding was private, as opposed to ex-parte, and in presence of all parties -- No secret information disclosed at private sessions under s. 38 -- Combined effect of ss. 38.04(4) and 38.12(2) was to deny Toronto Star access to s. 38 application and all court records associated with proceeding although all parties were present at proceeding and no secret information was disclosed during such sessions -- HELD: Motion allowed -- Sections 38.04(4),

38.11(1), and 38.12(2) of Canada Evidence Act infringed Toronto Star's rights under s. 2(b) of Charter -- Infringements not justified under s. 1 as impugned provisions did not meet minimum impairment requirement of Oakes test -- Where court sessions and court records were available to all parties in litigation, these confidentiality requirements infringed unjustifiably on open court principle -- Mandatory requirement to exclude public from portions of review hearing when there existed no risk that national security information or foreign confidences could be disclosed was overbroad -- Impugned sections read down to apply only to ex pate representations provided for in s. 38.11(2) -- Open court principle required media access and timely publication -- In exceptional event where exclusion of public might be justified even when all parties were present, ss 38.04(4) and 38.12(1) provided Court with discretionary authority to adopt such measures as warranted by circumstances to protect confidentiality of secret information.

Statutes, Regulations and Rules Cited:

Anti-Terrorism Act, S.C. 2001, c. 41, s. 38

Canada Evidence Act, R.S.C. 1985, c. C-5, s. 38, s. 38.02(1) (c), s. 38.03, s. 38.04(2)(c), s. 38.04(4), s. 38.04(5)(a), s. 38.04(5)(c), s. 38.06(1), s. 38.06(3), s. 38.09, s. 38.1, s. 38.11(1), s. 38.12(2), s. 38.131

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 2(b)

Federal Courts Act, R.S.C. 1985, c. F-7, s. 17(3)(b)

Federal Courts Rules, Rule 26, Rule 29, Rule 151

Privacy Act, R.S.C. 1985, c. P-21, s. 46, s. 51, s. 51(2)(a), s. 51(3)

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Lorne Waldman, for Plaintiff - Kassim Mohamed.

Alain Préfontaine, for Defendant.

REASONS FOR ORDER

1 LUTFY C.J.:-- For some twenty-five years now, hearings in the Federal Court have been held

in private for the determination of whether national security information should be disclosed, despite the objection of the Attorney General of Canada. The requirement for closed hearings applies even for those segments of the litigation where all the parties are present and no secret information is being reviewed by the Court. This proceeding is the first constitutional challenge to the mandatory statutory provisions requiring this degree of secrecy.

2 Where the court sessions and the court records are available to all parties in the litigation, I have concluded that the confidentiality requirements infringe unjustifiably on the open court principle. The appropriate constitutional remedy is to read down the impugned statutory provisions to apply only to court sessions and court records when secret information is in play. The effect of this decision is that court sessions at which all of the parties are present and court records available to all of the parties are presumptively open to the public.

Factual Background

3 In September 2004, Kassim Mohamed sued the Attorney General of Canada for damages and other relief, alleging that both the Royal Canadian Mounted Police and the Canadian Security Intelligence Service disclosed his personal information to foreign security agencies. In Mr. Mohamed's view, this disclosure resulted in his two-week detention by Egyptian authorities. His action is pending in the Federal Court under court file no. T-1666-04 (the civil action).

4 During the discovery process in the civil action, the Attorney General of Canada was notified that "potentially injurious information" or "sensitive information" as defined in section 38 of the *Canada Evidence Act*, R.S.1985, c. C-5 (secret information) was about to be disclosed. Secret information, in general terms, is information relating to international relations, national defence or national security.

5 On January 5, 2006, after receiving this notification, the Attorney General of Canada launched a designated proceeding pursuant to sections 38 and following of the Act (sometimes referred to collectively as "section 38") to have the Federal Court determine whether the secret information should be disclosed: *Canada (Attorney General of Canada) v. Mohamed*, court file no. DES-1-06 (the designated proceeding).

6 On January 25, 2006, the Attorney General of Canada authorized counsel for Mr. Mohamed to disclose the existence of the designated proceeding. As early as August 2005, the Federal Court's publicly accessible recorded entries of the civil action disclosed that the parties intended to seek relief under section 38. In effect, the Attorney General's authorization merely confirmed what was publicly available four months earlier.

7 Without the Attorney General's authorization, which was made under section 38.03, the disclosure of the fact that an application had been made to the Federal Court would have been prohibited by paragraph 38.02(1)(c).

8 As the result of this authorization, the Toronto Star Newspapers Limited (Toronto Star), which had been monitoring and reporting the civil action, was informed of the designated proceeding.

9 On February 23, 2006, the Toronto Star advised the Federal Court of its intention to challenge the confidentiality provisions to which section 38 designated proceedings are subject. If the constitutional challenge were made within the designated proceeding, section 38 may have required the argument to be heard in private. Each of the parties and the Court preferred that the issue be adjudicated in open court.

10 On April 19, 2006, counsel for the three parties agreed that the Toronto Star's constitutional challenge would be adjudicated as a question of law pursuant to paragraph 17(3)(b) of the *Federal Courts Act*, R.S. 1985, c. F-7.

11 On April 26, 2006, this proceeding was launched. The consent of the parties to proceed in this fashion removed the Toronto Star's intervention from the secrecy of section 38 proceedings for adjudication in a public forum. The Court is grateful for the ingenuity and the cooperation of counsel in having this constitutional challenge resolved in open court.

12 The first day of the public hearings took place on September 25, 2006. The second day, on October 18, 2006, focused on remedies.

The Impugned Provisions of Section 38

13 The plaintiffs, the Toronto Star and Mr. Mohamed, challenge the constitutionality of three provisions of the *Canada Evidence Act* (the impugned provisions).

14 First, the plaintiffs challenge subsection 38.11(1), which requires that section 38 application hearings be heard in private: "A hearing under subsection 38.04(5)...shall be heard in private..." ("Les audiences prévues au paragraphe 38.04(5)...sont tenues à huis clos...").

15 Second, the plaintiffs also impugn the constitutionality of two related provisions.

16 Subsection 38.04(4) requires that confidentiality be maintained in respect of all applications made pursuant to section 38: "An application under this section is confidential. ..." ("Toute demande présentée en application du présent article est confidentielle. ...").

17 Similarly, subsection 38.12(2) requires that confidentiality be maintained in respect of all court records related to a section 38 proceeding: "The court records relating to the hearing, appeal or review are confidential. ..." ("Le dossier ayant trait à l'audience, à l'appel ou à l'examen est confidentiel. ...").

18 The combined effect of subsections 38.04(4) and 38.12(2) is to deny the Toronto Star access to the section 38 application and all court records associated with the designated proceeding.

19 This proceeding has focused on the application and the hearing in the Federal Court. One would expect that the outcome of the constitutional challenge here would be the same for "appeals" in the Federal Court of Appeal and the Supreme Court of Canada, under sections 38.09 and 38.1 respectively, and for "reviews" under section 38.131. However, the parties' agreed statement of facts, their memoranda of law and their oral submissions focused only on applications and hearings in the Federal Court. In the absence of an evidentiary record for proceedings in the appellate courts, this decision will be limited to the Federal Court.

20 The impugned provisions as well as other relevant provisions of section 38 of the *Canada Evidence Act* are set out in full in Schedule A of these reasons. The plaintiffs are of the view that other provisions of section 38 may be unconstitutional. However, this proceeding is limited to the three impugned provisions.

21 In an earlier decision, I noted the difficulties presented by the scope of paragraph 38.02(1)(c), which prohibits disclosing the existence of a section 38 application: *Ottawa Citizen Group v. Canada (Attorney General of Canada)*, [2004] F.C.J. No. 1303, 2004 FC 1052 at paragraphs 35-40. I acknowledged the possibility of an exceptional case where the disclosure of the existence of a section 38 application may cause injury to legitimate government interests or perhaps even sensitive private interests. However, I added that the absence of judicial discretion in paragraph 38.02(1)(c) was, in my view, problematic. In reiterating my concern, I refer to paragraphs 38 and 40 of the decision:

> There may be an exceptional case where the secrecy envisaged in section 38.02 may be warranted. In the more usual situation, however, where secret information is in issue, the necessity of a section 38 proceeding is made known publicly before the person presiding over the tribunal or court hearing. The Federal Court is required by section 38 to keep secret a fact which has been referred publicly in the court or tribunal from which the proceeding emanates. It is unlikely that Parliament could have intended that the drafting of section 38 would result in such a consequence.
>
> [...]
>
> It is unusual that a party to the litigation should be the sole arbiter to authorize the disclosure of information which is or should be public. A court should be seen as having reasonable control over its proceedings in the situation I have just described.

22 The decision in this proceeding is premised on the fact that the existence of the designated proceeding has been made public. Until the constitutionality of the paragraph 38.02(1)(c) has been challenged and determined, these reasons are intended to apply only to those situations where

knowledge of the existence of the section 38 proceeding has been disclosed to the public.

The Issues

23 As set out in the parties' agreed statement of facts, this proceeding raises the following constitutional questions (at paragraph 22):

1. Does s. 38.04(4) of the *Canada Evidence Act* constitute an infringement of the Toronto Star's rights as guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*")? If so, is the infringement justified under s. 1 of the *Charter*?
2. Does the portion of s. 38.11(1) of the *Canada Evidence Act* which states that "a hearing under subsection 38.04(5) or an appeal or review of an order made under any of subsections 38.06(1) to (3) shall be heard in private" constitute an infringement of the Toronto Star's rights as guaranteed by s. 2(b) of the *Charter*. If so, is the infringement justified under s. 1 of the *Charter*?
3. Does the first sentence of s. 38.12(2) of the *Canada Evidence Act* constitute an infringement of the Toronto Star's rights as guaranteed by s. 2(b) of the *Charter*? If so, is the infringement justified under s. 1 of the *Charter*?

24 The Attorney General of Canada agrees with the plaintiffs that the impugned provisions violate the open court principle, a core democratic value inextricably linked to the fundamental freedoms of expression and of the media protected under section 2(b) of the *Canadian Charter of Rights and Freedoms*.

25 Accordingly, the issues to be decided in this proceeding include:

- Are the impugned provisions saved under section 1 of the *Charter*?
- If not, what is the appropriate constitutional remedy?

26 Put differently and in general terms, what is the justification for requiring closed hearings and maintaining the confidentiality of court documents where no secret information is disclosed? A review of the Federal Court's experience with section 38 may be useful.

27 An earlier version of section 38, which had been part of the *Canada Evidence Act* since 1982, also required that applications be heard in private. It is not apparent that this requirement was always respected where all parties were present and no secret information was being discussed: *Mulroney v. Canada (Attorney General)*, [1997] F.C.J. No. 1 (QL) (T.D.) at paragraph 12; *Moumdjian v. Canada (Security Intelligence Review Committee)*, [1995] F.C.J. No. 619 (QL) (T.D.) at paragraph 5.

28 Section 38 was substantially amended in the *Anti-Terrorism Act*, S.C. 2001, c. 41. Schedule B to these reasons lists the section 38 proceedings which have been publicly disclosed under the new provisions. Each has been case managed.

Proceedings under section 38 since the 2001 amendments

29 A section 38 application is to be heard by the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice. This provision has existed since 1982.

30 All hearings in a section 38 proceeding are closed to the public: subsection 38.11(1). Case management conferences are also conducted in private.

31 The exclusion of the public from all sessions of a section 38 proceeding is consistent with the secrecy envisaged by paragraph 38.02(1)(c), which prohibits the disclosure of "... the fact that an application is made to the Federal Court under subsection 38.04 ..." ("... le fait qu'une demande a été présentée à la Cour fédérale au titre de l'article 38.04 ...").

32 There are always two types of hearings in a section 38 proceeding: sessions at which all of the parties are present but which are nonetheless closed to the public (private sessions) and sessions which take place in the absence of one or more of the parties (*ex parte* sessions).

33 There is no secret information disclosed during the private sessions. The records available at the private sessions include the notice of application, the affidavits and the memoranda of law exchanged between the parties. None of these documents contains secret information. However, the combined effect of subsections 38.04(4) and 38.12(2) is to prevent the public from accessing and publicizing the contents of these documents.

34 *Ex parte* representations are available as of right to the Attorney General of Canada and with leave of the presiding judge to every other party: subsection 38.11(2). The constitutionality of the requirement that these *ex parte* sessions are closed to the public has not been challenged in this proceeding.

35 In every section 38 application, the Attorney General of Canada will make representations to the Court to confirm the prohibition of disclosure of the secret information in issue. Usually, the Attorney General of Canada will be the only party before the Court when these representations are made. However, if another party to the proceeding has possession of the same secret information in issue, it is possible for that party to be present when the *ex parte* submissions are made by the Attorney General of Canada.

36 The procedures followed in a typical section 38 proceeding are set out in some detail in the parties' agreed statement of facts, the relevant portions of which should be readily available on the public record:

5. The [Attorney General (A.G.)] advises that the procedure that is used in s. 38.04 *Canada Evidence Act* applications follows a number of customary steps, as follows.
6. First, following the issuance of a notice of application pursuant to s. 38.04, the A.G. files a motion for directions pursuant to paragraph 38.04(5)(a) of the *Canada Evidence Act*. In his motion material, the A.G. identifies all parties or witnesses whose interests he believes may be affected by the prohibition of disclosure of information, and may suggest which persons should be formally named as responding parties to the application. The A.G. requests that this portion of the motion for directions be adjudicated in writing.
7. After reading the A.G.'s motion material, the Federal Court will, pursuant to s. 38.04(5)(c) of the *Canada Evidence Act*, designate the responding parties to the application and order the A.G. to provide notice of the application to these persons by effecting service of the notice of application and motion for directions upon them.
8. The Federal Court will then convene a case conference with the parties to the application (i.e., the A.G. and the responding parties) to discuss the remaining issues raised by the A.G.'s motion for directions, including (1) whether it is necessary to hold a hearing with respect to the matter; (2) whether any other persons should be provided with notice of the hearing of the matter; and (3) whether the application should be specially managed with a formal schedule for the remaining procedural steps. These case conferences are confidential and are held in camera. The public is denied access to these case conferences and, generally speaking, only the parties to the application, their counsel, the presiding judge and designated Court staff are present.
9. Following adjudication of the motion for directions, a formal schedule is established to prepare the s. 38.04 *Canada Evidence Act* application for hearing. Like ordinary applications before the Federal Court, these schedules contemplate an exchange of affidavit evidence, cross-examinations on affidavits, the preparation of application records (including memoranda of fact and law) and an oral hearing before a designated applications judge. Unlike ordinary applications before the Federal Court, these schedules contemplate that portions of the affidavit evidence, application records and the oral hearings before a designated applications judge will be "*ex parte*" (i.e., only seen and heard by the A.G. and the Court), while others will be "private" (i.e., seen and heard by the parties and the Court, but not available to the public). Indeed, a typical s. 38.04 *Canada Evidence Act* application will have the following steps:

(a) the A.G.'s "private" affidavits are served on the responding party and filed with the Court;
(b) the responding party's "private" affidavits are served on the A.G. and filed with the Court;
(c) the A.G.'s "*ex parte*" affidavits are filed with the Court;
(d) cross-examinations on the parties' "private" affidavits take place out of court;
(e) the A.G.'s "private" application record is served on the responding party and filed with the Court;
(f) the A.G.'s "*ex parte*" application record is filed with the Court;
(g) the responding party's "private" application record is filed with the Court; and
(h) a hearing is convened at which there are both "private" sessions (at which all the parties are present but the public is excluded) and "*ex parte*" sessions (at which only the A.G. is present).

10. "Private" affidavits are affidavits prepared by a party to the application that are filed and served on the other parties and to which reference can be made at the portions of the hearings at which all parties are present (i.e., the "private" Court sessions). Such affidavits are, however, confidential by virtue of s. 38.12(2) and cannot be disclosed to the general public.
11. The A.G.'s position is that the "private" affidavits produced by him for the purposes of a s. 38.04 *Canada Evidence Act* application attempt to set out, in general terms, the factual and principled justification for protecting the information in issue from public disclosure, that is to say why the disclosure of the information would be injurious to international relations, national defence or national security. The A.G. advises that these "private" affidavits do not detail the information in issue (i.e., the information covered by the Notice), nor do they contain other specific facts that would themselves constitute "sensitive information" or "potentially injurious information". The A.G.'s stated purpose for filing and serving such "private" affidavits is to provide the responding parties seeking disclosure of the information in issue with as much factual material as possible so that they may understand why the A.G. is attempting to protect the information without compromising the information in issue or other sensitive/potentially injurious information regarding the need to protect the information in issue from disclosure.
12. "*Ex parte*" affidavits are affidavits that are filed by the A.G. and which are not served on the responding party. They are read only by the presiding judge and are only referred to at the *ex parte* portions of the hearings

where the A.G. is present and the responding party is excluded (i.e., the "*ex parte*" Court sessions) pursuant to s. 38.11(2) of the *Canada Evidence Act*.

13. The A.G.'s position is that the "*ex parte*" affidavits produced for the purposes of a s. 38.04 *Canada Evidence Act* application attempt to set out, in specific terms, the factual justification for protecting the information in issue from public disclosure, that is to say why the disclosure of the information would be injurious to international relations, national defence or national security. These affidavits also contain the information in issue that is covered by the Notice.
14. "Private" application records are filed and served on the other parties and reference can be made to these records at the "private" Court sessions. "*Ex parte*" application records filed by the A.G. are not served on the other parties, are read only by the presiding judge and are only referred to at the "*ex parte*" Court sessions pursuant to s. 38.11(2) of the *Canada Evidence Act*.
15. At the "private" Court sessions at which all parties to the application are present, argument is tendered with respect to, *inter alia*, (1) the potential relevance of the information in issue (if the relevance is not conceded by the A.G.), (2) whether disclosure of the information would be injurious to international relations, national defence or national security and (3) whether the public interest in disclosure outweighs in importance the public interest in non-disclosure. On the question of injury, such argument is presented in generalities by the A.G. because he does not wish to risk disclosure of the information in issue or risk compromising other sensitive/potentially injurious information.
16. At the "*ex parte*" Court sessions at which only the A.G. is present, the A.G. provides argument by reference to the "*ex parte*" affidavits with respect to whether disclosure of the information in issue would be injurious to international relations, national defence or national security. Counsel for the A.G. will be accompanied by the affiants who have sworn such affidavits so that they may be questioned by the presiding designated judge.

37 The agreed statement of facts does not deal with the right of the non-government party to seek leave to make *ex parte* representations. In the Court's experience to date, when *ex parte* representations are made by a party other than the Attorney General of Canada, only that party is present before the presiding judge. This may occur where the underlying proceeding is a criminal prosecution. Specifically, the accused may wish to make representations to the section 38 judge concerning the importance of disclosing the secret information to assist in defending the criminal charge. In such circumstances, the accused will prefer to make these submissions without disclosing to any other party the substance or detail of the defence in the criminal proceeding.

38 In addition, concerning paragraphs 6 and 7 of the agreed statement of facts, the order designating the respondents to the section 38 proceeding will often issue only after the motion for directions has been served on the potential interested parties, usually at the Court's request. This will occur particularly where these parties are aware that the Attorney General of Canada is in the process of filing the section 38 application. Paragraph 38.04(5)(a) requires the presiding judge to hear the representations of the Attorney General of Canada. There is no stipulation, however, that the identification of the interested parties must be done on an *ex parte* basis.

Analysis

A. *The Constitutionality of the Impugned Provisions*

39 As often repeated now by the Supreme Court of Canada, the open court principle is a cornerstone of our democracy enshrined in section 2(b) of the *Charter*: *Toronto Star Newspapers v. Ontario*, [2005] S.C.J. No. 41 at paragraph 1; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 at paragraph 23; *Ruby v. Canada (Solicitor General of Canada)*, [2002] 4 S.C.R. 3 at paragraph 53; *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at paragraph 23; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1339-40; and *Attorney General of Nova Scotia v. Macintyre*, [1982] 1 S.C.R. 175 at 187.

40 All parties agree that the impugned provisions of section 38 infringe section 2(b) of the *Charter*. However, the defendant (sometimes referred to in these reasons as the Attorney General of Canada) argues that these infringements constitute reasonable limits on the open court principle and are demonstrably justifiable in a free and democratic society.

41 The defendant bears the onus of establishing that the impugned provisions are saved by section 1 of the *Charter* in keeping with the justificatory test established in *R. v. Oakes*, [1986] 1 S.C.R. 103. In this proceeding, no section 1 affidavit evidence was filed.

42 The plaintiffs concede that preventing the inadvertent disclosure of the secret information is a sufficiently pressing and substantial legislative objective as to satisfy the first branch of the *Oakes* test.

43 Counsel for the Attorney General of Canada advanced the view that subsection 38.11(1) is saved by other provisions of section 38. More specifically, in his written submissions, counsel argued that subsection 38.04(5) confers upon the Federal Court the discretion to name the Toronto Star as a respondent to the application and the possibility of granting to the Toronto Star the same access to the Court records as it grants to Mr. Mohamed. Moreover, according to this view, the designated judge could order the Attorney General of Canada to notify the Toronto Star and grant to the Toronto Star the opportunity to make representations. With respect, this submission cannot be correct.

44 Pursuant to paragraph 38.04(5)(a), the judge shall hear the representations of the Attorney

General of Canada "concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject..." (emphasis added). Any such party or witness would then be designated as a respondent: paragraphs 6 and 7 of the agreed statement of facts.

45 The same statutory provision also mandates the judge to hear the submissions of the Attorney General of Canada "concerning the persons who should be given notice of any hearing of the matter".

46 Under paragraph 38.04(5)(c), the judge then determines who should be given notice of the hearing. This will usually be done on the basis of submissions from the Attorney General of Canada and any other party who has been identified as having an apparent legal interest. This paragraph also authorizes the judge to order the Attorney General of Canada to notify such persons and determine the content and form of the notice.

47 In my view, neither of these provisions allows the judge to designate the Toronto Star or any other member of the media as a respondent or a person to be given notice of the hearing.

48 As early as February 7, 2006, the parties in the designated proceeding and this Court were made aware of the Toronto Star's intention to challenge the constitutionality of those provisions which prohibited the media from accessing the private sessions. No one suggested during the designated proceeding that the Toronto Star could be named as a respondent or provided access to the private sessions through the notification process.

49 In any event, I do not understand the Toronto Star to be seeking the status of respondent or the right to file affidavits or memoranda of law. The Toronto Star is simply seeking to enforce the open court principle and to obtain access to the private sessions as a member of the media.

50 The media's concern in keeping the public informed about section 38 proceedings is not encompassed within the "interests" protected under subsection 38.04(5). Where an entity such as the Toronto Star wishes to exercise its "interests", in the legal sense of this term, it may seek to cause the disclosure of the information by initiating an application under paragraph 38.04(2)(c): for example, *Ottawa Citizen Group Inc. v. Canada (Attorney General of Canada)*, [2004] F.C.J. No. 1303, 2004 FC 1052 and [2006] F.C.J. No. 1969, 2006 FC 1552.

51 In addition, the Attorney General of Canada did not suggest a principled basis upon which the Court would be entitled to grant respondent status or access rights to the Toronto Star but not to the media at large. Again, I do not understand the defendant to be proposing that all members of the media be designated as respondents.

52 The position of the Attorney General of Canada was more nuanced during oral submissions. There, counsel focused less on characterizing the role of the Toronto Star as a respondent. The suggestion was that the Court had the discretion under paragraph 38.04(5)(c) to order that the

Toronto Star be given notice of the section 38 hearing and granted access to the proceeding, subject to a publication ban until the disposition of the matter.

53 The construction of paragraph 38.04(5)(c) advanced by the Attorney General of Canada functions as a minimal impairment argument. In effect, counsel for the government argues that the impugned provisions trench justifiably on the open court principle. In his view, paragraph 38.04(5)(c) may be interpreted as conferring upon the Court the discretion to allow the Toronto Star to access the private sessions and records subject to a publication ban lasting until a final order, disposing of the application, is rendered pursuant to section 38.06.

54 The interpretation proffered by the Attorney General of Canada does not give full effect to the open court principle. Public access to judicial proceedings cannot depend on fortuitous circumstances which lead one or more members of the media to seek access under paragraph 38.04(5)(c). Nor can open courts depend on one of the parties to the litigation making submissions to the Court that the media be provided access.

55 Counsel for the Attorney General of Canada acknowledged that the discretion available to the Court according to his interpretation of paragraph 38.04(5)(c) was not envisaged by Parliament. I agree. When read in their entire context and according to their ordinary sense, keeping in mind the objectives of section 38, the language of subparagraphs 38.04(5)(c)(i), (ii), and (iii) cannot be interpreted as a mechanism to apply the open court principle: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

56 In any event, and I do not decide the issue on this ground, I am not convinced that the interpretation of the Attorney General of Canada is consistent with the prohibition against disclosure of the existence of the file in paragraph 38.02(1)(c).

57 More importantly, even if this submission of the Attorney General of Canada were accepted, granting access to one media outlet falls well short of justifying the infringement of the open court principle and the presumptive openness of judicial proceedings.

58 In particular, counsel for the Attorney General of Canada contended that media access to the private sessions would necessarily be coupled with a publication ban. According to counsel, the Court has the authority to allow the Toronto Star and other media to attend the private sessions, but cannot authorize the publication of any news reports about the hearing, at least until the matter has been completed.

59 In *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, which also involved national security considerations, the Supreme Court of Canada rejected a similar argument for granting media access to a hearing subject to a publication ban (at paragraph 49):

> [W]e would not endorse the suggestion made by the Vancouver Sun that some members of its Editorial Board be allowed to attend the hearings and have access

> to the materials but be subject to an undertaking of confidentiality. It is difficult again to understand how the public good is better served by the qualified participation of professionals who cannot discharge fully their publicly entrusted mandate.

60 It bears repeating that there is no secret information disclosed in private sessions and materials. The open court principle requires media access and timely publication. Counsel has not identified a public interest to be served by postponing publication of what occurs in private sessions until the disposition of the section 38 hearing. To support his position that publication should be postponed, counsel for the government relied upon the suggestion in *Vancouver Sun (Re)* (at paragraph 58) that the decision to publicly release sealed information should take place at the end of the judicial investigative hearing in a criminal matter. However, this conclusion was not intended for the circumstances of section 38 proceedings.

61 In defending the constitutionality of the impugned provisions, the Attorney General of Canada advances an interpretation of the section 38 scheme that would entitle members of the media to be designated as interested parties or provided access to the private sessions subject to a publication ban. In the end, the best one can say about this position is that "necessity is usually the fuel of ingenuity", to take the phrase used by counsel. In this case, however, the inventive construction put forward to save the impugned provisions does not do sufficient justice to the open court principle.

62 In *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, the Supreme Court of Canada considered the constitutionality of provisions similar to those challenged in this proceeding.

63 *Ruby* involved a narrow challenge to the constitutionality of mandatory procedural requirements set out in paragraph 51(2)(a) and subsection 51(3) of the *Privacy Act*, R.S.C. 1985, c. P-21:

> 51. (2) An application referred to in subsection (1) or an appeal brought in respect of such application shall (*a*) be heard *in camera*; ...
> (3) During the hearing of an application referred to in subsection (1) ..., the head of the government institution concerned shall, on the request of the head of the institution, be given the opportunity to make representations *ex parte*.

[Emphasis added]

* * *

> 51. (2) Les recours visés au paragraphe (1) font, en premier ressort ou en appel, l'objet d'une audition à huis clos; ...
> (3) Le responsable de l'institution fédérale concernée a, au cours des auditions en première instance ou en appel et sur demande, le droit de présenter des arguments en l'absence d'une autre partie.

64 Section 51 of the *Privacy Act* establishes the procedure governing the conduct of judicial review application hearings where a government institution refuses an individual's request for access to personal information in order to protect government interests similar to those involved in section 38 proceedings.

65 Paragraph 51(2)(a) and subsection 51(3) require the reviewing court to hold the application hearing in private and to accept *ex parte* submissions at the request of the government institution refusing disclosure.

66 As in these proceedings, the question before the Supreme Court of Canada was whether the impugned provisions trenched unjustifiably on the open court principle.

67 The Supreme Court affirmed the validity of the statutory requirement that government submissions concerning secret information be received *ex parte* and in private. In view of this decision, the plaintiffs in this case, as noted earlier, did not challenge the constitutionality of the analogous requirement in subsection 38.11(2).

68 Writing for the unanimous Court, Justice Louise Arbour found that paragraph 51(2)(a) failed the *Oakes* test at the minimal impairment branch. In particular, Justice Arbour concluded that the mandatory requirement to exclude the public from portions of the review hearing when there existed no risk that national security information or foreign confidences could be disclosed was overbroad: A[S]ection [51(2)(a)] is overbroad in closing the court to the public even where no concern exists to justify such a departure from the general principle of open courts (*Ruby* at paragraph 59, emphasis added).

69 Justice Arbour's characterization of the overbroad scope of paragraph 51(2)(a) of the *Privacy Act* applies with equal force to the analogous procedural requirement in subsection 38.11(1), which prohibits public access to the private sessions of section 38 proceedings.

70 In my view, the impugned provisions do more than is minimally required to safeguard the secret information and therefore trench unduly on the open court principle. Accordingly, I conclude that these provisions fail at the minimal impairment branch of the *Oakes* test and cannot be saved under section 1 of the *Charter*.

71 On the basis of the same principles enunciated in *Ruby*, I find that subsection 38.11(1) is overbroad in closing the court to the public even where no secret information is at risk to justify a departure from the open court principle.

72 Similarly, subsections 38.04(4) and 38.12(2) are overbroad in subjecting all court records associated with the private sessions to mandatory confidentiality requirements where no secret information is at risk to justify a departure from the general principle of open courts. My view in this regard is consistent with the acknowledgement by all parties that the outcome concerning the constitutionality of all three impugned provisions should be the same.

B. *The Appropriate Constitutional Remedy*

73 During the hearing to canvass the parties' views on remedies, the Attorney General of Canada argued that, in the event this Court concluded the impugned provisions constituted an unjustified infringement of the open court principle, the appropriate remedy would be to strike down these provisions. This submission varied the original suggestion by counsel for the government that reading down was the appropriate remedial solution.

74 In arguing that the appropriate remedy is to strike down the impugned provisions, the Attorney General of Canada purported to rely on the Supreme Court's decision in *Ruby*.

75 First, the impugned provisions in *Ruby* were not struck down. Justice Arbour relied on reading down as a constitutional remedy in rendering section 51 of the *Privacy Act* compliant with section 2(b) of the *Charter*.

76 It had been the practice of counsel, on consent, to conduct *Privacy Act* hearings in public where no secret information could be disclosed. The Supreme Court disapproved of this practice. For Justice Arbour, it was not open to the parties to bypass Parliament's unambiguous language clearly intended to exclude the public from section 51 hearings.

77 I understand Justice Arbour to have relied on reading down as the appropriate constitutional remedy to cure the overbroad scope of the mandatory *in camera* hearing required by paragraph 51(2)(a). She accommodated the constitutional imperative that private sessions, where no secret information is disclosed, be open to the public by invoking the reading down mechanism (at paragraphs 58 and 60):

> Unless the mandatory requirement is found to be unconstitutional and the section is "read down" as a constitutional remedy, it cannot otherwise be interpreted to bypass its mandatory nature.
>
> [...]
>
> The appropriate remedy is therefore to read down s. 51(2)(*a*) so that it applies only to the *ex parte* submissions mandated by s. 51(3). A reviewing court retains the discretion, pursuant to s. 46, to conduct the remainder of the hearing or any portion thereof, either in public, or *in camera*, or *in camera* and *ex parte*.
>
> [Emphasis added].

78 Second, contrary to what was argued by the Attorney General of Canada, the provisions of

section 38 provide for the flexibility found in section 46 of the *Privacy Act*.

79 In particular, subsection 38.12(1) confers a broad discretion upon the presiding judge to make any order to protect the confidentiality of the information to which the hearing relates. In addition, subsection 38.04(4) confers an analogous discretion upon the Chief Administrator of the Courts Administration Service to adopt any appropriate measure to safeguard the confidentiality of section 38 applications.

80 Subsections 38.04(4) and 38.12(1) reflect Parliament's intent to afford the designated judge the discretion to adopt any confidentiality measures required to safeguard secret information. In the rare, indeed unlikely, event that the circumstances surrounding a section 38 proceeding require that the public be prohibited from accessing even the private sessions and related documents, the judge has the discretionary authority, analogous to that provided for in section 46 of the *Privacy Act*, capable of safeguarding the confidentiality of any information when required.

81 The government argued that Rules 26, 29, 151 of the *Federal Courts Rules* concerning the inspection of court files, *in camera* hearings, and confidentiality orders provide the Court discretionary authority to protect secret information. In my view, this discretionary authority is conferred upon the Court by section 38 and I do not concede that recourse to the *Federal Courts Rules* is necessary. If I am wrong, however, these Rules do afford the Court a further flexibility to adopt any measures to prevent the inappropriate disclosure of secret information.

82 Put simply, the approach to reading down adopted in *Ruby* is the appropriate manner in which to remedy the constitutional defects in the impugned provisions of section 38.

83 Concerning the mandatory exclusion of the public from the private sessions, I find that the structure of subsections 38.11(1) and 38.11(2) mirrors that of paragraph 51(2)(a) and subsection 51(3) of the *Privacy Act*. Accordingly, subsection 38.11(1) ought to be read down as a constitutional remedy to apply only to the *ex parte* representations provided for in subsection 38.11(2).

84 As in *Ruby*, the effect of this decision will be that private sessions, as defined in these reasons, are presumptively open to the public. To repeat, in the exceptional event where the exclusion of the public may be justified even when all parties are present, subsections 38.04(4) and 38.12(1) provide the Court with the discretionary authority to adopt such measures as are warranted by the circumstances to protect the confidentiality of secret information.

85 The "rare, indeed unlikely, event" I have referred to in paragraph 80 is to be understood in the context of the premise of this decision, that the existence of the designated proceeding has been made public.

86 The mandatory confidentiality requirements in subsections 38.04(4) and 38.12(2) should also be read down, as a constitutional remedy, to apply only to the *ex parte* representations provided for

in subsection 38.11(2). As a result of this decision, all court records accessible to the non-government party are presumptively available to the public. Again, subsections 38.04(4) and 38.12(2) provide the discretion, if ever necessary, to maintain confidentiality with respect to any record available to all parties.

87 The reading down I am adopting will exclude the public from all *ex parte* representations, those made by the Attorney General of Canada as of right and those made by a non-government party with leave of the Court. This conclusion masks an outstanding legal issue not addressed by the parties.

88 The debate in this case centered on national security considerations, not on the interests which might be asserted by a non-government party during *ex parte* representations. The focus was on sessions where all parties were present and on *ex parte* sessions granted as of right to the Attorney General of Canada. There was no discussion of the constitutionality of closed hearings to receive the *ex parte* representations of a non-government party.

89 In its written submissions, the Toronto Star acknowledged that it was not seeking access to *ex parte* sessions on the basis of the decision in *Ruby*. However, under subsection 38.11(2), the non-government party may also seek to make *ex parte* representations. This is an additional legal consideration which was not at issue in *Ruby*. This distinction was not referred to in the agreed statement of facts, nor was it the subject of any submissions in this proceeding.

90 In the absence of both an evidentiary record and submissions of counsel, I have chosen to leave the matter open and to preserve the *status quo* concerning the mandatory exclusion of the public where the non-government party is permitted to make *ex parte* representations. In this decision, the impugned provisions will be read down so as to apply to all *ex parte* representations envisaged in subsection 38.11(2).

Conclusion

91 For the foregoing reasons, the constitutional questions raised by this motion are answered as follows:

1. Do subsections 38.04(4), 38.11(1), and 38.12(2) of the *Canada Evidence Act* constitute infringements of the Toronto Star's rights as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*?

   Answer: Yes, as was conceded by the defendant.

2. Are the infringements constituted by subsections 38.04(4), 38.11(1), and 38.12(2) *Canada Evidence Act* justified under section 1 of the *Canadian*

Charter of Rights and Freedoms?

Answer: No. The impugned provisions fail the *Oakes* test at the minimum impairment branch.

The words in subsection 38.04(4), "An application under this section is confidential. ..." ("Toute demande présentée en application du présent article est confidentielle. ..."), are read down, as a constitutional remedy, to apply only to the *ex parte* representations provided for in subsection 38.11(2).

The words in subsection 38.11(1), "A hearing under subsection 38.04(5) ... shall be heard in private..." ("Les audiences prévues au paragraphe 38.04(5) ... sont tenues à huis clos..."), are read down, as a constitutional remedy, to apply only to the *ex parte* representations provided for in subsection 38.11(2).

The words in subsection 38.12(2), "The court records relating to the hearing... are confidential. ..." ("Le dossier ayant trait à l'audience... est confidential. ..."), are read down, as a constitutional remedy, to apply only to the *ex parte* representations provided for in subsection 38.11(2).

92 The defendant shall pay to the plaintiff Toronto Star Newspapers Limited the costs of this motion. There will be no order as to costs concerning the plaintiff Kassim Mohamed.

LUTFY C.J.

* * * * *

Schedule A: Excerpts from Section 38 of the *Canada Evidence Act*

International Relations and National Defence and National Security

...

38.01 (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the

participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act. ...

38.02(1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding

(*a*) information about which notice is given under any of subsections 38.01(1) to (4);

(*b*) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);

(*c*) the fact that an application is made to the Federal Court under section 38.04 or that an appeal or review of an order made under any of

subsections 38.06(1) to (3) in connection with the application is instituted; or

(*d*) the fact that an agreement is entered into under section 38.031 or subsection 38.04(6). ...

38.03 (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

...

(3) The Attorney General of Canada shall, within 10 days after the day on which he or she first receives a notice about information under any of subsections 38.01(1) to (4), notify in writing every person who provided notice under section 38.01 about that information of his or her decision with respect to disclosure of the information.

38.031 (1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in paragraphs 38.02(1)(*b*) to (*d*) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under paragraph 38.04(2)(*c*), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions. ...

38.04 (2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under section 38.031, authorizes the disclosure of only part of the information or disclosure subject to any conditions,

...

(*c*) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information. ...

(4) An application under this section is confidential. Subject to section 38.12, the Chief Administrator of the Courts Administration Service may take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

(5) As soon as the Federal Court is seized of an application under this section, the judge

(*a*) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;

(*b*) shall decide whether it is necessary to hold any hearing of the matter;

(*c*) if he or she decides that a hearing should be held, shall

(i) determine who should be given notice of the hearing,
(ii) order the Attorney General of Canada to notify those persons, and
(iii) determine the content and form of the notice; and

(*d*) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations. ...

38.06 (1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information.

(2) If the judge concludes that the disclosure of the information would be injurious to

international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure. ...

38.09 (1) An order made under any of subsections 38.06(1) to (3) may be appealed to the Federal Court of Appeal.

(2) An appeal shall be brought within 10 days after the day on which the order is made or within any further time that the Court considers appropriate in the circumstances.

38.1 Notwithstanding any other Act of Parliament,

(*a*) an application for leave to appeal to the Supreme Court of Canada from a judgment made on appeal shall be made within 10 days after the day on which the judgment appealed from is made or within any further time that the Supreme Court of Canada considers appropriate in the circumstances; and

(*b*) if leave to appeal is granted, the appeal shall be brought in the manner set out in subsection 60(1) of the *Supreme Court Act* but within the time specified by the Supreme Court of Canada.

38.11 (1) A hearing under subsection 38.04(5) or an appeal or review of an order made under any of subsections 38.06(1) to (3) shall be heard in private and, at the request of either the Attorney General of Canada or, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, shall be heard in the National Capital Region, as described in the schedule to the *National Capital Act*.

(2) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may give any person who makes representations under paragraph 38.04(5)(*d*), and shall give the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, the Minister of National Defence, the opportunity to make representations *ex parte*.

38.12 (1) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may make any order that the judge or the court considers appropriate in the circumstances to protect the confidentiality of the information to which the hearing, appeal or review relates.

(2) The court records relating to the hearing, appeal or review are confidential. The judge or the court may order that the records be sealed and kept in a location to which the public has no access.

38.13 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Security of Information Act* or for the purpose of protecting national defence or national security. ...

38.131 (1) A party to the proceeding referred to in section 38.13 may apply to the Federal Court of Appeal for an order varying or cancelling a certificate issued under that section on the grounds referred to in subsection (8) or (9), as the case may be. ...

* * *

Relations internationales et défense et sécurité nationales

...

38.01 (1) Tout participant qui, dans le cadre d'une instance, est tenu de divulguer ou prévoit de divulguer ou de faire divulguer des renseignements dont il croit qu'il s'agit de renseignements sensibles ou de renseignements potentiellement

préjudiciables est tenu d'aviser par écrit, dès que possible, le procureur général du Canada de la possibilité de divulgation et de préciser dans l'avis la nature, la date et le lieu de l'instance.

(2) Tout participant qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables sont sur le point d'être divulgués par lui ou par une autre personne au cours d'une instance est tenu de soulever la question devant la personne qui préside l'instance et d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (1). Le cas échéant, la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi.

(3) Le fonctionnaire C à l'exclusion d'un participant C qui croit que peuvent être divulgués dans le cadre d'une instance des renseignements sensibles ou des renseignements potentiellement préjudiciables peut aviser par écrit le procureur général du Canada de la possibilité de divulgation; le cas échéant, l'avis précise la nature, la date et le lieu de l'instance.

(4) Le fonctionnaire C à l'exclusion d'un participant C qui croit que des renseignements sensibles ou des renseignements potentiellement préjudiciables sont sur le point d'être divulgués au cours d'une instance peut soulever la question devant la personne qui préside l'instance; le cas échéant, il est tenu d'aviser par écrit le procureur général du Canada de la question dès que possible, que ces renseignements aient fait ou non l'objet de l'avis prévu au paragraphe (3) et la personne qui préside l'instance veille à ce que les renseignements ne soient pas divulgués, sauf en conformité avec la présente loi. ...

38.02 (1) Sous réserve du paragraphe 38.01(6), nul ne peut divulguer, dans le cadre d'une instance :

a) les renseignements qui font l'objet d'un avis donné au titre de l'un des paragraphes 38.01(1) à (4);

b) le fait qu'un avis est donné au procureur général du Canada au titre de l'un des paragraphes 38.01(1) à (4), ou à ce dernier et au ministre de la Défense nationale au titre du paragraphe 38.01(5);

c) le fait qu'une demande a été présentée à la Cour fédérale au titre de

l'article 38.04, qu'il a été interjeté appel d'une ordonnance rendue au titre de l'un des paragraphes 38.06(1) à (3) relativement à une telle demande ou qu'une telle ordonnance a été renvoyée pour examen;

d) le fait qu'un accord a été conclu au titre de l'article 38.031 ou du paragraphe 38.04(6). ...

38.03 (1) Le procureur général du Canada peut, à tout moment, autoriser la divulgation de tout ou partie des renseignements ou des faits dont la divulgation est interdite par le paragraphe 38.02(1) et assortir son autorisation des conditions qu'il estime indiquées.

...

(3) Dans les dix jours suivant la réception du premier avis donné au titre de l'un des paragraphes 38.01(1) à (4) relativement à des renseignements donnés, le procureur général du Canada notifie par écrit sa décision relative à la divulgation de ces renseignements à toutes les personnes qui ont donné un tel avis.

38.031 (1) Le procureur général du Canada et la personne ayant donné l'avis prévu aux paragraphes 38.01(1) ou (2) qui n'a pas l'obligation de divulguer des renseignements dans le cadre d'une instance, mais veut divulguer ou faire divulguer les renseignements qui ont fait l'objet de l'avis ou les faits visés aux alinéas 38.02(1) *b*) à *d*), peuvent, avant que cette personne présente une demande à la Cour fédérale au titre de l'alinéa 38.04(2) *c*), conclure un accord prévoyant la divulgation d'une partie des renseignements ou des faits ou leur divulgation assortie de conditions. ...

38.04 (2) Si, en ce qui concerne des renseignements à l'égard desquels il a reçu un avis au titre de l'un des paragraphes 38.01(1) à (4), le procureur général du Canada n'a pas notifié sa décision à l'auteur de l'avis en conformité avec le paragraphe 38.03(3) ou, sauf par un accord conclu au titre de l'article 38.031, il a autorisé la divulgation d'une partie des renseignements ou a assorti de conditions son autorisation de divulgation :

...

c) la personne qui n'a pas l'obligation de divulguer des renseignements dans le cadre d'une instance, mais qui veut en divulguer ou en faire divulguer, peut demander à la Cour fédérale de rendre une ordonnance concernant la divulgation des renseignements. ...

(4) Toute demande présentée en application du présent article est confidentielle. Sous réserve de l'article 38.12, l'administrateur en chef du Service administratif des tribunaux peut prendre les mesures qu'il estime indiquées en vue d'assurer la confidentialité de la demande et des renseignements sur lesquels elle porte.

(5) Dès que la Cour fédérale est saisie d'une demande présentée au titre du présent article, le juge :

(a) entend les observations du procureur général du Canada C et du ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale* C sur l'identité des parties ou des témoins dont les intérêts sont touchés par l'interdiction de divulgation ou les conditions dont l'autorisation de divulgation est assortie et sur les personnes qui devraient être avisées de la tenue d'une audience;

(*b*) décide s'il est nécessaire de tenir une audience;

(c) s'il estime qu'une audience est nécessaire :

(i) spécifie les personnes qui devraient en être avisées,
(ii) ordonne au procureur général du Canada de les aviser,
(iii) détermine le contenu et les modalités de l'avis;

(d) s'il l'estime indiqué en l'espèce, peut donner à quiconque la possibilité de présenter des observations. ...

38.06 (1) Le juge peut rendre une ordonnance autorisant la divulgation des renseignements, sauf s'il conclut qu'elle porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

(2) Si le juge conclut que la divulgation des renseignements porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

(3) Dans le cas où le juge n'autorise pas la divulgation au titre des paragraphes (1) ou (2), il rend une ordonnance confirmant l'interdiction de divulgation. ...

38.09 (1) Il peut être interjeté appel d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) devant la Cour d'appel fédérale.

(2) Le délai dans lequel l'appel peut être interjeté est de dix jours suivant la date de l'ordonnance frappée d'appel, mais la Cour d'appel fédérale peut le proroger si elle l'estime indiqué en l'espèce.

38.1 Malgré toute autre loi fédérale :

a) le délai de demande d'autorisation d'en appeler à la Cour suprême du Canada est de dix jours suivant le jugement frappé d'appel, mais ce tribunal peut proroger le délai s'il l'estime indiqué en l'espèce;

b) dans les cas où l'autorisation est accordée, l'appel est interjeté conformément au paragraphe 60(1) de la *Loi sur la Cour suprême*, mais le délai qui s'applique est celui qu'a fixé la Cour suprême du Canada.

38.11 (1) Les audiences prévues au paragraphe 38.04(5) et l'audition de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) sont tenues à huis clos et, à la demande soit du procureur général du Canada, soit du ministre de la Défense nationale dans le cas des instances engagées sous le régime de la partie III de la *Loi sur la défense nationale*, elles ont lieu dans la région de la capitale nationale définie à l'annexe de la *Loi sur la capitale nationale*.

(2) Le juge saisi d'une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) donne au procureur général du Canada C et au ministre de la Défense nationale dans le cas d'une instance engagée sous le régime de la partie III de la *Loi sur la défense nationale* C la possibilité de présenter ses observations en l'absence d'autres parties. Il peut en faire de même pour les personnes qu'il entend en application de l'alinéa 38.04(5)*d*).

38.12 (1) Le juge saisi d'une affaire au titre du paragraphe 38.04(5) ou le tribunal saisi de l'appel ou de l'examen d'une ordonnance rendue en application de l'un des paragraphes 38.06(1) à (3) peut rendre toute ordonnance qu'il estime indiquée en l'espèce en vue de protéger la confidentialité des renseignements sur lesquels porte l'audience, l'appel ou l'examen.

(2) Le dossier ayant trait à l'audience, à l'appel ou à l'examen est confidentiel. Le juge ou le tribunal saisi peut ordonner qu'il soit placé sous scellé et gardé dans un lieu interdit au public.

38.13 (1) Le procureur général du Canada peut délivrer personnellement un certificat interdisant la divulgation de renseignements dans le cadre d'une instance dans le but de protéger soit des renseignements obtenus à titre confidentiel d'une entité étrangère C au sens du paragraphe 2(1) de la *Loi sur la protection de l'information* C ou qui concernent une telle entité, soit la défense ou la sécurité nationales. ...

38.131 (1) Toute partie à l'instance visée à l'article 38.13 peut demander à la Cour d'appel fédérale de rendre une ordonnance modifiant ou annulant un certificat délivré au titre de cet article pour les motifs mentionnés aux paragraphes (8) ou (9), selon le cas. ...

* * *

Schedule B: List of Section 38 Applications Filed in Federal Court

Since the coming into force of the *Anti-Terrorism Act*, S.C. 2001, c. 41 on December 24, 2001, fourteen (14) section 38 applications have been publicly

disclosed. These are:

- *Ribic v. Canada*, court file DES-7-01: [2002] F.C.J. No. 384, 2002 FCT 290.

  This file, commenced on December 10, 2001, was decided under section 38 as amended by the *Anti-Terrorism Act*.

- *Canada (Attorney General) v. Ribic*, court file DES-1-02: [2002] F.C.J. No. 1186, 2002 FCT 839.
- *Canada (Attorney General) v. Ribic*, court file DES-2-02: [2002] F.C.J. No. 1835, 2002 FCT 1044.
- *Ribic v. Canada (Attorney General)*, court file DES-3-02: [2003] F.C.J. No. 1965, 2003 FCT 10, aff'd [2003] F.C.J. No. 1964, 2003 FCA 246.
- *Canada (Attorney General) v. Ribic*, court file DES-5-02: [2003] F.C.J. No. 1966, 2003 FCT 43, aff'd [2003] F.c.J. No. 1964, 2003 FCA 246.
- *Canada (Attorney General) v. Kempo*, court file DES-1-03: notice of discontinuance filed on October 27, 2005.
- *Canada (Attorney General) v. Ouzghar*, court file DES-4-03: notice of discontinuance filed on July 20, 2005.
- *Canada (Attorney General) v. Brad Kempo*, court file DES-5-03: [2004] F.C.J. No. 2196, 2004 FC 1678.
- *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, court file DES-1-04: [2004] F.C.J. No. 1303, 2004 FC 1052.
- *Canadian Broadcasting Corporation v. Canada (Attorney General)*, court file DES-2-04: notice of discontinuance filed on March 31, 2004.
- *Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, court file DES-4-04: notice of discontinuance filed on April 4, 2004.
- *Ribic v. Canada*, court file DES-1-05: adjourned *sine die* on June 3, 2005.
- *Canada (Attorney General) v. Mohamed*, court file DES-1-06.
- *Canada (Attorney General) v. Khawaja*, court file DES-2-06.
- *Canada (Attorney General) v. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*, court file DES-4-06.

cp/e/qlaim/qlcem/qltxp