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 / MOVING PARTY
MOTION RECORD

(pursuant to Rules 91, 94, 96, and 97 of the *Federal Courts Rules*)

Dated: November 14, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant / Moving Party

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
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AND TO: **OFFICE OF THE PRIVACY COMMISSIONER OF CANADA**
30 Victoria Street
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Privacy Commissioner of Canada

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NOTICE OF MOTION

TAKE NOTICE THAT THE APPLICANT will make a motion in writing to the Court pursuant to Rule 369 of the *Federal Courts Rules*, S.O.R./98-106.

THE MOTION IS FOR:

1. An order pursuant to Rule 97(d) of the *Federal Courts Rules*, S.O.R./98-106, dismissing the motion of the Privacy Commissioner of Canada for leave to intervene.

2. Alternatively, an order pursuant to Rule 97(c) of the *Federal Courts Rules*, S.O.R./98-106, striking out the affidavit of Ms. Patricia Kosseim, sworn on October 14, 2014.

3. Alternatively, an order pursuant to Rules 91, 94, 96, and 97 of the *Federal Courts Rules*, S.O.R./98-106, requiring Ms. Kosseim to re-attend at her own expense or the expense of the Privacy Commissioner of Canada, for cross-examination on her affidavit, sworn on October 14, 2014, and at the said re-attendance:

(a) provide proper, non-evasive answers to questions 53-54 and 60-61, and any follow-up questions;

(b) answer questions 16-19, 50, 52, 56, and 67, and any follow-up questions; and

(c) produce all communications in relation to the present proceeding between persons at the Office of the Privacy Commissioner of Canada and persons outside the Office, and answer questions in relation to them, including any follow-up questions.

4. An order setting a schedule for the remaining steps in the Commissioner's motion for leave to intervene, and permitting the Applicant 10 days from the receipt of the transcript of Ms. Kosseim's re-attendance to serve and file his responding motion record.

5. The costs of the present motion payable by Ms. Kosseim and the Privacy Commissioner of Canada forthwith and in any event of the cause.

6. Such further and other relief or directions as the Moving Party may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. On April 22, 2014, the Applicant , Dr. Gábor Lukács, filed an application for judicial review with the Federal Court of Appeal 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.

2. On October 17, 2014, the Privacy Commissioner of Canada ("Commissioner") served the Applicant with a motion pursuant to Rule 109 of the *Federal Courts Rules* for leave to intervene in the present application. The Commissioner's motion is supported by the affidavit of Ms. Patricia Kosseim, sworn on October 14, 2014.

3. On October 17, 2014, the Applicant served a Direction to Attend requiring Ms. Kosseim to attend for cross-examination on October 23, 2014 and requiring the production of:

   (1) all communications in relation to the present proceeding between persons at the Office of the Privacy Commissioner of Canada and persons outside the Office; and

   (2) summaries of complaints referenced in paragraph 11 of her affi-

davit and the findings of the Privacy Commissioner in relation to these complaints.

4. On October 22, 2014, Ms. Jennifer Seligy, counsel for the Commissioner, advised the Applicant that no documents responding to item (1) of the Direction to the Attend would be produced. Ms. Seligy also turned down the Applicant's offer to adjourn the cross-examination to allow the Commissioner to bring a motion for relief from production, pursuant to Rule 94(2) of the *Federal Courts Rules*.

5. On October 22, 2014, the Applicant warned Ms. Seligy that should Ms. Kosseim fail to produce all documents as directed, the cross-examination would be adjourned pursuant to Rule 96(2), and the Applicant would be seeking the reliefs sought in the present motion.

6. On October 23, 2014, at the cross-examination of Ms. Kosseim:

   (a) Ms. Kosseim provided evasive answers to questions 53-54 and 60-61 concerning the intended submissions of the Commissioner and how they would differ from the Agency's submissions;

   (b) counsel for the Commission objected to and/or Ms. Kosseim refused to answer questions 16-19, 50, 52, 56, and 67; and

   (c) Ms. Kosseim failed to produce documents as direct.

   These left the Applicant no choice but to adjourn the cross-examination of Ms. Kosseim pursuant to Rule 96(2) of the *Federal Courts Rules*.

7. On November 10, 2014, the Applicant provided counsel for the Commissioner with a copy of the transcript of the October 23, 2014 cross-examination of Ms. Kosseim, and demanded answers to the outstanding questions and productions.

8. On November 12, 2014, counsel for the Commissioner reconfirmed the positions she had taken earlier with respect to the outstanding questions and productions.

Questions 53-54, 56, 60-61, 67: the intended submissions of the Commissioner

9. How a proposed intervener intends to participate in the proceeding and how that participation will assist the Court are fundamental considerations on a motion for leave to intervene (*Pictou Landing Band Council v. Canada (Attorney General)*, 2014 FCA 21, para. 11; *Canadian Airlines International Ltd. v. Canada (Human Rights Commission) (F.C.A.)*, [2010] 1 F.C.R. 226, para. 8).

10. This fundamental factor cannot be assessed without having an indication of the submissions the Commissioner intends to make, and contrasting those with the positions taken by the parties (*Canada (Attorney General) v. Sasvari*, 2004 FC 1650, para. 11).

11. Counsel for the Commissioner frustrated the efforts of the Applicant to elicit direct answers to questions 53-54 and 60-61 by rephrasing them, and she explicitly endorsed the evasive answers of Ms. Kosseim to these questions (p. 19, l. 1-5 of the transcript):

> S. SELIGY: Again, the answer has been provided and I am not clear on the relevance of this question. Ms. Kosseim is not here to speak to the legal arguments that the Commissioner will be making beyond what is in the Affidavit and the motion.
>
> [Emphasis added.]

12. The conduct of Ms. Kosseim and of counsel for the Commissioner in relation to these fundamental questions calls for the most drastic remedies available under Rule 97: dismissal of the Commissioner's motion or the striking out of the affidavit of Ms. Kosseim.

Questions 16-19: Timing of the Commissioner's motion

13. A proposed intervener has a duty to seek leave to intervene at the earliest possible opportunity (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 84, para. 4; *Canada (Attorney General) v. Siemens Enterprises Communications*, 2011 FCA 250, para. 5).

14. In the present case, the Commissioner's motion for leave to intervene was brought nearly six months after the application was commenced.

15. Questions 16-19 and documents responding to item (1) of the Direction to Attend are relevant, because they are likely to assist the Court in assessing when the Commissioner learned about the present proceeding, and whether the motion for leave to intervene was brought in a timely manner.

Questions 50 and 52: collateral attack

16. Seeking an intervener status is not a mechanism to allow a person to correct their failure to protect their position in a timely basis (*Canada (Attorney General) v. Siemens Enterprises Communications*, 2011 FCA 250, para. 4).

17. Thus, questions 50 and 52 and follow-up questions to them, which are aimed at whether the Commissioner is intending to use the present proceeding to launch a collateral attack against certain provisions of the General Rules or the Dispute Rules of the Agency, are relevant to whether leave to intervene should be refused.

Statutes and regulations relied on

18. Rules 8, 91, 94, 96, 97, 109, and 369 of the *Federal Courts Rules*, S.O.R./98-106.

19. Such further and other grounds as the Moving Party may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Affidavit of Dr. Gábor Lukács, affirmed on November 12, 2014.

2. Transcript of cross-examination of Ms. Kosseim on October 23, 2014 on her affidavit sworn on October 14, 2014.

3. Such further and additional materials as the Moving Party may advise and this Honourable Court may allow.

November 14, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

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Applicant / **Moving Party**

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Privacy Commissioner of Canada

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: November 12, 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. On April 22, 2014, I filed an application for judicial review with the Federal Court of Appeal in respect to:

   (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 me to view unredacted documents in adjudicative File No. M4120-3/13-05726 of the Agency, even though no confidentiality order had been sought or made in that file.

   A copy of the Notice of Application is attached and marked as Exhibit "A".

2. On October 17, 2014, I was served with the motion record of the Privacy Commissioner of Canada (the "Commissioner") pursuant to Rule 109 of the *Federal Courts Rules* seeking leave to intervene in the present application. A copy of the Commissioner's notice of motion is attached and marked as Exhibit "B".

3. The Commissioner's motion is supported by the affidavit of Ms. Patricia Kosseim, sworn on October 14, 2014, a copy of which is attached and marked as Exhibit "C".

4. A copy of the Commissioner's written representations in relation to his motion for leave to intervene is attached and marked as Exhibit "D".

5. On October 17, 2014 before 5 p.m. Eastern Daylight Time, I sent a Direction to Attend by fax and email to Ms. Kosseim, and to Ms. Jennifer Seligy, counsel for the Commissioner, and by email to Ms. Odette Lalumière, counsel to the Agency. Ms. Kosseim was required to attend for cross-examination on October 23, 2014 and to produce:

   (1) all communications in relation to the present proceeding between persons at the Office of the Privacy Commissioner of Canada and persons outside the Office; and

   (2) summaries of complaints referenced in paragraph 11 of her affidavit and the findings of the Privacy Commissioner in relation to these complaints.

   A copy of the Direction to Attend, dated October 17, 2014, is attached and marked as Exhibit "E".

6. On October 21, 2014, counsel for the Commissioner advised me about the document that would be produced in response to item (2) of the Direction to Attend, but made no reference to documents responding to item (1). A copy of Ms. Seligy's email, dated October 21, 2014, is attached and marked as Exhibit "F".

7. On October 21, 2014, I wrote to counsel for the Commissioner to inquire about the absence of reference to productions responding to item (1) of the Direction to Attend. I also inquired whether she wished to have the cross-examination of Ms. Kosseim postponed in order to bring a motion pursuant to Rule 94(2) of the *Federal Courts Act*. A copy of my email to Ms. Seligy, dated October 21, 2014, is attached and marked as Exhibit "G".

8. On October 22, 2014, counsel for the Commissioner advised me that:

> Item no. 1 refers to documents that would not be relevant to either Ms. Kosseim's Affidavit or the Privacy Commissioner's motion seeking leave to intervene. Such documents would not be producible in accordance with Rule 91(2)(c).
>
> I can confirm that at this time, we are not seeking to postpone the cross-examination. Having relayed our position to you in this email, I see no need for a teleconference call.

A copy of Ms. Seligy's email, dated October 22, 2014, is attached and marked as Exhibit "H".

9. On October 22, 2014, advised Ms. Seligy and Ms. Kosseim that:

> [...] should Ms. Kosseim fail to produce all documents as directed, I may have no choice but to adjourn the examination pursuant to Rule 96(2) to seek directions from the

Court. Should this be necessary, I will be seeking:

1. an order, pursuant to Rule 97,
   a. dismissing the Commissioner's motion; or
   b. striking out the affidavit of Ms. Kosseim; or
   c. requiring Ms. Kosseim to re-attend at her own expense; and

2. an order for costs, pursuant to Rules 96(3) and 404, against Ms. Kosseim, the Commissioner, or you personally, as the case may be.

Finally, I would like to remind you that Ms. Kosseim must answer all questions on her own, and neither you nor any other counsel attending the examination may answer questions on her behalf.

A copy of my letter to Ms. Seligy, dated October 22, 2014, is attached and marked as Exhibit "I".

10. On October 24, 2014, following the cross-examination of Ms. Kosseim, I advised counsel to the Commissioner about my intention to bring a motion to compel answers and production of documents, and sought her consent to hold the motion for leave to intervene in abeyance pending resolution of that motion. A copy of my email to Ms. Seligy, dated October 24, 2014, is attached and marked as Exhibit "J".

11. On October 27, 2014, counsel for the Commissioner provided a noncommittal answer, a copy of which is attached and marked as Exhibit "K".

12. On October 27, 2014, I wrote to the Court to seek directions with respect to the Commissioner's motion for leave to intervene, and I asked that the motion be held in abeyance and not decided until after the receipt of the

transcript of the cross-examination of Ms. Kosseim and determination of a motion to compel answers and productions in relation to same. A copy of my letter, dated October 27, 2014, is attached and marked as Exhibit “L”.

13. On November 10, 2014, I provided counsel for the Commissioner with a copy of the transcript of the October 23, 2014 cross-examination of Ms. Kosseim, and demanded answers to outstanding questions and productions. A copy of my email to Ms. Seligy, dated November 10, 2014, is attached and marked as Exhibit “M”.

14. On November 12, 2014, counsel for the Commissioner reconfirmed the positions she had taken earlier with respect to the outstanding questions and productions. A copy of the email of Ms. Seligy, dated November 12, 2014, is attached and marked as Exhibit “N”.

AFFIRMED before me at the City of Halifax
in the Regional Municipality of Halifax
on November 12, 2014.

_____

_____

Dr. Gábor Lukács

Halifax, NS

lukacs@AirPassengerRights.ca

This is **Exhibit "A"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

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

This is **Exhibit "B"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF MOTION

TAKE NOTICE that the Privacy Commissioner of Canada will make a motion to the Court in writing pursuant to Rule 369 of the *Federal Courts Rules*.

THE MOTION IS FOR:

1. An Order, pursuant to Rule 109 of the *Federal Courts Rules*, for leave to intervene in these proceedings.

2. Such further relief as counsel may request and as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

1. Under Rule 109 of the *Federal Courts Rules*, the Court may, on motion, grant leave to any person to intervene in a proceeding.

2. In this application, the Applicant seeks judicial review of a decision of the Canadian Transportation Agency ("CTA") not to disclose certain information to the Applicant in response to the Applicant's request to view documents obtained by the CTA in a particular adjudicative proceeding. The Applicant challenges the CTA's reliance on the *Privacy Act* in refusing to disclose the information at issue and asserts that the CTA did not comply with the open court principle.

3. This application raises questions of law regarding the interpretation of various provisions in the *Privacy Act* as well as the interaction between the application of the *Privacy Act* and the open court principle.

4. The Privacy Commissioner of Canada has direct knowledge, experience and expertise in interpreting and applying the *Privacy Act*, which would assist the Court.

5. The Privacy Commissioner of Canada seeks to intervene in this application to assist the Court in the determination of the legal issues raised in this application.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Affidavit of Patricia Kosseim, sworn October 14, 2014; and

2. Such other material as counsel may advise and this Honourable Court permit.

DATED at Gatineau, Quebec this 16th day of October, 2014.

JENNIFER SELIGY
Office of the Privacy Commissioner of Canada
Counsel for the Proposed Intervener, Privacy Commissioner of Canada

This is **Exhibit "C"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF PATRICIA KOSSEIM

I, **PATRICIA KOSSEIM**, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Senior General Counsel and Director General, Legal Services, Policy, Research, and Technology Analysis Branch of the Office of the Privacy Commissioner of Canada. I report directly to the Privacy Commissioner of Canada (the "Privacy Commissioner" or the "Commissioner").

2. In this capacity, I have personal knowledge of the matters to which I depose, except where I have relied on the information of others, which information I believe to be true.

Overview

3. This application will consider the rights of the public, pursuant to the open court principle, to view information provided to the Canadian Transportation Agency

("CTA") in the course of its adjudicative proceedings. In the context of this application, this Court is asked to examine, *inter alia*, the interaction between the *Privacy Act* and the open court principle, including the potential application of various provisions of the *Privacy Act* to the CTA's disclosure of personal information obtained during adjudicative proceedings.

4. The Privacy Commissioner seeks to intervene to assist the Court in regard to the proper interpretation and application of the *Privacy Act* in relation to the issues raised in this application and the policy considerations informing the interpretation and administration of this *Act*.

5. The *Privacy Act* is one of the Privacy Commissioner's "home statutes". The Commissioner has particular experience and expertise applying this statute, which can assist the Court. The Commissioner also has day-to-day experience regarding the legal and practical interplay between the *Privacy Act* and the open court principle in respect of federal administrative tribunal proceedings and decisions. The Court's decision will impact the legal obligations of other institutions subject to the *Privacy Act* and the legal framework the Privacy Commissioner applies when he carries out his mandate to oversee compliance with the *Privacy Act*.

The Privacy Commissioner of Canada

6. Daniel Therrien is the Privacy Commissioner of Canada. The Privacy Commissioner of Canada is an independent officer of Parliament appointed by the Governor in Council pursuant to subsection 53(1) of the *Privacy Act*.

7. The Privacy Commissioner's mandate is to ensure compliance with the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). The Commissioner's broad mission is to protect and promote the privacy rights of Canadians.

8. Among other duties, the Privacy Commissioner has the responsibility to investigate complaints under section 29 of the *Privacy Act.* He may also, at his discretion, carry out investigations to ensure compliance with sections 4 to 8 of the *Privacy Act*.

The Privacy Commissioner's Expertise

9. The Privacy Commissioner has significant experience and expertise in interpreting and applying the specific provisions of the *Privacy Act* at issue in this application.

10. In investigating complaints under the *Privacy Act*, the Privacy Commissioner often has to consider the interaction between the *Privacy Act* and other laws and legal principles that may regulate the collection, use, and disclosure of personal information.

11. The Privacy Commissioner has investigated numerous complaints from individuals regarding the disclosure of personal information by federal administrative tribunals via the Internet. In this context, the Privacy Commissioner has had to consider the application of the *Privacy Act* to these tribunals as wells as the interaction between administrative tribunals' statutory obligations under the *Privacy Act* and other legislation and their need to comply with the open court principle.

12. In carrying out his duties, the Privacy Commissioner also regularly undertakes research activities and prepares publications with respect to a myriad of privacy-related matters. Among other things, the Office of the Privacy Commissioner has developed guidelines regarding the electronic disclosure of personal information in the decisions of administrative tribunals. In particular, the guidelines address issues relating to balancing privacy obligations with the open court principle.

13. Accordingly, the Privacy Commissioner has experience and expertise with respect to the legal issues at the heart of this application that will be of assistance to the Court.

14. The Privacy Commissioner has regularly participated as an intervener in proceedings involving the interpretation of his constituent legislation.

15. The Privacy Commissioner has been granted the right to fully participate in every court application in which the Privacy Commissioner has sought this right, including in numerous matters before the Supreme Court of Canada. For example, the Privacy Commissioner intervened in the matter of *A.B. v. Bragg Communications Inc*., [2012] 2 SCR 567, 2012 SCC 46, which dealt with the balance between the open court principle and an individual's privacy rights.

16. In each of these matters, the Privacy Commissioner was permitted to make representations both orally and in writing.

The Privacy Commissioner's Particular Interest in this Application

17. Among the issues raised in this application, the Court has been asked to address the following:

    i) Whether personal information provided to the CTA in the course of

adjudicative proceedings is "publicly available" information within the meaning of subsection 69(2) of the *Privacy Act* and therefore not subject to the limitations on disclosure set out in section 8 of the *Privacy Act*.

ii) Whether personal information provided to the CTA in the course of adjudicative proceedings may be disclosed by the CTA without consent, in accordance with one or more of the exceptions to the requirement of consent set out in paragraphs 8(2)(a), 8(2)(b), or 8(2)(m) of the *Privacy Act*.

iii) Whether, in light of the open court principle, any limit imposed by the *Privacy Act* on the rights of the public to view information provided to the CTA in the course of adjudicative proceedings would be inconsistent with subsection 2(b) of the *Canadian Charter of Rights and Freedoms*.

18. This application raises a number of important legal issues that have yet to be fully addressed by the Court. The decision of this Court will likely set a significant precedent and thereby form the foundation for future analysis and interpretation of issues relating to the proper interpretation of provisions allowing for the disclosure of personal information by administrative tribunals.

19. These matters fall squarely within the Privacy Commissioner's mandate, experience, and expertise under the *Privacy Act*. The Court's assessment of the various provisions of the *Privacy Act* and how the *Privacy Act* interacts with the open court principle will directly impact the legal obligations of federal government institutions subject to the *Privacy Act*. It will also impact the legal framework that the Privacy Commissioner applies when he discharges his mandate to oversee compliance with the *Privacy Act*.

20. Accordingly, the issues raised in this application are important not only in the specific factual context raised in this case, but more generally to situations that are likely to arise in different circumstances in the future.

21. I believe that the Privacy Commissioner's intervention will be of assistance to the Court in determining the legal issues in this application. The Commissioner's submissions will offer a different perspective from those of the other parties and will be grounded in the Privacy Commissioner's mission to protect and promote the privacy rights of Canadians and his Office's extensive experience in privacy-related issues.

22. The Privacy Commissioner does not seek to file additional affidavit evidence nor does he intend to participate in cross-examinations, if any, on the affidavits filed by the parties. The Privacy Commissioner is content to be bound by the Record before the Court.

23. If granted leave to intervene, the Privacy Commissioner intends to limit his submissions to the legal issues related to the facts as presented by the parties. He will not make submissions with regard to the factual determinations to be made by the Court based on the affidavit evidence tendered by the parties.

24. The Privacy Commissioner will not request any particular disposition of the application and will not support the position of any particular party. The Privacy Commissioner will not seek costs and asks that he not be liable for costs to any other party.

25. I make this affidavit in support of the Privacy Commissioner's motion seeking an order granting leave to intervene in these proceedings as permitted by Rule 109 of the *Federal Court Rules*.

Sworn before me at the City of Gatineau, in the Province of Quebec this 14th day of October, 2014.

A Commissioner, etc.

Patricia Kosseim

This is **Exhibit "D"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

WRITTEN REPRESENTATIONS

I – THE NATURE OF THIS MOTION

1. This is a motion for an Order granting the Privacy Commissioner of Canada (the "Privacy Commissioner" or the "Commissioner") leave to intervene in these proceedings as permitted by Rule 109 of the *Federal Court Rules*.

II - FACTS

2. The Privacy Commissioner is an independent officer of Parliament appointed pursuant to subsection 53(1) of the *Privacy Act* by the Governor in Council[1].

3. The Privacy Commissioner's statutory mandate is to oversee compliance with the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act*

1 Affidavit of Patricia Kosseim, Tab 2, para. 6.

("PIPEDA"). His broad mission is to protect and promote the privacy rights of Canadians[2].

4. Among his other duties, the Privacy Commissioner has the responsibility to investigate complaints under section 29 of the *Privacy Act*. He may also, at his discretion, carry out investigations to ensure compliance with sections 4 to 8 of the *Privacy Act*[3].

5. At issue in this application is the Canadian Transportation Agency's (the "CTA") decision not to disclose certain information to the Applicant in response to the Applicant's request to view documents presented to the CTA in a particular adjudicative proceeding[4].

6. Among other things, the Applicant challenges the CTA's reliance on the *Privacy Act* to refuse to disclose the information at issue and asserts that the *Privacy Act* does not trump the open court principle[5].

7. Among the issues raised in this application, the Court has been asked to address the following:

   i. Whether personal information provided to the CTA in the course of adjudicative proceedings is "publicly available" information within the meaning of subsection 69(2) of the *Privacy Act* and therefore not subject to the limitations on disclosure set out in section 8 of the *Privacy Act*.

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2 Affidavit of Patricia Kosseim, Tab 2, para. 7; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, Tab 5-C.

3 Affidavit of Patricia Kosseim, Tab 2, para. 8; *Privacy Act*, R.S.C. 1985, c. P-21, ss. 29 and 37, Tab 5-A.

4 Applicant's Notice of Application, at paras. (a) and (b).

5 Applicant's Notice of Application, at paras. 25-30.

ii. Whether personal information provided to the CTA in the course of adjudicative proceedings may be disclosed by the CTA without consent, in accordance with one or more of the exceptions to the requirement of consent set out in subsections 8(2)(a), 8(2)(b), or 8(2)(m) of the *Privacy Act*.

iii. Whether, in light of the open court principle, any limit imposed by the *Privacy Act* on the rights of the public to view information provided to the CTA in the course of adjudicative proceedings would be inconsistent with subsection 2(b) of the *Canadian Charter of Rights and Freedoms*.

8. The Privacy Commissioner's intervention in the application will assist the Court with the determination of the legal issues at the core of this application by reason of his expertise and the different perspective he will bring from that of the other parties. This perspective is uniquely grounded in the Commissioner's mission to protect and promote the privacy rights of Canadians.

III - SUBMISSIONS

Jurisdiction to grant party status in this Application

9. Rule 109 of the *Federal Court Rules* allows the Court to grant leave to intervene in any proceeding.

10. The fundamental question to be determined on a motion for intervention under Rule 109 is whether the participation of the proposed intervener will assist the Court in determining a factual or legal issue related to the proceeding[6].

6 *Apotex Inc. v. Canada (Minister of Health)*, [2000] F.C.J. No. 248 (QL) (F.C.T.D.), at para. 11, Tab 5-D.

11. Factors that the Court may consider on a motion to intervene include[7]:

    a. Is the proposed Intervener directly affected by the outcome?

    b. Is there a justiciable issue and a veritable public interest?

    c. Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

    d. Is the position of the proposed Intervener adequately defended by one of the parties to the case?

    e. Are the interests of justice better served by the intervention of the proposed party?

    f. Can the Court hear and decide the cause on its merits without the proposed intervener?

12. Not all the factors listed above need be met by a proposed intervener; the Court has the inherent authority to allow an intervention on terms and conditions which it deems appropriate in the circumstances[8].

13. The Privacy Commissioner has an interest in this appeal because the Court is being asked to interpret the *Privacy Act*, one of the Privacy Commissioner's "home statutes".

14. In deciding this application, the Court will have to interpret several provisions in the *Privacy Act*. The Court will have to address the application of the *Privacy Act* to a quasi-judicial body and the interaction between the *Privacy Act*, other legislation,

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7 *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd*., [2000] F.C.J. 220 (QL) (F.C.A.), at para. 8, Tab 5-E.

8 *Boutique Jacob Inc. v. Paintainer Ltd.*, [2006] F.C.J. 1947 (QL) (F.C.A.), at para. 21, Tab 5-F.

and the open court principle. These matters fall squarely within the Privacy Commissioner's mandate, experience, and expertise under the *Privacy Act*[9].

15. The Court's assessment of these issues will directly impact the legal obligations of federal government institutions subject to the *Privacy Act*. It will also impact the legal framework that the Privacy Commissioner applies when he discharges his mandate to oversee compliance with the *Privacy Act*[10].

16. The Privacy Commissioner will address this appeal from the perspective of a national privacy and data protection advocate who receives and investigates complaints across Canada.

17. The Privacy Commissioner thus offers the Court a unique vantage point on the issues before it. The Commissioner brings first-hand knowledge of how to address the interaction of *Privacy Act* with the open court principle in the context of administrative tribunal proceedings, based on practical experience assessing these issues in the context of complaint investigations. As a result, the Privacy Commissioner will bring a different perspective from the other parties.

18. The Privacy Commissioner does not seek to file additional affidavit evidence nor does he intend to participate in the cross-examinations, if any, on the affidavits filed by the parties. The Privacy Commissioner is content to be bound by the Record before the Court.

19. The Privacy Commissioner intends to limit his submissions to the legal issues and will not make submissions with regard to the factual determinations to be made by the Court based on the affidavit evidence tendered by the parties.

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9 Affidavit of Patricia Kosseim, at paras. 9-13, Tab 2.

10 Affidavit of Patricia Kosseim, at para. 19, Tab 2.

The Special Status of the Privacy Commissioner to Intervene

20. The Federal Court has held that the function and responsibilities of the Privacy Commissioner give the Commissioner special status to intervene in judicial proceedings involving the application of the Commissioner's constituent legislation.

21. In a case decided under PIPEDA, the Federal Court stated[11]:

> The Privacy Commissioner is not required to satisfy the rather stringent requirements set out in Rule 109 of the *Federal Courts Rules* in order to be granted leave to participate in proceedings involving the interpretation or application of the *PIPED Act*. The function and responsibilities of the Privacy Commissioner under the *PIPED Act* give [him] special status to intervene in judicial proceedings, particularly when the issues raised are significant and could set a precedent.

22. The Courts have uniformly granted the Privacy Commissioner the right to participate in applications under *PIPEDA* and the *Privacy Act*.

23. The Privacy Commissioner has a long history of responsible interventions, including in several matters before the Supreme Court of Canada[12].

24. In each of these cases, the Privacy Commissioner was permitted, in accordance with the usual approach to granting intervener status to the Commissioner, to make representations on the merits of the Application, both orally and in writing.

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11 *Breithaupt and Fournier v. MacFarlane and Calm Air International Ltd*. (October 24, 2005), Toronto T-2061-04 (F.C.T.D.) (Order of Prothonotary Lafreniere), page 3, Tab 5-G.

12 See for example: *Andrew Gordon Wakeling v. Attorney General of Canada on behalf of the United States of America, et al*., SCC Case Number 35072 (case involving the interplay between specific provisions of the *Criminal Code* and the *Privacy Act* in relation to international information-sharing), *Bernard v. Canada (Attorney General),* 2014 SCC 13 (CanLII) (whether the employer's disclosure of employee home addresses and phone numbers without consent to the union is permitted as a "consistent use" under the *Privacy Act*), and *A.B. v. Bragg Communications Inc*., [2012] 2 SCR 567, 2012 SCC 46 (CanLII) (balance between open court principle and the right of a child victim of cyberbullying to sue anonymously).

IV - ORDER SOUGHT

25. The Privacy Commissioner respectfully requests:

a. an Order that the Privacy Commissioner of Canada be granted leave to intervene in these proceedings;

b. an Order that the Privacy Commissioner be granted permission to file a Memorandum of Fact and Law thirty (30) days after the Respondent files its Memorandum of Fact and Law and to make oral representations at the hearing of these proceedings; and

c. such further relief as counsel may request and this Honourable Court deems just.

All of which is respectfully submitted this 16th day of October, 2014.

JENNIFER SELIGY
Office of the Privacy Commissioner of Canada
30 Victoria Street
Gatineau, Quebec K1A 1H3

Tel.: (819) 994-5910
Fax: (819) 994-5863

Email: jennifer.seligy@priv.gc.ca

Counsel for the Proposed Intervener, Privacy Commissioner of Canada

This is **Exhibit "E"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

DIRECTION TO ATTEND

TO: Patricia Kosseim

YOU ARE REQUIRED TO ATTEND AN EXAMINATION for cross-examination on your affidavit sworn on October 14, 2014 on behalf of the Office of the Privacy Commissioner of Canada, on **Thursday, October 23, 2014 at 12:00 p.m.** at the office of Gillespie Reporting Services, located at 130 Slater Street, 2nd Floor, Ottawa, Ontario, K1P 6E2 (Tel: 613-238-8501).

YOU ARE ALSO REQUIRED TO BRING WITH YOU and produce at the examination the following documents and things:

1. all communications in relation to the present proceeding between persons at the Office of the Privacy Commissioner of Canada and persons outside the Office; and

2. summaries of complaints referenced in paragraph 11 of your affidavit and the findings of the Privacy Commissioner in relation to these complaints.

TRAVEL EXPENSES for 1 day of attendance is served with this direction, calculated in accordance with Tariff A of the Federal Courts Rules, as follows:

Transportation allowance $0

Overnight accommodations and meal allowance $0

TOTAL $0

If further attendance is required, you will be entitled to additional money.

THE EXAMINATION WILL BE CONDUCTED IN ENGLISH. If you prefer to be examined in the other official language, an interpreter may be required and you must immediately advise the solicitor for the party conducting the examination.

IF YOU FAIL TO ATTEND OR REMAIN UNTIL THE END OF THIS EXAMINATION, YOU MAY BE COMPELLED TO ATTEND AT YOUR OWN EXPENSE AND YOU MAY BE FOUND IN CONTEMPT OF COURT.

INQUIRIES CONCERNING THIS DIRECTION may be directed to Dr. Gábor Lukács (lukacs@AirPassengerRights.ca).

October 17, 2014

DR. GÁBOR LUKÁCS

Halifax, Nova Scotia

lukacs@AirPassengerRights.ca

Applicant

This is **Exhibit "F"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

From Jennifer.Seligy@priv.gc.ca Tue Oct 21 18:37:10 2014
Date: Tue, 21 Oct 2014 21:37:02 +0000
From: Jennifer Seligy <Jennifer.Seligy@priv.gc.ca>
To: "Gabor Lukacs (lukacs@AirPassengerRights.ca)" <lukacs@airpassengerrights.ca>
Subject: RE: DIRECTION TO ATTEND: Cross examination of Ms. Kosseim on Thursday, Octob
er 23, 2014 at 12:00 p.m. [A-218-14 - Lukacs v. Canadian Transportation Agency]

Dr. Lukacs,

Thank you for your response.

We will be providing an excerpt of the Office of the Privacy Commissioner of Canada's Annual Report to Parliament on the Privacy Act for 2007-2008, specifically pages 23-31 of that Report. Should you wish to access these pages in advance of the cross-examination on Thursday, they are available on the Office of the Privacy Commissioner's website via the following link:

https://www.priv.gc.ca/information/ar/200708/200708_pa_e.pdf

Regards,

Jennifer

-----Original Message-----
From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of Gabor Lukacs
Sent: October-20-14 4:41 PM
To: Jennifer Seligy
Subject: RE: DIRECTION TO ATTEND: Cross examination of Ms. Kosseim on Thursday, Octob
er 23, 2014 at 12:00 p.m. [A-218-14 - Lukacs v. Canadian Transportation Agency]

Ms. Seligy,

My limited experience is that the length of cross examinations heavily depend on how cooperative the affiant is. Bearing in mind that I will also have to inspect documents produced, I have set aside 4 hours in my calendar for the cross examination, but I would very much hope to wrap it up in 1.5-2 hours.

I would like to take up as little as possible of the time of Ms. Kosseim, who, I am sure, has a very busy schedule.

In the interest of efficiency, I would propose that Ms. Kosseim provide me with the productions at least a day in advance, so that we do not have to make her wait while I inspect the documents.

Best wishes,
Dr. Gabor Lukacs

On Mon, 20 Oct 2014, Jennifer Seligy wrote:

> Dr. Lukacs,
>
> Can you please let me know how much time you expect you might need to
> conduct the cross-examination?
>
> Thank you,
>

> Jennifer
>
>
> -----Original Message-----
> From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
> Sent: October-17-14 4:52 PM
> To: Jennifer Seligy; Patricia Kosseim; Odette Lalumiere
> Cc: Wendy Liston; Alexei Baturin
> Subject: DIRECTION TO ATTEND: Cross examination of Ms. Kosseim on
> Thursday, October 23, 2014 at 12:00 p.m. [A-218-14 - Lukacs v.
> Canadian Transportation Agency]
>
> Dear Ms. Kosseim, Ms. Seligy, and Ms. Lalumiere,
>
> Enclosed please find a Direction to Attend for the cross-examination of Ms. Kosseim
.
>
> Should you wish to reschedule the examination to an earlier date, please provide me
 with your proposed dates/times.
>
> Best wishes,
> Dr. Gabor Lukacs
>
>
> On Fri, 17 Oct 2014, Gabor Lukacs wrote:
>
>> Dear Ms. Seligy,
>>
>> I am in receipt of your Motion Record seeking leave to intervene.
>>
>> I intend to cross examine Ms. Kosseim on her affidavit, and I will be
>> seeking productions. I am writing to inquire about the availabilities
>> of Ms. Kosseim next week, as it appears to be more practical than
>> simply serving a Direction to Attend without consulting you first.
>>
>> I look forward to hearing from you.
>>
>> Best wishes,
>> Dr. Gabor Lukacs
>>
>> --
>> Dr. Gabor Lukacs Air Passenger Rights
>> Tel: (647) 724 1727
>>
>

This is **Exhibit "G"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

From lukacs@AirPassengerRights.ca Tue Oct 21 23:15:48 2014
Date: Tue, 21 Oct 2014 23:15:46 -0300 (ADT)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: Jennifer Seligy <Jennifer.Seligy@priv.gc.ca>
Subject: Productions [RE: DIRECTION TO ATTEND: Cross examination of Ms. Kosseim on Th
ursday, October 23, 2014 at 12:00 p.m. [A-218-14 - Lukacs v. Canadian Transportation
Agency]]

Ms. Seligy,

Thank you for your message.

On October 17, 2014, I directed the Commissioner's affiant, Ms. Kosseim, to produce at the examination the following documents:

1. all communications in relation to the present proceeding between persons at the Office of the Privacy Commissioner of Canada and persons outside the Office; and

2. summaries of complaints referenced in paragraph 11 of her affidavit and the findings of the Privacy Commissioner in relation to these complaints.

I understand that you will be producing the excerpt of the 2007-2008 report (pp. 23-31) to satisfy item no. 2. I note, however, that your message is silent with respect to item no. 1, and I am wondering about the reason for this.

Should you have any concerns about item no. 1, it would be more efficient if we had a teleconference on Wednesday, October 22, 2014 to discuss the matter, and I propose that we do so.

In any event, kindly please confirm whether you wish to have the cross-examination of Ms. Kosseim postponed in order to bring a motion pursuant to Rule 94(2) of the Federal Courts Rules.

Best wishes,
Dr. Gabor Lukacs

On Tue, 21 Oct 2014, Jennifer Seligy wrote:

> Dr. Lukacs,
>
> Thank you for your response.
>
> We will be providing an excerpt of the Office of the Privacy
> Commissioner of Canada's Annual Report to Parliament on the Privacy Act
> for 2007-2008, specifically pages 23-31 of that Report. Should you wish
> to access these pages in advance of the cross-examination on Thursday,
> they are available on the Office of the Privacy Commissioner's website
> via the following link:
>
> https://www.priv.gc.ca/information/ar/200708/200708_pa_e.pdf
>
> Regards,
>
> Jennifer
>
>
>
> -----Original Message-----

> From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of Gabor Lukacs
> Sent: October-20-14 4:41 PM
> To: Jennifer Seligy
> Subject: RE: DIRECTION TO ATTEND: Cross examination of Ms. Kosseim on Thursday, Oct
ober 23, 2014 at 12:00 p.m. [A-218-14 - Lukacs v. Canadian Transportation Agency]
>
> Ms. Seligy,
>
> My limited experience is that the length of cross examinations heavily depend on ho
w cooperative the affiant is. Bearing in mind that I will also have to inspect docume
nts produced, I have set aside 4 hours in my calendar for the cross examination, but
I would very much hope to wrap it up in 1.5-2 hours.
>
> I would like to take up as little as possible of the time of Ms. Kosseim, who, I am
 sure, has a very busy schedule.
>
> In the interest of efficiency, I would propose that Ms. Kosseim provide me with the
 productions at least a day in advance, so that we do not have to make her wait while
 I inspect the documents.
>
> Best wishes,
> Dr. Gabor Lukacs
>
>
>
> On Mon, 20 Oct 2014, Jennifer Seligy wrote:
>
>> Dr. Lukacs,
>>
>> Can you please let me know how much time you expect you might need to
>> conduct the cross-examination?
>>
>> Thank you,
>>
>> Jennifer
>>
>>
>> -----Original Message-----
>> From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
>> Sent: October-17-14 4:52 PM
>> To: Jennifer Seligy; Patricia Kosseim; Odette Lalumiere
>> Cc: Wendy Liston; Alexei Baturin
>> Subject: DIRECTION TO ATTEND: Cross examination of Ms. Kosseim on
>> Thursday, October 23, 2014 at 12:00 p.m. [A-218-14 - Lukacs v.
>> Canadian Transportation Agency]
>>
>> Dear Ms. Kosseim, Ms. Seligy, and Ms. Lalumiere,
>>
>> Enclosed please find a Direction to Attend for the cross-examination of Ms. Kossei
m.
>>
>> Should you wish to reschedule the examination to an earlier date, please provide m
e with your proposed dates/times.
>>
>> Best wishes,
>> Dr. Gabor Lukacs
>>
>>
>> On Fri, 17 Oct 2014, Gabor Lukacs wrote:
>>
>>> Dear Ms. Seligy,
>>>

>>> I am in receipt of your Motion Record seeking leave to intervene.
>>>
>>> I intend to cross examine Ms. Kosseim on her affidavit, and I will be
>>> seeking productions. I am writing to inquire about the availabilities
>>> of Ms. Kosseim next week, as it appears to be more practical than
>>> simply serving a Direction to Attend without consulting you first.
>>>
>>> I look forward to hearing from you.
>>>
>>> Best wishes,
>>> Dr. Gabor Lukacs
>>>
>>> --
>>> Dr. Gabor Lukacs Air Passenger Rights
>>> Tel: (647) 724 1727
>>>
>>
>
>

This is **Exhibit "H"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

From Jennifer.Seligy@priv.gc.ca Wed Oct 22 16:42:23 2014
Date: Wed, 22 Oct 2014 19:42:14 +0000
From: Jennifer Seligy <Jennifer.Seligy@priv.gc.ca>
To: "Gabor Lukacs (lukacs@AirPassengerRights.ca)" <lukacs@airpassengerrights.ca>
Subject: RE: Productions [RE: DIRECTION TO ATTEND: Cross examination of Ms. Kosseim on Thursday, October 23, 2014 at 12:00 p.m. [A-218-14 - Lukacs v. Canadian Transportation Agency]]

Dr. Lukacs,

Item no. 1 refers to documents that would not be relevant to either Ms. Kosseim's Affidavit or the Privacy Commissioner's motion seeking leave to intervene. Such documents would not be producible in accordance with Rule 91(2)(c).

I can confirm that at this time, we are not seeking to postpone the cross-examination. Having relayed our position to you in this email, I see no need for a teleconference call.

Regards,

Jennifer
-----Original Message-----
From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of Gabor Lukacs
Sent: October-21-14 10:16 PM
To: Jennifer Seligy
Subject: Productions [RE: DIRECTION TO ATTEND: Cross examination of Ms. Kosseim on Thursday, October 23, 2014 at 12:00 p.m. [A-218-14 - Lukacs v. Canadian Transportation Agency]]

Ms. Seligy,

Thank you for your message.

On October 17, 2014, I directed the Commissioner's affiant, Ms. Kosseim, to produce at the examination the following documents:

1. all communications in relation to the present proceeding between persons at the Office of the Privacy Commissioner of Canada and persons outside the Office; and

2. summaries of complaints referenced in paragraph 11 of her affidavit and the findings of the Privacy Commissioner in relation to these complaints.

I understand that you will be producing the excerpt of the 2007-2008 report (pp. 23-31) to satisfy item no. 2. I note, however, that your message is silent with respect to item no. 1, and I am wondering about the reason for this.

Should you have any concerns about item no. 1, it would be more efficient if we had a teleconference on Wednesday, October 22, 2014 to discuss the matter, and I propose that we do so.

In any event, kindly please confirm whether you wish to have the cross-examination of Ms. Kosseim postponed in order to bring a motion pursuant to Rule 94(2) of the Federal Courts Rules.

Best wishes,
Dr. Gabor Lukacs

On Tue, 21 Oct 2014, Jennifer Seligy wrote:

> Dr. Lukacs,
>
> Thank you for your response.
>
> We will be providing an excerpt of the Office of the Privacy
> Commissioner of Canada’s Annual Report to Parliament on the Privacy
> Act for 2007-2008, specifically pages 23-31 of that Report. Should you
> wish to access these pages in advance of the cross-examination on
> Thursday, they are available on the Office of the Privacy
> Commissioner’s website via the following link:
>
> https://www.priv.gc.ca/information/ar/200708/200708_pa_e.pdf
>
> Regards,
>
> Jennifer
>
>
>
> -----Original Message-----
> From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of
> Gabor Lukacs
> Sent: October-20-14 4:41 PM
> To: Jennifer Seligy
> Subject: RE: DIRECTION TO ATTEND: Cross examination of Ms. Kosseim on
> Thursday, October 23, 2014 at 12:00 p.m. [A-218-14 - Lukacs v.
> Canadian Transportation Agency]
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> Ms. Seligy,
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I would very much hope to wrap it up in 1.5-2 hours.
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 sure, has a very busy schedule.
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 productions at least a day in advance, so that we do not have to make her wait while
 I inspect the documents.
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>> Can you please let me know how much time you expect you might need to
>> conduct the cross-examination?
>>
>> Thank you,
>>
>> Jennifer
>>
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>> -----Original Message-----

>> From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
>> Sent: October-17-14 4:52 PM
>> To: Jennifer Seligy; Patricia Kosseim; Odette Lalumiere
>> Cc: Wendy Liston; Alexei Baturin
>> Subject: DIRECTION TO ATTEND: Cross examination of Ms. Kosseim on
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>> Best wishes,
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>>> Dear Ms. Seligy,
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>>> I am in receipt of your Motion Record seeking leave to intervene.
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>>> I intend to cross examine Ms. Kosseim on her affidavit, and I will
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>>> availabilities of Ms. Kosseim next week, as it appears to be more
>>> practical than simply serving a Direction to Attend without consulting you first.
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>>> I look forward to hearing from you.
>>>
>>> Best wishes,
>>> Dr. Gabor Lukacs
>>>
>>> --
>>> Dr. Gabor Lukacs Air Passenger Rights
>>> Tel: (647) 724 1727
>>>
>>
>
>

This is **Exhibit "I"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

October 22, 2014

VIA EMAIL AND FAX

Jennifer Seligy
Office of the Privacy Commissioner of Canada
30 Victoria Street
Gatineau, QC K1A 1H3

Dear Ms. Seligy:

Re: Dr. Gábor Lukács v. Canadian Transportation Agency
Federal Court of Appeal File No.: A-218-14
Cross-examination of Ms. Kosseim and production of documents for inspection

I am in receipt of your email of even date. I am writing to express concern over what transpires as your misunderstanding the obligations of Ms. Kosseim as a witness pursuant to Rule 94(1) of the *Federal Courts Rules*.

The mandatory "shall" in Rule 94(1) imposes a positive duty upon a witness to produce documents, and does not allow a witness to consider whether the documents or materials sought in the Direction to Attend are relevant. The witness must comply with the Direction to Attend, unless the Court relieves the witness from that obligation, pursuant to Rule 94(2).

If you believe that the Direction to Attend of October 17, 2014 seeks productions of irrelevant documents, then you may bring a motion pursuant to Rule 94(2) (see *Apotex Inc. v. Eli Lilly and Co.*, 2005 FCA 134). On October 21, 2014, I inquired whether you wished to postpone the cross-examination of Ms. Kosseim in order to bring such a motion. In your email of today, you answered my question in the negative.

Since no motion pursuant to Rule 94(2) was brought nor have you asked to postpone the examination in order to bring such a motion, Ms. Kosseim has no lawful excuse for failing to produce all documents as directed.

Please be advised that should Ms. Kosseim fail to produce all documents as directed, I may have no choice but to adjourn the examination pursuant to Rule 96(2) to seek directions from the Court. Should this be necessary, I will be seeking:

1. an order, pursuant to Rule 97,
   (a) dismissing the Commissioner's motion; or
   (b) striking out the affidavit of Ms. Kosseim; or
   (c) requiring Ms. Kosseim to re-attend at her own expense; and

2. an order for costs, pursuant to Rules 96(3) and 404, against Ms. Kosseim, the Commissioner, or you personally, as the case may be.

Finally, I would like to remind you that Ms. Kosseim must answer all questions on her own, and neither you nor any other counsel attending the examination may answer questions on her behalf.

Yours very truly,

Dr. Gábor Lukács

Cc: Ms. Patricia Kosseim

This is **Exhibit "J"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

From lukacs@AirPassengerRights.ca Fri Oct 24 13:05:09 2014
Date: Fri, 24 Oct 2014 13:05:07 -0300 (ADT)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: Jennifer Seligy <Jennifer.Seligy@priv.gc.ca>
Subject: Consent to holding the motion for leave to intervene in abeyance [A-218-14 - Lukacs v. Canadian Transportation Agency]

Ms. Seligy,

I am writing to you as per our discussions on the phone today, to seek your consent that the motion for leave to intervene be held in abeyance pending:

(a) receipt of transcript of the cross-examination of Ms. Kosseim; and

(b) resolution of a motion to compel answers and production of documents by Ms. Kosseim, which I intend to bring after I receive the transcript.

I would like to thank you in advance for your cooperation.

I look forward to hearing from you.

Best wishes,
Dr. Gabor Lukacs

This is **Exhibit "K"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

From Jennifer.Seligy@priv.gc.ca Mon Oct 27 12:27:58 2014
Date: Mon, 27 Oct 2014 15:27:49 +0000
From: Jennifer Seligy <Jennifer.Seligy@priv.gc.ca>
To: "Gabor Lukacs (lukacs@AirPassengerRights.ca)" <lukacs@airpassengerrights.ca>
Subject: Request for consent to holding the motion for leave to intervene in abeyance [A-218-14 - Lukacs v. Canadian Transportation Agency]

[The following text is in the "iso-8859-1" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Dr. Lukacs,

This is further to your email of Friday October 24, 2014 requesting consent from the Office of the Privacy Commissioner (OPC) to holding its motion for leave to intervene in your judicial review application in abeyance. It is not clear from your request how you intend to proceed. If you intend to bring a motion for a time extension to respond to the OPC's motion for leave to intervene, or to bring a motion to hold the OPC's motion for leave to intervene in abeyance, I can, once I receive any such motion, obtain instructions from my client and inform you of the position the OPC will take on your proceedings promptly thereafter. I would need to see precisely what is being presented to the Court before I could seek instructions on the position the OPC would take.

Regards,

Jennifer

Jennifer Seligy
Legal Counsel / Conseill?re juridique
Legal Services, Policy, Research, and Technology Analysis Branch / Direction des services juridiques, des politiques, de la recherche, et de l'analyse des technologies
Office of the Privacy Commissioner of Canada / Commissariat ? la protection de la vie privée du Canada
Tel: (819) 994-5910 / Fax: (819) 994-5863
jennifer.seligy@priv.gc.ca

This is **Exhibit "L"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

October 27, 2014

VIA FAX

Judicial Administrator
Federal Court of Appeal
Ottawa, ON K1A 0H9

Dear Madam or Sir:

Re: Dr. Gábor Lukács v. Canadian Transportation Agency
Federal Court of Appeal File No.: A-218-14
Request for directions with respect to the motion for leave to intervene

I am the applicant in the present application for judicial review. I am seeking directions with respect to the motion of the Privacy Commissioner of Canada ("Commissioner") for leave to intervene that was served on me on October 17, 2014.

On October 23, 2014, I conducted a cross-examination of Ms. Patricia Kosseim, whose affidavit was submitted in support of the Commissioner's motion. A transcript of the examination, which was ordered immediately, will be available in 10 business days, on or around November 6, 2014.

Once the transcript is available, it is my intention to bring a motion to compel answers to questions that were refused or not properly answered by Ms. Kosseim and production of documents that she did not produce as directed in the Direction to Attend.

I am therefore asking that the Honourable Court hold the Commissioner's motion for leave to intervene in abeyance, and not decide the motion until after:

(a) receipt of the transcript of the cross-examination of Ms. Kosseim; and

(b) determination of a motion to compel answers and production of documents by Ms. Kosseim, which I intend to bring shortly after I receive the transcript.

I have attempted to obtain the consent of the Commissioner to hold its motion in abeyance as described above, however, I received a noncommittal answer (enclosed).

Sincerely yours,

Dr. Gábor Lukács

Enclosed: Email sent to Ms. Seligy on October 24, 2014
Email received from Ms. Seligy on October 27, 2014

Cc: Ms. Odette Lalumière, counsel for the Canadian Transportation Agency
Ms. Jennifer Seligy, counsel for the Privacy Commissioner of Canada

From lukacs@AirPassengerRights.ca Fri Oct 24 13:05:09 2014
Date: Fri, 24 Oct 2014 13:05:07 -0300 (ADT)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: Jennifer Seligy <Jennifer.Seligy@priv.gc.ca>
Subject: Consent to holding the motion for leave to intervene in abeyance [A-218-14 - Lukacs v. Canadian Transportation Agency]

Ms. Seligy,

I am writing to you as per our discussions on the phone today, to seek your consent that the motion for leave to intervene be held in abeyance pending:

(a) receipt of transcript of the cross-examination of Ms. Kosseim; and

(b) resolution of a motion to compel answers and production of documents by Ms. Kosseim, which I intend to bring after I receive the transcript.

I would like to thank you in advance for your cooperation.

I look forward to hearing from you.

Best wishes,
Dr. Gabor Lukacs

From Jennifer.Seligy@priv.gc.ca Mon Oct 27 12:27:58 2014
Date: Mon, 27 Oct 2014 15:27:49 +0000
From: Jennifer Seligy <Jennifer.Seligy@priv.gc.ca>
To: "Gabor Lukacs (lukacs@AirPassengerRights.ca)" <lukacs@airpassengerrights.ca>
Subject: Request for consent to holding the motion for leave to intervene in abeyance
 [A-218-14 - Lukacs v. Canadian Transportation Agency]

    [The following text is in the "iso-8859-1" character set.]
    [Your display is set for the "ISO-8859-2" character set.]
    [Some special characters may be displayed incorrectly.]

Dr. Lukacs,

This is further to your email of Friday October 24, 2014 requesting consent from the Office of the Privacy Commissioner (OPC) to holding its motion for leave to intervene in your judicial review application in abeyance. It is not clear from your request how you intend to proceed. If you intend to bring a motion for a time extension to respond to the OPC's motion for leave to intervene, or to bring a motion to hold the OPC's motion for leave to intervene in abeyance, I can, once I receive any such motion, obtain instructions from my client and inform you of the position the OPC will take on your proceedings promptly thereafter. I would need to see precisely what is being presented to the Court before I could seek instructions on the position the OPC would take.

Regards,

Jennifer

Jennifer Seligy
Legal Counsel / Conseill?re juridique
Legal Services, Policy, Research, and Technology Analysis Branch / Direction des services juridiques, des politiques, de la recherche, et de l'analyse des technologies
Office of the Privacy Commissioner of Canada / Commissariat ? la protection de la vie privée du Canada
Tel: (819) 994-5910 / Fax: (819) 994-5863
jennifer.seligy@priv.gc.ca

This is **Exhibit "M"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

From lukacs@AirPassengerRights.ca Mon Nov 10 12:04:57 2014
Date: Mon, 10 Nov 2014 12:04:50 -0400 (AST)
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
To: Jennifer Seligy <Jennifer.Seligy@priv.gc.ca>
Subject: Demand for answers and productions [A-218-14 - Lukacs v. Canadian Transporta
tion Agency]

Ms. Seligy:

1. Enclosed please find the transcript of the cross-examination of Ms. Kosseim.

2. After careful review of the transcript, I can confirm that:

(a) Ms. Kosseim provided improper, evasive answers to questions 53-54 and 60-61;

(b) you improperly objected to questions 16-19, 50, 52, 56, and 67; and

(c) Ms. Kosseim failed to produce documents responding to item (1) of the Direction to Attend without lawful excuse.

3. I demand that Ms. Kosseim answer these outstanding questions, produce documents as directed, and re-attend at her own expense or the Commissioner’s expense to answer follow-up questions.

4. Should I not hear from you by November 12, 2014 at 12 p.m. (noon) Eastern Standard Time with respect to a reasonable schedule for Ms. Kosseim to answer the outstanding questions, produce the documents, and answer follow-up questions, I will be bringing a motion to:

(i) have the Commissioner’s motion for leave to intervene dismissed; or

(ii) have the affidavit of Ms. Kosseim struck; or

(iii) compel answers, productions, and re-attendance.

I will also be seeking costs against Ms. Kosseim personally and the Commissioner.

Yours very truly,
Dr. Gabor Lukacs

[Part 2: ""]

The following attachment was sent,
but NOT saved in the Fcc copy:
A Application/PDF (Name="2014-10-23--Patricia_Kosseim--cross-examination--SCANNED
.pdf") segment of about 552,252 bytes.

This is **Exhibit "N"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on November 12, 2014

_____

Signature

From Jennifer.Seligy@priv.gc.ca Wed Nov 12 12:05:30 2014
Date: Wed, 12 Nov 2014 16:05:22 +0000
From: Jennifer Seligy <Jennifer.Seligy@priv.gc.ca>
To: "Gabor Lukacs (lukacs@AirPassengerRights.ca)" <lukacs@airpassengerrights.ca>
Subject: RE: Demand for answers and productions [A-218-14 - Lukacs v. Canadian Transp
ortation Agency]

[The following text is in the "iso-8859-1" character set.]
[Your display is set for the "ISO-8859-2" character set.]
[Some special characters may be displayed incorrectly.]

Good morning Dr. Lukacs,

I write in response to your "demand for answers and productions", as set out in your email of November 10, 2014.

With respect to questions 53-54 and 60-61, Ms. Kosseim's responses to your questions are neither improper nor evasive. In response to each question, Ms. Kosseim provided as full an answer as was possible in light of the facts available to her at the time of the cross-examination and at the time she swore her affidavit.

With respect to questions 16-19, these questions are not relevant to any issue arising from the Privacy Commissioner's motion for leave to intervene or from Ms. Kosseim's affidavit in support of that motion.

With respect to questions 50 and 52, these questions are not relevant to the Privacy Commissioner's motion for leave to intervene or Ms. Kosseim's affidavit in support of that motion. Subject to this objection, I am prepared to stipulate on behalf of the Office of the Privacy Commissioner of Canada that the answer to these questions is "no".

With respect to questions 56 and 67, Ms. Kosseim had previously answered these questions, in her responses to questions 53-55 and 60-61 respectively.

Finally, as stated to you previously, item 1 of your Direction to Attend requests materials that would not be relevant to any issue arising from the Privacy Commissioner's motion for leave to intervene or arising from Ms. Kosseim's affidavit in support of that motion. The request in item 1 of your Direction to Attend is accordingly not proper under Rule 91(2)(c) of the Federal Courts Rules.

Regards,

Jennifer

Jennifer Seligy
Legal Counsel / Conseill?re juridique
Legal Services, Policy, Research, and Technology Analysis Branch / Direction des serv
ices juridiques, des politiques, de la recherche, et de l'analyse des technologies
Office of the Privacy Commissioner of Canada / Commissariat ? la protection de la vie
privée du Canada
Tel: (819) 994-5910 / Fax: (819) 994-5863
jennifer.seligy@priv.gc.ca

r kind cooperation.

-----Original Message-----
From: Gabor Lukacs [mailto:lukacs@AirPassengerRights.ca]
Sent: November-10-14 11:05 AM
To: Jennifer Seligy
Subject: Demand for answers and productions [A-218-14 - Lukacs v. Canadian Transportation Agency]

Ms. Seligy:

1. Enclosed please find the transcript of the cross-examination of Ms. Kosseim.

2. After careful review of the transcript, I can confirm that:

(a) Ms. Kosseim provided improper, evasive answers to questions 53-54 and 60-61;

(b) you improperly objected to questions 16-19, 50, 52, 56, and 67; and

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3. I demand that Ms. Kosseim answer these outstanding questions, produce documents as directed, and re-attend at her own expense or the Commissioner’s expense to answer follow-up questions.

4. Should I not hear from you by November 12, 2014 at 12 p.m. (noon) Eastern Standard Time with respect to a reasonable schedule for Ms. Kosseim to answer the outstanding questions, produce the documents, and answer follow-up questions, I will be bringing a motion to:

(i) have the Commissioner’s motion for leave to intervene dismissed; or

(ii) have the affidavit of Ms. Kosseim struck; or

(iii) compel answers, productions, and re-attendance.

I will also be seeking costs against Ms. Kosseim personally and the Commissioner.

Yours very truly,
Dr. Gabor Lukacs

Tel: 613-238-8501 Fax: 613-238-1045 Toll Free 1-800-267-3926

Examination No. 14-1010 Court File No. A-218-14

FEDERAL COURT OF APPEAL

B E T W E E N:

DR. GÁBOR LUKÁCS

APPLICANT

- and -

CANADIAN TRANSPORTATION AGENCY

RESPONDENT

****

CROSS-EXAMINATION OF PATRICIA KOSSEIM on her Affidavit sworn October 14th, 2014, pursuant to an appointment made on consent of the parties, to be reported by Gillespie Reporting Services, on 23rd day of October, 2014, commencing at the hour of 12:01 in the afternoon.

****

APPEARANCES:

Dr. Gábor Lukács, for the Applicant

Ms. Jennifer Seligy and
Mr. Thomas Brady, for the Privacy Commissioner of Canada

This Examination was digitally recorded by Gillespie Reporting Services at Ottawa, Ontario, having been duly appointed for the purpose.

(i)

INDEX

NAME OF WITNESS: PATRICIA KOSSEIM

CROSS-EXAMINATION BY: DR. GÁBOR LUKÁCS

NUMBER OF PAGES: 2 THROUGH 23 INCLUSIVE

ADVISEMENTS, OBJECTIONS & UNDERTAKINGS

EXHIBITS

DATE TRANSCRIPT ORDERED: OCTOBER 23RD, 2014

DATE TRANSCRIPT COMPLETED: NOVEMBER 7th, 2014

PATRICIA KOSSEIM, SWORN:

CROSS-EXAMINATION BY DR. LUKÁCS:

1. Q. I understand that on October 14th, 2014 you swore an Affidavit?

A. Yes, I have.

DR. LUKÁCS: Let's mark that as Exhibit Number 1.

EXHIBIT NO. 1: Affidavit of Ms. Kosseim, sworn on October 14, 2014.

2. Q. I understand that you received the Direction to Attend dated October 17th, 2014.

A. Yes, I did.

DR. LUKÁCS: Let's mark that as Exhibit Number 2.

EXHIBIT NO. 2: Direction to Attend, dated October 17, 2014.

3. Q. I understand that in response to item number two of the Direction to Attend, you have produced an excerpt from the 2007-2008 Report of the Privacy Commissioner.

A. Yes, we did.

DR. LUKÁCS: Let's mark that as Exhibit 3.

EXHIBIT NO. 3: Excerpt of the Office of the Privacy Commissioner of Canada's Annual Report to Parliament on the Privacy Act for 2007-2008, pages 23 to 31, along with cover letter from the Privacy Commissioner of Canada addressed to The Honourable

Peter Milliken, M.P., The Speaker, The House of Commons.

I understand this consists of pages 23 to 31.

A. Yes.

4. Q. And the cover letter of the Commissioner submitting it to Parliament.

A. Yes.

5. Q. Are there other documents in your possession, power or control that respond to item number two of the Direction to Attend?

MS. SELIGY: We are going to object to responding to that request. It's not relevant. *O*

DR. LUKÁCS: Ms. Seligy, I am not sure if you heard my question. My question refers to item number two.

MS. SELIGY: Oh, I am sorry. Sorry.

DR. LUKÁCS: Yes.

MS. SELIGY: Maybe ask the question again, please.

DR. LUKÁCS:

6. Q. So my question was are there other documents in your possession, power, or control that respond to item number two of the Direction to Attend?

MS. SELIGY: This is all that we are producing in response to that item number two.

DR. LUKÁCS: I am sorry, Ms. Seligy, this was a question to the witness and now today Ms. Kosseim is the

witness and I have advised you in my letter, I object to you answering on behalf of the witness. It is inappropriate. So my question to the witness was and I would like to ask you do not feed answers to the witness because it is also inappropriate. So my question to Ms. Kosseim was,

7. Q. Are there other documents in your possession, power, or control that respond to item number two of the Direction to Attend?

A. No.

8. Q. Thank you. Now we move on to item number one and my question to you is, which documents are you producing in response to item number one of the Direction to Attend?

A. We are producing no documents.

9. Q. I asked you as a witness, Ms. Kosseim, which documents you are producing as a witness because you are here as a witness, not a party today. So, do you refuse to produce documents in response to item number one?

MS. SELIGY: Yes, we object to producing documents in response to item number one. *O*

DR. LUKÁCS: Ms. Seligy, again this was a question to the witness. As you know, the witness has an obligation to produce documents. If you have an objection, the proper avenue to do it is through a motion

pursuant to Rule 94(2).

MS. SELIGY: Ms. Kosseim has answered your question and we have stated our position that we object to responding to your question on the grounds that it is not relevant and that is our position. *O*

DR. LUKÁCS: Ms. Kosseim did not answer the question. My question to her was, whether she refuses to produce documents in response to item number one of the Direction to Attend.

THE WITNESS: On advice of counsel who has objected, I am not producing any documents in response to number one.

DR. LUKÁCS:

10. Q. All right. I am warning you that I will be seeking production of those documents and will be seeking that you re-attend the examination at your own personal cost.

Do you have any documents in your possession, power, or control that respond to item number one of the Direction to Attend?

MS. SELIGY: We are objecting to responding to that question on the grounds it is not relevant. *O*

DR. LUKÁCS:

11. Q. Ms. Kosseim, I understand that the Privacy Commissioner is seeking leave to intervene in the present

application.

A. Yes.

12. Q. The Commissioner caused a motion record for leave to intervene to be served on me.

A. Yes, I believe so.

13. Q. How did the Office of the Commissioner obtain my home address?

A. I don't know.

MS. SELIGY: That information is a matter of public record, in the court record.

DR. LUKÁCS: So counsel, was that information obtained from the court record? Is that what you imply?

MS. SELIGY: I am merely just indicating that it is a matter of public record.

DR. LUKÁCS:

14. Q. In paragraph three of your Affidavit, you refer to "this application".

A. Yes.

15. Q. Have you read the Notice of Application?

A. Yes.

16. Q. How did the Office of the Commissioner obtain a copy of the Notice of Application?

MS. SELIGY: We are going to object to that question and I am instructing my counsel not to answer. It is not relevant to Ms. Kosseim's Affidavit or the

motion. And just to add to that, the Notice of Application is a matter of public record on the court record. *O*

17. Q. When did the Office of the Commissioner obtain a copy of the Notice of Application?

MS. SELIGY: Again, this is -- again, we are objecting to that question. It is not relevant. *O*

DR. LUKÁCS:

18. Q. When did the Office of the Commissioner first learn about the present application?

MS. SELIGY: Again, we are objecting. These questions -- this line of questioning is not relevant to Ms. Kosseim's Affidavit or the motion.

DR. LUKÁCS: Counsel, would you like perhaps to excuse the witness for a moment that we discuss the issue of relevance on the record. It may save some time and possibly a motion to the court. So, I would propose perhaps that the witness step out for a moment and...

MS. SELIGY: Yes.

(WITNESS LEAVES ROOM)

THE REPORTER: Okay.

DR. LUKÁCS: Counsel, as I am sure you realize, one of the issues on which a motion for leave to intervene can be denied and has been denied in the past, is failure to bring a motion for leave to intervene in a timely

manner. Therefore when and how the Office of the Commissioner learned about this application is highly relevant to the propriety of this motion. If you wish, I can provide you with case law on that if you would like to take a short break to review it. I do not want to unnecessarily waste the court's time with a motion but I can assure you that I found authorities speaking on that point. So, there is legal relevance to this issue and this question.

MS. SELIGY: Again, our position is that this question is not relevant to Ms. Kosseim's Affidavit or the issues on the motion. What you are raising is a legal question and that's a matter that is properly addressed in the hearing of the motion. *O*

DR. LUKÁCS: I am asking facts --

MS. SELIGY: But not with respect to the facts that Ms. Kosseim has set out in her Affidavit.

DR. LUKÁCS: I am asking for facts that underpin one of the criteria. If you refer to the decision of Madam Justice Sharlow that I referred you to yesterday, relevance is determined with respect to the law. In this case in addition to those criteria set out in the decision also timely action is an issue here. Certainly this is something that involves both facts and the law. So I am asking your witness questions --

MS. SELIGY: Yes.

DR. LUKÁCS: -- that relate to whether the Privacy Commissioner acted in a timely manner and therefore it is relevant. It is a fact relevant to whether leave should be granted.

MS. SELIGY: Our position is that is it not relevant and at this point you are fishing for a response on this issue that we have already stated is not relevant.

DR. LUKÁCS: I guess this will then have to be raised through a motion but let's continue then the examination with Ms. Kosseim. Let's ask her to join us.

(WITNESS ENTERS ROOM)

DR. LUKÁCS: Okay.

19. Q. Did anyone at the Office of the Commissioner communicate with persons at the Canadian Transportation Agency about the present application?

MS. SELIGY: Again, object to that response -- to that question rather and I am instructing my counsel not to respond. It is not relevant. *O*

DR. LUKÁCS: Instruct whom? I didn't hear you.

MS. SELIGY: My client.

DR. LUKÁCS:

20. Q. Ms. Kosseim, did you or others at the Office of the Commissioner know about the motion of the Canadian Transportation Agency to quash the application?

A. I can only speak for myself and no, I don't know of that. I did not know of that and don't know of that.

21. Q. Before coming for this examination, did you inform yourself about this matter?

A. I prepared my review of the relevant documents, yes.

22. Q. Did you also speak to your subordinates about information they may have relevant?

A. With respect to what I have before me, yes, I discussed what I have before me with my subordinates.

23. Q. Did you or anyone else at the Office of the Commissioner provide any assistance or advice, formal or informal, to the Canadian Transportation Agency in relation to the present application?

MS. SELIGY: I am going to object to that question. I am instructing my client not to answer; not relevant. *O*

DR. LUKÁCS:

24. Q. I understand that Mr. Daniel Therrien is the Privacy Commissioner of Canada.

A. Yes, he is.

25. Q. So, whenever you say "Privacy Commissioner" in your Affidavit, you refer to Mr. Therrien?

A. It depends on the time frame. If I am

referring to the present Privacy Commissioner, yes. If I am referring to the Privacy Commissioner that may have been acting in that position prior to his appointment, then I am referring to the previous Privacy Commissioner.

26. Q. Hm-humm. You refer in paragraph 15 of your Affidavit to A.B. v Bragg Communications.

A. Yes.

27. Q. What was the length of the factum and the length of the oral argument that the Commissioner was allowed in that case?

MS. SELIGY: I would object to that question. I don't see the relevance of that question but I think Ms. Kosseim can answer and we will see where this goes. *O*

THE WITNESS: I think we prepared a factum and our oral arguments in accordance with what we were afforded as an opportunity by the court. I can't remember exactly. It may have been 20 pages and 10 minutes of oral pleading.

DR. LUKÁCS:

28. Q. I suggest that it was actually only 10 pages. Do you agree with me?

A. Then it may have been 10 pages. I don't have the decision or the factum in front of me but we, as I said, we produced our factum and our oral argument in accordance with what we were allowed by the court.

29. Q. In paragraph 11 of your Affidavit, you state

that the Commissioner "has investigated numerous complaints from individuals regarding the disclosure of personal information by federal administrative tribunals via the Internet"; correct?

A. Yes, that is correct.

30. Q. Did you refer in paragraph 11 to the investigations summarized in Exhibit 3?

A. Yes, those are the complaints. I believe there were 23 of them that are referred in the annual report that we produced, or was produced as an Exhibit.

31. Q. Were all of these complaints and investigations in relation to disclosure of personal information on the Internet?

A. I believe so, yes.

32. Q. Does the present application involve disclosure of personal information on the Internet in any way?

A. Not to my knowledge, no.

33. Q. Please look at page 25 of Exhibit 3.

A. Yes.

34. Q. I see here several administrative tribunals listed on the page; correct?

A. Correct.

35. Q. Which of these boards conduct hearings in an adversarial manner?

A. I can't answer that offhand. I would have to refresh my memory.

36. Q. Would you like to take a break to do that?

A. I think the description of the tribunal are indicated in the annual report, page 25.

37. Q. My question is specifically about how those tribunals work, whether they are adversarial as two parties presenting arguments or more of a, I would say, single sided type of procedure where, for example, someone seeks a pension, I believe there is only the person appearing before the board. There is no adversary there.

A. It may vary.

38. Q. Well, my question is what each of those things, can you tell me whether it is adversarial or not.

A. Offhand, no I can't tell you.

39. Q. Well then, given that you said you informed yourself about these matters, apparently perhaps you may have omitted informing yourself about this, I would ask that perhaps we take a break and you look into this matter and you advise me on that or alternatively --

MS. SELIGY: How these bodies work is a matter of public record. This is -- it is not relevant for Ms. Kosseim to provide a description of how each of these bodies work. This information is available publicly. *O*

DR. LUKÁCS: Well, given that the Commissioner

intends to rely on this, I believe that, and that Ms. Kosseim claims to have knowledge of these matters, I do believe that it is relevant.

MS. SELIGY: It is not relevant to ask her to testify as to how these other public bodies work.

DR. LUKÁCS: I guess we will have to agree to disagree there.

40. Q. So this Exhibit 3 is from 2007-2008; correct?

A. Correct.

41. Q. And Mr. Therrien was appointed on June 5th, 2014; correct?

A. He was appointed in early June. I can't remember the exact date offhand, but yes, early June, yes in that time frame.

42. Q. 2014?

A. 2014, yes.

43. Q. So, Mr. Therrien did not conduct any investigations of complaints about disclosure of personal information prior to June, 2014, did he?

A. Not in his current capacity as Privacy Commissioner.

44. Q. Now please look at page 30 of Exhibit 3.

A. Yes.

45. Q. First, just to avoid misunderstanding, kindly please read into the record the paragraph below the

heading "Next Steps"?

A. "Under the *Privacy Act*, this is not a matter that we are empowered to bring before the courts for further guidance".

46. Q. What matter is being referred to here?

A. The matter that's referred to there are the matters that were raised in the complaints that are the subject of and described in the annual report.

47. Q. So do I understand it correctly that the Privacy Commissioner could not bring before the court the issue of disclosure of personal information by tribunals? That is what the report says, is that correct?

A. The Privacy Commissioner cannot bring before the court complaints that bear on either collection, use or disclosure of personal information. They can -- he can or she can bring to the court matters that deal with access to personal information.

48. Q. So, the reason that the Commissioner cannot bring this matter to the court is because the powers or jurisdiction of the Commissioner in terms of bringing matters before the court is confined to access to personal information and they don't include disclosure.

A. The Privacy Commissioner does not have jurisdiction to bring before the court matters that -- or complaints that deal with disclosure of personal

information.

49. Q. All right. Are you familiar with the Canadian Transportation Agency General Rules?

A. No, I am not other than -- no, I don't -- I am not familiar with the Rules of the CTA.

DR. LUKÁCS: Let's mark as Exhibit Number 4, Rules 23 to 25 and 40.

EXHIBIT NO. 4: Canadian Transportation Agency General Rules, S.O.R./2005-35, Rules 23-25 and 40.

First, please read Rule 23(1) into the record.

A. Rule 23(1)reads, "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."

50. Q. Did the Privacy Commissioner seek leave to appeal or otherwise challenge Rule 23(1)?

MS. SELIGY: I am going to object to that question. It's not relevant. I am instructing Ms. Kosseim not to answer. *O*

DR. LUKÁCS: Counsel, just a word of explanation. This is relevant to the issue of collateral attack which the Commissioner may be engaging in which is not permitted. Do you maintain your objection?

MS. SELIGY: Yes.

DR. LUKÁCS: Okay.

51. Q. Are you familiar with the Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)?

A. No, personally, I am not familiar with the details of those Rules.

DR. LUKÁCS: Let's mark as Exhibit Number 5 the Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), specifically Rules 7, 18, 19, 31 and Schedules 5 and 6.

EXHIBIT NO. 5: Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings) S.O.R./2014-104, Rules 7, 18, 19 31 and Schedules 5 and 6.

Please read Rule 7(2) into the record.

A. Rule 7(2) reads, "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".

52. Q. Did the Privacy Commissioner seek leave to appeal or otherwise challenge Rule 7(2)?

MS. SELIGY: Again, I am going to raise an objection to that question. It is not relevant. *O*

DR. LUKÁCS:

53. Q. Now, let's look at paragraph 21 of your Affidavit. What submissions does the Commissioner intend to make in this application?

A. The Commissioner will make submissions aligned with what we state in our Notice of Motion and my Affidavit.

54. Q. I am afraid that is not a proper answer. My question was, what are those submissions?

A. The submissions will be aligned with what we state we intend to do, both in the Notice of Motion and my Affidavit.

55. Q. Can you please point to me where in your Affidavit you are referring to?

A. Among other paragraphs, I would point you to paragraph 19, 20, 22, 23, 24.

56. Q. My question to you was what will be your submissions. You have identified a number of issues on which the Commissioner intends to make submissions but so far you haven't told me what will be the Commissioner's submissions on these issues?

MS. SELIGY: This question has been asked and answered already by Ms. Kosseim. *O*

DR. LUKÁCS: My position, Ms. Seligy, is that the question has not been answered and therefore I am requesting a proper answer to my question.

MS. SELIGY: Again, the answer has been provided and I am not clear on the relevance of this question. Ms. Kosseim is not here to speak to the legal arguments that the Commissioner will be making beyond what is in the Affidavit and the motion.

DR. LUKÁCS: Well, Ms. Seligy, Ms. Kosseim makes explicit reference to the Commissioner's submissions in paragraph 21 and she claims to have knowledge of same so therefore certainly the submissions that a party seeking leave to intervene intends to make are highly relevant to whether leave to intervene should be granted.

MS. SELIGY: Again, Ms. Kosseim has answered the question so we would suggest moving on.

DR. LUKÁCS:

57. Q. Ms. Kosseim, how do you know that the Commissioner's submissions will be different than those of the Canadian Transportation Agency?

A. Because the Privacy Commissioner has had the opportunity to examine this question in accordance, in the context of several different administrative tribunals and therefore has examined the question and the issues from numerous different perspectives and this is a position and a value added that the Commissioner feels he can offer in this case.

58. Q. Ms. Kosseim, Commissioner Therrien did not

participate in those investigations in 2007 and 2008.

A. When I refer to the Privacy Commissioner, I refer to the Office of the Privacy Commissioner.

59. Q. But it is the Commissioner himself seeking leave to intervene in the present case, isn't it?

A. It is the Office of the Privacy Commissioner that is headed up by the Privacy Commissioner which is seeking leave to intervene in this case.

60. Q. How will the Commissioner's submissions differ from those of the Agency?

A. As I said, the Commissioner has had a unique opportunity to examine this question in the context of several different administrative tribunals, has examined the issue from multiple perspectives and different legislative regimes and therefore has value that it feels it can add to the discussion before the court.

61. Q. My question to you, Ms. Kosseim, was in what way the Commissioner's submissions will differ from the submissions of the Agency?

MS. SELIGY: Ms. Kosseim has answered that question already. *O*

DR. LUKÁCS: Ms. Seligy, I am afraid that was not the case. I did not receive a proper answer and therefore I am seeking a clear explanation and answer as to in what way the submissions will be different. One of the

criteria, as you know, for leave to intervene is that a party has to make submissions different than -- or the intervener has to make submissions different than those made by a party. In this case, there is already the Canadian Transportation Agency which will be defending and opposing this application. So my question refers to how the Commissioner's submissions will differ, if it will differ in any way from the submissions of the Agency. Given that Ms. Kosseim testifies that the Commissioner will offer different submissions, I am entitled to know how this will be different.

A. The Privacy Commissioner's submissions will be different given its perspective on this issue from, in multiple contexts, its expertise in balancing the right to privacy with other countervailing issues, its objectivity in terms of looking at these issues as an impartial arbitrator in various contexts, in the context of the complaint investigations.

62. Q. Impartial arbitrator, can you elaborate on that please?

A. As an ombudsman.

63. Q. Ms. Kosseim, are you aware that the Federal Court held that the Privacy Commissioner has no specialized expertise in interpreting privacy legislation?

A. The courts have recognized the Privacy

Commissioner's expertise in certain decisions.

64. Q. My question to you was, are you aware that the Federal Court held that the Privacy Commissioner has no specialized expertise in interpreting privacy legislation? Are you aware of that; yes or no?

A. In the specific context of that case, yes.

65. Q. Of what that case are you referring to?

A. I can't remember offhand but I do recall that case.

66. Q. Justice Robert Mainville, I believe?

MS. SELIGY: Can I ask what decision it is that you are referring to?

DR. LUKÁCS: Yes, just give me a moment. It is State Farm Mutual Automobile Insurance Company v Privacy Commissioner of Canada, 2010 FC 736.

67. Q. So I am still not clear on this, Ms. Kosseim. You have given me a conclusion that you believe that the Commissioner's submissions will be different but you haven't told me yet in what way they will be different. My question is not what makes you believe that they are different but rather my question is, how will the position taken by the Commissioner in this proceeding differ from the position advanced by the Agency? In what point, to put things differently, what point will the Commissioner disagree or take a different position on the issues than

the Agency?

MS. SELIGY: Ms. Kosseim has answered this question several times now and I am going to suggest that we move on. *O*

DR. LUKÁCS: I believe that I haven't received proper answers so I will therefore adjourn the examination of Ms. Kosseim pursuant to Rule 96(2) of the Federal Courts Rules for failure to produce documents and to provide proper answers to questions. Thank you very much.

THE WITNESS: Thank you.

THE REPORTER: Off record?

DR. LUKÁCS: Yes.

THE REPORTER: Okay, thank you.

DR. LUKÁCS: Thank you.

--THIS CROSS-EXAMINATION ADJOURNED AT 12:37 P.M., ON THE 23RD DAY OF OCTOBER, 2014.

I HEREBY CERTIFY THAT the foregoing was transcribed to the best of my skill and ability, from digitally recorded proceedings.

.....

G R S / M J A

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

DIRECTION TO ATTEND

TO: Patricia Kosseim

YOU ARE REQUIRED TO ATTEND AN EXAMINATION for cross-examination on your affidavit sworn on October 14, 2014 on behalf of the Office of the Privacy Commissioner of Canada, on **Thursday, October 23, 2014 at 12:00 p.m.** at the office of Gillespie Reporting Services, located at 130 Slater Street, 2nd Floor, Ottawa, Ontario, K1P 6E2 (Tel: 613-238-8501).

YOU ARE ALSO REQUIRED TO BRING WITH YOU and produce at the examination the following documents and things:

1. all communications in relation to the present proceeding between persons at the Office of the Privacy Commissioner of Canada and persons outside the Office; and

2. summaries of complaints referenced in paragraph 11 of your affidavit and the findings of the Privacy Commissioner in relation to these complaints.

TRAVEL EXPENSES for 1 day of attendance is served with this direction, calculated in accordance with Tariff A of the Federal Courts Rules, as follows:

Transportation allowance $0

Overnight accommodations and meal allowance $0

TOTAL $0

If further attendance is required, you will be entitled to additional money.

THE EXAMINATION WILL BE CONDUCTED IN ENGLISH. If you prefer to be examined in the other official language, an interpreter may be required and you must immediately advise the solicitor for the party conducting the examination.

IF YOU FAIL TO ATTEND OR REMAIN UNTIL THE END OF THIS EXAMINATION, YOU MAY BE COMPELLED TO ATTEND AT YOUR OWN EXPENSE AND YOU MAY BE FOUND IN CONTEMPT OF COURT.

INQUIRIES CONCERNING THIS DIRECTION may be directed to Dr. Gábor Lukács (lukacs@AirPassengerRights.ca).

October 17, 2014

DR. GÁBOR LUKÁCS

Halifax, Nova Scotia

lukacs@AirPassengerRights.ca

Applicant

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CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency General Rules

Règles générales de l'Office des transports du Canada

SOR/2005-35

DORS/2005-35

Current to May 27, 2014

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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.

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.

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.

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.

Disposition of Claim for Confidentiality

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.

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.

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.

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.

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.

Décision sur la demande de traitement confidentiel

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

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.

Representation and Change of Contact Information

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.

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.

PLEADINGS

Application

Filing of application

18. (1) Any application filed with the Agency must include the information referred to in Schedule 5.

Application complete

(2) If the application is complete, the parties are notified in writing that the application has been accepted.

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.

Closure of file

(4) If the applicant fails to provide the missing information within the time limit, the file is closed.

New application

(5) An applicant whose file is closed may file a new application in respect of the same matter.

ne dépose pas l'attestation par affidavit ou par déclaration devant témoin.

Représentation et changements des coordonnées

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.

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.

ACTES DE PROCÉDURE

Demande

Dépôt de la demande

18. (1) Toute demande déposée auprès de l'Office comporte les éléments visés à l'annexe 5.

Demande complète

(2) Si la demande est complète, les parties sont avisées par écrit de l'acceptation de la demande.

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.

Fermeture du dossier

(4) Si le demandeur ne complète pas la demande dans le délai imparti, le dossier est fermé.

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.

Request for Confidentiality

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.

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.

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-

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.

Requête de confidentialité

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.

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.

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.

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

WRITTEN REPRESENTATIONS OF THE APPLICANT / MOVING PARTY

PART I – STATEMENT OF FACTS

A. OVERVIEW

(i) Nature of the proceeding

1. The present proceeding is an application for judicial review, pursuant to section 28 of the *Federal Courts Act*, 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.

Lukács Affidavit, Exhibit "A" **Tab 2A: 18**

***Federal Courts Act*, R.S.C. 1985, c. F-7, s. 28** **Tab 5: 147**

2. No remedies pursuant to section 41 of the *Privacy Act*, section 14 of the *Personal Information Protection and Electronic Documents Act*, or section 41 of the *Access to Information Act* are sought in the present proceeding.

***Lukács v. Canadian Transportation Agency*, 2014 FCA 205, paras. 12-13** **Tab 11: 190**

(ii) The Privacy Commissioner's motion for leave to intervene

3. On October 17, 2014, the Privacy Commissioner of Canada (the "Commissioner") served upon the Applicant a motion pursuant to Rule 109 of the *Federal Courts Rules* for leave to intervene in the proceeding.

Lukács Affidavit, Exhibits "B" and "D" **Tabs 2B and 2D: 28 , 39**

4. The Commissioner's motion is supported by the affidavit of Ms. Patricia Kosseim, sworn on October 14, 2014.

Lukács Affidavit, Exhibit "C" **Tab 2C: 31**

(iii) The present motion

5. This is an interlocutory motion arising from the October 23, 2014 cross-examination of Ms. Kosseim, who provided evasive answers and refused to produce documents as directed in the Direction to Attend, and where counsel for the Commissioner improperly objected to questions.

6. As a remedy, the Applicant is seeking dismissal of the Commissioner's motion or the striking out of Ms. Kosseim's affidavit, or alternatively, requiring Ms. Kosseim to re-attend at her own or the Commissioner's expense for cross-examination, and to properly answer questions and produce documents.

B. THE CROSS-EXAMINATION OF MS. KOSSEIM

7. On October 17, 2014, the Applicant, Dr. Gábor Lukács, served on Ms. Kosseim and opposing counsels a Direction to Attend requiring Ms. Kosseim to attend for cross-examination on October 23, 2014 and requiring the production of:

(1) all communications in relation to the present proceeding between persons at the Office of the Privacy Commissioner of Canada and persons outside the Office; and

(2) summaries of complaints referenced in paragraph 11 of her affidavit and the findings of the Privacy Commissioner in relation to these complaints.

Lukács Affidavit, Exhibit "E" **Tab 2E: 47**

(i) Refusal to produce documents as directed

8. On October 21, 2014, Lukács offered counsel for the Commissioner to postpone the cross-examination of Ms. Kosseim in order to allow her to bring a motion for relief from production, pursuant to Rule 94(2) of the *Federal Courts Rules*.

Lukács Affidavit, Exhibit "G" **Tab 2G: 53**

9. On October 22, 2014, counsel for the Commissioner turned down the offer to adjourn Ms. Kosseim's cross-examination in order to allow her to contest the productions sought in the Direction to Attend, and instead advised Lukács that no documents responding to item (1) of the Direction to Attend would be produced.

Lukács Affidavit, Exhibit "H" **Tab 2H: 57**

10. On October 22, 2014, Lukács cautioned counsel for the Commissioner and Ms. Kosseim that:

> [...] should Ms. Kosseim fail to produce all documents as directed, I may have no choice but to adjourn the examination pursuant to Rule 96(2) to seek directions from the Court. Should this be necessary, I will be seeking:
>
> 1. an order, pursuant to Rule 97,
>   a. dismissing the Commissioner's motion; or
>   b. striking out the affidavit of Ms. Kosseim; or
>   c. requiring Ms. Kosseim to re-attend at her own expense; and
>
> 2. an order for costs, pursuant to Rules 96(3) and 404, against Ms. Kosseim, the Commissioner, or you personally, as the case may be.
>
> Finally, I would like to remind you that Ms. Kosseim must answer all questions on her own, and neither you nor any other counsel attending the examination may answer questions on her behalf.

Lukács Affidavit, Exhibit "I" **Tab 2I: 61**

11. In spite of being warned of the consequences, Ms. Kosseim refused to produce documents in response to item (1) of the Direction to Attend.

Kosseim Cross-Examination, p. 5, l. 10-17 **Tab 3: 83**

(ii) Evasive answers and improper objections

12. Ms. Kosseim provided evasive answers to questions 53-54 and 60-61 concerning the intended submissions of the Commissioner and how they would differ from the Agency's submissions.

Kosseim Cross-Examination, p. 18, l. 1-11; p. 20, l. 9-19; p. 21, l. 12-18 **Tab 3: 96 , 98 , 99**

13. Questions 56 and 67 were reformulations of questions 53, 54, 60, and 61, to which evasive answers were provided. Counsel for the Commissioner frustrated the examination of Ms. Kosseim by improperly objecting to questions 56 and 67 and falsely claiming that Ms. Kosseim had answered these questions.

Kosseim Cross-Examination, p. 18, l. 16-22; p. 22, l. 16-25 and p. 23, l. 1-4 — **Tab 3: 96 , 100 , 101**

14. Counsel for the Commissioner improperly objected to questions 16-19 concerning the timing of the Commissioner's motion and the time the Commissioner learned about the present application for judicial review; she maintained her objection even after Lukács provided her with a detailed explanation as to the relevance of the questions, and offered her to take a break to review the applicable authorities.

Kosseim Cross-Examination, pp. 6-9 — **Tab 3: 84 - 87**

15. Counsel for the Commissioner also improperly objected to questions 50 and 52 concerning whether the Commissioner had challenged in any way the Agency's rules requiring documents to be placed on "public record".

Kosseim Cross-Examination, p. 16, l. 16-20 and p. 17, l. 21-24 — **Tab 3: 94 - 95**

(iii) Adjournment pursuant to Rule 96(2)

16. The evasive answers of Ms. Kosseim to questions 53-54 and 60-61, which are central to whether leave to intervene should be granted, and Ms. Kosseim's refusal to produce documents as directed left Lukács no choice but to adjourn the cross-examination pursuant to Rule 96(2) of the *Federal Courts Rules*.

Kosseim Cross-Examination, p. 23, l. 5-9 — **Tab 3: 101**

(iv) Subsequent correspondence

17. On October 24, 2014, Lukács advised counsel for the Commissioner that he would be bringing a motion to compel answers and production of documents, and sought her consent to hold the Commissioner's motion for leave to intervene in abeyance pending resolution of his motion. On October 27, 2014, counsel for the Commissioner provided a noncommittal answer to Lukács.

Lukács Affidavit, Exhibits "J" and "K" **Tabs 2J and 2K: 64 , 66**

18. On October 27, 2014, Lukács wrote to this Honourable Court to seek directions with respect to the Commissioner's motion for leave to intervene, and asked that the Commissioner's motion be held in abeyance and not decided until after the receipt of the transcript of the cross-examination of Ms. Kosseim and determination of a motion to compel answers and productions in relation to same.

Lukács Affidavit, Exhibit "L" **Tab 2L: 68**

19. On November 10, 2014, Lukács provided counsel for the Commissioner with a copy of the transcript of the October 23, 2014 cross-examination of Ms. Kosseim, and demanded answers to the outstanding questions and productions.

Lukács Affidavit, Exhibit "M" **Tab 2M: 73**

20. On November 12, 2014, counsel for the Commissioner reconfirmed the positions she had taken earlier with respect to the outstanding questions and productions.

Lukács Affidavit, Exhibit "N" **Tab 2N: 75**

PART II – STATEMENT OF THE POINTS IN ISSUE

21. The questions to be decided on this motion are:

(i) Should the Commissioner's motion for leave to intervene be dismissed, pursuant to Rule 97(d)?

(ii) Should the affidavit of Ms. Kosseim be struck, pursuant to Rule 97(c)?

(iii) Should Ms. Kosseim be required to re-attend at her own expense or the expense of the Commissioner, for cross-examination on her affidavit, and at the re-attendance:

(a) provide proper, non-evasive answers to questions 53-54 and 60-61, and any follow-up questions;

(b) answer questions 16-19, 50, 52, 56, and 67, and any follow-up questions; and

(c) produce all communications in relation to the present proceeding between persons at the Office of the Privacy Commissioner of Canada and persons outside the Office, and answer questions in relation to them, including any follow-up questions;

(iv) The schedule for the remaining steps in the motion of the Commissioner for leave to intervene.

PART III – STATEMENT OF SUBMISSIONS

22. The relevance of a question or a document to a motion for leave to intervene is determined based on whether an answer to the question or production of the document may assist the Court in determining whether the intervention should be permitted. Such assistance might be obtained, for example if the answer to the question or the document is likely to speak to one or more of the factors to be taken into account in permitting the intervention.

***Eli Lilly and Co. v. Apotex Inc.*,** **Tab 10: 181**
2005 FCA 134, para. 9

23. In *Canadian Airlines International Ltd. v. Canada (Human Rights Commission) (F.C.A.)*, Noël, J.A. (as he was then) followed *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90 (C.A.), and identified six factors guiding the exercise of discretion to grant leave to intervene:

(1) Is the proposed intervener directly affected by the outcome?

(2) Does there exist a justiciable issue and a veritable public interest?

(3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(4) Is the position of the proposed intervener adequately defended by one of the parties to the case?

(5) Are the interests of justice better served by the intervention of the proposed third party?

(6) Can the Court hear and decide the cause on its merits without the proposed intervener?

***Canadian Airlines International Ltd. v. Canada (Human Rights Commission) (F.C.A.)*,** **Tab 9: 174**
[2010] 1 F.C.R. 226, para. 8

24. Recently, Stratas, J.A. held that the factors set out in *Rothmans* were outmoded, did not meet the exigencies of modern litigation, and the considerations guiding whether to grant intervener status should be:

> I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.
>
> II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?
>
> III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?
>
> IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?
>
> V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

A. QUESTIONS 53-54, 56, 60-61, 67: THE INTENDED SUBMISSIONS OF THE COMMISSIONER

(i) Relevance

25. Rule 109(2)(b) requires a person seeking leave to intervene to describe "how the proposed intervener wishes to participate in the proceeding" and "how that participation will assist the determination of a factual or legal issue related to the proceeding."

***Federal Courts Rules*, Rule 109(2)** **Tab 6: 157**

26. Both the *Rothmans* test and the test formulated by Stratas, J.A. call for assessing whether the proposed intervention will add to the debate an element which is absent from what the parties before the Court will bring. This factor cannot be assessed by the Court nor addressed by Lukács without having an indication of the submissions the Commissioner intends to make, and contrasting those with the positions taken by the parties.

***Canada (Attorney General) v. Sasvari*, 2004 FC 1650, para. 11** **Tab 7: 164**

27. Thus, the intended submissions of the Commissioner are relevant to the Commissioner's motion for leave to intervene. Ms. Kosseim referred to the intended submissions of the Commissioner at paragraph 21 of her affidavit, and due to her position, she has and/or can obtain knowledge of same:

> The Commissioner's submissions will offer a different perspective from those of the other parties and will be grounded in the Privacy Commissioner's mission to protect and promote the privacy rights of Canadians and his Office's extensive experience in privacy-related issues.
>
> [Emphasis added.]

Lukács Affidavit, Exhibit "C" **Tab 2C: 37**

28. Therefore, questions 53-54, 56, 60-61, and 67, directed at the intended submissions of the Commissioner and how they would differ from the Agency's submissions, are proper questions.

(ii) Evasive answers to questions 53-54 and 60-61

29. The answers of Ms. Kosseim to questions 53-54 were evasive, and she repeatedly failed to give a direct answer to the question of what submissions the Commissioner would be making if he were granted leave to intervene:

> 53. Q. Now, let's look at paragraph 21 of your Affidavit. What submissions does the Commissioner intend to make in this application?
>
> A. The Commissioner will make submissions aligned with what we state in our Notice of Motion and my Affidavit.
>
> 54. Q. I am afraid that is not a proper answer. My question was, what are those submissions?
>
> A. The submissions will be aligned with what we state we intend to do, both in the Notice of Motion and my Affidavit.
>
> [Emphasis added.]

Kosseim Cross-Examination, p. 18, l. 1-11 **Tab 3: 96**

30. Similarly, Ms. Kosseim gave evasive answers to questions 60-61, and she repeatedly failed to give a direct answer regarding in what way the Commissioner's submissions would be different from the submissions of the Agency:

> 60. Q. How will the Commissioner's submissions differ from those of the Agency?
>
> A. As I said, the Commissioner has had a unique opportunity to examine this question in the context of several different administrative tribunals, has examined the issue from multiple perspectives and different legislative regimes and therefore has value that it feels it can add to the discussion before the court.

> 61. Q. My question to you, Ms. Kosseim, was in what way the Commissioner's submissions will differ from the submissions of the Agency?
>
> ⋮
>
> A. The Privacy Commissioner's submissions will be different given its perspective on this issue from, in multiple contexts, its expertise in balancing the right to privacy with other countervailing issues, its objectivity in terms of looking at these issues as an impartial arbitrator in various contexts, in the context of the complaint investigations.
>
> [Emphasis added.]

Kosseim Cross-Examination, p. 20, l. 9-19 and p. 21, l. 12-18 — **Tab 3: 98 - 99**

(iii) Improper objections to questions 56 and 67

31. After Ms. Kosseim provided evasive answers to question 53-54, counsel for the Commissioner improperly objected to Lukács rephrasing the question:

> 56. Q. My question to you was what will be your submissions. You have identified a number of issues on which the Commissioner intends to make submissions but so far you haven't told me what will be the Commissioner's submissions on these issues?
>
> MS. SELIGY: This question has been asked and answered already by Ms. Kosseim.
>
> DR. LUKÁCS: My position, Ms. Seligy, is that the question has not been answered and therefore I am requesting a proper answer to my question.
>
> MS. SELIGY: Again, the answer has been provided and I am not clear on the relevance of this question. Ms. Kosseim is not here to speak to the legal arguments that the Commissioner will be making beyond what is in the Affidavit and the motion.

Kosseim Cross-Examination, p. 18, l. 16-25; p. 19, l. 1-5 — **Tab 3: 96 - 97**

32. Similarly, after Ms. Kosseim provided evasive answers to questions 60-61, counsel for the Commissioner improperly objected to Lukács rephrasing the question:

> 67. Q. So I am still not clear on this, Ms. Kosseim. You have given me a conclusion that you believe that the Commissioner's submissions will be different but you haven't told me yet in what way they will be different. My question is not what makes you believe that they are different but rather my question is, how will the position taken by the Commissioner in this proceeding differ from the position advanced by the Agency? In what point, to put things differently, what point will the Commissioner disagree or take a different position on the issues than the Agency?
>
> Ms. Seligy: Ms. Kosseim has answered this question several times now and I am going to suggest that we move on.
>
> [Emphasis added.]

Kosseim Cross-Examination, p. 22, l. 16-25 and p. 23, l. 1-4 **Tab 3: 100 - 101**

33. Rephrasing a question is a common and proper way to elicit a direct answer to a question. Lukács was entitled to rephrase questions 53-54 and 60-61, which had been evasively answered by Ms. Kosseim. Thus, it is submitted that questions 56 and 67 were proper, and Ms. Seligy's objections to them improperly frustrated the conduct of the examination.

34. It is to be noted that Ms. Seligy inappropriately questioned the relevance of question 56. As a trained lawyer who is the solicitor of record on a motion for leave to intervene, she knows or should know that the intended submissions of a proposed intervener are relevant on such a motion.

(iv) Remedies

35. By providing evasive answers to questions 53-54 and 60-61, Ms. Kosseim effectively refused to answer questions that were not only proper, but were directed to one of the core considerations on a motion for leave to intervene. Counsel for the Commissioner frustrated the efforts of Lukács to elicit direct answers to these questions by rephrasing them, and explicitly endorsed the evasive answers of Ms. Kosseim:

> S. SELIGY: Again, the answer has been provided and I am not clear on the relevance of this question. Ms. Kosseim is not here to speak to the legal arguments that the Commissioner will be making beyond what is in the Affidavit and the motion.
>
> [Emphasis added.]

Kosseim Cross-Examination, p. 19, l. 1-5 **Tab 3: 97**

36. It is submitted that this Honourable Court should not tolerate such a flagrant disregard of Rule 109, the case law governing leave to intervene, and the right of Lukács to cross-examine the Commissioner's affiant on matters that are fundamental to the motion. The conduct of Ms. Kosseim, and of counsel for the Commissioner, who is not a even party to the application, calls for the most drastic remedies available under Rule 97: dismissal of the Commissioner's motion or the striking out of the affidavit of Ms. Kosseim.

***Federal Courts Rules*, Rules 97(c) and 97(d)** **Tab 6: 155**

37. In the alternative, it is submitted that Ms. Kosseim should be required to re-attend for cross-examination, at her own expense or the expense of the Commissioner, to answer questions 53-54, 56, 60, 61, and 67, and any follow-up questions.

***Federal Courts Rules*,** **Tab 6: 155**
Rules 96(2), 97(a), 97(b), 97(e)

B. QUESTIONS 16-19: TIMING OF THE COMMISSIONER'S MOTION

38. A proposed intervener has a duty to seek leave to intervene at the earliest possible opportunity. In the present case, the Commissioner's motion for leave to intervene was brought nearly six months after the application was commenced. The reason for this delay is a relevant consideration in determining whether leave to intervene should be granted.

***Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 84, para. 4**	**Tab 12: 193**
***Canada (Attorney General) v. Siemens Enterprises Communications*, 2011 FCA 250, para. 5**	**Tab 8: 169**

39. Counsel for the Commissioner objected to questions 16-19 on the grounds that they are not relevant:

> 16. Q. How did the Office of the Commissioner obtain a copy of the Notice of Application?
>
> MS. SELIGY: We are going to object to that question and I am instructing my counsel not to answer. It is not relevant to Ms. Kosseim's Affidavit or the motion. And just to add to that, the Notice of Application is a matter of public record on the court record.
>
> 17. Q. When did the Office of the Commissioner obtain a copy of the Notice of Application?
>
> MS. SELIGY: Again, this is – again, we are objecting to that question. It is not relevant.
>
> DR. LUKÁCS:
>
> 18. Q. When did the Office of the Commissioner first learn about the present application?
>
> MS. SELIGY: Again, we are objecting. These questions – this line of questioning is not relevant to Ms. Kosseim's Affidavit or the motion.
>
> ⋮

> 19. Q. Did anyone at the Office of the Commissioner communicate with persons at the Canadian Transportation Agency about the present application?
>
> MS. SELIGY: Again, object to that response – to that question rather and I am instructing my counsel not to respond. It is not relevant.

Kosseim Cross-Examination, p. 6, l. 16-25 and p. 7, l. 1-13; p. 9, l. 14-19 — **Tab 3: 84 - 85 , 87**

40. Lukács submits that these questions, whose aim was to elicit answers about the time that the Commissioner learned about the present proceeding, were proper questions that were improperly objected to by counsel to the Commissioner. It is further submitted that Ms. Kosseim should be required to re-attend cross-examination, at the expense of the Commissioner, to answer questions 16-19 and any follow-up questions.

C. QUESTIONS 50 AND 52: COLLATERAL ATTACK

41. Seeking an intervener status is not a mechanism to allow a person to correct their failure to protect their position in a timely basis.

***Canada (Attorney General) v. Siemens Enterprises Communications*, 2011 FCA 250, para. 4** — **Tab 8: 169**

42. Both the Agency's old General Rules and the new Dispute Rules require placing all documents filed in an adjudicative proceeding on the Agency's "public record" unless confidentiality was sought and granted by the Agency.

Kosseim Cross-Examination, Exhibits No. 4 and 5 — **Tabs 3B and 3C: 104 , 111**

43. Whether the Commissioner is intending to use the present proceeding to launch a collateral attack against these provisions of the General Rules or the Dispute Rules is a relevant consideration for refusing leave to intervene.

44. Thus, questions 50 and 52, which are aimed precisely at this issue, are relevant to the Commissioner's motion. These were proper questions that were improperly objected to by counsel to the Commissioner. Ms. Kosseim should be required re-attend cross-examination to answer these questions and any follow-up questions.

Kosseim Cross-Examination, p. 16, l. 16-20 and p. 17, l. 21-24 **Tab 3: 94 - 95**

D. REFUSAL TO PRODUCE DOCUMENTS

45. Rule 94 of the *Federal Courts Rules* states:

> **94.** (1) Subject to subsection (2), a person who is to be examined on an oral examination or the party on whose behalf that person is being examined shall produce for inspection at the examination all documents and other material requested in the direction to attend that are within that person's or party's possession and control, other than any documents for which privilege has been claimed or for which relief from production has been granted under rule 230.
>
> (2) On motion, the Court may order that a person to be examined or the party on whose behalf that person is being examined be relieved from the requirement to produce for inspection any document or other material requested in a direction to attend, if the Court is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of documents or amount of material requested, it would be unduly onerous to require the person or party to produce it.
>
> [Emphasis added.]

***Federal Courts Rules*, Rule 94** **Tab 6: 154**

46. Rule 94(1) puts a positive duty upon a person being examined to bring material to the examination. This duty is only subject to the Court's powers, under Rule 94(2), to relieve the person from this duty if the Court is of the opinion that the material is irrelevant or that the task would be unduly onerous.

47. The discretion to relieve a person from the duty to produce documents is reserved to the Court, and cannot be exercised by the person being examined or by a party by simply refusing to produce documents that were requested and which are in the person's possession, power, or control.

48. Thus, the appropriate course of action for a person who is served with an excessively broad direction to attend that requests production of documents that are believed to be irrelevant is bringing a motion pursuant to Rule 94(2) for relief from production.

***Eli Lilly and Co. v. Apotex Inc.*, 2005 FCA 134** **Tab 10: 177**

49. Ms. Kosseim received a Direction to Attend requiring her to produce, among other things, "all communications in relation to the present proceeding between persons at the Office of the Privacy Commissioner of Canada and persons outside the Office."

Kosseim Cross-Examination, p. 2, l. 9-12 and Exhibit No. 2 **Tabs 3 and 3A: 80 , 102**

50. Lukács offered counsel for the Commissioner, Ms. Seligy (who is also acting as counsel for the deponent, Ms. Kosseim), to postpone the examination of Ms. Kosseim in order to allow her to bring a motion pursuant to Rule 94(2); however, Ms. Seligy turned down the offer.

Lukács Affidavit, Exhibits "G" and "H" **Tabs 2G and 2H: 53 , 57**

51. In these circumstances, it is submitted that Ms. Kosseim had no lawful excuse for refusing to produce documents responding to item (1) of the Direction to Attend.

Kosseim Cross-Examination, p. 5, l. 10-17 **Tab 3: 83**

(i) Relevance

52. As noted earlier, a proposed intervener has a duty to seek leave to intervene at the earliest possible opportunity. The documents sought under item (1) of the Direction to Attend are likely to assist the Court in assessing when the Commissioner learned about the present proceeding, and whether the motion for leave to intervene was brought in a timely manner.

(ii) Remedies

53. It is submitted that Ms. Kosseim should be required to produce documents responding to item (1) of the Direction to Attend, and be required to re-attend cross-examination at her own or the Commissioner's expense to answer questions about these documents.

***Federal Courts Rules*,** **Tab 6: 155**
Rules 96(2), 97(a), 97(b), 97(e)

E. SCHEDULE FOR REMAINING STEPS IN THE COMMISSIONER'S MOTION

54. Lukács has been unable to file his answer to the Commissioner's motion for leave to intervene for reasons that are entirely beyond his control:

(a) the transcript of the October 23, 2014 cross-examination of Ms. Kosseim was not available, even though it was ordered on the spot; and

(b) the cross-examination of Ms. Kosseim could not be completed on October 23, 2014 due to her giving evasive answers and refusing to produce documents as directed, and improper objections of counsel for the Commissioner.

55. Lukács is therefore asking the Honourable Court to extend the deadline for filing the answer to the Commissioner's motion for leave to intervene, set a schedule for the remaining steps in the Commissioner's motion, and permit Lukács 10 days from the receipt of the transcript of Ms. Kosseim's re-attendance to serve and file his responding motion record.

F. COSTS

56. Pursuant to Rule 96(3), the Court may sanction, through costs, a person whose conduct at examination necessitates adjourning the examination and bringing a motion.

***Federal Courts Rules*, Rule 96(3)** **Tab 6: 155**

57. The present motion, whose preparation forced Lukács to spend a substantial amount of time and resources, was necessitated by the conduct of Ms. Kosseim, who provided evasive answers and refused to produce documents, and the improper objections of Ms. Seligy, counsel for the Commissioner.

58. Both Ms. Kosseim and Ms. Seligy are trained in law, and thus should have reasonably been aware of the consequences of their actions. While Ms. Seligy was acting on behalf of the Commissioner, and her actions may not merit awarding costs against her personally but only against her client, Ms. Kosseim was present as a witness, and consequently should be personally liable for the consequences of her conduct.

59. Therefore, Lukács is asking the Honourable Court to exercise its discretion by requiring Ms. Kosseim and the Commissioner to pay for the costs of the present motion forthwith and in any event of the cause.

PART IV – ORDER SOUGHT

60. The Applicant, Dr. Gábor Lukács, is seeking an Order:

(i) dismissing the Privacy Commissioner's motion for leave to intervene, pursuant to Rule 97(d) of the *Federal Courts Rules*;

(ii) alternatively, striking out the affidavit of Ms. Patricia Kosseim, sworn on October 14, 2014, pursuant to Rule 97(c) of the *Federal Courts Rules*;

(iii) alternatively, requiring Ms. Kosseim to re-attend at her own expense or the expense of the Privacy Commissioner of Canada, for cross-examination on her affidavit sworn on October 14, 2014, and at the said re-attendance:

a. provide proper, non-evasive answers to questions 53-54 and 60-61, and any follow-up questions;

b. answer questions 16-19, 50, 52, 56, and 67, and any follow-up questions; and

c. produce all communications in relation to the present proceeding between persons at the Office of the Privacy Commissioner of Canada and persons outside the Office, and answer questions in relation to them, including any follow-up questions;

(iv) setting a schedule for the remaining steps in the motion for leave to intervene, and permitting Lukács 10 days from the receipt of the transcripts of Ms. Kosseim's re-attendance to serve and file his responding motion record in the motion for leave to intervene;

(v) directing Ms. Kosseim and the Privacy Commisioner of Canada to pay Lukács the costs of the present motion forthwith and in any event of the cause; and

(vi) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 14, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant / **Moving Party**

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Federal Courts Act, R.S.C. 1985, c. F-7
s. 28

Federal Courts Rules, S.O.R./98-106
Rules 8, 91, 94, 96, 97, 109, 369

CASES

Canada (Attorney General) v. Sasvari, 2004 FC 1650

Canada (Attorney General) v. Siemens Enterprises Communications Inc., 2011 FCA 250

Canadian Airlines International Ltd. v. Canada (Human Rights Commission) (F.C.A.), [2010] 1 F.C.R. 226

Eli Lilly and Co. v. Apotex Inc., 2005 FCA 134

Lukács v. Canadian Transportation Agency, 2014 FCA 205

Mugesera v. Canada (Minister of Citizenship and Immigration), 2003 FCA 84

Pictou Landing Band Council v. Canada (Attorney General), 2014 FCA 21

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

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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

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Extension by consent

7. (1) Subject to subsections (2) and (3), a period provided by these Rules may be extended once by filing the consent in writing of all parties.

Limitation

(2) An extension of a period under subsection (1) shall not exceed one half of the period sought to be extended.

Exception

(3) No extension may be made on consent of the parties in respect of a period fixed by an order of the Court or under subsection 203(1), 304(1) or 339(1).

Extension or abridgement

8. (1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.

When motion may be brought

(2) A motion for an extension of time may be brought before or after the end of the period sought to be extended.

Motions for extension in Court of Appeal

(3) Unless the Court directs otherwise, a motion to the Federal Court of Appeal for an extension of time shall be brought in accordance with rule 369.

SOR/2004-283, s. 32.

Délai prorogé par consentement écrit

7. (1) Sous réserve des paragraphes (2) et (3), tout délai prévu par les présentes règles peut être prorogé une seule fois par le dépôt du consentement écrit de toutes les parties.

Limite

(2) La prorogation selon le paragraphe (1) ne peut excéder la moitié du délai en cause.

Exception

(3) Les délais fixés par une ordonnance de la Cour et ceux prévus aux paragraphes 203(1), 304(1) et 339(1) ne peuvent être prorogés par le consentement des parties.

Délai prorogé ou abrégé

8. (1) La Cour peut, sur requête, proroger ou abréger tout délai prévu par les présentes règles ou fixé par ordonnance.

Moment de la présentation de la requête

(2) La requête visant la prorogation d'un délai peut être présentée avant ou après l'expiration du délai.

Requête présentée à la Cour d'appel fédérale

(3) Sauf directives contraires de la Cour, la requête visant la prorogation d'un délai qui est présentée à la Cour d'appel fédérale doit l'être selon la règle 369.

DORS/2004-283, art. 32.

PART 2

ADMINISTRATION OF THE COURT

Officers of the Court

9. to 11. [Repealed, SOR/2004-283, s. 4]

Court registrars

12. (1) The Administrator shall arrange that there be in attendance at every sitting of the Court a duly qualified person to act as court registrar for the sitting, who shall, subject to the direction of the Court,

(*a*) make all arrangements necessary to conduct the sitting in an orderly, efficient and dignified manner;

PARTIE 2

ADMINISTRATION DE LA COUR

Fonctionnaires de la cour

9. à 11. [Abrogés, DORS/2004-283, art. 4]

Greffiers

12. (1) Sous réserve des directives de la Cour, l'administrateur veille à ce qu'une personne qualifiée pour agir à titre de greffier de la Cour soit présente à chacune des séances de la Cour; cette personne :

a) prend les dispositions nécessaires pour assurer l'ordre, la bonne marche et la dignité de la séance;

the person's residence where a superior court sits.

Person residing outside Canada

(2) Where a person to be examined on an oral examination resides outside Canada, the time, place, manner and expenses of the oral examination shall be as agreed on by the person and the parties or, on motion, as ordered by the Court.

Travel expenses

(3) No person is required to attend an oral examination unless reasonable travel expenses have been paid or tendered to the person.

Direction to attend

91. (1) A party who intends to conduct an oral examination shall serve a direction to attend, in Form 91, on the person to be examined and a copy thereof on every other party.

Production for inspection at examination

(2) A direction to attend may direct the person to be examined to produce for inspection at the examination

(*a*) in respect of an examination for discovery, all documents and other material in the possession, power or control of the party on behalf of whom the person is being examined that are relevant to the matters in issue in the action;

(*b*) in respect of the taking of evidence for use at trial, all documents and other material in that person's possession, power or control that are relevant to the matters in issue in the action;

(*c*) in respect of a cross-examination on an affidavit, all documents and other material in that person's possession, power or control that are relevant to the application or motion; and

(*d*) in respect of an examination in aid of execution, all documents and other

une cour supérieure qui est le plus proche de la résidence de la personne.

Personne résidant à l'étranger

(2) Lorsque la personne devant subir un interrogatoire oral réside à l'étranger, l'interrogatoire est tenu aux date, heure et lieu, de la manière et pour les montants au titre des indemnités et dépenses dont conviennent la personne et les parties ou qu'ordonne la Cour sur requête.

Frais de déplacement

(3) Nul ne peut être contraint à comparaître aux termes d'une assignation à comparaître pour subir un interrogatoire oral que si des frais de déplacement raisonnables lui ont été payés ou offerts.

Assignation à comparaître

91. (1) La partie qui entend tenir un interrogatoire oral signifie une assignation à comparaître selon la formule 91 à la personne à interroger et une copie de cette assignation aux autres parties.

Production de documents pour examen

(2) L'assignation à comparaître peut préciser que la personne assignée est tenue d'apporter avec elle les documents ou éléments matériels qui :

a) sont en la possession, sous l'autorité ou sous la garde de la partie pour le compte de laquelle elle est interrogée et qui sont pertinents aux questions soulevées dans l'action, dans le cas où elle est assignée pour subir un interrogatoire préalable;

b) sont en sa possession, sous son autorité ou sous sa garde et qui sont pertinents à l'action, dans le cas où elle est assignée pour donner une déposition qui sera utilisée à l'instruction;

c) sont en sa possession, sous son autorité ou sous sa garde et qui sont pertinents à la requête ou à la demande, dans le cas où elle est assignée pour subir un

material in that person's possession, power or control that are relevant to the person's ability to satisfy the judgment.

contre-interrogatoire concernant un affidavit;

d) sont en sa possession, sous son autorité ou sous sa garde et qui fournissent des renseignements sur sa capacité de payer la somme fixée par jugement, dans le cas où elle est assignée pour subir un interrogatoire à l'appui d'une exécution forcée.

Service of direction to attend

(3) A direction to attend an oral examination shall be served

(*a*) where the person to be examined is an adverse party, at least six days before the day of the proposed examination;

(*b*) where the person to be examined is not a party to the proceeding, at least 10 days before the day of the proposed examination; or

(*c*) where the person is to be cross-examined on an affidavit filed in support of a motion, at least 24 hours before the hearing of the motion.

Signification de l'assignation

(3) L'assignation à comparaître est signifiée :

a) si elle s'adresse à une partie adverse, au moins six jours avant la date de l'interrogatoire;

b) si elle ne s'adresse pas à une partie à l'instance, au moins 10 jours avant la date de l'interrogatoire;

c) si elle vise le contre-interrogatoire de l'auteur d'un affidavit déposé au soutien d'une requête, au moins 24 heures avant l'audition de celle-ci.

Swearing

92. A person to be examined on an oral examination shall be sworn before being examined.

Serment

92. La personne soumise à un interrogatoire oral prête serment avant d'être interrogée.

Examining party to provide interpreter

93. (1) Where a person to be examined on an oral examination understands neither French nor English or is deaf or mute, the examining party shall arrange for the attendance and pay the fees and disbursements of an independent and competent person to accurately interpret everything said during the examination, other than statements that the attending parties agree to exclude from the record.

Interprète fourni par la partie qui interroge

93. (1) Si la personne soumise à un interrogatoire oral ne comprend ni le français ni l'anglais ou si elle est sourde ou muette, la partie qui interroge s'assure de la présence et paie les honoraires et débours d'un interprète indépendant et compétent chargé d'interpréter fidèlement les parties de l'interrogatoire oral qui sont enregistrées selon le paragraphe 89(4).

Administrator to provide interpreter

(2) Where an interpreter is required because the examining party wishes to conduct an oral examination in one official language and the person to be examined wishes to be examined in the other official

Interprète fourni par l'administrateur

(2) Lorsqu'une partie désire procéder à l'interrogatoire oral d'une personne dans une langue officielle et que cette dernière désire subir l'interrogatoire dans l'autre langue officielle, la partie peut demander à

language, on the request of the examining party made at least six days before the examination, the Administrator shall arrange for the attendance and pay the fees and disbursements of an independent and competent interpreter.

l'administrateur, au moins six jours avant l'interrogatoire, d'assurer la présence d'un interprète indépendant et compétent. Dans ce cas, l'administrateur paie les honoraires et les débours de l'interprète.

Oath of interpreter

(3) Before aiding in the examination of a witness, an interpreter shall take an oath, in Form 93, as to the performance of his or her duties.

SOR/2007-301, s. 3(E).

(3) Avant de fournir des services d'interprétation, l'interprète prête le serment, selon la formule 93, de bien exercer ses fonctions.

DORS/2007-301, art. 3(A).

Serment de l'interprète

Production of documents on examination

94. (1) Subject to subsection (2), a person who is to be examined on an oral examination or the party on whose behalf that person is being examined shall produce for inspection at the examination all documents and other material requested in the direction to attend that are within that person's or party's possession and control, other than any documents for which privilege has been claimed or for which relief from production has been granted under rule 230.

94. (1) Sous réserve du paragraphe (2), la personne soumise à un interrogatoire oral ou la partie pour le compte de laquelle la personne est interrogée produisent pour examen à l'interrogatoire les documents et les éléments matériels demandés dans l'assignation à comparaître qui sont en leur possession, sous leur autorité ou sous leur garde, sauf ceux pour lesquels un privilège de non-divulgation a été revendiqué ou pour lesquels une dispense de production a été accordée par la Cour en vertu de la règle 230.

Production de documents

Relief from production

(2) On motion, the Court may order that a person to be examined or the party on whose behalf that person is being examined be relieved from the requirement to produce for inspection any document or other material requested in a direction to attend, if the Court is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of documents or amount of material requested, it would be unduly onerous to require the person or party to produce it.

(2) La Cour peut, sur requête, ordonner que la personne ou la partie pour le compte de laquelle la personne est interrogée soient dispensées de l'obligation de produire pour examen certains des documents ou éléments matériels demandés dans l'assignation à comparaître, si elle estime que ces documents ou éléments ne sont pas pertinents ou qu'il serait trop onéreux de les produire du fait de leur nombre ou de leur nature.

Partie non tenue de produire des documents

Objections

95. (1) A person who objects to a question that is asked in an oral examination shall briefly state the grounds for the objection for the record.

95. (1) La personne qui soulève une objection au sujet d'une question posée au cours d'un interrogatoire oral énonce brièvement les motifs de son objection pour qu'ils soient inscrits au dossier.

Objection

Preliminary answer

(2) A person may answer a question that was objected to in an oral examination subject to the right to have the propriety of the question determined, on motion, before the answer is used at trial.

Improper conduct

96. (1) A person being examined may adjourn an oral examination and bring a motion for directions if the person believes that he or she is being subjected to an excessive number of questions or to improper questions, or that the examination is being conducted in bad faith or in an abusive manner.

Adjournment to seek directions

(2) A person conducting an oral examination may adjourn the examination and bring a motion for directions if the person believes answers to questions being provided are evasive or if the person being examined fails to produce a document or other material requested under rule 94.

Sanctions

(3) On a motion under subsection (1) or (2), the Court may sanction, through costs, a person whose conduct necessitated the motion or a person who unnecessarily adjourned the examination.

Failure to attend or misconduct

97. Where a person fails to attend an oral examination or refuses to take an oath, answer a proper question, produce a document or other material required to be produced or comply with an order made under rule 96, the Court may

(*a*) order the person to attend or re-attend, as the case may be, at his or her own expense;

(*b*) order the person to answer a question that was improperly objected to and any proper question arising from the answer;

Réponse préliminaire

(2) Une personne peut répondre à une question au sujet de laquelle une objection a été formulée à l'interrogatoire oral, sous réserve de son droit de faire déterminer, sur requête, le bien-fondé de la question avant que la réponse soit utilisée à l'instruction.

Questions injustifiées

96. (1) La personne qui est interrogée peut ajourner l'interrogatoire oral et demander des directives par voie de requête, si elle croit qu'elle est soumise à un nombre excessif de questions ou à des questions inopportunes, ou que l'interrogatoire est effectué de mauvaise foi ou de façon abusive.

Ajournement

(2) La personne qui interroge peut ajourner l'interrogatoire oral et demander des directives par voie de requête, si elle croit que les réponses données aux questions sont évasives ou qu'un document ou un élément matériel demandé en application de la règle 94 n'a pas été produit.

Sanctions

(3) À la suite de la requête visée aux paragraphes (1) ou (2), la Cour peut condamner aux dépens la personne dont la conduite a rendu nécessaire la présentation de la requête ou la personne qui a ajourné l'interrogatoire sans raison valable.

Défaut de comparaître ou inconduite

97. Si une personne ne se présente pas à un interrogatoire oral ou si elle refuse de prêter serment, de répondre à une question légitime, de produire un document ou un élément matériel demandés ou de se conformer à une ordonnance rendue en application de la règle 96, la Cour peut :

a) ordonner à cette personne de subir l'interrogatoire ou un nouvel interrogatoire oral, selon le cas, à ses frais;

b) ordonner à cette personne de répondre à toute question à l'égard de laquelle une objection a été jugée injusti-

(*c*) strike all or part of the person's evidence, including an affidavit made by the person;

(*d*) dismiss the proceeding or give judgment by default, as the case may be; or

(*e*) order the person or the party on whose behalf the person is being examined to pay the costs of the examination.

fiée ainsi qu'à toute question légitime découlant de sa réponse;

c) ordonner la radiation de tout ou partie de la preuve de cette personne, y compris ses affidavits;

d) ordonner que l'instance soit rejetée ou rendre jugement par défaut, selon le cas;

e) ordonner que la personne ou la partie au nom de laquelle la personne est interrogée paie les frais de l'interrogatoire oral.

Contempt order

98. A person who does not comply with an order made under rule 96 or 97 may be found in contempt.

Ordonnance pour outrage au tribunal

98. Quiconque ne se conforme pas à une ordonnance rendue en application des règles 96 ou 97 peut être reconnu coupable d'outrage au tribunal.

Written Examinations

Interrogatoire écrit

Written examination

99. (1) A party who intends to examine a person by way of a written examination shall serve a list of concise, separately numbered questions in Form 99A for the person to answer.

Interrogatoire par écrit

99. (1) La partie qui désire procéder par écrit à l'interrogatoire d'une personne dresse une liste, selon la formule 99A, de questions concises, numérotées séparément, auxquelles celle-ci devra répondre et lui signifie cette liste.

Objections

(2) A person who objects to a question in a written examination may bring a motion to have the question struck out.

Objection

(2) La personne qui soulève une objection au sujet d'une question posée dans le cadre d'un interrogatoire écrit peut, par voie de requête, demander à la Cour de rejeter la question.

Answers to written examination

(3) A person examined by way of a written examination shall answer by way of an affidavit.

Réponses

(3) La personne interrogée par écrit est tenue de répondre par affidavit établi selon la formule 99B.

Service of answers

(4) An affidavit referred to in subsection (3) shall be in Form 99B and be served on every other party within 30 days after service of the written examination under subsection (1).

Signification des réponses

(4) L'affidavit visé au paragraphe (3) est signifié à toutes les parties dans les 30 jours suivant la signification de l'interrogatoire écrit.

that person may bring an *ex parte* motion for directions as to how the claims are to be decided.

Directions

(2) On a motion under subsection (1), the Court shall give directions regarding

(*a*) notice to be given to possible claimants and advertising for claimants;

(*b*) the time within which claimants shall be required to file their claims; and

(*c*) the procedure to be followed in determining the rights of the claimants.

Intervention

Leave to intervene

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

Contents of notice of motion

(2) Notice of a motion under subsection (1) shall

(*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

Directions

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(*a*) the service of documents; and

(*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

Questions of General Importance

Notice to Attorney General

110. Where a question of general importance is raised in a proceeding, other

b) d'autre part, elle accepte de remettre les biens à la Cour ou d'en disposer selon les directives de celle-ci.

Directives

(2) Sur réception de la requête visée au paragraphe (1), la Cour donne des directives concernant :

a) l'avis à donner aux réclamants éventuels et la publicité pertinente;

b) le délai de dépôt des réclamations;

c) la procédure à suivre pour décider des droits des réclamants.

Interventions

Autorisation d'intervenir

109. (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

Avis de requête

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

Directives de la Cour

(3) La Cour assortit l'autorisation d'intervenir de directives concernant :

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

Question d'importance générale

Signification au procureur général

110. Lorsqu'une question d'importance générale, autre qu'une question visée à

(*c*) subject to rule 368, the portions of any transcripts on which the respondent intends to rely;

(*d*) subject to rule 366, written representations; and

(*e*) any other filed material not contained in the moving party's motion record that is necessary for the hearing of the motion.

SOR/2009-331, s. 6; SOR/2013-18, s. 13.

c) sous réserve de la règle 368, les extraits de toute transcription dont l'intimé entend se servir et qui ne figurent pas dans le dossier de requête;

d) sous réserve de la règle 366, les prétentions écrites de l'intimé;

e) les autres documents et éléments matériels déposés qui sont nécessaires à l'audition de la requête et qui ne figurent pas dans le dossier de requête.

DORS/2009-331, art. 6; DORS/2013-18, art. 13.

Memorandum of fact and law required

366. On a motion for summary judgment or summary trial, for an interlocutory injunction, for the determination of a question of law or for the certification of a proceeding as a class proceeding, or if the Court so orders, a motion record shall contain a memorandum of fact and law instead of written representations.

SOR/2002-417, s. 22; SOR/2007-301, s. 8; SOR/2009-331, s. 7.

Mémoire requis

366. Dans le cas d'une requête en jugement sommaire ou en procès sommaire, d'une requête pour obtenir une injonction interlocutoire, d'une requête soulevant un point de droit ou d'une requête en autorisation d'une instance comme recours collectif, ou lorsque la Cour l'ordonne, le dossier de requête contient un mémoire des faits et du droit au lieu de prétentions écrites.

DORS/2002-417, art. 22; DORS/2007-301, art. 8; DORS/2009-331, art. 7.

Documents filed as part of motion record

367. A notice of motion or any affidavit required to be filed by a party to a motion may be served and filed as part of the party's motion record and need not be served and filed separately.

Dossier de requête

367. L'avis de requête ou les affidavits qu'une partie doit déposer peuvent être signifiés et déposés à titre d'éléments de son dossier de requête ou de réponse, selon le cas. Ils n'ont pas à être signifiés et déposés séparément.

Transcripts of cross-examinations

368. Transcripts of all cross-examinations on affidavits on a motion shall be filed before the hearing of the motion.

Transcriptions des contre-interrogatoires

368. Les transcriptions des contre-interrogatoires des auteurs des affidavits sont déposés avant l'audition de la requête.

Motions in writing

369. (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

Procédure de requête écrite

369. (1) Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites.

Request for oral hearing

(2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of

Demande d'audience

(2) L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une mention à cet effet, accompagnée des rai-

the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

sons justifiant l'audition, dans ses prétentions écrites ou son mémoire des faits et du droit.

Reply

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

Réponse du requérant

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

Disposition of motion

(4) On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

Décision

(4) Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

Abandonment of motion

370. (1) A party who brings a motion may abandon it by serving and filing a notice of abandonment in Form 370.

Désistement

370. (1) La partie qui a présenté une requête peut s'en désister en signifiant et en déposant un avis de désistement, établi selon la formule 370.

Deemed abandonment

(2) Where a moving party fails to appear at the hearing of a motion without serving and filing a notice of abandonment, it is deemed to have abandoned the motion.

Désistement présumé

(2) La partie qui ne se présente pas à l'audition de la requête et qui n'a ni signifié ni déposé un avis de désistement est réputée s'être désistée de sa requête.

Testimony regarding issue of fact

371. On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised on a motion.

Témoignage sur des questions de fait

371. Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une requête.

PART 8

PRESERVATION OF RIGHTS IN PROCEEDINGS

General

Motion before proceeding commenced

372. (1) A motion under this Part may not be brought before the commencement of a proceeding except in a case of urgency.

Undertaking to commence proceeding

(2) A party bringing a motion before the commencement of a proceeding shall undertake to commence the proceeding within the time fixed by the Court.

PARTIE 8

SAUVEGARDE DES DROITS

Dispositions générales

Requête antérieure à l'instance

372. (1) Une requête ne peut être présentée en vertu de la présente partie avant l'introduction de l'instance, sauf en cas d'urgence.

Engagement

(2) La personne qui présente une requête visée au paragraphe (1) s'engage à introduire l'instance dans le délai fixé par la Cour.

Case Name:

Canada (Attorney General) v. Sasvari

Between
Attorney General of Canada, applicant, and
Georgina Sasvari, respondent

[2004] F.C.J. No. 2006

[2004] A.C.F. no 2006

2004 FC 1650

2004 CF 1650

21 Admin. L.R. (4th) 72

135 A.C.W.S. (3d) 691

Docket T-940-04

Federal Court

Tabib, Prothonotary

Heard: In writing.
Judgment: November 24, 2004.

(15 paras.)

Civil procedure -- Parties -- Intervenors -- Administrative law -- Boards and tribunals -- Human rights law -- Administration and enforcement -- Commissions.

Motions by the Canadian Human Rights Commission for leave to intervene in two applications for judicial review of its decisions. The applications arose out of decisions by the Commission to deal with complaints made by the respondent, Sasvari, against Transport Canada and the Canadian Transportation Agency. The affidavit in support of the motion to intervene contained the records of proceedings before the Commission.

HELD: Motions dismissed. The Commission did not articulate the questions of law that arose in each of the jurisdictional issues it wanted to address, whether and how the questions went to jurisdiction rather than correctness of its decisions, the substance of the arguments it proposed, or how its arguments would differ from those of the parties. It was not always appropriate for a tribunal to apply to intervene if its jurisdiction was at issue. The Commission was bound by the same test for intervention as other litigants. Jurisdiction was another factor to consider on a motion for leave to intervene. The Commission failed to present any evidence or material demonstrating how its intervention would assist the court.

Statutes, Regulations and Rules Cited:

Federal Court Rules, Rule 109.

Counsel:

Written representations by:

Michael Roach, for the appellant/applicant.

Lisa Cirillo, for the respondent.

Philippe Dufresne and Ceilidh Snider, for the proposed intervener.

REASONS FOR ORDER

1 TABIB, PROTHONOTARY:-- I am seized, in two separate matters (T-932-04 and T-940-04) of motions by the Canadian Human Rights Commission (the "Commission") for leave to intervene in applications for the judicial review of its decisions. While the applications in both matters are not joined or consolidated and involve distinct decisions of the Commission and different Applicants, the issues upon which the Commission wishes to intervene are the same, and I have concluded, after considering the material before me on both motions, that both must fail for the same reasons. These reasons are therefore written to apply in both matters.

2 These judicial review applications arise out of the decisions by the Commission to deal with complaints made by the Respondent, Georgina Sasvari, (the same in both instances) against Transport Canada (in file T-940-04) and against the Canadian Transportation Agency (the "CTA") (in file T-932-04).

3 In preliminary objections filed before the Commission, the CTA and Transport Canada had argued that they were not proper respondents to Ms. Sasvari's complaint, and that Ms. Sasvari's

complaints were an abuse of process, or were barred under the principles of res judicata or issue estoppel, as a complaint had already been made to and heard by the Commission against Air Transat in relation to the same incident. The Commission, in both cases and in identically worded decisions, decided that the matters were within its jurisdiction and that the CTA and Transport Canada were proper respondents to the complaints. It is these decisions that are the subject of the judicial review applications before the Court.

4 While each notice application states the grounds for review in different words, the Commission presents the issues that are raised by the applications and on which it wishes to intervene as follows in both of its motions.

> "i) the Commission's jurisdiction to deal with the complaint filed against [the Applicant] as a proper respondent to the human rights complaint;
> ii) the Commission's jurisdiction to determine that there is no issue of estoppel or abuse of process as alleged by the Applicant;
> iii) the Commission's jurisdiction to accept the complaint under section 41 of the Canadian Human Rights Act, R.S., 1985, c. H-6 (the "Act")
>
> The within application for judicial review also raises the issue of prematurity of the application for judicial review of the Commission's decision made pursuant to subsection 41(1) of the CHRA by the respondent to the complaint."

5 In support of its motions, the Commission submits the affidavits of Maria Stokes, which merely introduce as 8exhibits the records of the proceedings before the Commission, without further comments or explanations. It is appropriate to note here that the exhibits to Ms. Stokes' affidavits are already part of the Court's record, having been introduced by the parties themselves. In each of its motions the Commission then baldly argues that:

> "The within application raises jurisdictional issues [as outlined].
>
> This Honourable Court has recognized that the Commission can intervene to argue points of law, inter alia when the purpose thereof is to defend its jurisdiction.
>
> The Commission is not seeking leave to intervene in order to defend its decision.
>
> The Commission will bring a unique perspective which will be different from

that of the parties.

> In C.A.I.M.A.W. v. Paccar of Canada Ltd, [1989] 2 S.C.R. 983 at 1016, the Supreme Court of Canada has recognized that an administrative tribunal could bring a unique contribution to the proceedings by drawing on its specialized expertise in order to "[...] render reasonable what would otherwise appear unreasonable."

6 Nowhere does the Commission articulate the question or questions of law that arise in each "jurisdictional" issue, whether and how these questions of law truly go to its jurisdiction rather than to the correctness of its decision, the substance of the arguments it proposes to make and how these arguments differ from those made or which can be expected to be made by the parties, such that the Commission's intervention would indeed bring a unique perspective or draw on its specialized jurisdiction or expertise in a way that the parties are unable or unwilling to adequately place before the Court.

7 In truth, the Commission appears to proceed under the mistaken assumption that if an application for judicial review of its decision can be construed as raising a jurisdictional issue, then it is appropriate for it to intervene, and that, as the tribunal whose jurisdiction is "under attack", it must necessarily bring a unique perspective to the issues and be in a better position to explain its record (supposing, as the Commission appears to do, that its record is in need of explanation). The Commission's positioning of the existence of "jurisdictional issues" as the cornerstone of its motion for leave to intervene creates an erroneous perception that the test for a tribunal's intervention in judicial reviews of its decision is somehow distinct from the test applicable to other would-be interveners. Unless the right to intervene in a proceeding is granted and defined by statute, the intervention of any person, including a tribunal, is conditional upon leave being granted in accordance with Rule 109 of the Federal Court Rules, 1998 (see Canada (Attorney General) v. Georgian College of Applied Arts and Technology, [2003] F.C.J. No. 394 (C.A.) and Li v. Canada (Minister of Citizenship and Immigration), [2004] F.C.J. No. 1264 (C.A.)).

8 Rule 109 specifically requires a motion for leave to intervene to "describe [...] how that participation will assist the determination of a factual or legal issue related to the proceedings".

9 Judicial interpretation of the requirements of Rule 109 has resulted in identifying a series of factors that may be considered in deciding whether leave should be granted. There factors include:

- whether the proposed intervener is directly affected by the outcome;
- whether a justiciable issue and a veritable public interest exist;
- whether there is an apparent lack of any other reasonable or efficient means to submit the question to the Court;
- whether the position of the proposed intervener is adequately defended by one of the parties to the case;

- whether the interests of justice are better served by the intervention of the proposed third party; and
- whether the Court can hear and decide the case on its merits without the proposed intervener.

(See Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd., [2000] F.C.J. 220 (C.A.).

10 Because of the particular status of tribunals whose orders are the subject of judicial review proceedings and the public policy imperative of preserving the tribunal's image of impartiality and avoiding the unseemly spectacle of an impartial tribunal defending the correctness of its decisions (see C.A.I.M.A.W. v. Paccar (supra), Canada (Attorney General) v. Canada (Human Rights Tribunal), [1994] F.C.J. No. 300), an additional layer of scrutiny was imposed on requests for leave to intervene by tribunals, ensuring that the scope of interventions be limited to matters of jurisdiction "in a restricted sense" and the explanation of their records. These jurisprudential developments did not create a special "right" of intervention for tribunals; they simply added to and refined the list of factors to be considered under Rule 109 as it applies to tribunals. And thus, the central issue to be determined by the Court upon a motion for leave to intervene by a tribunal remains: has it been shown "how [the intervention] will assist in the determination of a factual or legal issue related to the proceeding?" [My emphasis].

11 This overriding consideration requires, in every case, that the proposed intervener demonstrate that its intervention will assist the determination of an issue. This cannot be achieved without demonstrating that the proposed intervention will add to the debate an element which is absent from what the parties before the Court will bring (see Canada Union of Public Employees (Airline Division v. Canadian Airlines International Inc. (supra). In turn, I find it difficult to conceive how such a demonstration can be made without giving an indication of the facts and arguments the Commission intends to present, and contrasting those with the positions taken by the parties.

12 Here, the Commission has failed to present any evidence or material demonstrating how its intervention will assist the Court, and the record before the Court provides no further support for the Commission's motions. The Commission's motions must accordingly fail.

13 Nor is it an answer for the Commission to argue, as it has done in its reply material in file T-940-04, that as it has "consistently" been granted leave to intervene in respect of the same jurisdictional issue in other applications, intervener status ought automatically to be granted to it in this case.

14 Requests for leave to intervene are considered on a case by case basis, and in each case, the proposed intervener must satisfy the Court that its intervention in that particular case will be of assistance. The decisions and orders cited by the Commission do not discuss the material which was before the Court in each case to support the Court's ruling on the motion for leave to intervene and

there is no basis upon which the Court can conclude that the circumstances which justified the intervention of the Commission in these cases similarly prevail in the matters before it now.

15 I find that the Commission's motions, in failing to even address the issue of how the proposed intervention would add to the argument and facts presented to the Court by the parties, were ill conceived and bound to fail. They should not have been made, and costs on the contested motion in file T-940-04 will therefore be payable by the Commission to the Applicant forthwith, in any event of the cause. As the Commission's motion was not opposed by the Applicant in file T-932-04, no costs are awarded.

TABIB, PROTHONOTARY

cp/e/qw/qlklc

Case Name:

Canada (Attorney General) v. Siemens Enterprises Communications Inc.

Between
Attorney General of Canada, Applicant, and
Siemens Enterprises Communications Inc., Respondent, and
West Atlantic Systems, Proposed Intervener

[2011] F.C.J. No. 1314

2011 FCA 250

423 N.R. 248

Docket A-39-11

Federal Court of Appeal
Ottawa, Ontario

Sharlow, Pelletier and Mainville JJ.A.

Heard: In writing.
Judgment: September 14, 2011.

(9 paras.)

Administrative law -- Judicial review and statutory appeal -- Practice and procedure -- Parties -- Motion by West Atlantic Systems for leave to intervene in judicial review proceeding dismissed -- Attorney General sought judicial review of Canadian International Trade Tribunal decision finding that conduct of Department of Public Works and Government Services in procurements at issue were deficient -- Rules permitting interventions were not to be used in order to replace respondent with intervener -- West Atlantic did not meet its duty to act at earliest possible opportunity -- Principal grounds of complaint raised by West Atlantic to justify its intervention related to findings that were never challenged and were not before Court.

Civil litigation -- Civil procedure -- Parties -- Intervenors -- Motion by West Atlantic Systems for leave to intervene in judicial review proceeding dismissed -- Attorney General sought judicial review of Canadian International Trade Tribunal decision finding that conduct of Department of

Public Works and Government Services in procurements at issue were deficient -- Rules permitting interventions were not to be used in order to replace respondent with intervener -- West Atlantic did not meet its duty to act at earliest possible opportunity -- Principal grounds of complaint raised by West Atlantic to justify its intervention related to findings that were never challenged and were not before Court.

Motion by West Atlantic Systems for leave to intervene in a judicial review proceeding. The Attorney General sought judicial review of a decision of the Canadian International Trade Tribunal finding that the conduct of the Department of Public Works and Government Services in the procurements at issue were deficient and failed to comply with the North American Free Trade Agreement. The respondent took no part in the judicial review proceedings. West Atlantic was now attempting to substitute itself as the respondent in the judicial review proceeding. The Court had already ordered that the judicial review application would be decided on the basis of the record and submissions made. West Atlantic first indicated its intention to intervene only one week before the date originally set for the oral hearing of the application.

HELD: Motion dismissed. The rules permitting interventions were not to be used in order to replace a respondent with an intervener, nor were they a mechanism which allowed people to correct their failure to protect their own position on a timely basis. West Atlantic did not meet its duty to act at the earliest possible opportunity. The principal grounds of complaint raised by West Atlantic to justify its intervention related to findings that were never challenged and that were not the object of the Crown's judicial review application.

Statutes, Regulations and Rules Cited:

Federal Courts Rules, Rule 109(2)

North American Free Trade Agreement, Art. 1007(1)

Counsel:

Written representations by:

Phil Weedon, for the Proposed Intervener.

The judgment of the Court was delivered by

1 MAINVILLE J.A.:-- This concerns a motion brought by West Atlantic Systems ("WAS") for leave to intervene in these judicial review proceedings and to obtain related orders, including a)

directions to the applicant to serve on WAS the Notice of Application, the supporting affidavits, the documentary exhibits, the applicant's record, as well as the transcript of the proceedings before the Canadian International Trade Tribunal (the "Tribunal"); b) an extension of time for WAS to serve and file supporting affidavits and documentary exhibits; c) an extension of time for WAS to serve and file a response to the applicant's record; and d) relief from costs throughout the proceedings.

2 The motion record should be accepted for filing even though it is does not answer all the requirements of the *Federal Courts Rules*; however, for the reasons set out below I am of the view that the motion itself should be dismissed.

3 A short chronology of the aspects of the proceedings pertinent to the proposed intervention is useful to understand the peculiar circumstances in which this motion has been filed:

a. In August of 2010, Siemens Enterprise Communications Inc. ("Siemens"), formerly Enterasys Networks of Canada Ltd., filed various complaints with the Canadian International Trade Tribunal (the "Tribunal").
b. On October 8, 2010 WAS requested leave to intervene before the Tribunal in the proceedings concerning these complaints.
c. On November 4, 2010, [2010] C.I.T.T. No. 141, the Tribunal denied WAS's request to intervene on the basis that though WAS is an "interested party" within the meaning of section 30.1 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.) c. 47, its interests could be adequately represented by Siemens, the complainant in the proceedings.
d. On December 23, 2010 the Tribunal issued its determination in these complaints, finding that the conduct of the Department of Public Works and Government Services ("PWGSC") in the procurements at issue were deficient and failed to comply with Article 1007(1) of the *North American Free Trade Agreement* in certain instances, but did not preclude Siemens from submitting a bid nor justify any remedy for Siemens.
e. On January 19, 2011 the Attorney General of Canada (the "Crown") applied for judicial review of this determination under sections 18.1 and 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.
f. Siemens chose not to file an appearance and did not participate in these judicial review proceedings.
g. By order dated June 16, 2011, this application for judicial review was scheduled to be heard in Ottawa on September 14, 2001.
h. On June 20, 2011, the Court released its reasons in *Attorney General of Canada v. Enterasys Networks of Canada Ltd.*, 2011 FCA 207 ("*Enterasys*"), a case which raised similar issues to those raised in these proceedings and in which neither Siemens nor WAS sought to participate.
i. On June 16, 2011, the Court requested counsel for the Crown to provide supplementary submissions (with a copy to Siemens) as to whether and to

what extent the principles stated in *Enterasys* disposed of these judicial review proceedings.

j. These supplementary submissions were served and filed on August 31, 2011.

k. On September 2, 2011, on the request of the Crown, the Court ordered that this judicial review application would be disposed of without an oral hearing and on the basis of the material in the applicant's record and the applicant's supplementary submissions.

l. On September 7, 2011 WAS filed a letter with the Registry asking that it "be given an opportunity this week to file a motion for intervener status prior to the end of the day Friday September 9, 2011."

m. On September 8, 2011 this Court directed that the panel considering the judicial review application would consider the motion proposed to be filed by WAS by the end of the business day on Friday September 9, 2011, hence the present motion.

4 By its motion, WAS is attempting to substitute itself for Siemens as the respondent in this judicial review application. WAS seeks to challenge the application under a proposed order of the Court which would, for all intents and purposes, grant it a status equivalent to that of a respondent in these proceedings. The rules permitting interventions are intended to provide a means by which persons who are not parties to the proceedings may nevertheless assist the Court in the determination of a factual or legal issue related to the proceedings (Rule 109(2)*b*) of the *Federal Courts Rules*). These rules are not to be used in order to replace a respondent by an intervener, nor are they a mechanism which allows a person to correct its failure to protect its own position in a timely basis.

5 A person who proposes to intervene has a duty to make its motion at the earliest possible opportunity in order to minimize the disruption in the proceedings in which it seeks to participate (*Canada (Minister of Citizenship and Immigration) v. Mugesera,* 2003 FCA 84). In this case, WAS first indicated its intention to intervene only one week before the date originally set for the oral hearing of the application and after the Court had already ordered that the application would be decided on the basis of the record and submissions made. Although WAS asserts that it was not formally notified by the Crown of the judicial review application, it does not deny in the material submitted in support of its motion that it was aware of these proceedings since their inception, nor does it explain why it was otherwise impeded from acting earlier. In these circumstances, I do not accept that WAS has met its duty to act at the earliest possible opportunity.

6 Moreover, the principal grounds raised by WAS to justify its intervention before the Tribunal were described as follows in a letter it sent to the Tribunal dated October 29, 2010 and attached as Exhibit C to the motion record before this Court:

> It is clear that one of the main grounds of complaint is that PWGSC is purchasing

> products outside of the scope of Categories 1.1 and 1.2, and in these cases PWGSC should either tender to the industry for a new category, as described in the NESS Annex A Statement of Work, where West Atlantic Systems could participate in these tenders and propose other products, or PWGSC should issue "RFP outside the NESS", and clearly West Atlantic has an interest in these RFP's and could produce products other than Enterasys products.

7 These grounds of complaint were extensively canvassed by the Tribunal in its Reasons at paragraphs 218 to 261. The Tribunal concluded at paragraph 262 of its Reasons that it was unable to accept Siemen's claims of product "miscategorization" regarding any of the procurements in issue. This determination of the Tribunal was never challenged and is not the object of the Crown's judicial review application. The principal grounds of complaint raised by WAS to justify its intervention are thus not before this Court.

8 Finally, most of the issues raised by the Crown in its judicial review application have been already dealt with by this Court in *Enterasys*, and any submissions on these issues by WAS would be of no or of very limited assistance to this Court in these proceedings.

9 On the basis of all of the above reasons, WAS's motion shall be denied. There shall be no order as to costs.

MAINVILLE J.A.
SHARLOW J.A.:--I agree
PELLETIER J.A.:-- I agree

Indexed as:

Canadian Airlines International Ltd. v. Canada (Human Rights Commission) (F.C.A.)

Canadian Airlines International Limited and Air Canada (Appellants)

v.

Canadian Human Rights Commission, Canadian Union of Public Employees (Airline Division) and Public Service Alliance of Canada (Respondents)

[2010] 1 F.C.R. 226

[2010] 1 R.C.F. 226

[2000] F.C.J. No. 220

[2000] A.C.F. no 220

No. A-346-99

Federal Court

Richard C.J., Létourneau and Noel JJ.A.

Heard: Montréal, February 15, 2000.
Judgment: Montréal, February 15, 2000.

(13 paras.)

Editor's Note: Although this judgment was not selected for full-text publication after it was rendered on February 15, 2000, because it is frequently cited by both counsel and the Federal Courts, it is now being published in the *Federal Courts Reports* in order to facilitate access to the profession.

Catchwords:

Practice -- Parties -- Intervention -- Appeal from interlocutory decision of Federal Court Trial

Division granting Public Service Alliance of Canada (PSAC) leave to intervene in judicial review applications pertaining to Canadian Human Rights Tribunal decision -- Motions Judge providing no reasons for order granting leave -- Relevant factors to consider in determining whether to grant inter-vention set out herein -- PSAC failing to demonstrate how expertise would assist in determination of issues placed before Court by parties -- PSAC's interest "jurisprudential" in nature -- Such interest alone not justifying application to intervene -- Without benefit of motion Judge's reasoning, not possible to see how intervention could have been granted without falling into error -- Appeal allowed.

Statutes and Regulations Cited

Canadian Human Rights Act, R.S.C., 1985, c. H-6, s. 11.

Federal Court Rules, 1998, SOR/98-196, r. 109.

[page227]

Cases Cited

Referred to:

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General), [1990] 1 F.C. 74, (1989), 41 Admin. L.R. 102, 29 F.T.R. 267 (T.D.).

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General), [1990] 1 F.C. 84, (1989), 41 Admin. L.R. 155, 29 F.T.R. 272 (T.D.).

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General), [1990] 1 F.C. 90, (1989), 45 C.R.R. 382, 103 N.R. 391 (C.A.).

R. v. Bolton, [1976] 1 F.C. 252 (C.A.).

Tioxide Canada Inc. v. Canada, [1995] 1 C.T.C. 285, (1994), 94 DTC 6655, 174 N.R. 212 (F.C.A.).

History and Disposition:

APPEAL from an interlocutory decision of the Federal Court -- Trial Division granting the Public Service Alliance of Canada leave to intervene in judicial review applications pertaining to a decision of the Canadian Human Rights Tribunal (*Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [1998] C.H.R.D. No. 8 (QL)). Appeal allowed.

Appearances:

Peter M. Blaikie for appellants.

Andrew J. Raven for respondent Public Service Alliance of Canada.

Solicitors of record:

Heenan Blaikie, Montréal, for appellants.

Raven, Allen, Cameron & Ballantyne, Ottawa, for respondent Public Service Alliance of Canada.

The following are the reasons for judgment rendered in English by

1 **NOËL J.A.**:-- This is an appeal from an interlocutory decision of the Trial Division granting the Public Service Alliance of Canada (PSAC) leave to intervene in the judicial review applications brought by the Canadian Human Rights Commission (the Commission) and the Canadian Union of Public Employees (Airline Division) (CUPE). These judicial review applications pertain to a [page228] decision of the Canadian Human Rights Tribunal (the Tribunal) [*Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [1998] C.H.R.D. No. 8 (QL)] rejecting a complaint by CUPE, that the appellants paid discriminatory wages to their flight attendants, pilots and technical operations personnel.

2 By this decision, the Tribunal held *inter alia* that the above-described employees of Air Canada and Canadian Airlines International Limited (Canadian) work in separate "establishments" for the purposes of section 11 of the *Canadian Human Rights Act* [R.S.C., 1985, c. H-6] since they are subject to different wage and personnel policies.

3 PSAC did not seek to intervene in the proceedings before the Tribunal.

4 The Tribunal's decision was released on December 15, 1998. The Commission and CUPE filed judicial review applications on January 15, 1999, and PSAC's application for leave to intervene was filed on May 6, 1999. The sole issue with respect to which leave to intervene was sought is whether the pilots, flight attendants and technical operations personnel employed by Air Canada and Canadian respectively are in the same "establishment" for the purposes of section 11 of the Act.

5 The order allowing PSAC's intervention was granted on terms but without reasons. The order reads:

> The Public Service Alliance of Canada (the Alliance) is granted leave to

intervene on the following basis:

(a) the Alliance shall be served with all materials of the other parties;
(b) the Alliance may file its own memorandum of fact and law by June 14, 1999, being within 14 days of the date for serving and filing the Respondent Canadian Airlines International Limited and the Respondent Air Canada's [page229] memoranda of fact and law as set out in the order of Mr. Justice Lemieux, dated March 9, 1999;
(c) the Applicant Canadian Union of Public Employees (Airline Division) and the Applicant Canadian Human Rights Commission and the Respondents Canadian Airlines International Limited and Air Canada may file a reply to the Alliance's memorandum of fact and law by June 28, 1999, being 14 days from the date of service of the Alliance's memorandum of fact and law;
(d) the parties' right to file a requisition for trial shall not be delayed as a result of the Alliance's intervention in this proceeding;
(e) the Alliance shall be consulted on hearing dates for the hearing of this matter;
(f) the Alliance shall have the right to make oral submissions before the Court.

6 In order to succeed, the appellants must demonstrate that the motions Judge misapprehended the facts or committed an error of principle in granting the intervention. An appellate court will not disturb a discretionary order of a motions judge simply because it might have exercised its discretion differently.

7 In this respect, counsel for PSAC correctly points out that the fact that the motions Judge did not provide reasons for her order is no indication that she failed to have regard to the relevant considerations. It means however that this Court does not have the benefit of her reasoning and hence no deference can be given to the thought process which led her to exercise her discretion the way she did.

8 It is fair to assume that in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:[1]

(1) Is the proposed intervener directly affected by the outcome?
(2) Does there exist a justiciable issue and a veritable public interest?

[page230]

(3) Is there an apparent lack of any other reasonable or efficient means to submit the

question to the Court?

(4) Is the position of the proposed intervener adequately defended by one of the parties to the case?

(5) Are the interests of justice better served by the intervention of the proposed third party?

(6) Can the Court hear and decide the case on its merits without the proposed intervener?

9 She also must have had in mind rule 109 of the *Federal Court Rules, 1998* [SOR/98-106] and specifically subsection (2) thereof which required PSAC to show in the application before her how the proposed intervention "will assist the determination of a factual or legal issue related to the proceeding."

10 Accepting that PSAC has acquired an expertise in the area of pay equity, the record reveals that:

1. PSAC represents no one employed by either of the appellant airlines;
2. the Tribunal's decision makes no reference to any litigation in which PSAC was or is engaged;
3. the grounds on which PSAC has been granted leave to intervene are precisely those which both the Commission and CUPE intend to address;
4. nothing in the materials filed by PSAC indicates that it will put or place before the Court any case law, authorities or viewpoint which the Commission or CUPE are unable or unwilling to present.

11 It seems clear that at its highest PSAC's interest is "jurisprudential" in nature; it is concerned that the decision of the Tribunal, if allowed to stand, may have repercussions on litigation involving pay equity issues in the future. It is well established that this kind of interest alone cannot justify an application to intervene.[2]

[page231]

12 Beyond asserting its expertise in the area of pay equity, it was incumbent upon PSAC to show in its application for leave what it would bring to the debate over and beyond what was already available to the Court through the parties. Specifically, it had to demonstrate how its expertise would be of assistance in the determination of the issues placed before the Court by the parties. This has not been done. Without the benefit of the motion Judge's reasoning, we can see no basis on which she could have granted the intervention without falling into error.

13 The appeal will be allowed, the order of the motions Judge granting leave to intervene will be set aside, PSAC's application for leave to intervene will be dismissed and its memorandum of fact

and law filed on June 14, 1999, will be removed from the record. The appellants will be entitled to their costs on this appeal.

1 *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (T.D.), at pp. 79-83; *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 84 (T.D.), at p. 88; *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 90 (C.A.).

2 See *R. v. Bolton*, [1976] 1 F.C. 252 (C.A.) (*per* Jackett C.J.); *Tioxide Canada Inc. v. Canada*, [1995] 1 C.T.C. 285 (F.C.A.) (*per* Hugessen J.A.).

Case Name:

Eli Lilly and Co. v. Apotex Inc.

Between
Apotex Inc., appellant (plaintiff by counterclaim), and
Eli Lilly and Company and Eli Lilly Canada Inc., respondents (defendants by counterclaim), and
Shionogi & Co. Ltd., respondent (defendant by counterclaim)

[2005] F.C.J. No. 609

[2005] A.C.F. no 609

2005 FCA 134

2005 CAF 134

334 N.R. 335

138 A.C.W.S. (3d) 1001

Docket A-579-04

Federal Court of Appeal
Ottawa, Ontario

Sharlow J.A.

Heard: In writing.
Judgment: April 13, 2005.

(14 paras.)

Evidence -- Documentary evidence -- Affidavits -- Cross-examination on.

Motion by the Commissioner of Competition for an order striking out a portion of a direction to attend served by Eli Lilly for cross-examination on the Commissioner's affidavit. The affidavit was filed in support of the Commissioner's motion to intervene in an appeal. Apotex appealed an order

dismissing part of Apotex's counterclaim in a patent infringement action. The purpose of the proposed intervention was to permit the Commissioner to make submissions about the correctness of certain conclusions of law stated in the decision under appeal and to assist the Court in understanding the Commissioner's Intellectual Property Enforcement Guidelines. The direction to attend required the Commissioner to bring all correspondence between Apotex and the commissioners as well as all notes and other communications concerning the present proceeding. The Commissioner argued that the requested documents were irrelevant to the motion to intervene and that they were confidential.

HELD: Motion allowed. The documents requested were not relevant. Only those documents that would assist the court in determining whether the Commissioner should be granted intervener status were relevant. Some of the listed documents were sought to explore the motivation of the Commissioner for intervention. The Commissioner's underlying motive for seeking to intervene would not assist the court in determining whether to permit the proposed intervention.

Statutes, Regulations and Rules Cited:

Competition Act, R.S.C. 1985, c. 34, s. 45.

Federal Court Rules, Rules 94(2), 109(2).

Counsel:

Written representations by:

William Miller, Randall Hofley and Belinda Peres, for the proposed intervener, Commissioner of Competition.

H.B. Radomski, David Scrimger and Miles Hastie, for the appellant.

A. David Morrow and Colin B. Ingram, for the respondent, Shionogi & Co. Ltd.

Patrick Smith and John Norman, for the respondents, Eli Lilly and Company and Eli Lilly Canada Inc.

[Editor's note: An amendment was released by the Court on August 17, 2005. The changes were not indicated. This document contains the amended text.]

REASONS FOR ORDER

1 SHARLOW J.A.:-- On February 28, 2005, the Commissioner of Competition filed a notice of

motion for an order seeking leave to intervene in this appeal. The appeal is from Eli Lilly and Co. v. Apotex Inc. (2004), 35 C.P.R. (4th) 155 (F.C.), in which Hugessen J. allowed the motion of the respondents for summary judgment dismissing part of Apotex's counter claim in a patent infringement action.

2 Apotex had alleged that Lilly breached section 45 of the Competition Act, R.S.C. 1985, c. 34, by acquiring from Shionogi & Co. Ltd. certain patents, thus acquiring sole control of all of the commercially viable process for making cefaclor. In granting summary dismissal of those allegations, Hugessen J. concluded that section 45 of the Competition Act can apply to an agreement involving the exercise of patent rights, but that the acquisition by Lilly of the patents in issue did not constitute a breach of section 45.

3 The scope of the proposed intervention is set out in the first paragraph of the Commissioner's submissions on the motion to intervene, which reads as follows:

> This is an application by the Commissioner of Competition for an order granting her leave to intervene in the within appeal, in order to present submissions, and affidavit evidence regarding the development and meaning of the Intellectual Property Enforcement Guidelines (2000) (the "IPEGs") and similar U.S. and E.U. guidelines, with respect to the following two issues raised by this appeal:
>
> (i) whether section 50 of the Patent Act precludes the application of section 45 (and section 36) of the Competition Act (the "Act") to an assignment(s) of a patent(s); and
> (ii) whether the learned motions judge was correct in stating that his conclusions with respect to the above issue are fully compatible with the IPEGs issued by the Commissioner.

4 Thus, the purpose of the proposed intervention, as I understand it, is to permit the Commissioner to make submissions about the correctness of certain conclusions of law stated in the decision under appeal, as well as the comment that those conclusions are consistent with the Commissioner's Intellectual Property Enforcement Guidelines. These are submissions that deal essentially with the theory of competition law.

5 Apotex has indicated its consent to the Commissioner's intervention. For reasons that will become apparent, the respondents have not yet filed a motion record in relation to the motion to intervene.

6 In support of the intervention motion, the Commissioner submitted the affidavit of Gwillym Allen, a Commerce Officer employed by the Commissioner in the Competition Bureau, sworn on February 25, 2005. Mr. Allen's affidavit reads in part as follows:

3. The Commissioner has not commenced an investigation or inquiry under the Competition Act (the "Act") into the matters referred to or dealt with in the within litigation. Her proposed role is limited to contributing to this Court's consideration of the proper interpretation of the Act and the Patent Act, by assisting the Court incoming to an understanding of the role of the Act, and her published guidelines, with respect to intellectual property (IP) rights.
4. More specifically, the Commissioner's interest in the within appeal relates solely to the following findings of Hugessen J. in reliance on the Federal Court of Appeal's decision in Molnlycke AB v. Kimberley-Clark of Canada Ltd. et al. (1991), 36 CPR (3d) 493:

    (a) "... the Patent Act does not have the effect of insulating from liability under the Competition Act any and every agreement which may also have to do with the exercise of patent rights. However, where an agreement deals only with patent rights and is itself specifically authorized by the Patent Act, any lessening of competition resulting therefrom, being authorized by Parliament, is not "undue" and is not an offence under section 45." [emphasis added]
    (b) that this finding was "fully compatible with the [IPEGs] issued by the Competition Bureau."

7 Lilly served Mr. Allen with a direction to attend for cross-examination on his affidavit. The direction to attend includes a requirement to bring the following documents:

1. any and all letters, e-mails or other communications between Apotex Inc., its agents or counsel with commissioners, employees or counsel for the Competition Bureau and any notes relating to such communication;
2. all notes, memos, letters, communication and other documents concerning the subject proceeding or the interpretation of section 45 or the impact of the subject proceeding on the enforcement activities of the Bureau under the Act;
3. all notes, memos, letters, communications and other documents concerning the interpretation of Molnlycke AB v. Kimberly-Clark; and
4. all notes, memos, letters, communications and other documents relating to the Bureau's analysis of the facts of the within proceeding as performed using the framework outlined in paragraph 7 of the Allen affidavit including but not limited to any decision made.

8 Before me is a motion by the Commissioner to strike the quoted portion of the direction to attend on the basis that the requested documents are not relevant to the Commissioner's motion to intervene, that they are confidential records of a law enforcement agency, and that the requests are

overly broad, vague and general and constitute an impermissible fishing expedition. This is in substance a motion for relief under Rule 94(2) (Federal Courts Rules, 1998, SOR/98-106). Rule 94(2) reads as follows:

> 94 (2) On motion, the Court may order that a person to be examined or the party on whose behalf that person is being examined be relieved from the requirement to produce for inspection any document or other material requested in a direction to attend, if the Court is of the opinion that the document or other material requested is irrelevant or, by reason of its nature or the number of documents or amount of material requested, it would be unduly onerous to require the person or party to produce it.
>
> * * *
>
> 94 (2) La Cour peut, sur requête, ordonner que la personne ou la partie pour le compte de laquelle la personne est interrogée soient dispensées de l'obligation de produire pour examen certains des documents ou éléments matériels demandés dans l'assignation à comparaître, si elle estime que ces documents ou éléments ne sont pas pertinents ou qu'il serait trop onéreux de les produire du fait de leur nombre ou de leur nature.

9 Following the reasoning of Hugessen J. in Merck Frosst Canada Inc. v. Canada (Minister of Health) (1997), 80 C.P.R. (3d) 550 (F.C.T.D.), affirmed (1999), 3 C.P.R. (4th) 286 (F.C.A.), a document would be relevant to the cross-examination of Mr. Allen if its production may assist the Court in determining whether the intervention should be permitted. Such assistance might be obtained, for example, if the document is likely to speak to one or more of the factors to be taken into account in permitting the intervention.

10 According to Rule 109(2), an applicant for leave to intervene in an appeal must establish that the proposed intervention "will assist the determination of a factual or legal issue related to the proceeding". The factors to be considered in determining whether to grant leave to intervene are set out in Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd., [2000] F.C.J. No. 220 (QL) (F.C.A.), at paragraph 8:

1) Is the proposed intervener directly affected by the outcome?
2) Does there exist a justiciable issue and a veritable public interest?
3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
5) Are the interests of justice better served by the intervention of the proposed third party?
6) Can the Court hear and decide the cause on its merits without the proposed

intervener?

11 I do not propose to discuss all of the submissions of Lilly in support of its request for documents, but I will address what appear to me to be the two most important points.

12 First, Lilly is seeking production of some of the listed documents in order to explore the possibility that the Commissioner has a motive for the intervention other than the wish to assist the Court with legal submissions. Lilly seems to be of the view that the Commissioner's motion to intervene would be undermined if the Commissioner is found not to be "neutral". In my view, information about the Commissioner's underlying motive for seeking to intervene in this appeal would not assist the Court in determining whether to permit her proposed intervention which, as stated above, relates solely to issues of law.

13 Second, it appears that some of the submissions of Lilly are based on the incorrect premise that the Commissioner is challenging the correctness of Molnlycke AB v. Kimberly-Clark of Canada Ltd. (cited above). I do not read the Commissioner's proposed intervention as involving anything more than a challenge to the correctness of certain statements in the decision under appeal in this case.

14 Having reviewed Mr. Allen's affidavit and all of the submissions of the parties, I must agree with the Commissioner that the documents sought by Lilly are not relevant. Lilly is entitled to cross-examine Mr. Allen on his affidavit, but in my view Mr. Allen should be relieved of the obligation to produce documents.

SHARLOW J.A.

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.

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

Case Name:

Mugesera v. Canada (Minister of Citizenship and Immigration)

Between
The Minister of Citizenship and Immigration, appellant,
and
Léon Mugesera, Gemma Uwamariya, Irenée Rutema, Yves Rusi, Carmen Nono, Mireille Urumuri and Marie-Grace Hoho, respondents

[2003] F.C.J. No. 231

[2003] A.C.F. no 231

2003 FCA 84

2003 CAF 84

Docket A-317-01

Federal Court of Appeal

Noël J.A.

Heard: In writing.
Judgment: February 14, 2003.

(5 paras.)

Practice -- Appeals -- Parties -- Persons entitled to participate in an appeal -- Intervenors.

Application by the Canadian Centre for International justice and PAGE-RWANDA for intervenor status regarding an appeal by the Minister of Citizenship and Immigration. The application was filed almost two years after the judgment under appeal and two months before the proposed hearing date.

HELD: Application dismissed. The applicants' participation would not assist in disposing of the

appeal as the Minister was in a position to convey the full extent of the legal issues involved. A proposed intervenor was required to apply for such status at the earliest possible opportunity in order to minimize disruption to the proceedings. The applicants failed to offer any explanation for the lateness of their application.

Counsel:

Written representations by:
Louise-Marie Courtemanche, for the appellant.
Guy Bertrand, for the respondents.
David Matas, for the proposed intervener.

REASONS FOR ORDER

1 **NOËL J.A.**:-- This is an application for leave to intervene by the Canadian Centre for International Justice and by PAGE-RWANDA. The respondents oppose the motion whereas the appellant takes a neutral position.

2 The applicants propose to file a 55 paragraph memorandum to which the respondents will want to respond if leave be granted. The application was filed almost two years after the judgment under appeal was rendered and after of a requisition for hearing had been filed. In this respect, the parties have indicated their availability for an April hearing date in Quebec City.

3 After carefully reviewing the material on file including the applicants' proposed memorandum, I am not convinced that the applicants' participation will assist the Court in disposing of the appeal. In this regard, the appellant appears to be in a position to convey to the Court the full dimension of the legal issues and I am particularly concerned about the appellant's expressed desire to respond to the arguments which the applicants propose to bring.

4 I would add that a proposed intervener has a duty to make its application at the earliest possible opportunity in order to minimize the disruption of the proceedings in which it seeks to participate. In this instance, no explanation of any sort was offered for the lateness of the application. In these circumstances, the Court will obviously be less inclined to disrupt the proceeding in order to accommodate a third party's desire to be heard.

5 The application will accordingly be dismissed.

NOËL J.A.

cp/e/qw/qlklc

Case Name:

Pictou Landing Band Council v. Canada (Attorney General)

Between
Attorney General of Canada, Appellant, and
Pictou Landing Band Council and Maurina Beadle, Respondents

[2014] F.C.J. No. 115

2014 FCA 21

456 N.R. 365

68 Admin. L.R. (5th) 228

237 A.C.W.S. (3d) 570

2014 CarswellNat 149

Docket A-158-13

Federal Court of Appeal
Ottawa, Ontario

Stratas J.A.

Heard: In writing.
Judgment: January 29, 2014.

(34 paras.)

Civil litigation -- Civil procedure -- Parties -- Intervenors -- Motions by First Nations Child and Family Caring Society and Amnesty International to intervene in appeal allowed -- Applicants had complied with requirements of Rule 109(2) as they addressed nature of participation and how it would assist court -- Applicants had genuine interest in matter and matters they proposed to raise would further court's determination -- Interventions would, at best, delay hearing of appeal by only three weeks -- Existing parties would not suffer significant prejudice as issues interveners would address were closely related to those already in issue.

Motions by the First Nations Child and Family Caring Society and Amnesty International to intervene in the appeal. The respondent Band Council requested funding to cover the expenses for services rendered to a 17-year-old disabled Band member whose condition required 24-hour care. His mother previously provided his care, but she suffered a stroke in 2010 and could not care for the child without assistance. The Band provided funding for the child's care, but later requested that the federal government cover the child's expenses. Aboriginal Affairs and Northern Development considered the request and applied a funding principle that was passed by the House of Commons to the effect that the federal government would provide funding for First Nations children in certain circumstances, and it rejected the request. The Band Council successfully quashed the rejection in the Federal Court and the Crown appealed. The key issues raised on the appeal were whether the Federal Court selected the correct standard of review and, if so, whether it applied the standard of review correctly. The applicants intended to situate the funding principle against the backdrop s. 15 Charter jurisprudence, international instruments and human rights understandings and jurisprudence.

HELD: Motions allowed. The applicants had complied with the specific procedural requirements in Rule 109(2) as they described the nature of their proposed participation and how it would assist the court. The applicants had a genuine interest in the matter before the court. Their activities and previous interventions in legal and policy matters indicated that they had considerable knowledge, skills and resources relevant to the questions before the court and would deploy them to assist the court. The contextual matters the applicants wished to raise might inform the court's determination of the appropriate standard of review and might assist in the application of that standard of review. It was in the interests of justice that the court expose itself to perspectives beyond those advanced by the parties and the proposed interventions would further the just determination of the proceeding on its merits. The interventions would not significantly delay the appeal and, as the issues raised by the interveners were closely related to those already in issue, the existing parties would not be substantially prejudiced.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Federal Courts Rules, SOR/98-106, Rule 3, Rules 65-68, Rule 70, Rule 109, Rule 109(2), Rules 359-369

Counsel:

Written representations by:

Jonathan D.N. Tarlton and Melissa Chan, for the Appellant.

Justin Safayeni and Kathrin Furniss, for the Proposed Intervener, Amnesty International.

Katherine Hensel and Sarah Clarke, for the Proposed Intervener, First Nations Child and Family Caring Society.

REASONS FOR ORDER

1 **STRATAS J.A.**:-- Two motions to intervene in this appeal have been brought: one by the First Nations Child and Family Caring Society and another by Amnesty International.

2 The appellant Attorney General opposes the motions, arguing that the moving parties have not satisfied the test for intervention under Rule 109 of the *Federal Courts Rules*, SOR/98-106. The respondents consent to the motions.

3 Rule 109 provides as follows:

> **109**. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.
>
> (2) Notice of a motion under subsection (1) shall
>
> (*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and
>
> (*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.
>
> (3) In granting a motion under subsection (1), the Court shall give directions regarding
>
> (*a*) the service of documents; and
>
> (*b*) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

* * *

109. (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

(3) La Cour assortit l'autorisation d'intervenir de directives concernant :

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

4 Below, I describe the nature of this appeal and the moving parties' proposed interventions in this appeal. At the outset, however, I wish to address the test for intervention to be applied in these motions.

5 The Attorney General submits, as do the moving parties, that in deciding the motions for intervention I should have regard to *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 at paragraph 12 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.), an oft-applied authority: see, *e.g.*, *CCH Canadian Ltd. v. Law Society of Upper Canada* (2000), 189 D.L.R. (4th) 125 (F.C.A.). *Rothmans, Benson & Hedges* instructs me that on these motions a list of six factors should guide my discretion. All of the factors need not be present in order to grant the motions.

6 In my view, this common law list of factors, developed over two decades ago in *Rothmans, Benson & Hedges*, requires modification in light of today's litigation environment: *R. v. Salituro*, [1991] 3 S.C.R. 654. For the reasons developed below, a number of the *Rothmans, Benson & Hedges* factors seem divorced from the real issues at stake in intervention motions that are brought today. *Rothmans, Benson & Hedges* also leaves out other considerations that, over time, have

assumed greater prominence in the Federal Courts' decisions on practice and procedure. Indeed, a case can be made that the *Rothmans, Benson & Hedges* factors, when devised, failed to recognize the then-existing understandings of the value of certain interventions: Philip L. Bryden, "Public Intervention in the Courts" (1987) 66 Can. Bar Rev. 490; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 U. T. Fac. L. Rev. 151. Now is the time to tweak the *Rothmans, Benson & Hedges* list of factors.

7 In these reasons, I could purport to apply the *Rothmans, Benson & Hedges* factors, ascribing little or no weight to individual factors that make no sense to me, and ascribing more weight to others. That would be intellectually dishonest. I prefer to deal directly and openly with the *Rothmans, Benson & Hedges* factors themselves.

8 In doing this, I observe that I am a single motions judge and my reasons do not bind my colleagues on this Court. It will be for them to assess the merit of these reasons.

9 The *Rothmans, Benson& Hedges* factors, and my observations concerning each, are as follows:

- *Is the proposed intervener directly affected by the outcome?* "Directly affected" is a requirement for full party status in an application for judicial review - *i.e.*, standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236. All other jurisdictions in Canada set the requirements for intervener status at a lower but still meaningful level. In my view, a proposed intervener need only have a genuine interest in the precise issue(s) upon which the case is likely to turn. This is sufficient to give the Court an assurance that the proposed intervener will apply sufficient skills and resources to make a meaningful contribution to the proceeding.
- *Does there exist a justiciable issue and a veritable public interest?* Whether there is a justiciable issue is irrelevant to whether intervention should be granted. Rather, it is relevant to whether the application for judicial review should survive in the first place. If there is no justiciable issue in the application for judicial review, the issue is not whether a party should be permitted to intervene but whether the application should be struck because there is no viable administrative law cause of action: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250.
- *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* This is irrelevant. If an intervener can help and improve the Court's consideration of the issues in a judicial review or an appeal therefrom, why would the Court turn the intervener aside just because the intervener can go elsewhere? If the concern

underlying this factor is that the intervener is raising a new question that could be raised elsewhere, generally interveners - and others - are not allowed to raise new questions on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paragraphs 22-29.

- *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.
- *Are the interests of justice better served by the intervention of the proposed third party?* Again, this is relevant and important. Sometimes the issues before the Court assume such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties who happen to be before the Court. Sometimes that broader exposure is necessary to appear to be doing - and to do - justice in the case.
- *Can the Court hear and decide the case on its merits without the proposed intervener?* Almost always, the Court can hear and decide a case without the proposed intervener. The more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter.

10 To this, I would add two other considerations, not mentioned in the list of factors in *Rothmans, Benson & Hedges*:

- *Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"?* For example, some motions to intervene will be too late and will disrupt the orderly progress of a matter. Others, even if not too late, by their nature may unduly complicate or protract the proceedings. Considerations such as these should now pervade the interpretation and application of procedural rules: *Hryniak v. Mauldin*, 2014 SCC 7.

- *Have the specific procedural requirements of Rules 109(2) and 359-369 been met?* Rule 109(2) requires the moving party to list its name, address and solicitor, describe how it intends to participate in the proceeding, and explain how its participation "will assist the determination of a factual or legal issue related to the proceeding." Further, in a motion such as this,

brought under Rules 359-369, moving parties should file detailed and well-particularized supporting affidavits to satisfy the Court that intervention is warranted. Compliance with the Rules is mandatory and must form part of the test on intervention motions.

11 To summarize, in my view, the following considerations should guide whether intervener status should be granted:

I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

12 In my view, these considerations faithfully implement some of the more central concerns that the *Rothmans, Benson & Hedges* factors were meant to address, while dealing with the challenges that regularly present themselves today in litigation, particularly public law litigation, in the Federal Courts.

13 I shall now apply these considerations to the motions before me.

- I -

14 The moving parties have complied with the specific procedural requirements in Rule 109(2).

This is not a case where the party seeking to intervene has failed to describe with sufficient particularity the nature of its participation and how its participation will assist the Court: for an example where a party failed this requirement, see *Forest Ethics Advocacy Association*, *supra* at paragraphs 34-39. The evidence offered is particular and detailed, not vague and general. The evidence satisfactorily addresses the considerations relevant to the Court's exercise of discretion.

- II -

15 The moving parties have persuaded me that they have a genuine interest in the matter before the Court. In this regard, the moving parties' activities and previous interventions in legal and policy matters have persuaded me that they have considerable knowledge, skills and resources relevant to the questions before the Court and will deploy them to assist the Court.

- III -

16 Both moving parties assert that they bring different and valuable insights and perspectives to the Court that will further the Court's determination of the appeal.

17 To evaluate this assertion, it is first necessary to examine the nature of this appeal. Since this Court's hearing on the merits of the appeal will soon take place, I shall offer only a very brief, top-level summary.

18 This appeal arises from the Federal Court's decision to quash Aboriginal Affairs and Northern Development Canada's refusal to grant a funding request made by the respondent Band Council: *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342. The Band Council requested funding to cover the expenses for services rendered to Jeremy Meawasige and his mother, the respondent Maurina Beadle.

19 Jeremy is a 17-year-old disabled teenager. His condition requires assistance and care 24 hours a day. His mother served as his sole caregiver. But in May 2010 she suffered a stroke. After that, she could not care for Jeremy without assistance. To this end, the Band provided funding for Jeremy's care.

20 Later, the Band requested that Canada cover Jeremy's expenses. Its request was based upon *Jordan's Principle*, a resolution passed by the House of Commons. In this resolution, Canada announced that it would provide funding for First Nations children in certain circumstances. Exactly what circumstances is very much an issue in this case.

21 Aboriginal Affairs and Northern Development Canada considered this funding principle, applied it to the facts of this case, and rejected the Band Council's request for funding. The respondents successfully quashed this rejection in the Federal Court. The appellant has appealed to this Court.

22 The memoranda of fact and law of the appellant and the respondents have been filed. The parties raise a number of issues. But the two key issues are whether the Federal Court selected the correct standard of review and, if so, whether the Federal Court applied that standard of review correctly.

23 The moving parties both intend to situate the funding principle against the backdrop of section 15 Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters. Although the appellant and the respondents do touch on some of this context, in my view the Court will be assisted by further exploration of it.

24 This further exploration of contextual matters may inform the Court's determination whether the standard of review is correctness or reasonableness. It will be for the Court to decide whether, in law, that is so and, if so, how it bears upon the selection of the standard of review.

25 The further exploration of contextual matters may also assist the Court in its task of assessing the funding principle and whether Aboriginal Affairs was correct in finding it inapplicable or was reasonable in finding it inapplicable.

26 If reasonableness is the standard of review, the contextual matters may have a bearing upon the range of acceptable and defensible options available to Aboriginal Affairs. The range of acceptable and defensible options takes its colour from the context, widening or narrowing depending on the nature of the question and other circumstances: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 37-41 and see also *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at paragraph 22, *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50, and *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14. In what precise circumstances the range broadens or narrows is unclear - at this time it cannot be ruled out that the contextual matters the interveners propose to raise have a bearing on this.

27 In making these observations, I am not offering conclusions on the relevance of the contextual matters to the issues in the appeal. In the end, the panel determining this appeal may find the contextual matters irrelevant to the appeal. At present, it is enough to say that the proposed interveners' submissions on the contextual matters they propose to raise - informed by their different and valuable insights and perspectives - will actually further the Court's determination of the appeal one way or the other.

- IV -

28 Having reviewed some of the jurisprudence offered by the moving parties, in my view the issues in this appeal - the responsibility for the welfare of aboriginal children and the proper interpretation and scope of the relevant funding principle - have assumed a sufficient dimension of public interest, importance and complexity such that intervention should be permitted. In the circumstances of this case, it is in the interests of justice that the Court should expose itself to

perspectives beyond those advanced by the existing parties before the Court.

29 These observations should not be taken in any way to be prejudging the merits of the matter before the Court.

- V -

30 The proposed interventions are not inconsistent with the imperatives in Rule 3. Indeed, as explained above, by assisting the Court in determining the issues before it, the interventions may well further the "just...determination of [this] proceeding on its merits."

31 The matters the moving parties intend to raise do not duplicate the matters already raised in the parties' memoranda of fact and law.

32 Although the motions to intervene were brought well after the filing of the notice of appeal in this Court, the interventions will, at best, delay the hearing of the appeal by only the three weeks required to file memoranda of fact and law. Further, in these circumstances, and bearing in mind the fact that the issues the interveners will address are closely related to those already in issue, the existing parties will not suffer any significant prejudice. Consistent with the imperatives of Rule 3, I shall impose strict terms on the moving parties' intervention.

33 In summary, I conclude that the relevant considerations, taken together, suggest that the moving parties'motions to intervene should be granted.

34 Therefore, for the foregoing reasons, I shall grant the motions to intervene. By February 20, 2014, the interveners shall file their memoranda of fact and law on the contextual matters described in these reasons (at paragraph 23, above) as they relate to the two main issues before the Court (see paragraph 22, above). The interveners'memoranda shall not duplicate the submissions of the appellant and the respondents in their memoranda. The interveners' memoranda shall comply with Rules 65-68 and 70, and shall be no more than ten pages in length (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover). The interveners shall not add to the evidentiary record before the Court. Each intervener may address the Court for no more than fifteen minutes at the hearing of the appeal. The interveners are not permitted to seek costs, nor shall they be liable for costs absent any abuse of process on their part. There shall be no costs of this motion.

STRATAS J.A.