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 / RESPONDING PARTY MOTION RECORD (Privacy Commissioner's motion for leave to intervene)

Dated: January 16, 2015

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant / Responding Party

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

Odette Lalumière

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

Solicitor for the Respondent,
Canadian Transportation Agency

AND TO: **OFFICE OF THE PRIVACY COMMISSIONER OF CANADA**
30 Victoria Street
Gatineau, QC K1A 1H3

Jennifer Seligy

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

Counsel for the Proposed Intervener,
Privacy Commissioner of Canada

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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: October 23, 2014)

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

1. I am the Applicant in the present proceeding. As such, I have personal knowledge of the matters to which I depose.

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

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

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

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

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

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

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

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

The email had as an attachment a PDF file called "AI-2013-00081.PDF" that consisted of 121 numbered pages, 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"). A copy of Ms. Bellerose's email, dated March 19, 2014, including pages 67-70, 75, and 77-80 of its attachment, is attached and marked as Exhibit "C".

5. 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. Nevertheless, 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).

6. On March 24, 2014, I demanded in writing that the Agency comply with its obligations under the open court principle and s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and provide me with unredacted copies of all documents in File No. M4120-3/13-05726 with respect to which no confidentiality order was made by a Member of the Agency. A copy of my March 24, 2014 letter is attached and marked as Exhibit "D".

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

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

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

8. 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 "F".

9. On or around July 31, 2014, I was served with a motion of the Agency to quash the present application for judicial review for lack of jurisdiction.

10. A copy of the Order of Mr. Justice Webb, J.A., dated September 19, 2014, dismissing the Agency's motion to quash the application for judicial review, is attached and marked as Exhibit "G".

11. On October 17, 2014, I was served with a motion of Mr. Daniel Therrien, the Privacy Commissioner of Canada, seeking leave to intervene in the present application pursuant to Rule 109 of the *Federal Courts Rules*.

12. Mr. Daniel Therrien was appointed Privacy Commissioner of Canada on June 5, 2014. A copy of the biography of Commissioner Therrien, obtained from the website of the Office of the Privacy Commissioner of Canada on October 22, 2014, is attached and marked as Exhibit “H”.

13. A printout of Docket no. 34240 of the Supreme Court of Canada, *A.B. v. Bragg Communications Inc.*, obtained from the website of the Supreme Court of Canada on October 22, 2014, is attached and marked as Exhibit “I”.

AFFIRMED before me at the City of Halifax
in the Regional Municipality of Halifax
on October 23, 2014.

_____

_____
Dr. Gábor Lukács

Halifax, NS
Tel:
lukacs@AirPassengerRights.ca

This is **Exhibit "A"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on October 23, 2014

_____

Signature

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

Dear Madam Secretary,

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

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

Sincerely yours,
Dr. Gabor Lukacs

This is **Exhibit "B"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on October 23, 2014

_____

Signature

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

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

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

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

Ms. Lalumiere,

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

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

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

Yours very truly,
Dr. Gabor Lukacs

On Mon, 24 Feb 2014, Odette Lalumiere wrote:

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

>
> odette.lalumiere@otc-cta.gc.ca
>
>
>>>> Gabor Lukacs <lukacs@AirPassengerRights.ca> 21/02/2014 1:19 PM >>>
> Dear Ms. Lalumiere and Ms. Bellerose,
>
> I am writing to follow up on the request below. I am profoundly
> concerned
> about what transpires as the Agency attempting to frustrate my rights
> pursuant to s. 2(b) of the Charter.
>
> Yours very truly,
> Dr. Gabor Lukacs
>
>
>
>
> On Mon, 17 Feb 2014, Odette Lalumiere wrote:
>
>> Mr Lukacs
>> Your request is being processed by Ms Bellerose’s group.
>>
>> Odette Lalumi??re
>>
>>
>>
>> From: Gabor Lukacs
>> Sent: Monday, February 17, 2014 4:07 PM
>> To: secretaire-secretary
>> Cc: Odette Lalumiere; Patrice Bellerose
>> Subject: Re: Request to view file no. M4120-3/13-05726 pursuant to s.
> 2(b)
>> of the Charter
>>
>> Dear Madam Secretary,
>>
>> I am writing to follow-up on the matter below, which may be of some
> public
>> interest, and as such delay in your response may interfere with my
> rights
>> under s. 2(b) of the Charter.
>>
>> I look forward to hearing from you.
>>
>> Sincerely yours,
>> Dr. Gabor Lukacs
>>
>>
>> On Fri, 14 Feb 2014, Gabor Lukacs wrote:
>>
>>> Dear Madam Secretary,
>>>
>>> I would like to view the public documents in file no.
> M4120-3/13-05726.
>>>
>>> Due the public interest in the case, in which a final decision has
> been
>>> released today, the present request is urgent.
>>>
>>> Sincerely yours,
>>> Dr. Gabor Lukacs

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>>>
>>
>>
>
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This is **Exhibit "C"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on October 23, 2014

_____

Signature

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

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

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

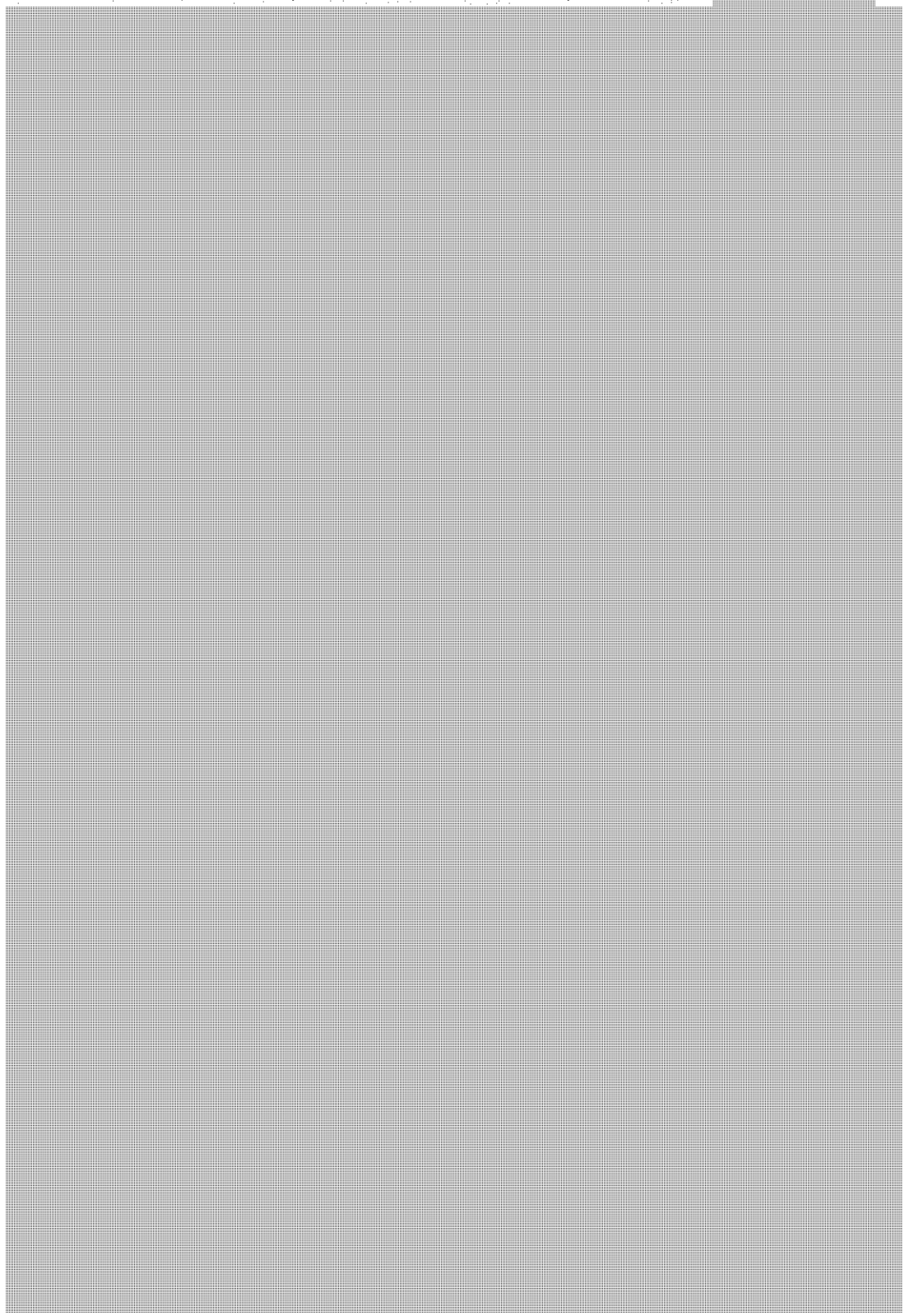
Patrice Bellerose
Gestionnaire principale | Senior Manager
Services d’information, des projets de services partagés et
coordinatrice de l’AIPRP | Information Services, Shared Services
Projects & ATIP Coordinator
Office des transports du Canada | Canadian Transportation Agency
Bureau 1718 | Office 1718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

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

AIR CANADA

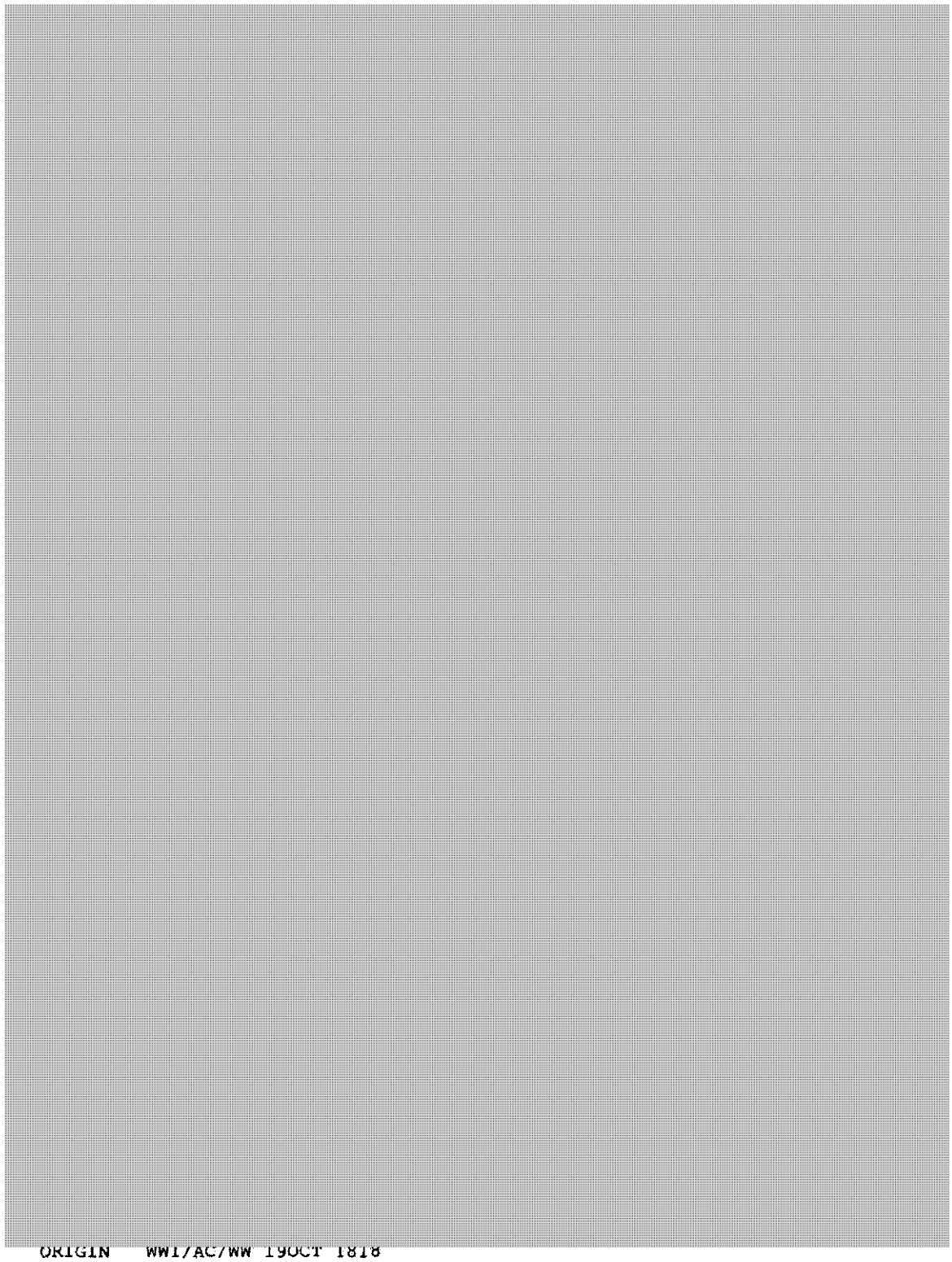
Annex G

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



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

PA



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

AIR CANADA

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

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

VIA EMAIL

October 18, 2013

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

To the attention of Sylvie Giroux, Analyst

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

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

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

Sincerely,

[redacted]
Regulatory & Litigation

Office
des transports
du Canada

Canadian
Transportation
Agency

October 4, 2013

File No. M4120-3/13-05726

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

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

Dear Madames:

Re: Complaint against Air Canada

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

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

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

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

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

.../2

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

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

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

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

It is important to read the attached privacy information.

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

Sincerely,

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

Attachment

Important privacy information

Open court principle

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

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

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

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

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

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

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

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

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

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

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

Privacy of records

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

This is **Exhibit "D"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on October 23, 2014

_____

Signature

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

March 24, 2014

VIA EMAIL and FAX

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Dear Madam Secretary:

Re: Request pursuant to the open court principle and s. 2(b) of the *Charter* to view File No. M4120-3/13-05726
Heavily redacted documents received on March 19, 2014

I am writing to make a final request, prior to making an application for judicial review, that the Agency comply with its obligations under the open court principle and s. 2(b) of the *Canadian Charter of Rights and Freedoms*, to make documents that are part of the public record available for public viewing.

1. On February 14, 2014, I made a request to the Agency to "view the public documents in file no. M4120-3/13-05726" pursuant to s. 2(b) of the *Charter*.

2. In subsequent communications dated February 17, 21, and 24, 2014, I have reiterated that my request was based on s. 2(b) of the *Charter*.

3. On March 19, 2014, I received an email from Ms. Bellerose, the Senior Manager of the Information Services, Shared Services Projects & ATIP Coordinator of the Agency, stating that:

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

Ms. Bellerose's email had a PDF file named "AI-2013-00081.PDF" attached, which contained heavily redacted copies of documents in File No. M4120-13/13-05726.

It is my position that providing redacted documents does not discharge the Agency's obligations under the open court principle, because the file contains no confidentiality order made by a Member of the Agency pursuant to Rules 23-25 of the *Canadian Transportation Agency General Rules*, S.O.R./2005-35.

My position is consistent with Rule 23(1) of the *Canadian Transportation Agency General Rules*:

> The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person filing the document makes a claim for its confidentiality in accordance with this section.

My position is also consistent with the Agency's Privacy Statement concerning the Agency's complaint process:

> In accordance with the values of the open court principle and pursuant to the Canadian Transportation Agency General Rules, all information filed with the Agency becomes part of the public record and may be made available for public viewing.

Finally, I refer to Decision No. 219-A-2009 of the Agency, concerning the motion of Leslie Tenenbaum for non-publication of his name and certain personal information, where the Agency analyzed in great detail its own obligations under the open court principle.

In light of the foregoing, I trust you agree with me that the documents in question were redacted without lawful authority or authorization to do so, and in breach of the Agency's obligations under the open court principle and s. 2(b) of the *Charter*.

Therefore, I am requesting that:

A. the present letter be brought to the attention of Mr. Geoffrey C. Hare, Chair and CEO of the Agency; and

B. the Agency provide me, within five (5) business days, with unredacted copies of all documents in File No. M4120-3-/13-05726 with respect to which no confidentiality order was made by a Member of the Agency.

Kindly please confirm the receipt of this letter.

Yours very truly,

Dr. Gábor Lukács

This is **Exhibit "E"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on October 23, 2014

_____

Signature

Office
des transports
du Canada

Canadian
Transportation
Agency

Bureau du
Président

Office of the
Chairman

March 26, 2014

Mr. Gábor Lukács

Halifax, NS

lukacs@AirPassengerRights.ca

Mr. Lukács,

Re: Your letter of March 24, 2014 in regards to your request to view
File No. M4120-3/13-05726

The Canadian Transportation Agency (Agency) is a government institution which was included in the schedule to the *Privacy Act* (Act) in 1982. When Parliament adds a government institution to the schedule of the Act, either through legislation or regulation, it reflects a decision to subject the institution to the full application of the Act. For the Agency, that decision was maintained throughout successive legislation modifications.

The purpose of the Act is to protect the privacy of individuals with respect to personal information about themselves held by a government institution. Section 8 of the Act is clear that, except for specific exceptions found in that section, personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution. Also, in accordance with sections 10 and 11 of the Act, personal information under the control of a government institution such as the Agency must be accounted for in either personal information banks or classes of personal information. Because there are no provisions in the Act that grant to government institutions that are subject to the Act the discretion to not apply those provisions of the Act, personal information under the control of the Agency is not disclosed without the consent of the individual and are accounted for either in personal information banks or classes of personal information and consequently published in Info Source. This is all consistent with the directions of the Treasury Board of Canada Secretariat.

Although Agency case files are available to the public for consultation in accordance with the open court principle, personal information contained in the files such as an individual's home address, personal email address, personal phone number, date of birth, financial details, social insurance number, driver's license number, or credit card or passport details, is not available for consultation.

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

Sincerely,

Geoffrey C. Hare
Chair and Chief Executive Officer

This is **Exhibit "F"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on October 23, 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 "G"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on October 23, 2014

_____

Signature

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140919

Docket: A-218-14

Ottawa, Ontario, September 19, 2014

Present: **WEBB J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

ORDER

THIS COURT ORDERS THAT the Motion of the Respondent to quash the Applicant's application for judicial review is dismissed, with costs payable in any event of the cause.

"Wyman W. Webb"

J.A.

This is **Exhibit "H"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on October 23, 2014

_____

Signature

Office of the Privacy Commissioner of Canada

Biography of Daniel Therrien, Privacy Commissioner of Canada

Daniel Therrien was appointed federal Privacy Commissioner on June 5, 2014. Prior to his appointment, he practiced law at the Department of Justice since being called to the Quebec Bar in 1981.

Commissioner Therrien began his career practicing correctional law for the Department of the Solicitor General, the Correctional Service of Canada and the National Parole Board. He then practiced immigration law, serving as Senior General Counsel and Director, Citizenship and Immigration Legal Services, at the Department of Justice from 1990 to 2001. In that capacity, he played a key role in the development of the *Immigration and Refugee Protection Act*. He also served as Director General, Refugee Policy, at Citizenship and Immigration Canada from 2001 to 2002.

In 2002, he joined the office of the Assistant Deputy Attorney General, Citizenship and Immigration Portfolio, at the Department of Justice and became Assistant Deputy Minister in 2005. He held that position, renamed Assistant Deputy Attorney General, Public Safety, Defence and Immigration Portfolio, until his nomination as Privacy Commissioner of Canada.

As Assistant Deputy Attorney General of the Public Safety, Defence and Immigration Portfolio, Mr. Therrien co-led the negotiating team responsible for the adoption of privacy principles governing the sharing of information between Canada and the U.S. under the Beyond the Border accord.

Commissioner Therrien holds a Bachelor of Arts and a *Licence en droit* from the University of Ottawa.

Date Modified: 2014-08-20

This is **Exhibit "I"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on October 23, 2014

_____

Signature

Supreme Court of Canada | Cour suprême du Canada

Supreme Court of Canada

Docket

34240

A.B. by her Litigation Guardian, C.D. v. Bragg Communications Incorporated, a body corporate, et al.

(Nova Scotia) (Civil) (By Leave)

(Publication ban in case) (Sealing order)

Proceedings

Date	Proceeding	Filed By (if applicable)
2012-10-23	Appeal closed	
2012-09-28	Formal judgment sent to the registrar of the court of appeal and all parties	
2012-09-28	Judgment on appeal and notice of deposit of judgment sent to all parties	
2012-09-27	Judgment on the appeal rendered, CJ LeB De F Abe Ro Ka, The appeal from the judgment of the Nova Scotia Court of Appeal, Number CA330605, 2011 NSCA 26, dated March 4, 2011, heard on May 10, 2012, is allowed in part to permit A.B. to proceed anonymously with her application for disclosure of the identity of the relevant IP user(s). The lower courts' costs orders are set aside and no costs are awarded in this Court. Allowed in part, without costs	
2012-07-04	Media lock-up request refused	
2012-06-29	Media lock-up consent form received from, Daniel Burnett	Daniel W. Burnett
2012-06-28	Media lock-up consent form received from, Brian Murphy	BullyingCanada Inc.
2012-06-21	Media lock-up consent form received from, McInnes Cooper	A.B. by her Litigation Guardian, C.D.
2012-06-20	Media lock-up consent form received from, Nancy G. Rubin	Halifax Herald Limited, a body corporate
2012-06-12	Media lock-up letter, consent form and undertaking sample sent to all parties	
2012-06-08	Media lock-up requested	
2012-05-28	Transcription received, (98 pages)	
2012-05-10	Judgment reserved OR rendered with reasons to follow	
2012-05-10	Intervener's condensed book, (14 copies) distributed at the hearing	Kids Help Phone
2012-05-10	Intervener's condensed book, (14 copies) distributed at hearing	Privacy Commissioner of Canada
2012-05-10	Amicus curiae's condensed book, (14 copies) distributed at hearing	Daniel W. Burnett
2012-05-10	Appellant's condensed book, (14 copies) distributed at hearing	A.B. by her Litigation Guardian, C.D.
2012-05-10	Acknowledgement and consent for video taping of proceedings, from all parties	
2012-05-10	Hearing of the appeal, 2012-05-10, CJ LeB De F Abe Ro Ka Judgment reserved	
2012-05-08	Order on motion to extend time	
2012-05-08	Decision on motion to extend time, to serve and file the intervener's factum and book of authorities to May 3, 2012, Reg Granted	
2012-05-08	Submission of motion to extend time, Reg	

Date	Proceeding	Filed By (if applicable)
2012-05-08	Supplemental document, Book of Authorities, Completed on: 2012-05-08	Canadian Civil Liberties Association
2012-05-07	Correspondence received from, Heather Ross, by email, Re: requesting one reserved seat at hearing	Kids Help Phone
2012-05-07	Notice of appearance, Tamir Israel and David Fewer will be present at hearing	Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
2012-05-04	Correspondence received from, Caroline Etter, by email, Re: requests 4 reserved seats at the hearing	Privacy Commissioner of Canada
2012-05-04	Motion to extend time, to serve and file the factum and authorities to May 3/12, Completed on: 2012-05-04	Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
2012-05-03	Intervener's book of authorities, Completed on: 2012-05-02	Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
2012-05-03	Intervener's factum, Completed on: 2012-05-03	Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
2012-05-02	Notice of appearance, Ryder GIlliland and Adam Lazier will be present at the hearing	Newspaper Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists,, Professional Writers Association of Canada and Book and Periodical Council
2012-05-02	Notice of appearance, Daniel W. Burnett and Paul Brackstone will be present at the hearing	Daniel W. Burnett
2012-05-02	Notice of appearance, Iris Fischer and Dustin Kenall will be present at the hearing	Canadian Civil Liberties Association
2012-05-02	Notice of appearance, Mahmud Jamal, Jason MacLaren, Steven Golick and Carly Fidler will be present at the hearing	Kids Help Phone
2012-05-01	Notice of appearance, Marko Vesely and M. Toby Kruger will be present at hearing	British Columbia Civil Liberties Association
2012-05-01	Intervener's book of authorities, Completed on: 2012-05-01	Beyond Borders
2012-05-01	Amicus curiae's book of authorities, Completed on: 2012-05-01	Daniel W. Burnett
2012-05-01	Amicus curiae's factum, Service to come (rec'd May 2/12), Completed on: 2012-05-02	Daniel W. Burnett
2012-04-30	Order by, Ro, FURTHER TO THE ORDER dated April 3, 2012, granting leave to intervene to the British Columbia Civil Liberties Association, the Kids Help Phone, the Canadian Civil Liberties Association, the Privacy Commissioner of Canada, the Newspaper Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists, Professional Writers Association of Canada and Book and Periodical Council, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, the Canadian Unicef Committee, the Information and Privacy Commissioner of Ontario, Beyond Borders and BullyingCanada Inc. in the above appeal; IT IS HEREBY FURTHER ORDERED THAT only the following six groups of interveners, the British Columbia Civil Liberties Association, the Kids Help Phone, the Canadian Civil Liberties Association, the Privacy Commissioner of Canada, the Newspaper Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists, Professional Writers Association of Canada and Book and Periodical Council and the Canadian Unicef Committee, are each granted permission to present oral argument not exceeding ten (10) minutes at the hearing of this appeal Allowed in part	
2012-04-27	Notice of appearance, Joseph E. Magnet and Patricia Kosseim will be present at the hearing	Privacy Commissioner of Canada
2012-04-27	Notice of appearance, Jeffrey S. Leon, Ranjan K. Agarwal and Daniel Holden will be present at hearing	Canadian Unicef Committee

Date	Proceeding	Filed By (if applicable)
2012-04-27	Intervener's factum, CD to come (rec'd May 1/12), Completed on: 2012-05-01	Beyond Borders
2012-04-27	Intervener's book of authorities, Completed on: 2012-05-15	BullyingCanada Inc.
2012-04-27	Intervener's factum, Completed on: 2012-04-27	BullyingCanada Inc.
2012-04-27	Intervener's book of authorities, Completed on: 2012-04-27	Information and Privacy Commissioner of Ontario
2012-04-27	Intervener's book of authorities, (2 volumes), Completed on: 2012-04-27	Privacy Commissioner of Canada
2012-04-27	Intervener's factum, Completed on: 2012-04-27	Information and Privacy Commissioner of Ontario
2012-04-27	Intervener's factum, CD to come (rec'd April 30/12), Completed on: 2012-05-01	Privacy Commissioner of Canada
2012-04-27	Intervener's book of authorities, Completed on: 2012-04-27	Canadian Unicef Committee
2012-04-27	Intervener's factum, Completed on: 2012-04-27	Canadian Unicef Committee
2012-04-27	Intervener's book of authorities, Completed on: 2012-04-27	Kids Help Phone
2012-04-27	Intervener's factum, Completed on: 2012-04-27	Kids Help Phone
2012-04-27	Intervener's book of authorities, Completed on: 2012-04-27	Canadian Civil Liberties Association
2012-04-27	Intervener's factum, Completed on: 2012-04-27	Canadian Civil Liberties Association
2012-04-27	Intervener's book of authorities, Completed on: 2012-04-30	Newspaper Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists,, Professional Writers Association of Canada and Book and Periodical Council
2012-04-27	Intervener's factum, Service to come (rec'd April 30/12), Completed on: 2012-04-30	Newspaper Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists,, Professional Writers Association of Canada and Book and Periodical Council
2012-04-27	Intervener's book of authorities, Completed on: 2012-04-27	British Columbia Civil Liberties Association
2012-04-27	Intervener's factum, Completed on: 2012-04-27	British Columbia Civil Liberties Association
2012-04-23	Notice of appearance, Michelle Awad, QC and Jane O'Neill will be present at hearing	A.B. by her Litigation Guardian, C.D.
2012-04-20	Appeal perfected for hearing	
2012-04-19	Notice of appearance, Brian Murphy and Wanda Severns will be present at the hearing.	BullyingCanada Inc.
2012-04-03	Order by, Abe, IT IS HEREBY ORDERED THAT: Given that the Respondents have advised the Court that they will not be participating in this appeal, Daniel W. Burnett is accordingly appointed as amicus curiae to assist the Court by filing a factum of no more than 40 pages and a book of authorities on or before May 1, 2012, and by presenting oral argument not exceeding 60 minutes at the hearing of the appeal Granted	
2012-04-03	Order on motion for leave to intervene, (BY ABELLA J.)	
2012-04-03	Decision on the motion for leave to intervene, Abe, UPON APPLICATIONS by the British Columbia Civil Liberties Association, the Kids Help Phone, the Canadian Civil Liberties Association, the Privacy Commissioner of Canada, the Newspaper Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists, Professional Writers Association of Canada and Book and Periodical	

Date	Proceeding	Filed By (if applicable)
	Council, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, the Canadian Unicef Committee, the Information and Privacy Commissioner of Ontario, Beyond Borders and BullyingCanada Inc. for leave to intervene in the above appeal; AND THE MATERIAL FILED having been read; IT IS HEREBY ORDERED THAT: The motions for leave to intervene by the British Columbia Civil Liberties Association, the Kids Help Phone, the Canadian Civil Liberties Association, the Privacy Commissioner of Canada, the Newspaper Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists,, Professional Writers Association of Canada and Book and Periodical Council, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, the Canadian Unicef Committee, the Information and Privacy Commissioner of Ontario, Beyond Borders and BullyingCanada Inc. are granted and the said ten groups of interveners shall each be entitled to serve and file a factum not to exceed 10 pages in length on or before April 27, 2012. The requests to present oral argument are deferred to a date following receipt and consideration of the written arguments of the parties and the interveners. The interveners are not entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties. Pursuant to Rule 59(1)(a) of the Rules of the Supreme Court of Canada, the interveners shall pay to the appellant and respondent any additional disbursements occasioned to the appellant and respondents by their interventions Granted	
2012-04-03	Submission of motion for leave to intervene, Abe	
2012-04-02	Correspondence received from, Michelle C. Awad dated April 2/12 and rec'd by fax, re.: appellant will not seek costs against Bragg (sent to juges April 3/12)	A.B. by her Litigation Guardian, C.D.
2012-03-26	Response to the motion for leave to intervene, (Letter Form), (of Beyond Borders) from Michelle C. Awad, dated March 23/12, by fax,, Completed on: 2012-03-26	A.B. by her Litigation Guardian, C.D.
2012-03-23	Reply to the motion for leave to intervene, (Letter Form), from Iris Fischer, dated March 23/12, by fax, Re: response to letter of appellant dated March 19/12, Completed on: 2012-03-23	Canadian Civil Liberties Association
2012-03-23	Motion for leave to intervene, (Motion for extension of time filed but not necessary) service to come, Incomplete	Beyond Borders
2012-03-23	Reply to the motion for leave to intervene, (Letter Form), from Chris W. Sanderson, dated March 23, 2012, by fax, Completed on: 2012-03-23	British Columbia Civil Liberties Association
2012-03-22	Motion for leave to intervene, (bookform), Completed on: 2012-03-22	Information and Privacy Commissioner of Ontario
2012-03-19	Response to the motion for leave to intervene, (Letter Form), (joint response for all motions), Completed on: 2012-03-19	A.B. by her Litigation Guardian, C.D.
2012-03-16	Correspondence received from, Colleen Bauman, dated March 15/12, by fax, Re: consent from the appellant to the extension of time	Information and Privacy Commissioner of Ontario
2012-03-16	Motion for leave to intervene, (bookform), Completed on: 2012-03-16	Canadian Unicef Committee
2012-03-12	Discontinuance of motion to extend time, (entered for administrative purpose)	Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
2012-03-12	Motion to extend time, to serve and file the motion for leave to intervene (NOT NECESSARY), Completed on: 2012-03-12	Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
2012-03-12	Motion for leave to intervene, (bookform), Completed on: 2012-03-12	Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic
2012-03-09	Motion for leave to intervene, (bookform), Completed on: 2012-03-09	Newspaper Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists,, Professional Writers Association of Canada and Book and Periodical Council

Date	Proceeding	Filed By (if applicable)
2012-03-09	Motion for leave to intervene, (bookform), Completed on: 2012-03-09	Privacy Commissioner of Canada
2012-03-09	Motion for leave to intervene, (bookform), Completed on: 2012-03-09	Kids Help Phone
2012-03-09	Notice of hearing sent to parties	
2012-03-09	Appeal hearing scheduled, 2012-05-10 Judgment reserved	
2012-03-08	Supplemental document, (Book of Authorities), Completed on: 2012-03-08	Canadian Civil Liberties Association
2012-03-08	Motion for leave to intervene, (bookform), Completed on: 2012-03-08	Canadian Civil Liberties Association
2012-03-02	Motion for leave to intervene, (bookform), Completed on: 2012-03-02	British Columbia Civil Liberties Association
2012-02-27	Correspondence received from, Michelle Awad dated February 27, 2012. Re: Still seeking costs against The Halifax Herald	A.B. by her Litigation Guardian, C.D.
2012-02-24	Correspondence received from, Patricia J. Wilson, dated Feb.24/12, Re: publication ban	A.B. by her Litigation Guardian, C.D.
2012-02-24	Appellant's record, Completed on: 2012-02-24	A.B. by her Litigation Guardian, C.D.
2012-02-24	Appellant's book of authorities, (CD and Form rec'd Mar. 2/12), Completed on: 2012-03-08	A.B. by her Litigation Guardian, C.D.
2012-02-24	Appellant's factum, (CD and Form rec'd Mar. 2/12), Completed on: 2012-03-08	A.B. by her Litigation Guardian, C.D.
2012-02-21	Correspondence received from, Nancy Rubin dated February 21, 2012. Re: Will not be participating in the appeal	Halifax Herald Limited, a body corporate
2012-02-07	Correspondence (sent by the Court) to, All parties. Re: Removal of Global Television from style of cause	
2012-02-07	Correspondence received from, Kimberley Hayes dated February 7, 2012. Re: Will not be participating in the appeal	Bragg Communications Incorporated, a body corporate
2012-02-06	Correspondence received from, Alan Parish dated February 6, 2012. Re: Confirmation that Global Television is not part of style of cause	Global Television
2012-02-02	Correspondence received from, Michelle Awad dated February 2, 2012. Re: Wants to remove the respondent, Global Television, from style of cause	A.B. by her Litigation Guardian, C.D.
2012-02-02	Correspondence received from, M.C. Awad by fax, re.: Potential interveners	A.B. by her Litigation Guardian, C.D.
2012-01-31	Correspondence received from, Alan Parish dated January 31, 2012. Re: Respondent would like to be removed from style of cause	Global Television
2012-01-23	Letter advising the parties of tentative hearing date and filing deadlines (Leave granted)	
2011-11-23	Response to the motion for leave to intervene, (Letter Form), from Nancy G. Rubin dated Nov. 23/11 re intervention is premature, Completed on: 2011-11-23	Halifax Herald Limited, a body corporate
2011-11-23	Response to the motion for leave to intervene, (Letter Form), from Michelle C. Awad & Jane O'Neil dated Nov. 23/11, Completed on: 2011-11-23	A.B. by her Litigation Guardian, C.D.
2011-11-14	Motion for leave to intervene, Completed on: 2011-11-21	BullyingCanada Inc.
2011-11-14	Notice of appeal, Completed on: 2011-11-14	A.B. by her Litigation Guardian, C.D.
2011-10-14	Copy of formal judgment sent to Registrar of the Court of Appeal and all parties	
2011-10-14	Judgment on leave sent to the parties	
2011-10-13	Decision on the application for leave to appeal, LeB F Cro, The application for leave to appeal from the judgment of the Nova Scotia Court of Appeal, Number CA330605, 2011 NSCA 26, dated March 4, 2011, is granted with costs in the cause. The order of Fish J. dated May 25, 2011, shall be continued. Granted, with costs in the cause	

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Date	Proceeding	Filed By (if applicable)
2011-06-20	All materials on application for leave submitted to the Judges, LeB F Cro	
2011-06-13	Applicant's reply to respondent's argument, (SEALED) (6 redacted copies filed) 2 services missing (rec'd June 15/11), Completed on: 2011-06-20	A.B. by her Litigation Guardian, C.D.
2011-06-02	Respondent's response on the application for leave to appeal, (SEALED) 1 redacted public copy filed, Completed on: 2011-06-02	Halifax Herald Limited, a body corporate
2011-05-25	Order on miscellaneous motion, (BY FISH J.)	
2011-05-25	Decision on the miscellaneous motion, F, UPON APPLICATION for an order: 1) Allowing the applicant and her Litigation Guardian to bring an application for leave to appeal by using pseudonyms; 2) Prohibiting publication of the words used in the Facebook profile that is the subject of the application for leave until final disposition of this matter by this Court. AND THE MATERIAL FILED having been read; IT IS HEREBY ORDERED THAT: The motion is granted Granted	
2011-05-25	Submission of miscellaneous motion, F	
2011-05-24	Reply to miscellaneous motion, (Letter Form), from Jane O'Neill, dated May 24/11 (by fax), Completed on: 2011-05-24	A.B. by her Litigation Guardian, C.D.
2011-05-16	Response to miscellaneous motion, (bookform), Completed on: 2011-05-16	Halifax Herald Limited, a body corporate
2011-05-16	Response to miscellaneous motion, (Letter Form), from Alan V. Parish, Q.C., dated May 16/11, by fax, Completed on: 2011-05-16	Global Television
2011-05-16	Letter acknowledging receipt of a complete application for leave to appeal	
2011-05-11	Correspondence received from, Nancy G. Rubin, dated May 10/11, by fax, Re: intent to file a response to motion	Halifax Herald Limited, a body corporate
2011-05-10	Response to miscellaneous motion, (Letter Form), (Takes no position), Completed on: 2011-05-10	Bragg Communications Incorporated, a body corporate
2011-05-04	Correspondence received from, (Letter Form), Ryan Conrod, dated May 4/11, by fax, Re: Decision and Order issued by Justice Beveridge of Nova Scotia Court of Appeal	A.B. by her Litigation Guardian, C.D.
2011-05-03	Notice of miscellaneous motion, allowing the applicant and her Litigation Guardian to bring a leave to appeal by using pseudonyms and prohibiting publication of the words used in the Facebook profile that is the subject of the application for leave until final disposition of this matter, Completed on: 2011-05-03	A.B. by her Litigation Guardian, C.D.
2011-05-03	Book of authorities	A.B. by her Litigation Guardian, C.D.
2011-05-03	Application for leave to appeal, Completed on: 2011-05-03	A.B. by her Litigation Guardian, C.D.

Date modified: 2012-12-03

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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.

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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

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December 2008

The Honourable Peter Milliken, M.P.
The Speaker
The House of Commons
Ottawa, Ontario K1A 0A6

Dear Mr. Speaker:

I have the honour to submit to Parliament the Annual Report of the Office of the Privacy Commissioner of Canada on the *Privacy Act* for the period from April 1, 2007 to March 31, 2008.

Sincerely,

Original signed by

Jennifer Stoddart
Privacy Commissioner of Canada

ADMINISTRATIVE AND QUASI-JUDICIAL BODIES:
BALANCING OPENNESS AND PRIVACY IN THE INTERNET AGE

Complaints to the OPC highlight concerns about federal administrative and quasi-judicial tribunals posting highly sensitive personal information to the web

Highly personal information about Canadians fighting for government benefits and taking part in other federal administrative and quasi-judicial proceedings is being posted to the Internet – exposing those people to enormous privacy risks.

In 2007-2008, the OPC investigated 23 complaints regarding the disclosure of personal information on the Internet by seven bodies created by Parliament to adjudicate disputes. (We received three more similar complaints in May 2008.)

These administrative and quasi-judicial bodies consider issues such as the denial of pension and employment insurance benefits; compliance with employment and other professional standards; allegations of regulatory violations; and irregularities in federal public service hiring processes.

The adjudication process often involves very intimate details related to people's lives, including their financial status, health, job performance and personal history.

Few would question the fundamental importance of transparency in tribunal proceedings.

But is it in the public interest to make considerable amounts of an individual's sensitive personal information indiscriminately available to anyone with an Internet connection?

Why should a law-abiding citizen fighting for a government benefit be forced to expose the intimate details of her personal life to public scrutiny?

Why should a law-abiding citizen fighting for a government benefit be forced to expose the intimate details of her personal life to public scrutiny?

The Human Impact

"Anybody, anywhere in the whole world, who types my name comes immediately to this personal information.... this situation leaves me open to criticism and mockery."

The decisions of administrative and quasi-judicial decision-makers are routinely packed with personal details that not many people would be comfortable sharing widely: salaries, physical and mental health problems as well as detailed descriptions of disputes with bosses and alleged wrongdoing in the workplace.

In addition to the types of personal information legitimately needed in these bodies' reasons for decision, seemingly irrelevant information is often included – the names of participants' children; home addresses; people's place and date of birth; and descriptions of criminal convictions for which a pardon has been granted, for example.

Many complainants told us they were distressed to discover – typically with no prior notice – that this type of information about them was available on the Internet for neighbours, colleagues and prospective employees to peruse.

The following are some of the comments we heard:

"By posting my name, I feel violated in my privacy and this could adversely affect my prospects for jobs, business and my image in the community. I have never given consent."

"Anybody, anywhere in the whole world, who types my name comes immediately to this personal information.... this situation leaves me open to criticism and mockery."

"I'm at a loss to understand why this would have been done, except to think that this is further punitive measures taken against me."

The potential for embarrassment, humiliation and public ridicule is significant. A long-ago legal transgression or temporary lapse in judgment could continue to haunt an individual for many, many years into the future.

Individuals whose personal information, particularly financial information, is disclosed on the Internet may be at greater risk of identity theft. They also face a risk of discrimination, harassment and stalking. The information could also be used by data brokers that compile profiles of individuals.

A list of the bodies whose practice of posting personal information online have resulted in complaints investigated by the OPC in 2007-2008:

Canada Appeals Office on Occupational Health and Safety

The Canada Appeals Office on Occupational Health and Safety (CAO), now known as the Occupational Health and Safety Tribunal Canada, is a quasi-judicial administrative tribunal that determines appeals of decisions and directions issued by health and safety officers. It operates under the auspices of Human Resources Development Canada. Decisions rendered by this tribunal may include an individual's name, coupled with that person's personal opinions or views and place of employment.

Military Police Complaints Commission

The Military Police Complaints Commission is an independent federal body that oversees and reviews complaints about the conduct of Military Police members. The Commission is empowered to: review the Provost Marshal's handling of complaints concerning the conduct of Military Police; deal with complaints alleging interference in military police investigations; and conduct its own investigations or hearings related to complaints when the Commission believes that doing so is in the public interest.

All of the Military Police Complaints Commission decisions are vetted by the Commission with a view to the standards expressed in the *Privacy Act*. Most decisions rendered by the Military Police Complaints Commission are published on the Internet in summary and depersonalized form. Where decisions are not depersonalized, they may contain extensive personal information about military police members.

Pension Appeals Board

The Pensions Appeal Board is responsible for hearing appeals flowing from decisions of the Canada Pension Plan Review Tribunals. A hearing before the board may be initiated by an individual seeking Canada Pension Plan (CPP) benefits or by the Minister of Social Development. The board has the authority to determine, among other things, whether benefits under the CPP are payable to an individual.

Board decisions reveal a considerable amount of sensitive personal information about individuals seeking benefits, including dates of birth, detailed family, education and employment histories, extensive personal health information and personal financial data.

Public Service Commission

The Public Service Commission is a quasi-judicial tribunal that may conduct investigations and audits on any matter within its jurisdiction, including safeguarding the integrity of appointments and in overseeing the political impartiality of the federal public service. Its decisions may include information relating to individuals' education or medical or employment history.

Public Service Staff Relations Board

The board, which has been replaced by the Public Service Labour Relations Board, was a federal tribunal responsible for administering the collective bargaining and grievance adjudication systems in the federal public service.

Decisions may include descriptions of individuals' conduct and issues at work as well as disciplinary sanctions they've faced.

RCMP Adjudication Board

An RCMP Adjudication Board conducts formal disciplinary hearings respecting RCMP members' compliance with the Code of Conduct adopted under the *Royal Canadian Mounted Police Act*. Decisions include information about alleged misconduct, and, in some cases, other personal information such as an officer's marital situation and medical information. Adjudication Board decisions, which include the names of individuals, are published on the RCMP intranet, although the Board has advised that it intends to post its decisions on the Internet.

Umpire Benefits Decisions (Service Canada)

The *Employment Insurance Act* permits claimants and other interested parties to appeal to an umpire certain decisions rendered under that Act. An umpire is empowered to decide any question of fact or law that is necessary for the disposition of an appeal.

Decisions by an umpire tend to reveal detailed information about the employment history of claimants. A typical decision might also reveal information about a claimant's place of residence, marital status and sources of income.

Access to Justice

Another concern we have is that access to justice could suffer if tribunals, boards and other administrative decision makers continue to post decisions on the Internet.

The risk of having one's personal details made public may make people increasingly reticent to assert their rights in administrative and quasi-judicial proceedings. People trying to obtain benefits required to provide food and shelter for themselves and their families may feel that participation in tribunal proceedings is essentially mandatory – and that they have no option other than to give up their right to privacy.

In some cases, however, individuals have declined to exercise their legal right to appeal administrative decisions that significantly impacted them because of the loss of privacy this would entail.

"Open Court" Principle

The widespread practice of posting reasons for decisions on the Internet appears to be based on the assumption by decision makers that the rules – or lack of rules – which apply to judicial proceedings apply equally to administrative and quasi-judicial proceedings.

Many of the institutions investigated argued that the "open court" principle required the online publication of decisions.

The open court principle is an important part of our legal system and exists to ensure the effectiveness of the evidentiary process, encourage fair and transparent decision-making, promote the integrity of the justice system and inform the public about its operation. Opening decision-making processes up to public scrutiny assists to further these goals.

However, there is an important distinction between the courts and the institutions we investigated. The *Privacy Act,* which does not apply to the courts, applies to many administrative tribunals and quasi-judicial bodies and imposes specific rules on them regarding the disclosure of personal information. Through the *Privacy Act*, Parliament may be said to have set express limits on the extent to which the open court principle could authorize publication of decisions of the administrative tribunals subject to its provisions via the Internet.

Striking a Reasonable Balance

Respect for the open court principle can co-exist effectively with government institutions' statutory obligations under the *Privacy Act* through reasonable efforts to depersonalize any decisions posted online by replacing names with random initials.

It is beyond debate that the public requires access to the information necessary to maintain confidence in the integrity of a tribunal's proceedings, to enhance the evidentiary process, to promote accountability and to further public education. Yet in most cases, these important goals may be accomplished without disclosing the name of an individual appearing before a tribunal.

The identity of individuals appearing before tribunals is not obviously relevant to the merits of any given tribunal decision. As the open court principle is intended to subject *government institutions* to public scrutiny, and not the lives of the *individuals* who appear before them, the OPC has taken the position that the public interest in accessing information about tribunals' proceedings does not obviously or necessarily extend to accessing identifying information about individual participants.

Furthering the values that the open court principle promotes will not be hindered if, consistent with government institutions' obligations under the *Privacy Act*, only de-personalized decisions that do not reveal the identities of participants are made available to the public. It is, of course, also open to tribunals to redact all personal information that would otherwise be found in reasons for decision made available to the public. However, simple suppression of direct and obvious identifiers such as names is likely to represent the most efficient and effective means of complying with the *Privacy Act*. This method of protecting privacy poses no significant threat to tribunals' independence and ensures that the facts and issues in individual cases may be fully and transparently debated in an open and accessible manner.

Where there is a genuine and compelling public interest in disclosure of identifying information that clearly outweighs the resulting invasion of privacy, institutions have the legal authority to exercise their discretion to disclose personal information in identifiable form in their decisions. For example, where the public has a compelling interest in knowing the identity of an individual who has been found guilty in disciplinary proceedings, or of someone who poses a potential danger to the public, a tribunal may exercise its discretion to disclose personal information, including that individual's name, to the public.

Likewise, where Parliament or a body empowered to make regulations has drafted a law or regulation that authorizes the disclosure of personal information, the *Privacy Act* permits disclosure of personal information in accordance with such a provision. In this way, the Act recognizes the right of lawmakers to craft disclosure regimes that are responsive to particular tribunals' mandates and the associated demands of the open court principle.

There is, thus, no intractable conflict between the rights and interests protected by the open court principle and compliance with the *Privacy Act*.

It is also noteworthy that courts, too, are increasingly recognizing the need to limit the disclosure of personal information in judgments. The Canadian Judicial Council has published a Recommended Protocol for the use of personal information in judgements. This protocol recognizes it can be appropriate for judges to omit some personal information from a judgment in the interests of protecting privacy. Where appropriate, these guidelines encourage the judiciary to omit from judgments personal data identifiers, highly specific personal information and extraneous personal information with little or no relevance to the conclusions reached.

Privacy Act Limits

During our investigation, we found there is a significant lack of consensus among administrative and quasi-judicial decision-makers on the limits that the *Privacy Act* places on the Internet disclosure of personal information in their decisions.

The decisions of most, if not all, institutions subject to the *Privacy Act* contain personal information to which the protections of the legislation apply.

The *Privacy Act* says that personal information under the control of a government institution may be disclosed for the purpose for which it was obtained or compiled, or for a use consistent with that purpose.

The OPC concluded that the blanket electronic disclosure of these bodies' reasons for decision on the intranet or Internet is not the purpose for which the information was obtained. Rather, tribunals collect personal information for the purpose of making a decision on the facts of each specific case before them.

Moreover, disclosing administrative or quasi-judicial decisions with identifiable personal information on the Internet as a matter of course was not found to be reasonably necessary for the accomplishment of the investigated institutions' mandates. It was not a disclosure for a use that was consistent with the purpose for which the personal information was obtained – particularly when the uses to which sensitive personal information would be put could not be identified in advance or controlled in any way.

…disclosing administrative or quasi-judicial decisions with identifiable personal information on the Internet as a matter of course was not found to be reasonably necessary for the accomplishment of the investigated institutions' mandates.

Under the *Privacy Act*, limits on the disclosure of personal information do not

apply to publicly available information. Some of the institutions investigated argued that the publicly accessible nature of administrative and quasi-judicial proceedings rendered the personal information discussed during those proceedings publicly available for the purposes of the Act.

However, none of those institutions presented any evidence to indicate there was any record, in any form, of the personal information disclosed during the course of proceedings that is available in the public domain. Our Office found that disclosure of personal information during a proceeding did not in itself render that information available in the public domain.

The *Privacy Act* also allows for disclosure of personal information in accordance with any Act of Parliament or regulation authorizing such a disclosure.

Some institutions argued that the disclosure of personal information was permissible due to the fact that relevant legislation or regulations did not prohibit or address disclosure. We rejected this argument. There must be some specific indication in an Act or regulation that Parliament intended to permit disclosures of personal information outside of the quasi-constitutional regime created by the *Privacy Act*. Legislative silence on the issue does not constitute a legal authority to disclose personal information.

Recommendations

In the well-founded complaints we investigated, our Office made a number of recommendations to government institutions:

- Reasonably depersonalize future decisions that will be posted on the Internet through the use of randomly assigned initials in place of individuals' names; or post only a summary of the decision with no identifying personal information.

- Observe suggested guidelines respecting the exercise of discretion to disclose personal information in any case where an institution proposes to disclose personal information in decisions in electronic form on the Internet.

- Remove decisions that form the basis of the complaints to the OPC from the Internet on a priority basis until they can be reasonably depersonalized through the use of randomly assigned initials and re-posted in compliance with the *Privacy Act*.

- Restrict the indexing by name of past decisions by global search engines through the use of an appropriate "web robot exclusion protocol;" or remove from or reasonably depersonalize all past decisions on the Internet through the use of randomly assigned initials, within a reasonable amount of time.

Response to OPC Concerns

Even after being advised of privacy issues, most government institutions were reticent to change their policies and practices.

Notwithstanding the growing number and severity of privacy threats to individuals whose personal information is posted indiscriminately on the Internet, some government institutions told us they plan to continue posting sensitive personal information as they always have.

Others took important but incomplete steps towards improved compliance with the *Privacy Act*. As a result of our investigations, some institutions have implemented technical measures to prevent the names of individuals who participate in their decision-making processes from creating "search hits" when typed into major search engines. Others have agreed to use initials in place of individuals' names.

Notably, Service Canada and Human Resources Development Canada agreed to fully implement our recommendations.

The OPC has relayed the results of its investigation to the complainants. In cases where these results were disappointing, the OPC remains committed to working with the bodies involved with a view to improving privacy protections for those who participate in administrative and quasi-judicial processes.

The varying degrees of responsiveness to the OPC's recommendations means that, even among those institutions investigated, there remains inconsistent privacy protection for Canadians who participate in these institutions' administrative and/or quasi-judicial proceedings.

It is also worth noting that many other administrative and quasi-judicial bodies post online reasons for decisions that link identifiable individuals with a great deal of sensitive personal information, but the OPC has not received complaints about them.

Next Steps

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

However, our Office is committed to continuing to work with the government institutions which have been reluctant to implement all of the recommendations. We hope that by maintaining a constructive dialogue, we will be able to persuade these organizations to take the steps necessary to protect Canadians' privacy.

We also see a need for a new government-wide policy on this privacy issue. Given the complexity of the issues involved, recommendations flowing from our investigation of a small number of institutions are not the best instruments around which to build government-wide compliance with the *Privacy Act*. A comprehensive policy document based on consultations with a wider range of government institutions is required.

We hope that by maintaining a constructive dialogue, we will be able to persuade these organizations to take the steps necessary to protect Canadians' privacy.

We have already conveyed to the Treasury Board Secretariat our view that centralized policy guidance is required. This guidance will ensure consistency in the privacy protection available to Canadians who participate in administrative and quasi-judicial proceedings.

Many institutions we investigated agreed with our view that centralized policy guidance is required and would welcome the same. They were willing to participate in consultations with Treasury Board to develop policy guidance and comply with this guidance when it took effect.

Treasury Board has advised our Office that its officials continue to work on developing guidance for federal institutions subject to the *Privacy Act* with respect to the posting of personal information on government websites. Treasury Board has also indicated that it will consult with our Office on any draft guidance that is developed.

Electronically publishing personal information contained in the administrative and quasi-judicial decisions of government institutions is risky privacy business. We look forward to working with Treasury Board on this important issue to ensure Canadians' privacy will be better protected by strong policy guidance in the future.

The trend to put more and more federal government information online raises important questions about how to balance the public interest and individual privacy rights.

While the use of the Internet to promote transparency and accountability in the federal government – posting contracts and travel expenses, for example – is a welcome development, it is clear there must be limits when it comes to the disclosure of personal information.

Examination No. 14-0775 Court File No. A-218-14

FEDERAL COURT OF APPEAL

B E T W E E N:

DR. GABOR LUKACS

APPLICANT

- and –

CANADIAN TRANSPORTATION AGENCY

RESPONDENT

****

CROSS-EXAMINATION OF PATRICE BELLEROSE ON HER AFFIDAVIT SWORN JULY 29, 2014, pursuant to an appointment made on consent of the parties, to be reported by Gillespie Reporting Services, on the 21st day of August, 2014, commencing at the hour of 10:29 in the forenoon.

****

APPEARANCES:

Dr. Gabor Lukacs, for the Applicant

Mr. Simon-Pierre Lessard, for the Respondent

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

(i)

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NAME OF WITNESS: PATRICE BELLEROSE

CROSS-EXAMINATION BY: DR. GABOR LUKACS

NUMBER OF PAGES: 2 THROUGH TO AND INCLUDING 27

ADVISEMENTS, OBJECTIONS & UNDERTAKINGS

EXHIBITS

DATE TRANSCRIPT ORDERED: August 21, 2014

DATE TRANSCRIPT COMPLETED: August 25, 2014

PATRICE BELLEROSE, SWORN:

CROSS-EXAMINATION BY DR. GABOR LUKACS:

1. Q. Ms. Bellerose, I understand that on July 29, 2014, you swore an affidavit.

A. Yes.

DR. LUKACS: Let's mark that Affidavit as Exhibit 1.

EXHIBIT NO. 1: Affidavit of Patrice Bellerose dated July 29, 2014

DR. LUKACS:

2. Q. And I understand that you received the Direction to Attend dated August 8, 2014.

A. That is correct.

DR. LUKACS: Let's mark it as Exhibit 2.

EXHIBIT NO. 2: Direction to Attend dated August 8, 2014

DR. LUKACS:

3. Q. For how long have you been working with the Canadian Transportation Agency and in what roles?

A. I have been working with the Canadian Transportation Agency for just about six years and my initial position was the manager of record services and access to information and privacy co-ordinator for the Agency initially for the first one to two years. I was the acting director of the information services

directorate for three and a half years and I have recently been changed to a slightly different position as the senior manager of information services but that again is supposed to be changing shortly. There is going to be another reorganization of the Agency.

4. Q. In your current role what are your responsibilities?

A. I am responsible for all records, record keeping at the Agency, retention, dispositions, keeping the files, so information management, access to information and mail services.

5. Q. So when you say “records” can you elaborate what you mean by records in that context?

A. All records relating to the Agency, both transitory and official records.

6. Q. So for example, when the Agency orders paper would that also be a record that you would be handling?

A. If we -- the order for the paper?

7. Q. Yes, the invoice and all those things, are those records in this sense?

A. It depends. Probably for a period of time we have to have a record of an invoice, sure.

8. Q. And also submissions of parties and proceedings before the Agency are records?

A. Case files are records of the Agency, yes.

9. Q. Okay. In your current position can you describe to me the chain of command, who is your immediate supervisor, superior or whom do you report?

A. Right now I report to the director of information services who the current acting is Christine Guérette. She reports to the acting director of communications and information services branch which is Jacqueline Bannister who reports directly to the chairman.

10. Q. Just to confirm, are you currently or have you ever been a member of the Canadian Transportation Agency?

A. Of the which?

11. Q. Of the Canadian Transportation Agency. Have you been a member?

A. No.

12. Q. In carrying out your duties as manager of record services and access to information and privacy are you required to follow the decisions, rules and policies made by the Agency?

A. Yes.

13. Q. Now let’s look at Exhibit A to your Affidavit. Do you have it in front of you?

A. Exhibit A to my Affidavit?

14. Q. Yes.

A. Yes.

15. Q. This is an email dated February 14th, 2014

from myself to the secretary of the Agency, correct?

A. Yes.

16. Q. Were you aware when you received this that it explicitly makes reference to the fact that the request is made pursuant to section 2(b) of the Charter?

A. Yes.

17. Q. Did you understand the meaning of a request pursuant to section 2(b) of the Charter?

A. Yes.

18. Q. What does it mean?

A. It means that you were making a request under the Charter, under your Charter rights, and any requests for information at the Agency are treated as in -- those types of requests are treated as informal requests for information.

19. Q. What does section 2(b) of the Charter mean to you?

MR. LESSARD: For the record, I will object to the question because -- well there is an issue of relevance but also because you are asking the opinion to the witness. However Madam Bellerose will answer subject to the right to have the propriety of the question determined by the court at a later date. *O*

DR. LUKACS: Sure.

THE WITNESS: Okay so my understanding is that you

were making a request under the Charter which you were saying your Charter rights allowed you to request the documents as they were part of the open court principle and were subject -- it was under your Charter rights as opposed to making a formal access to information request.

DR. LUKACS:

20. Q. Did you make any inquiry to anybody at the Agency as to the meaning of a request pursuant to section 2(b) of the Charter?

A. Well, we discussed your request with the secretary and legal services.

MR. LESSARD: I will object because it is solicitor/client privilege with respect to discussions with legal services and -- like for the rest of the question I don't really have a problem with it. *O*

THE WITNESS: So we discussed the request and it was determined that we would proceed, even though you had indicated that it was under section 2(b) of the Charter, that we would proceed as a normal request for information as we normally receive for other case files throughout the Agency. We regularly receive them from other applicants on a daily basis.

DR. LUKACS:

21. Q. Did you receive any instructions from your superiors about how to process such a request pursuant to

section 2(b) of the Charter?

A. All requests for information are processed through our office in a standard fashion; either they are formal requests under the Access to Information Act or they are informal. Generally anybody asking for information regarding a case file that is ongoing at the Agency is considered an informal request because the documents are part of the public record.

22. Q. So do you agree with me that Exhibit A to your Affidavit was not a request made pursuant to the Access to Information Act?

MR. LESSARD: I will object for the record again because in this case it is not appropriate in this type of examination to ask for admissions from a witness. She is here as a witness and not as a party. However Madame Bellerose will answer subject to the right to have the propriety of the question determined by the court at a later date. *O*

THE WITNESS: It was not considered a formal request under the Access to Information Act, no. It did not meet the requirements.

DR. LUKACS:

23. Q. So at section 3 of your affidavit you say that the request was treated as an informal access request.

A. Yes.

24. Q. Can you please explain exactly what an informal access request means?

A. It means any requests for government records that are not completed formally under the Access to Information Act, meaning it must require the $5 fee. It must have the formal form that has been completed and signed.

25. Q. So in the case of this request you'd agree that no fee was paid.

A. No fee was paid nor was the form filled out.

26. Q. So there are two types of requests. There is a formal request where the fee is paid and the form is completed and --

A. Correct.

27. Q. -- those are treated as formal requests under the Act.

A. Correct.

28. Q. And then there are the informal requests which are everything else which are not treated under the Act, correct?

A. That's correct.

29. Q. In paragraph 3 of your Affidavit you say that this request was treated and I am quoting, "in conformity with the directive on the administration of the Access to Information Act".

A. Yes.

30. Q. Is Exhibit B to your Affidavit the directive that you are referring to?

A. Yes.

31. Q. Can you point to specific provisions of the directive to which treating the request as an informal access request conforms?

A. Section 7.4.5.

32. Q. Would you mind reading it into the record just for clarity?

A. “Informal processing

7.4.5 Determining whether it is appropriate to process the request on an informal basis. If so, offering the requester the possibility of treating the request informally and explaining that only formal requests are subject to provisions of the Act”.

33. Q. So just for clarity, according to this directive an informal request for access is not subject to the provisions of the Act. Is that correct?

A. An informal?

34. Q. Yes.

A. That is correct.

35. Q. And did you consult this directive when you were deciding how to treat my request?

A. No, because any request that we receive for information at the Agency other than formal requests are treated as informal access to information requests.

36. Q. Let's move on. I asked you to bring the attachment to your March 19, 2014 email which was referenced in paragraph 4 of your Affidavit.

A. Yes.

37. Q. I believe it consists of 121 pages.

A. That is correct.

DR. LUKACS: Let's mark it as Exhibit 3.

EXHIBIT NO. 3: Attachment to the email dated March 19, 2014 12:58 PM, from Patrice Bellerose to Dr. Gabor Lukacs, attachment 121 pages.

DR. LUKACS:

38. Q. Do you agree that the file contains no claim for confidentiality by any of the parties?

A. Yes.

39. Q. Do you agree that the file contains no determination by the Agency concerning confidential treatment of any of the documents or portions of documents in the file?

A. Sorry. Can you repeat that?

40. Q. Do you agree that the file contains no determination by the Agency concerning confidential treatment of any of the documents or portions of

documents?

A. No.

41. Q. You don't agree or...?

A. No. There is personal information that is contained in the documents that the Agency determines as confidential.

42. Q. Can you refer me to -- My question is: Is there -- in the file is there a decision, order or any other decision by the Agency stating that certain documents or portions of document will be treated confidentially?

A. The Privacy Act requires that we remove personal information from Agency records.

43. Q. I am sorry. I didn't ask you about the Privacy Act. I asked you about those 121 pages.

A. Yes there contains personal information in those 121 pages.

44. Q. That is not my question.

MR. LESSARD: Can you please reformulate Dr. Lukacs?

DR. LUKACS: Sure.

45. Q. Among those 121 pages is there any document, any directive, decision, order made by a member or members of the Agency directing that any of these documents be treated confidentially?

A. No.

46. Q. Thank you. Do you agree with me that some of the pages were partially blacked out?

A. Yes.

47. Q. Who decided which parts to black out?

A. Myself in collaboration with various staff members of the Agency.

48. Q. How was it decided which parts to black out?

A. Personal information was removed. That's all.

49. Q. All personal information?

A. No, only personal information that was not divulged in the decision.

50. Q. Under what legal authority was the blackened outs performed?

A. The Privacy Act.

51. Q. So under the Privacy Act are you telling me that you have the authority to decide which parts of an Agency adjudicative document will be released?

A. Under the Privacy Act we are obligated to remove personal information from government records prior to releasing them.

52. Q. Now let’s look at page 75. It was a letter from Air Canada to the secretary of the Agency dated October 18th, 2013, correct?

A. Correct.

53. Q. Do you agree that the name, that the business email address and the signature of Air Canada's counsel were blacked out on page 75?

A. Yes.

54. Q. Do you agree that the name, the business email address and the signature of Air Canada's counsel were blacked out throughout the file?

A. I would have to look through the pages --

55. Q. Take your time.

A. -- through the 121 pages to verify that but they should be. It's possible we made an error but generally yes they should be.

56. Q. So you say that those things should have been blacked out in your opinion?

A. Their contact information as well as their emails.

57. Q. Even though we are talking about work email address, not home ones?

A. We have had various consultations with air industry and different industries at the Agency and depending on whether a number is published, a work number is published or not, determines whether sometimes the information is public or not. Sometimes information is available publically; sometimes it's not. So in those cases more often than not we err on the side of caution

and if the number isn't published -- sometimes it is a general number, for example. If it is a general line obviously we include that type of information.

58. Q. So just to be clear, you made this decision or decided what things to redact in consultation also with the airline industry. Is that correct, what you just earlier said?

A. On previous files. That's not just air but different transportation modes. They have indicated that there are certain numbers that are purposely not published for people that work in businesses and that they keep those -- that information protected for various reasons and that they would like it not to be divulged.

59. Q. So in the case of Air Canada, Air Canada's lawyers, the counsel acting on the file, the name of the counsel, the business email address were blacked out pursuant to this request from the industry, from Air Canada specifically?

A. Based on consultations we have previously had with industry this was --

60. Q. But in this specific file was there any request from Air Canada to have their information redacted in this specific file?

A. We didn't consult them on this specific file because it was informal and we just went with according to

the usual personal information exemptions that we had so that we could get you the file in a timely fashion.

61. Q. Let's go also to page 68 of this file, actually 67, Annex G. This was an exhibit filed by Air Canada, correct?

A. That is correct.

62. Q. What I am seeing here on pages 68, 69 and 70 is that virtually the entire pages were blacked out, correct?

A. Correct.

63. Q. Why is that?

A. Because they contained PNR details which have personal information contained within them.

64. Q. All PNR information is personal information?

A. Pardon me?

65. Q. All PNR information is personal information?

A. Not necessarily. Certain parts are. It contains all of the information relating to the passenger air travel.

66. Q. Isn't that the issue before the Agency, the passengers' travel?

A. Sure, but the details of their travel aren't really relevant. If they are they have been included in the decision and the information is released.

67. Q. Are you familiar with the notion of open court

principle?

A. I am.

68. Q. Did you receive any training concerning the notion of open court principle?

A. Yes.

69. Q. Are you aware of any relationship between the open court principle and section 2(b) of the Charter?

MR. LESSARD: For the record, I will object to the question because of relevance and the fact again that you are asking an opinion from a witness who is not a party in this case. However Madame Bellerose will answer subject to the right to have the propriety of the question determined by the court at a later date. *O*

THE WITNESS: Sorry. Can you repeat the question?

DR. LUKACS:

70. Q. My question was: Are you aware of any relationship between the open court principle and section 2(b) of the Charter?

A. Yes.

71. Q. Do you know if the Agency is subject to the open court principle?

A. Yes.

72. Q. Are you aware of any policies or rules of the CTA that are in place for the purpose of compliance with the open court principle?

A. Our General Rules state that documents filed in relation to a complaint -- or actually there is a specific term for it. I don't have the General Rules in front of me -- but a proceeding, sorry, will be on the public record.

73. Q. How many requests pursuant to the open court principle have you handled in, say, the past 12 months?

A. In the past 12 months? I don't have the numbers with me but we --

74. Q. Approximately?

A. Twenty to 25.

75. Q. And they were all pursuant to the open court principle?

A. They were all requests for -- I am taking the liberty of trying to figure out what you are talking about but essentially any requests for case files, documents that were filed in relation to a decision that was issued by the Agency, where the documents were placed on the public record I would say we had about 20 to 25 of those in the past 12 months.

76. Q. In each case, in each of those cases, what you provided to the public was redacted documents?

A. Just personal information removed from each of them, yes.

77. Q. And all requests that were made pursuant to

the open court principle were handled as informal access requests?

A. That's correct. And actually I should elaborate on my previous answer. There were some requests for information where claims for confidentiality had been made on certain cases, so that information was also removed in those cases.

78. Q. That is obvious. That is not an issue in this case. All right; let’s look at page 79 of the same document. Just for clarity would you care to read into the record the two titles and the first two paragraphs, please?

A. “Important privacy information and Open Court Principle"

79. Q. And the first two paragraph?

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

80. Q. Okay, so what does “public record” mean here?

A. It means it's available for public viewing. It's available to the public.

81. Q. So any document placed on public record the public can access. Would it be fair to say that?

A. As long as it is filed with the Agency and in respect to a proceeding.

82. Q. So are you telling me that if somebody walks in the door of the Agency and says hi, I want to see file number so-and-so then they can look at all documents on the public record?

A. Well they have to be -- we have to remove personal information from them prior to viewing.

83. Q. But I don’t understand really. You say that all documents are placed on public record. You just said that all documents on public record can be viewed. Then where does this Act of removal fit into that notion of public record?

A. I am sorry. Can you repeat that?

84. Q. You just said that documents filed with the Agency are placed on public record, correct?

A. Correct.

85. Q. You also said that documents on public record can be viewed by the public.

A. Correct.

86. Q. Where does redaction come into this whole

procedure then? The Agency's own information sheet just says that those things may be viewed by the public.

A. They may be viewed by the public but the personal information that is contained within those documents is removed prior to viewing.

87. Q. So let's back-trace. What do you mean then by the notion "public record", because my understanding of public record is that public record is a document that the public can view? Do you agree with that?

A. Yes.

88. Q. So what you are telling me here is that you go and remove personal information from documents which are already on public record?

A. We remove personal information from Agency records prior to disclosing them to the public, yes.

89. Q. Doesn't public record mean that the public can access those documents?

A. They are accessing the documents. They are just not accessing the personal information that is contained within them. The public has a right to transparency which is the purpose of what we are doing because of the open court principle but the individual also has a right to privacy.

DR. LUKACS: Let's mark as Exhibit 4 Rule 23 of the Agency, of the General Rules.

THE WITNESS: Sorry, Rule 23? Okay, we don't have the General Rules with us but I believe you are talking --

DR. LUKACS: I believe it was printed out.

THE WITNESS: It is the part where it talks about the confidentiality of records and that all documents will be placed on the public record unless a claim for confidentiality is made?

DR. LUKACS: That's right.

THE WITNESS: Okay.

EXHIBIT NO. 4: Canadian Transportation Agency General Rules, Rule No. 23.

DR. LUKACS:

90. Q. So you have already referred to it and I would prefer to have it in front of you.

MR. LESSARD: I just gave it to her.

THE WITNESS: This is only a portion of the General Rules. There are other things that come into play. We only have a portion here to talk about but okay let's --

DR. LUKACS:

91. Q. Which portion do you have there because my understanding is that Rule 23 in its entirety should be before you?

A. Rule 23 is here.

92. Q. Yes. Is there any other Rule in the General

Rules that govern confidentiality?

A. Yes, there is another rule further that talks about the Agency can deem certain records confidential. Unfortunately I don't have the rules with me to identify that for you. I apologize.

93. Q. You are referring to financial or corporate information. Is that the Rule that you are referring to?

A. Yes.

94. Q. But we are talking here about personal information not --

A. That's right.

95. Q. So can you explain to me something?

A. Sure.

96. Q. Rule 23 has an elaborate confidentiality procedure.

A. That is correct.

97. Q. A party who doesn't want some information to be released to the public can request confidentiality, correct?

A. That is correct.

98. Q. And if the request is granted then a redacted copy of the document is placed on the public record.

A. That's correct.

99. Q. So deciding what to redact and what isn't, isn't that the job of the members of the Agency according

to Rule 23?

MR. LESSARD: For the record, I will object to the question because again it is a question of relevance and you are asking for an opinion or an admission from the witness. However Madame Bellerose will answer subject to the right to have the propriety of the question determined by the court at a later date. *O*

THE WITNESS: The Agency is subject to the Privacy Act and so for that reason that is why the personal information is redacted.

DR. LUKACS:

100. Q. You are not answering my question. My question was: Isn't it the duty of members and the responsibility of members hearing the case to determine pursuant to Rule 23 what portions will be redacted and what portions won't?

A. In a claim for confidentiality, yes.

101. Q. So if no claim for confidentiality is made all documents are placed on the public record, correct?

A. With the personal information removed.

102. Q. Can you point to me at anything in the General Rules that requires the removal of personal information?

A. The Agency is subject to the Privacy Act. That's what requires us to remove the personal information.

103. Q. My question was: Can you point to me at something in the General Rules that requires the removal of personal information, in the General Rules?

A. In the General Rules, no.

104. Q. No. The General Rules require that all documents with respect to which confidentiality has not been claimed be placed on public record, correct?

A. This is correct.

105. Q. And what you are telling me is that after a document is placed on public record you go in and redact things from it.

A. We don’t redact things. We redact personal information that is required under the Privacy Act which is another legislation to which we are required to comply.

106. Q. I am sorry. I am asking you now about the facts, not about the law, for the law will be for the court to decide. My question is: When you have a file which contains no claim for confidentiality which we have agreed is placed on public record, correct?

A. Correct.

107. Q. And then when the public wants to access the file you go in and redact a portion of it. Is that correct?

A. We remove -- no, not a portion. We remove personal information.

108. Q. Is personal information not a portion of the document?

A. I guess vaguely, yes.

109. Q. It is contained in the document. So to summarize even when a document is placed on public record pursuant to Rule 23 you redact further portions from it before releasing it to the public, correct?

A. Correct. I think it is important to clarify that it is personal information that is removed. "Portions" isn't really clear. It is important to distinguish that it is personal information only that is removed.

110. Q. Things that you deem to be personal information.

A. Things that are defined in the Act as personal information.

111. Q. But you purport to making those decisions what to redact or not, we just heard earlier, correct?

A. I interpret the Act, is that what you are asking?

112. Q. What I am asking is: Once the document is placed on public record and the Agency -- as a member of the Agency did not see a reason to grant confidentiality--

A. Or if there was no request.

113. Q. Or if there was no request.

A. That's right.

114. Q. Then you go and make some decisions as to what to redact from the file before it is released to the public, correct?

A. Personal information is removed, that is correct.

115. Q. And you decide what will be removed and what not?

A. I personally decide or --

116. Q. Yes.

A. -- is there an approval process?

117. Q. What can you tell me about that approval process?

A. Sure. Generally speaking it depends on -- with informal requests generally we take care of them in our office. Sometimes we consult with legal services and depending on the file it is possible that it can go to the chair who is the delegated head for access to information and privacy at the Agency.

DR. LUKACS: I guess I have no more questions. Thank you.

--THIS CROSS-EXAMINATION ADJOURNED AT 11:07 A.M. ON THE 21ST DAY OF AUGUST, 2014.

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

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LG R S / B M P

Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

WRITTEN REPRESENTATIONS OF THE APPLICANT

PART I – STATEMENT OF FACTS

1. The Applicant, Dr. Gábor Lukács, opposes the motion of the Privacy Commissioner of Canada (the "Commissioner") for leave to intervene in the application, which falls outside the mandate and legal capacity that Parliament granted to the Commissioner.

2. The Commissioner proposes to address issues that have already been addressed in the Agency's memorandum, and he does not represent an unrepresented interest. The Commissioner has less expertise and experience than this Honourable Court with respect to the issues raised in the application.

3. Lukács respectfully asks that the present motion be heard orally and by a panel of at least three judges for the following reasons:

(a) there are conflicting authorities from this Honourable Court about the legal test for granting leave to intervene; and

(b) the jurisprudence of this Honourable Court appears to conflate "added party intervener" and "friend of the court intervener."

A. NATURE OF THE APPLICATION: OPEN COURT PRINCIPLE

4. This application highlights the chasm between the policies and rules of the Canadian Transportation Agency ("Agency") that implement the open court principle, and the Agency's actual practices. In this application, brought under s. 28 of the *Federal Courts Act*, Lukács challenges the practices of the Agency related to the rights of the public, pursuant to the open court principle, to view documents received by the Agency in the course of quasi-judicial functions.

Lukács Affidavit, Exhibit "F" **Tab 1F: 32**

***Federal Courts Act*, R.S.C. 1985, c. F-7, s. 28** **Tab 7: 165**

5. Lukács is also seeking a *mandamus* directing the Agency to provide him and/or others on his behalf with unredacted copies of the documents in File No. M4120-3/13-05726. (Lukács was not involved in this file as a party nor in any other capacity.) The file contains no claim for confidentiality made by any of the parties, nor a directive, decision, or order made by a Member of the Agency that any of the documents in the file be treated confidentially.

Bellerose Cross-Examination, Q38, Q45 **Tab 3: 97 , 98**

6. Lukács served on the Attorneys General and filed a Notice of Constitutional Question, in accordance with section 57 of the *Federal Courts Act*, on November 21, 2014.

Notice of Constitutional Question **Court Docket, document nos. 44-45**

7. 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 application.

***Lukács v. Canadian Transportation Agency*, 2014 FCA 205, paras. 12-13** **Tab 15: 221**

(i) The Agency's policies and rules

8. The Agency acknowledges in its "Important privacy information" notice, provided to parties in adjudicative proceedings, that it is subject to the open court principle when it acts in a quasi-judicial capacity. Such a notice was also provided to the parties in the proceeding in File No. M4120-3/13-05726:

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

Lukács Affidavit, Ex. "C" **Tab 1C: 21**

9. The open court principle is incorporated in both the Agency's old and current procedural rules, which speak about the "public record" and the "confidential record" of the Agency, and provide that:

(a) all documents filed with the Agency are to be placed on the public record, unless confidentiality was sought and granted;

(b) a request for confidentiality must be made by the party who is filing the document, and at the time of the filing;

(c) requests for confidentiality and redacted versions of confidential documents are to be placed on the Agency's public record; and

(d) unredacted versions of confidential documents are to be placed on the Agency's confidential record.

***Canadian Transportation Agency Rules (Dispute Proceedings)*, S.O.R./2014-104 ("New Rules"), ss. 7(2), 31(2)** **Tab 5: 146 - 149**

***Canadian Transportation Agency General Rules*, S.O.R./2005-35 ("Old Rules"), ss. 23(1), 23(6)** **Tab 6: 155 - 157**

(ii) The Agency's practices

10. The aforementioned reasonable and sensible rules, however, are not being followed. In practice, members of the public are not permitted to view documents contained in the Agency's tribunal files that were placed on the Agency's "public record" in their entirety; only redacted versions of these documents can be viewed, with portions that contain "personal information" blacked out. What constitutes "personal information" is decided by Agency Staff, who are not Members of the Agency.

Bellerose Cross-Examination, Q82-Q86 **Tab 3: 106 - 107**

11. These practices are followed even in cases where the Member(s) of the Agency hearing the case did not find it appropriate to grant confidentiality or where confidentiality was not requested by the parties at all.

Bellerose Cross-Examination, Q112-Q114 **Tab 3: 112 - 113**

12. Agency Staff have an expansive notion of what constitutes "personal information"; for example, the name and business email address of a lawyer representing a corporation before the Agency may be "personal information" that, in their view, must be redacted from documents placed on "public record" before they would be disclosed to members of the public.

Bellerose Cross-Examination, Q53-Q57 **Tab 3: 100**

13. The explanation offered by the Agency for its practices relies on section 8 of the *Privacy Act*, and is based on the false premise that the *Privacy Act* trumps the open court principle.

Lukács Affidavit, Ex. "E" **Tab 1E: 26**

B. THE COMMISSIONER'S MOTION

(i) The interest asserted: jurisprudential

14. There is no evidence that the Commissioner may gain or lose anything as a consequence of the decision of this Court in the application. The Commissioner seeks leave to intervene simply because it anticipates that the decision of the Court will set a significant precedent that will likely affect cases in different circumstances sometime in the future.

Kosseim Affidavit, paras. 18 and 20 **Commissioner's Record, Tab 2, pp. 7-8**

(ii) Lack of specialized expertise in interpreting the *Privacy Act*

15. The Commissioner's claim advanced on the present motion that he has specialized expertise in interpreting statutory provisions related to his investigations has been explicitly rejected by the Federal Court.

***State Farm Mutual Automobile Insurance Co. v. Canada (Privacy Commissioner)*, 2010 FC 736, para. 91** **Tab 18: 257**

16. Section 41 of the *Privacy Act* entrusts the Federal Court, and not the Commissioner, with the authority and mandate to interpret the Act. As such, it is the Federal Court and the Federal Court of Appeal, and not the Commissioner, that have specialized expertise in the interpretation of the *Privacy Act*.

***Privacy Act*, R.S.C. 1985, c. P-21, s. 41** **Tab 8: 171**

(iii) No mandate with respect to disclosure of personal information

17. The mandate of the Commissioner to intervene in court proceedings is not open-ended. Section 42 of the *Privacy Act* allows the Commissioner to involve himself only in applications pursuant to s. 41 of the *Privacy Act* for the review of a refusal to grant access to personal information about the same individual who is seeking access.

***Privacy Act*, R.S.C. 1985, c. P-21, s. 42** **Tab 8: 171**

18. Ms. Kosseim correctly acknowledged on her cross-examination that the Commissioner has neither jurisdiction nor mandate to bring before the courts matters that bear on either collection, use, or disclosure of personal information.

Kosseim Cross-Examination, Q47-Q48 **Tab 2: 68**

(iv) Lack of relevant experience

19. There are several difficulties with the Commissioner's claim that he has investigated numerous complaints from individuals regarding the disclosure of personal information by federal administrative tribunals via the Internet.

Kosseim Affidavit, para. 11 **Commissioner's Motion Record, Tab 2, p. 5**

20. Ms. Kosseim testified on her cross-examination that the investigations referred to in her affidavit were reported in the 2007-2008 report of the Privacy Commissioner of Canada. Consequently, these investigations must have taken place prior to 2014. Mr. Daniel Therrien, however, was appointed Commissioner only in June 2014, and thus he could not have conducted these investigations.

Kosseim Cross-Examination, Q30 & Exhibit No. 3 **Tab 2: 65**
Tab 2A: 77

Lukács Affidavit, Exhibit "H" **Tab 1H: 44**

21. As for the substance of the investigations, they were in relation to disclosure of personal information by tribunals on the Internet. While questions related to privacy in the age of Internet are undoubtedly interesting and important, Ms. Kosseim correctly acknowledged that the present application involves no questions of this nature.

Kosseim Cross-Examination, Q31-Q32 **Tab 2: 65**

(v) Relevant procedural history

22. The Commissioner's motion was brought on October 16, 2014. On October 23, 2014, Lukács cross-examined Ms. Kosseim, the Commissioner's affiant, and Ms. Kosseim refused to answer certain questions and to produce certain documents.

23. On November 13, 2014, the Agency filed its Respondent's Record with respect to the application. The Agency's memorandum of fact and law contains detailed arguments and analysis concerning all three issues that the Commissioner proposes to address:

(a) "publicly available" information within the meaning of subsection 69(2) of the *Privacy Act* is addressed in paragraphs 46-48;

(b) the exceptions set out under paragraphs 8(2)(a), 8(2)(b), and 8(2)(m) of the *Privacy Act* are addressed in paragraphs 40-45; and

(c) consistency of the limits imposed by the *Privacy Act* with subsection 2(b) of the *Charter* is addressed in paragraphs 34-39.

Respondent's Record of the Agency, Tab 2 Memorandum of Fact and Law **Court Docket, document no. 55**

24. On November 14, 2014, Madam Justice Gauthier, J.A., directed that the Commissioner's motion be held in abeyance to allow Lukács to bring a motion concerning the refusals of Ms. Kosseim and for an extension to file his response to the Commissioner's motion. On the same day, Lukács brought a motion as directed. Lukács did not address the substance of the Commissioner's motion, which was being held in abeyance.

25. On November 24, 2014, the Commissioner filed its response to the motion of Lukács, and agreed (in paragraph 51 of its written representations) that Lukács should be granted 10 days from the disposition of the motion to serve and file his response to the Commissioner's motion for leave to intervene. On November 27, 2014, Lukács filed his reply in relation to his motion.

26. On December 10, 2014, Mr. Justice Stratas, J.A., dismissed the motion of Lukács, and granted the Commissioner's motion for leave to intervene without having received the submissions of Lukács concerning the substance of the Commissioner's motion.

27. On December 11, 2014, Lukács advised the Court he was not afforded an opportunity to file a response to the Commissioner's motion. On December 18, 2014, the Commissioner advised the Court that he was taking no position as to whether Lukács should be permitted to file responding materials in regard to the Commissioner's motion for leave to intervene.

28. On January 8, 2015, Mr. Justice Stratas, J.A., directed that Lukács could file his response to the Commissioner's motion within ten days, and granted the Commissioners four days to file a reply.

PART II – STATEMENT OF THE POINTS IN ISSUE

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

(i) Does the Commissioner have the necessary mandate and legal capacity to intervene in the present application?

(ii) Should the present motion be heard orally and by a panel of at least three judges?

(iii) What is the correct legal test for granting leave to intervene?

(iv) Should the Privacy Commissioner be granted leave to intervene in the application, and if so, what are the appropriate scope, terms, and schedule for the intervention?

PART III – STATEMENT OF SUBMISSIONS

A. PRELIMINARY MATTER: THE COMMISSIONER LACKS THE NECESSARY MANDATE AND LEGAL CAPACITY

30. The Supreme Court of British Columbia held that the Commissioner lacks the legal capacity to commence a lawsuit, unless Parliament expressly authorized the Commissioner to do so:

> I am satisfied that the Privacy Commissioner's appointment under the Great Seal of Canada does not confer on him a power that Parliament did not expressly grant, in particular the capacity to commence a lawsuit such as this one.

***Canada (Privacy Commissioner) v. Canada (Attorney General)*, 2003 BCSC 862, para. 16** **Tab 11: 190**

31. This begs the question of whether the Commissioner has the necessary mandate and/or legal capacity to intervene in the present application, which is outside the scope of sections 41 and 42 of the *Privacy Act*. Lukács submits that this question is to be answered in the negative for the following reasons.

(i) The Commissioner's mandate

32. The core mandate of the Commissioner under the *Privacy Act* is to act as an ombudsperson to receive and investigate complaints from individuals in relation to personal information about themselves held by government institutions, and to report his findings to the head of the government institutions, and when appropriate, to the complainant. The Commissioner has broad powers for the purposes of conducting investigations into complaints that are filed.

***Lavigne v. Canada*, 2002 SCC 53, paras. 32-33, and 38-39** **Commissioner's Record, Tab 4C, pp. 52-53 and 56-57**

33. The Commissioner is an ombudsperson, and not an adjudicator or decision-maker; his powers are generally limited to investigating, reporting, and making recommendations.

(ii) Sections 41 and 42 of the *Privacy Act*

34. The *Privacy Act* provides for a judicial review only with respect to refusal to grant access to personal information about the complainants themselves. Sections 42(a) and 42(b) of the *Privacy Act* allows the Commissioner to make such an application on behalf of the complainant and to represent the complainant, if the Commissioner has the consent of the complainant.

***Privacy Act*, R.S.C. 1985, c. P-21, ss. 41-42** **Tab 8: 171**

35. Section 42(c) of the *Privacy Act* permits the Commissioner to become, with leave of the court, an added party intervener in applications for judicial review made pursuant to section 41 of the Act:

> 42. The Privacy Commissioner may
>
> (c) with leave of the Court, appear as a party to any review applied for under section 41.
>
> [Emphasis added.]

***Privacy Act*, R.S.C. 1985, c. P-21, s. 42** **Tab 8: 171**

36. The court does not need an explicit statutory provision in order to grant added party intervener status, provided that the proposed intervener has the necessary legal capacity. Parliament does not speak in vain, and statutes are presumed to contain no redundant provisions. Thus, the purpose of subsection 42(c) of the *Privacy Act* is not to confer powers upon the court that the court already has, but rather to grant the Commissioner the legal capacity necessary to become an intervener in certain, but limited, types of proceedings.

37. Therefore, the Commissioner lacks the legal capacity to become an intervener in legal proceedings in which Parliament did not expressly authorize the Commissioner to intervene. This conclusion is further supported by observing that the Commissioner's office, including the resources used for intervening in proceedings, are funded from the taxpayers' money. It would be inappropriate for the Commissioner to divert public resources allocated for the purposes identified by Parliament to other purposes that he may consider important.

(iii) Caselaw cited by the Commissioner

38. The *Lavigne* case supports the foregoing submissions, as Mr. Levigne was refused access to personal information about himself, and the Commissioner was granted leave to intervene pursuant to s. 42(c) of the *Privacy Act*. The other authority cited by the Commissioner (*Breithaupt and Fournier*) is of a similar nature, where leave to intervention was sought and granted under subsection 15(c) of the *PIPEDA*, which is analogous to subsection 42(c) of the *Privacy Act*, and its scope is limited to applications brought under section 14 of *PIPEDA*.

(iv) Application to the case at bar

39. The present application was not brought under section 41 of the *Privacy Act*, nor under section 14 of *PIPEDA*. Lukács is not seeking access to personal information about himself. As such, intervening in the present application is outside the Commissioner's mandate.

40. In the absence of an express grant of legal capacity to intervene, the Commissioner has no legal capacity to intervene in the present application, and the Commissioner's motion is a nullity.

B. REQUEST FOR AN ORAL HEARING BEFORE A PANEL

41. While motions are usually dealt with in writing and by a single judge in the Federal Court of Appeal, the need to resolve in a conclusive manner the ambiguities concerning the legal test for granting leave to intervene warrants an oral hearing and a determination by a panel of the Court.

(i) Conflicting authorities from this Honourable Court

42. There are conflicting authorities on what is the appropriate legal test for granting leave to intervene. Panels of this Honourable Court have consistently endorsed and applied a six-part test:

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

(2) Is there 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.)*, [2010] 1 F.C.R. 226, para. 8** **Tab 12: 196**

43. On the other hand, recently, Mr. Justice Stratas, J.A., sitting as a single motions judge, held that these factors were outmoded and did not meet the

exigencies of modern litigation, and he articulated and applied a different test, which, among other things, replaces "directly affected by the outcome" with "genuine interest." Mr. Justice Stratas, J.A., prefaced his analysis with:

> [...] 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.

***Pictou Landing Band Council v. Canada (Attorney General)*, 2014 FCA 21, paras. 8-11** **Tab 16: 227 - 229**

44. The two tests substantially differ from each other, and the presence of conflicting authorities on the question creates an uncertainty as to the state of the law. This is a concern with ramifications beyond the present motion, because the Federal Court and federal tribunals are all looking to this Honourable Court for guidance.

45. Whether "directly affected by the outcome" or a "genuine interest" is the correct test for leave to intervene may affect the outcome of the present motion, as the Commission did not lead any evidence nor make any submissions that it is directly affected by the outcome of the application. Thus, the question is not academic, but rather, there is a practical and immediate benefit and need for deciding what is the correct legal test for leave to intervene.

46. While *Pictou* is not binding on other judges of this Honourable Court, *Canadian Airlines International Ltd.* certainly is, because it was rendered by a panel of the Court. Hence, only a panel of this Honourable Court can conclusively decide which of the two tests is the correct one, or articulate a different test.

(ii) Confusion between "added party intervener" and "friend of the court intervener"

47. Both *Canadian Airlines International Ltd.* and *Pictou* articulate a "one size fits all" legal test, but fail to distinguish between two different types of interveners, namely, "added party intervener" and "friend of the court intervener."

> In added party intervention, the intervenor seeks to protect a specific or general interest; hence the question is whether that interest is already fully protected in the litigation. In friend of the court intervention, the intervenor seeks to assist the court by revealing a unique or different point of view or approach to an issue in the litigation, exploring a relevant issue that would not otherwise be examined, or presenting opinions or views of a constituency that would be affected by the litigation. In the end, the question in added party intervention is whether the interests sought to be protected by the applicant are being fully and fairly protected by the existing parties; in friend of the court intervention, the question is whether there is an issue, point of view, or other perspective that the court would find useful and helpful in its deliberations.
>
> **Paul R. Muldoon: *Law of Intervention* (Canada Law Book Inc., 1989), p. 143** **Tab 19: 288**

48. The observation in *Pictou* that the requirements for intervener status in other jurisdictions in Canada are lower than "directly affected" overlooks the fact that Canadian jurisdictions do distinguish between added party intervener and friend of the court intervener (see Rules 13.01 and 13.02 in Ontario, Manitoba, and Prince Edward Island; Rules 7.05 and 7.06 in Newfoundland and Labrador; and Rules 15.02 and 15.03 in New Brunswick). The requirements for an added party intervener are fairly similar to "directly affected" across these jurisdictions; it is the friend of the court intervener status that has a lower threshold.

> **Provincial superior court rules governing intervention** **Tab 9: 173**

49. It submitted that oral arguments before a panel are also necessary in order to resolve the confusion between these two types of interveners.

C. THE LEGAL TESTS FOR GRANTING LEAVE TO INTERVENE

50. It is submitted that this Honourable Court should follow the majority of Canadian jurisdictions in distinguishing between the two types of interveners, and replace the "one size fits all" legal tests from *Canadian Airlines International Ltd.* and *Pictou* with a pair of new and pragmatic legal tests: one for added party intervener, and another for friend of the court intervener.

(i) Test for added party intervener status

(a) Precondition: directly affected

51. An added party intervener seeks to participate in a proceeding for the purpose of protecting its interests. Consequently, a precondition for granting added party intervener status is that the proposed intervener be "directly affected" by the outcome of the proceeding.

52. It is recognized by the rules of provincial superior courts (such as Rule 13.01 in Ontario, Manitoba, and Prince Edward Island) that there are many ways a proposed intervener may be "directly affected" by the outcome of a proceeding, including:

(a) having an interest in the subject matter of the proceeding (for example, in a property);

(b) being potentially adversely affected by a judgment in the proceeding; or

(c) having a dispute of fact or law with some of the parties to the proceeding that is common with some of the questions in issue in the proceeding.

53. A mere jurisprudential interest, related to the repercussions on litigation in the future, is insufficient to establish that the proposed intervener is "directly affected" by the proceeding, and leave to intervene as an added party should be refused.

> ***Pfizer Ltd. v. Ratiopharm Inc.*, 2009 FCA 339, para. 7** — **Tab 17: 235**
>
> ***Canadian Airlines International Ltd. v. Canada (Human Rights Commission) (F.C.A.)*, para. 11** — **Tab 12: 197**

(b) Main consideration: are the interests already protected by the parties?

54. The main consideration guiding the discretion to grant added party intervener status is whether the interests sought to be protected by the proposed intervener are already being protected by the existing parties.

> **Paul R. Muldoon: *Law of Intervention* (Canada Law Book Inc., 1989), p. 143** — **Tab 19: 288**

55. Leave to intervene should be refused if there is no evidence that the interests of the proposed intervener are not already protected and that the submissions of the proposed intervener will be different from those of the existing parties.

> ***Pfizer Ltd. v. Ratiopharm Inc.*, 2009 FCA 339, para. 9** — **Tab 17: 235**

(c) Additional consideration: impact on the existing parties

56. An additional consideration identified in the rules of many provincial superior courts is whether the intervention will "unduly delay or prejudice the determination of the rights of the parties to the proceeding." This consideration is similar to item V in *Pictou*.

> ***Pictou Landing Band Council v. Canada (Attorney General)*, 2014 FCA 21, para. 11** — **Tab 16: 229**

(ii) Test for friend of the court intervener

(a) Precondition: the Court is in need of assistance

57. Unlike an added party intervener, a friend of the court (*amicus curiae*) participates in a proceeding to assist the court in its deliberations in cases where there is a failure to present the issues by the parties, or where the case involves issues that are outside the expertise and experience of the court. Intervening for the purpose of representing the interests of a party who is capable of defending his own interests is not permitted.

> ***John Doe v. Ontario (Information and Privacy Commissioner)*, [1991] O.J. No. 2334** **Tab 14: 212**

58. Thus, a precondition for granting a friend of the court intervener status is the presence of an issue that is not properly presented to the Court, and in which the Court needs assistance.

(b) Main consideration: is the proposed intervener able to assist?

59. A proposed intervener must demonstrate how its participation will be of assistance to the Court; a mere assertion that its participation would assist the Court and/or that it has a different perspective than the parties is insufficient.

> ***Forest Ethics Advocacy Assn. v. Canada (National Energy Board)*, 2013 FCA 236, paras. 36-38** **Tab 13: 208**

60. Duplicating the issues raised by the parties will offer no assistance to the Court. Thus, a proposed intervener must demonstrate that it will be making submissions that do substantially differ from those of the parties.

> ***Pictou Landing Band Council v. Canada (Attorney General)*, 2014 FCA 21, para. 31** **Tab 16: 232**

61. This latter condition cannot be ascertained without an indication of the position of the proposed intervener with respect to the questions on which they propose to intervene and the arguments the proposed intervener intends to make, and then contrasting those with the positions taken by the parties. These requirements are also found in Rule 57(2) of the *Rules of the Supreme Court of Canada*.

> ***Canada (Attorney General) v. Sasvari*, 2004 FC 1650, para. 11** **Tab 10: 183**
>
> ***Rules of the Supreme Court of Canada*, s. 57(2)**

62. Finally, the proposed intervener must demonstrate that it has expertise and experience required to assist the Court; in particular, the proposed intervener is expected to demonstrate that it has expertise and experience relevant to the issues that exceed the expertise and experience of the court with respect to the issues in question.

(c) Additional consideration: interest of justice

63. In addition to the consideration of whether the intervention will delay or prejudice the determination of the rights of the parties to the proceeding, the interest of justice as well as the appearance of justice become important considerations in the context of friend of the court interveners, whose purpose is to ensure that the Court is in possession of the relevant facts and arguments.

64. In this context, it is submitted that the court should also consider the imbalance of resources between the existing parties, how granting leave to intervene will affect this imbalance, and what measures are available to mitigate the strain on the parties' resources caused by granting leave to intervene.

D. APPLICATION OF THE TESTS TO THE COMMISSIONER'S MOTION

65. The Commissioner's motion is ambiguous as to what type of intervener status the Commissioner is seeking. On the one hand, the Commissioner refers to the jurisdiction of the Court to grant party status on page 3 of his written representations. On the other hand, the purpose of the proposed intervention seems to be assisting the court, which points in the direction of a friend of the court intervener. For greater certainty, both types are addressed below.

(i) The Commissioner has no "special status"

66. The argument that a proposed intervener should granted intervener status based on its past successful interventions has been correctly rejected by the Federal Court. 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 it meets the appropriate legal test.

***Canada (Attorney General) v. Sasvari*, 2004 FC 1650, paras. 13-14** — **Tab 10: 183**

67. The Commissioner erroneously argues in paragraphs 20-24 of his written representations that he has a special status to intervene in judicial proceedings involving applications of the *Privacy Act* or *PIPEDA*. This is clearly not the case even in applications brought under section 41 of the *Privacy Act*, and the Commissioner is not automatically entitled to an intervener status in any proceeding. Even if the Commissioner did have some form of "special status" to intervene, the clear legislative language of subsection 42(c) of the *Privacy Act* demonstrates that such a "special status" is confined to applications brought under section 41 of the *Privacy Act* (or section 14 of *PIPEDA*). The present application, however, is of a different nature. Consequently, the Commissioner has no "special status" to intervene in the present application.

(ii) Added party intervener status

68. The Commissioner's interest in the present application is only jurisprudential. Indeed, the Commissioner will not suffer any prejudice nor have any advantage depending on the outcome of the application. While this may be sufficient for a friend of the court intervener status, it is clearly insufficient for an added party intervener.

> ***Pfizer Ltd. v. Ratiopharm Inc.*, 2009 FCA 339, para. 7** — **Tab 17: 235**
>
> ***Canadian Airlines International Ltd. v. Canada (Human Rights Commission) (F.C.A.)*, para. 11** — **Tab 12: 197**

69. Even if the Commissioner were "directly affected" by the application (which is explicitly denied), the Commissioner has chosen to lead no evidence about his proposed submissions. Thus, there is no evidence before this Honourable Court capable of establishing that the Commissioner's submissions would differ in any way from those found in the Agency's memorandum.

> ***Canada (Attorney General) v. Sasvari*, 2004 FC 1650, para. 11** — **Tab 10: 183**

(iii) Friend of the court intervener status

(a) <u>The Court needs no assistance in the present application</u>

70. The Agency undoubtedly has the necessary resources and is capable of responding to the present application. Indeed, the Agency has filed a lengthy Memorandum of Fact and Law that addresses the issues raised by Lukács, including all three issues that the Commissioner proposes to address.

> **Respondent's Record of the Agency, Tab 2 Memorandum of Fact and Law** — **Court Docket, document no. 55**

71. While Lukács disagrees with the substance of the Agency's submissions, he does not object to them on the basis of the doctrine of *functus officio*.

72. The doctrine of *functus officio* is not applicable in the present case for a number of reasons. First, Lukács is seeking a *mandamus*, and not a *certiorari*. Second, Lukács challenges the practice of the Agency, and not just a single instance of this practice. Third, no confidentiality order or directive of any sort has been made by a Member of the Agency.

> Q. Among those 121 pages is there any document, any directive, decision, order made by a member or members of the Agency directing that any of these documents be treated confidentially?
>
> A. No.
>
> **Bellerose Cross-Examination, Q45** **Tab 3: 98 - 99**

73. Consequently, there is neither practical nor legal barrier to the Agency addressing all issues raised in the present application as the Agency has done in its memorandum. Therefore, there is no unrepresented issue with respect to which this Honourable Court would need assistance.

74. Finally, even if the Commissioner believes that his legal team is able to argue for the Agency's position better than the Agency does, it is neither the mandate of the Commissioner nor the proper scope and purpose of becoming an intervener to represent one of the parties. The Agency has to respond to the present application on its own.

> ***John Doe v. Ontario (Information and Privacy Commissioner)*, [1991] O.J. No. 2334** **Tab 14: 212**

(b) <u>The Commissioner is unable to assist the Court</u>

75. The present application concerns constitutional law, and specifically, the open court principle. Courts have a unique role and expertise in interpreting the Constitution, which is also the reason that constitutional questions continue to be reviewed on a correctness standard even in the post-*Dunsmuir* era.

76. Representing the public interest in constitutional cases is the duty and the expertise of the Attorneys General. Under section 57 of the *Federal Courts Act*, they are entitled to a notice of every constitutional question, and are entitled, as of right, to make submissions and adduce evidence in relation to constitutional questions. While the Attorneys General do not have a monopoly on defending constitutional challenges, the Commissioner has no specialized expertise or experience in this area.

***Federal Courts Act*, R.S.C. 1985, c. F-7, s. 57** **Tab 7: 168**

77. The context of the present application is specific to the Agency, its enabling statute, the *Canada Transportation Act*, and the Agency's procedural rules (which incorporate the open court principle). There is no evidence that the Commissioner or anyone among his staff is familiar with the operation of the Agency. On the contrary, the Commissioner's affiant, Ms. Kosseim, testified that she was not familiar with it.

Kosseim Cross-Examination, Q49 and Q51 **Tab 2: 69 - 70**

78. There is no doubt that the issues to be addressed on the present application include interpretation of certain provisions of the *Privacy Act*, but they do not involve any question related to investigating complaints. It is the Federal Courts, and not the Commissioner, that have specialized expertise and experience in interpreting the *Privacy Act* (and *PIPEDA*). Indeed, Parliament entrusted the courts, and not the Commissioner, with that authority.

***State Farm Mutual Automobile Insurance Co. v. Canada (Privacy Commissioner)*, 2010 FC 736, para. 91** **Tab 18: 257**

79. Consequently, the Commissioner has no specialized expertise or experience relevant to the present application that would exceed the expertise or experience of this Honourable Court.

80. Finally, the Commissioner led no evidence nor did he make any submissions to illuminate in what way his submissions will differ from the submissions of the Agency. The Commission only asserts that he has a different perspective, but does not explain how this different perspective translates to a legal position that differs from the position of the parties. Such bare assertions, however, are insufficient for granting an intervener status.

***Forest Ethics Advocacy Assn. v. Canada (National Energy Board)*, 2013 FCA 236, paras. 36-38** **Tab 13: 208**

(c) Interest of justice

81. While the Commissioner claims that the present application will establish an important precedent, this is far from being clear. Neither the open court principle nor its applicability to quasi-judicial functions are new. Moreover, the present application concerns the specific context of the Agency, and Lukács does not seek any remedy that affects other tribunals. Thus, the application has no public interest dimension that would support granting leave to intervene.

82. Granting the Commissioner leave to intervene would create a significant burden on the resources of Lukács, who is an unrepresented citizen with limited resources, while the Agency, a tribunal funded from the public purse, has virtually unlimited resources. Indeed, if the Commissioner's submissions do not duplicate the Agency's submissions (which is far from being clear at this point), then Lukács will have to expand additional resources to respond to the Commissioner's memorandum.

83. Granting the Commissioner leave to intervene will also harm the appearance of justice by creating the image of a sole citizen fighting against "the powerful" (the Agency, the Commissioner, and possibly the Attorneys General).

(iv) Conclusion

84. The Commissioner does not meet the test for an added party intervener, nor the test for friend of the court intervener. He has no sufficient interest in the proceeding for the former, and no relevant expertise or experience for the latter. The Agency is perfectly capable of defending itself and addressing all issues raised in the application.

85. The interest of justice strongly militates against granting leave to intervene, which would create a burden on the limited resources of Lukács, and a public image of "the powerful" ganging up on a sole citizen, which may undermine the legitimacy of the proceeding in the eyes of the public.

E. SCOPE, TERMS, AND SCHEDULE FOR THE INTERVENTION (IF GRANTED)

86. Should this Honourable Court grant the Commissioner leave to intervene in the application, Lukács respectfully asks that the scope, terms, and schedule for the intervention be set as follows:

(a) the Commissioner's submissions shall be limited to issues not addressed in the Agency's Memorandum of Fact and Law;

(b) the Commissioner's Memorandum of Fact and Law shall not exceed ten (10) pages in length, and is to be served and filed within ten (10) days from the disposition of the motion;

(c) the Commissioner shall not add to the evidentiary record, and shall not seek costs;

(d) Lukács may file a memorandum, responding to the Commissioner's submissions, within twenty (20) days of the receipt of the Commissioner's memorandum; and

(e) the Commissioner shall reimburse Lukács for all costs he incurs in relation to responding to the Commissioner's memorandum.

87. Courts have discretion to require an intervener to pay for the costs incurred by a party as a result of the intervention (see, for example, Rule 59(1)(a) of the *Rules of the Supreme Court of Canada*). It is submitted that the circumstances of the present case call for this measure in order to balance out the resources available to the parties who represent opposite sides of the issues.

***Rules of the Supreme Court of Canada*, s. 59(1)(a)**

F. OUT-OF-POCKET EXPENSES OF LUKÁCS

88. Lukács asks this Honourable Court to exercise its discretion with respect to costs by awarding Lukács his disbursements in the present motion in any event of the cause.

PART IV – ORDER SOUGHT

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

(i) dismissing the Commissioner's motion for leave to intervene;

(ii) alternatively, directing that:

a. the Commissioner may file a Memorandum of Fact and Law not exceeding ten (10) pages in length, within ten (10) days;

b. the Commissioner's submissions shall be limited to issues not addressed in the Agency's Memorandum of Fact and Law;

c. the Commissioner shall not add to the evidentiary record, and shall not seek costs;

d. Lukács may file a responding memorandum within twenty (20) days of the receipt of the Commissioner's Memorandum of Fact and Law; and

e. the Commissioner shall reimburse Lukács for all costs he incurs in relation to responding to the Commissioner's memorandum.

(iii) directing the Privacy Commissioner to pay Lukács the disbursements of the present motion in any event of the cause; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 16, 2015

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Applicant / **Responding Party**

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), S.O.R./2014-104, ss. 7(2), 18, 19, 31(2), and Schedules 5 and 6

Canadian Transportation Agency General Rules, S.O.R./2005-35, ss. 23(1), 23(6), 40

Court of Queen's Bench Rules, Man. Reg. 553/88, Rule 13

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

Privacy Act, R.S.C. 1985, c. P-21, ss. 41, 42

Rules of Civil Procedure, R.R.O. 1990, Regulation 194, Rule 13

Rules of Court, N.B. Reg. 82-73 Rule 15

Rules of the Supreme Court, 1986, S.N.L. 1986 c. 42, Sch. D, Rules 7.05 and 7.06

Rules of the Supreme Court of Canada, ss. 57(2), 59(1)(a)

CASE LAW

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

Canada (Privacy Commissioner) v. Canada (Attorney General), 2003 BCSC 862

CASE LAW (CONTINUED)

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

Forest Ethics Advocacy Assn. v. Canada (National Energy Board), 2013 FCA 236

John Doe v. Ontario (Information and Privacy Commissioner), [1991] O.J. No. 2334

Lavigne v. Canada (Office of the Commissioner of Official Languages), 2002 SCC 53

Lukács v. Canadian Transportation Agency, 2014 FCA 205

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

Pfizer Ltd. v. Ratiopharm Inc., 2009 FCA 339

State Farm Mutual Automobile Insurance Co. v. Canada (Privacy Commissioner), 2010 FC 736

COMMENTARY

Paul R. Muldoon: *Law of Intervention*
(Canada Law Book Inc., 1989)

CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)

Règles de l’Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances)

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réparation, avec ou sans conditions, en vue du règlement équitable des questions.

Filing of Documents and Sending of Copy to Parties

Dépôt de documents et envoi de copies aux autres parties

Filing

7. (1) Any document filed under these Rules must be filed with the Secretary of the Agency.

Dépôt

7. (1) Le dépôt de documents au titre des présentes règles se fait auprès du secrétaire de l'Office.

Agency's public record

(2) All filed documents are placed on the Agency's public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document.

Archives publiques de l'Office

(2) Les documents déposés sont versés aux archives publiques de l'Office, sauf si la personne qui dépose le document dépose au même moment une requête de confidentialité, en vertu de l'article 31, à l'égard du document.

Copy to parties

8. A person that files a document must, on the same day, send a copy of the document to each party or, if a party is represented, to the party's representative, except if the document is

(*a*) a confidential version of a document in respect of which a request for confidentiality is filed under section 31;

(*b*) an application; or

(*c*) a position statement.

Copie aux autres parties

8. La personne qui dépose un document envoie le même jour une copie du document à chaque partie ou à son représentant, le cas échéant, sauf s'il s'agit :

a) d'une version confidentielle d'un document à l'égard duquel une requête de confidentialité a été déposée en vertu de l'article 31;

b) d'une demande;

c) d'un énoncé de position.

Means of transmission

9. Documents may be filed with the Agency and copies may be sent to the other parties by courrier, personal delivery, email, facsimile or other electronic means specified by the Agency.

Modes de transmission

9. Le dépôt de documents et l'envoi de copies aux autres parties peut se faire par remise en mains propres, par service de messagerie, par courriel, par télécopieur ou par tout autre moyen électronique que précise l'Office.

Facsimile — cover page

10. A person that files or sends a document by facsimile must include a cover page indicating the total number of pages transmitted, including the cover page, and the name and telephone number of a contact person if problems occur in the transmission of the document.

Télécopieur — page couverture

10. La personne qui dépose ou transmet un document par télécopieur indique sur une page couverture le nombre total de pages transmises, y compris la page couverture, ainsi que le nom et le numéro de téléphone d'une personne à joindre en cas de difficultés de transmission.

Electronic transmission

11. (1) A document that is sent by email, facsimile or other electronic means

Transmission électronique

11. (1) Le document transmis par courriel, télécopieur ou tout autre moyen élec-

tion from the Agency's record if the person fails to file the verification.

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

Representation and Change of Contact Information

Représentation et changements des coordonnées

Representative not a member of the bar

16. A person that is represented in a dispute proceeding by a person that is not a member of the bar of a province must authorize that person to act on their behalf by filing the information referred to in Schedule 4.

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.

Représentant — non-membre du barreau

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.

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.

Changement des coordonnées

PLEADINGS

ACTES DE PROCÉDURE

Application

Demande

Filing of application

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

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

Dépôt de la demande

Application complete

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

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

Demande complète

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.

(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.

Demande incomplète

Closure of file

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

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

Fermeture du dossier

New application

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

(5) Le demandeur dont le dossier est fermé peut déposer à nouveau une demande relativement à la même affaire.

Nouvelle demande

Answer

Filing of answer

19. A respondent may file an answer to the application. The answer must be filed within 15 business days after the date of the notice indicating that the application has been accepted and must include the information referred to in Schedule 6.

Réponse

Dépôt d'une réponse

19. Le défendeur qui souhaite déposer une réponse le fait dans les quinze jours ouvrables suivant la date de l'avis d'acceptation de la demande. La réponse comporte les éléments visés à l'annexe 6.

Reply

Filing of reply

20. (1) An applicant may file a reply to the answer. The reply must be filed within five business days after the day on which they receive a copy of the answer and must include the information referred to in Schedule 7.

Réplique

Dépôt d'une réplique

20. (1) Le demandeur qui souhaite déposer une réplique à la réponse le fait dans les cinq jours ouvrables suivant la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 7.

No new issues

(2) The reply must not raise issues or arguments that are not addressed in the answer or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Nouvelles questions

(2) La réplique ne peut soulever des questions ou arguments qui ne sont pas abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Intervention

Filing of intervention

21. (1) An intervener may file an intervention. The intervention must be filed within five business days after the day on which their request to intervene is granted by the Agency and must include the information referred to in Schedule 8.

Intervention

Dépôt de l'intervention

21. (1) L'intervenant qui souhaite déposer une intervention le fait dans les cinq jours ouvrables suivant la date à laquelle sa requête d'intervention a été accordée. L'intervention comporte les éléments visés à l'annexe 8.

Participation rights

(2) An intervener's participation is limited to the participation rights granted by the Agency.

Droits de participation

(2) La participation de l'intervenant se limite aux droits de participation que lui accorde l'Office.

Response to intervention

22. An applicant or a respondent that is adverse in interest to an intervener may file a response to the intervention. The response must be filed within five business days after the day on which they receive a copy of the intervention and must include the information referred to in Schedule 9.

Réponse à l'intervention

22. Le demandeur ou le défendeur qui a des intérêts opposés à ceux d'un intervenant et qui souhaite déposer une réponse à l'intervention le fait dans les cinq jours ouvrables suivant la date de réception de la copie de l'intervention. La réponse à l'intervention comporte les éléments visés à l'annexe 9.

the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

No new issues

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

après la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 15.

Nouvelles questions

(4) La réplique ne peut soulever des questions ou arguments qui ne sont abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Request for Confidentiality

Requête de confidentialité

Confidential treatment

31. (1) A person may file a request for confidentiality in respect of a document that they are filing. The request must include the information referred to in Schedule 17 and must be accompanied by, for each document identified as containing confidential information,

(*a*) one public version of the document from which the confidential information has been redacted; and

(*b*) one confidential version of the document that identifies the confidential information that has been redacted from the public version of the document and that includes, at the top of each page, the words: "CONTAINS CONFIDENTIAL INFORMATION" in capital letters.

Traitement confidentiel

31. (1) Toute personne peut déposer une requête de confidentialité portant sur un document qu'elle dépose. La requête comporte les éléments visés à l'annexe 17 et, pour chaque document désigné comme étant confidentiel :

a) une version publique du document, de laquelle les renseignements confidentiels ont été supprimés;

b) une version confidentielle du document, qui indique les passages qui ont été supprimés de la version publique du document et qui porte la mention « CONTIENT DES RENSEIGNEMENTS CONFIDENTIELS » en lettres majuscules au haut de chaque page.

Agency's record

(2) The request for confidentiality and the public version of the document from which the confidential information has been redacted are placed on the Agency's public record. The confidential version of the document is placed on the Agency's confidential record pending a decision of the Agency on the request for confidentiality.

Archives de l'Office

(2) La requête de confidentialité et la version publique du document de laquelle les renseignements confidentiels ont été supprimés sont versées aux archives publiques de l'Office. La version confidentielle du document est versée aux archives confidentielles de l'Office en attendant que celui-ci statue sur la requête.

Request for disclosure

(3) Any party may oppose a request for confidentiality by filing a request for disclosure. The request must be filed within five business days after the day on which they receive a copy of the request for con-

Requête de communication

(3) La partie qui souhaite s'opposer à une requête de confidentialité dépose une requête de communication dans les cinq jours ouvrables suivant la date de réception de la copie de la requête de confidentialité.

fidentiality and must include the information referred to in Schedule 18.

Response to request for disclosure

(4) The person that filed the request for confidentiality may file a response to a request for disclosure. The response must be filed within three business days after the day on which they receive a copy of the request for disclosure and must include the information referred to in Schedule 14.

Agency's decision

(5) The Agency may

(*a*) if the Agency determines that the document is not relevant to the dispute proceeding, decide to not place the document on the Agency's record;

(*b*) if the Agency determines that the document is relevant to the dispute proceeding and that no specific direct harm would likely result from its disclosure or that any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed, decide to place the document on the Agency's public record; or

(*c*) if the Agency determines that the document is relevant to the dispute proceeding and that the specific direct harm likely to result from its disclosure justifies confidentiality,

(i) decide to confirm the confidentiality of the document or any part of it and keep the document or part of the document on the Agency's confidential record,

(ii) decide to place a version of the document or any part of it from which the confidential information has been redacted on the Agency's public record,

(iii) decide to keep the document or any part of it on the Agency's confi-

La requête de communication comporte les éléments visés à l'annexe 18.

Réponse à la requête de communication

(4) La personne ayant déposé la requête de confidentialité et qui souhaite déposer une réponse à une requête de communication le fait dans les trois jours ouvrables suivant la date de réception de copie de la requête de communication. La réponse comporte les éléments visés à l'annexe 14.

Décision de l'Office

(5) L'Office peut :

a) s'il conclut que le document n'est pas pertinent au regard de l'instance de règlement des différends, décider de ne pas le verser aux archives de l'Office;

b) s'il conclut que le document est pertinent au regard de l'instance de règlement des différends et que sa communication ne causerait vraisemblablement pas de préjudice direct précis ou que l'intérêt du public à ce qu'il soit communiqué l'emporte sur le préjudice direct précis qui pourrait en résulter, décider de le verser aux archives publiques de l'Office;

c) s'il conclut que le document est pertinent au regard de l'instance de règlement des différends et que le préjudice direct précis que pourrait causer sa communication justifie le traitement confidentiel :

(i) décider de confirmer le caractère confidentiel du document ou d'une partie de celui-ci et garder le document ou une partie de celui-ci dans ses archives confidentielles,

(ii) décider qu'une version ou une partie du document, de laquelle les renseignements confidentiels ont été supprimés, soit versée à ses archives publiques,

dential record but require that the person requesting confidentiality provide a copy of the document or part of the document in confidence to any party to the dispute proceeding, or to certain of their advisors, experts and representatives, as specified by the Agency, after the person requesting confidentiality has received a signed undertaking of confidentiality from the person to which the copy is to be provided, or

(iv) make any other decision that it considers just and reasonable.

(iii) décider de garder le document ou une partie de celui-ci dans ses archives confidentielles, mais exiger que la personne qui demande la confidentialité fournisse une copie du document ou une partie de celui-ci de façon confidentielle à une partie à l'instance, à certains de ses conseillers, experts ou représentants, tel qu'il le précise, après que la personne qui demande la confidentialité ait reçu un engagement de non-divulgation signé de chaque personne à qui le document devra être envoyé,

(iv) rendre toute autre décision qu'il estime juste et raisonnable.

Filing of undertaking of confidentiality

(6) The original copy of the undertaking of confidentiality must be filed with the Agency.

(6) L'original de l'engagement de non-divulgation est déposé auprès de l'Office.

Dépôt de l'engagement de non-divulgation

Request to Require Party to Provide Complete Response

Requête visant à obliger une partie à fournir une réponse complète à l'avis

Requirement to respond

32. (1) A party that has given notice under subsection 24(1) may, if they are not satisfied with the response to the notice or if they wish to contest an objection to their request, file a request to require the party to which the notice was directed to provide a complete response. The request must be filed within two business days after the day on which they receive a copy of the response to the notice or the objection, as the case may be, and must include the information referred to in Schedule 13.

32. (1) La partie qui a donné un avis en vertu du paragraphe 24(1) et qui est insatisfaite des réponses à l'avis ou qui souhaite contester l'opposition à sa demande peut déposer une requête pour demander que la partie à qui l'avis a été donné fournisse une réponse complète. La requête est déposée dans les deux jours ouvrables suivant la date de réception de la copie des réponses à l'avis ou de l'opposition et comporte les éléments visés à l'annexe 13.

Obligation de répondre

Agency's decision

(2) The Agency may do any of the following:

(*a*) require that a question be answered in full or in part;

(*b*) require that a document be provided;

(2) L'Office peut :

a) exiger qu'il soit répondu à la question en tout ou en partie;

b) exiger la production d'un document;

Décisions de l'Office

SCHEDULE 5
(Subsection 18(1))

APPLICATION

1. The applicant's name, complete address, telephone number and, if applicable, email address and facsimile number.

2. If the applicant is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

3. If the applicant is represented by a person that is not a member of the bar of a province, a statement to that effect.

4. The respondent's name and, if known, their complete address, telephone number and, if applicable, email address and facsimile number.

5. The details of the application that include

(*a*) any legislative provisions that the applicant relies on;

(*b*) a clear statement of the issues;

(*c*) a full description of the facts;

(*d*) the relief claimed; and

(*e*) the arguments in support of the application.

6. A list of any documents submitted in support of the application and a copy of each of those documents.

ANNEXE 5
(Paragraphe 18(1))

DEMANDE

1. Les nom et adresse complète ainsi que le numéro de téléphone et, le cas échéant, le numéro de télécopieur et l'adresse électronique du demandeur.

2. Si le demandeur est représenté par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

4. Le nom du défendeur et, s'il sont connus, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

5. Les détails concernant la demande, notamment :

a) les dispositions législatives sur lesquelles la demande est fondée;

b) un énoncé clair des questions en litige;

c) une description complète des faits;

d) les réparations demandées;

e) les arguments à l'appui de la demande.

6. La liste de tous les documents à l'appui de la demande et une copie de chacun de ceux-ci.

SCHEDULE 6
(Section 19)

ANSWER TO APPLICATION

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The respondent's name, complete address, telephone number and, if applicable, email address and facsimile number.

3. If the respondent is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

4. If the respondent is represented by a person that is not a member of the bar of a province, a statement to that effect.

5. The details of the answer that include

(*a*) a statement that sets out the elements that the respondent agrees with or disagrees with in the application;

(*b*) a full description of the facts; and

(*c*) the arguments in support of the answer.

6. A list of any documents submitted in support of the answer and a copy of each of those documents.

7. The name of each party to which a copy of the answer is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 6
(Article 19)

RÉPONSE À UNE DEMANDE

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom du défendeur, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si le défendeur est représenté par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

4. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

5. Les détails concernant la réponse, notamment :

a) les points de la demande sur lesquels le défendeur est d'accord ou en désaccord;

b) une description complète des faits;

c) les arguments à l'appui de la réponse.

6. La liste de tous les documents à l'appui de sa réponse et une copie de chacun de ceux-ci.

7. Le nom de chaque partie à qui une copie de la réponse est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency General Rules

Règles générales de l'Office des transports du Canada

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able information that the party considers would be of assistance to the party who directed the questions.

Request for Agency order

(3) If a party who directed questions is not satisfied that the response is complete or adequate, the party may request the Agency to order that the questions be answered in full, and the Agency may order that the questions be answered in full or in part, or not at all.

renseignement disponible qui, à son avis, serait utile à la partie qui lui a adressé les questions.

Arrêté de l'Office sur demande

(3) La partie insatisfaite des réponses à ses questions peut demander à l'Office d'ordonner qu'il y soit répondu de manière complète et satisfaisante et l'Office peut ordonner qu'il soit répondu aux questions en tout ou en partie ou qu'il n'y soit pas répondu du tout.

Formulation of Issues

Reasons for formulation of issues

21. The Agency may formulate the issues to be considered in any proceeding or direct the parties to propose the issues for its consideration if

(*a*) the documents filed do not sufficiently raise or disclose the issues;

(*b*) the formulation would assist the Agency in the conduct of the proceeding; or

(*c*) the formulation would assist the parties to participate more effectively in the proceeding.

Formulation des questions

Raisons de la formulation des questions

21. L'Office peut formuler les questions qu'il examinera au cours d'une instance ou ordonner aux parties de lui en proposer pour examen, si, selon le cas :

a) les documents déposés n'établissent pas assez clairement les questions en litige;

b) une telle démarche l'aiderait à mener l'instance;

c) une telle démarche contribuerait à la participation plus efficace des parties à l'instance.

Determination of Issues

Determination prior to continuing a proceeding

22. (1) If the Agency determines that an issue should be decided before continuing a proceeding, or if a party requests it, the Agency may direct that the issue be decided in any manner that it considers appropriate.

Postponement of proceeding

(2) The Agency may, pending its decision on the issue, postpone the whole or any part of the proceeding.

Règlement des questions

Décision avant de poursuivre l'instance

22. (1) Si l'Office l'estime nécessaire ou si une partie lui en fait la demande, il peut ordonner qu'une question soit tranchée avant de poursuivre l'instance, de la manière qu'il juge indiquée.

Suspension de l'instance

(2) L'Office peut, en attente de sa décision sur la question, suspendre tout ou partie de l'instance.

Confidentiality

Claim for confidentiality

23. (1) The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person

Confidentialité

Demande de traitement confidentiel

23. (1) L'Office verse dans ses archives publiques les documents concernant une instance qui sont déposés auprès de lui, à

filing the document makes a claim for its confidentiality in accordance with this section.

Prohibition

(2) No person shall refuse to file a document on the basis of a claim for confidentiality alone.

Form of claim

(3) A claim for confidentiality in respect of a document shall be made in accordance with subsections (4) to (9).

What to file

(4) A person making a claim for confidentiality shall file

(*a*) one version of the document from which the confidential information has been deleted, whether or not an objection has been made under paragraph (5)(*b*); and

(*b*) one version of the document that contains the confidential information marked "contains confidential information" on the top of each page and that identifies the portions that have been deleted from the version of the document referred to in paragraph (*a*).

Content of claim

(5) A person making a claim for confidentiality shall indicate

(*a*) the reasons for the claim, including, if any specific direct harm is asserted, the nature and extent of the harm that would likely result to the person making the claim for confidentiality if the document were disclosed; and

(*b*) whether the person objects to having a version of the document from which the confidential information has been removed placed on the public record and, if so, shall state the reasons for objecting.

moins que la personne qui les dépose ne présente une demande de traitement confidentiel conformément au présent article.

Interdiction

(2) Nul ne peut refuser de déposer un document en se fondant uniquement sur le fait qu'une demande de traitement confidentiel a été présentée à son égard.

Forme de la demande

(3) La demande de traitement confidentiel à l'égard d'un document doit être faite conformément aux paragraphes (4) à (9).

Documents à déposer

(4) Quiconque présente une demande de traitement confidentiel doit déposer :

a) une version des documents desquels les renseignements confidentiels ont été retirés, qu'une opposition ait été présentée ou non aux termes de l'alinéa (5)*b*);

b) une version des documents qui porte la mention « contient des renseignements confidentiels » au haut de chaque page et qui indique les passages qui ont été retirés de la version visée à l'alinéa *a*).

Contenu de la demande

(5) La personne qui demande le traitement confidentiel doit indiquer :

a) les raisons de sa demande et, le cas échéant, la nature et l'ampleur du préjudice direct que lui causerait vraisemblablement la divulgation du document;

b) les raisons qu'elle a, le cas échéant, de s'opposer à ce que soit versée dans les archives publiques la version des documents desquels les renseignements confidentiels ont été retirés.

Claim on public record

(6) A claim for confidentiality shall be placed on the public record and a copy shall be provided, on request, to any person.

Demande versée dans les archives publiques

(6) La demande de traitement confidentiel est versée dans les archives publiques, et une copie en est remise à toute personne qui en fait la demande.

Request for disclosure and filing

(7) A person contesting a claim for confidentiality shall file with the Agency

(*a*) a request for the disclosure of the document, setting out the relevance of the document, the public interest in its disclosure and any other reason in support of the request; and

(*b*) any material that may be useful in explaining or supporting those reasons.

Demande de divulgation et dépôt

(7) Quiconque conteste la demande de traitement confidentiel d'un document dépose auprès de l'Office :

a) une demande de divulgation du document exposant sa pertinence au regard de l'instance, l'intérêt du public dans sa divulgation ainsi que tout autre motif à l'appui de la demande;

b) tout document de nature à éclairer ou à renforcer ces motifs.

Service of request for disclosure

(8) A person contesting a claim for confidentiality shall serve a copy of the request for disclosure on the person making the claim.

Signification de la demande de divulgation

(8) Quiconque conteste la demande de traitement confidentiel signifie une copie de la demande de divulgation à la personne qui a demandé le traitement confidentiel.

Reply to request for disclosure

(9) The person making a claim for confidentiality may, within five days after being served with a request for disclosure, file a reply with the Agency and serve a copy of the reply on the person who made the request for disclosure.

Réplique

(9) Quiconque a demandé le traitement confidentiel dépose une réplique dans les cinq jours suivant la date de la signification de la demande de divulgation et en signifie une copie à la personne qui a demandé la divulgation.

Disposition of Claim for Confidentiality

Décision sur la demande de traitement confidentiel

Agency's powers

24. (1) The Agency may dispose of a claim for confidentiality on the basis of

(*a*) documents filed with the Agency or oral evidence heard by it;

(*b*) documents or evidence obtained at a conference if the matter has been referred to a conference under section 35; or

(*c*) documents or evidence obtained through depositions taken before a member or officer of the Agency or any other person appointed by the Agency.

Pouvoirs de l'Office

24. (1) L'Office peut trancher la demande de traitement confidentiel sur la foi :

a) des documents déposés auprès de lui ou des témoignages qu'il a entendus;

b) des documents ou des éléments de preuve obtenus lors de la conférence, si la question a été soumise à une conférence en vertu de l'article 35;

c) des documents ou des éléments de preuve tirés des dépositions recueillies par un membre ou un agent de l'Office

ou toute autre personne nommée à cette fin par l'Office.

Placing of document on public record

(2) The Agency shall place a document in respect of which a claim for confidentiality has been made on the public record if the document is relevant to the proceeding and no specific direct harm would likely result from its disclosure or any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed.

Versement du document dans les archives publiques

(2) L'Office verse dans ses archives publiques le document faisant l'objet d'une demande de traitement confidentiel s'il estime que le document est pertinent au regard de l'instance et que sa divulgation ne causerait vraisemblablement pas de préjudice direct, ou que l'intérêt du public à le divulguer l'emporte sur le préjudice direct qui pourrait en résulter.

Order for Withdrawal

(3) If the Agency determines that a document in respect of which a claim for confidentiality has been made is not relevant to a proceeding, the Agency may order that the document be withdrawn.

Arrêté de retrait

(3) Si l'Office conclut que le document faisant l'objet de la demande de traitement confidentiel n'est pas pertinent au regard de l'instance, il peut ordonner que le document soit retiré.

Document confidential and relevant

(4) If the Agency determines that a document in respect of which a claim for confidentiality has been made is relevant to a proceeding and the specific direct harm likely to result from its disclosure justifies a claim for confidentiality, the Agency may

(*a*) order that the document not be placed on the public record but that it be maintained in confidence;

(*b*) order that a version or a part of the document from which the confidential information has been removed be placed on the public record;

(*c*) order that the document be disclosed at a hearing to be conducted in private;

(*d*) order that the document or any part of it be provided to the parties to the proceeding, or only to their solicitors, and that the document not be placed on the public record; or

(*e*) make any other order that it considers appropriate.

Document confidentiel et pertinent

(4) Si l'Office juge que le document faisant l'objet de la demande de traitement confidentiel est pertinent au regard de l'instance et qu'une telle demande est justifiée en raison du préjudice direct que pourrait causer sa divulgation, il peut, selon le cas :

a) ordonner que le document ne soit pas versé dans ses archives publiques mais qu'il soit conservé de façon à en préserver la confidentialité;

b) ordonner qu'une version ou une partie du document ne contenant pas de renseignements confidentiels soit versée dans les archives publiques;

c) ordonner que le document soit divulgué au cours d'une audience à huis clos;

d) ordonner que tout ou partie du document soit fourni aux parties ou à leurs avocats seulement, et que le document ne soit pas versé dans les archives publiques;

e) prendre tout autre arrêté qu'il juge indiqué.

Agency Determination of Confidentiality

Procedure

25. The Agency may make a determination of confidentiality on its own initiative after giving the other parties to the proceeding an opportunity to comment on the issue of confidentiality, in accordance with the procedure set out in section 23, with such modifications as the circumstances or the Agency requires.

Documents Containing Financial or Corporate Information

Confidential Documents

26. If financial or corporate information is filed with the Agency, the Agency shall treat the information as confidential unless the person who provides it agrees in writing that the Agency need not treat it as confidential.

Postponements and Adjournments

Request

27. Subject to section 66, a party may request in writing a postponement or an adjournment of a proceeding.

Agency's powers

28. (1) The Agency may allow a postponement or an adjournment

(*a*) if a delay of the proceedings would be appropriate until a decision is rendered in another proceeding before the Agency or before any court in Canada in which the issue is the same or substantially the same as the issue to be raised in the proceeding;

(*b*) if a party to a proceeding has not complied with any requirement of these Rules, or with any direction on procedure issued by the Agency, which postponement or adjournment shall continue until the Agency is satisfied that the requirement or direction has been complied with; or

Décision de l'Office sur le caractère confidentiel

Procédure

25. L'Office peut, de sa propre initiative, se prononcer sur le caractère confidentiel d'un document en donnant aux autres parties la possibilité de formuler des commentaires sur la question conformément à la procédure prévue à l'article 23, avec les adaptations dictées par les circonstances ou par l'Office.

Documents contenant des renseignements financiers ou d'entreprise

Documents réputés confidentiels

26. Si des renseignements financiers ou d'entreprise sont déposés auprès de l'Office, il les traite de manière confidentielle à moins que la personne qui les a fournis renonce par écrit à leur caractère confidentiel.

Ajournement et suspension

Demande

27. Sous réserve de l'article 66, une partie peut demander par écrit l'ajournement ou la suspension de l'instance.

Pouvoirs de l'Office

28. (1) L'Office peut autoriser l'ajournement ou la suspension de l'instance dans l'un ou l'autre des cas suivants :

a) il juge qu'il serait indiqué de retarder l'instance jusqu'à ce que lui-même ou un autre tribunal canadien ait rendu la décision sur une question identique ou similaire à celle qui est soulevée dans l'instance;

b) une partie à l'instance ne s'est pas conformée à une exigence des présentes règles ou à une directive sur la procédure qu'il lui a donnée, auquel cas il maintient l'ajournement ou la suspension jusqu'à ce qu'il soit convaincu que l'exigence ou la directive a été respectée;

APPLICATION

Form and content

40. (1) Every application shall be in writing and shall be commenced by filing with the Agency

(*a*) the full name, address, telephone number and any other telecommunications numbers of the applicant or the applicant's representative;

(*b*) a clear and concise statement of the relevant facts, the grounds for the application, the provisions of the Act or any regulations made under the Act under which the application is made, the nature of, and the justification for, the relief sought in the application and any request for costs; and

(*c*) any other information or documentation that is relevant in explaining or supporting the application or that may be required by the Agency or under the Act.

Incomplete application

(2) If any of the information referred to in subsection (1) is not filed or is deficient in any way, the Agency may advise the applicant that the application is not complete and cannot be processed until the necessary information is filed.

Service

41. An applicant shall serve a copy of the application on each respondent and on any other person that the Agency directs.

ANSWER

Form and content

42. (1) A respondent may oppose an application within 30 days after receiving it, by filing with the Agency a clear and concise written answer that includes an admission or denial of any facts alleged in the application and any documents that are rel-

DEMANDE

Forme et contenu

40. (1) Toute demande se fait par écrit et est introduite par le dépôt auprès de l'Office des renseignements suivants :

a) le nom complet, l'adresse, le numéro de téléphone et autre numéro de télécommunication du demandeur ou de son représentant;

b) un exposé clair et concis des faits pertinents, les dispositions de la Loi ou de ses règlements d'application aux termes desquelles la demande est présentée, la nature et les motifs du redressement recherché et toute demande de frais liée à la demande;

c) tout autre renseignement ou document utile à l'appui de la demande ou requis par l'Office ou sous le régime de la Loi.

Demande incomplète

(2) Si l'un ou l'autre des renseignements visés au paragraphe (1) n'est pas déposé ou est incomplet de quelque façon que ce soit, l'Office peut aviser le demandeur que la demande est incomplète et qu'elle ne pourra être examinée tant que tous les renseignements nécessaires n'auront pas été déposés.

Signification

41. Le demandeur signifie une copie de la demande à chaque intimé et à toute autre personne désignée par l'Office.

RÉPONSE

Forme et contenu

42. (1) L'intimé peut s'opposer à la demande en déposant auprès de l'Office, dans les trente jours suivant la réception de la demande, une réponse écrite claire et concise qui comporte la reconnaissance ou la dénégation de tout ou partie des faits allégués dans la demande et des documents

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Act

Loi sur les Cours fédérales

R.S.C., 1985, c. F-7

L.R.C. (1985), ch. F-7

Current to June 23, 2014

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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.

sued out of the superior courts of the province in which the property to be seized is situated are, by the law of that province, required to be executed; and

(*b*) bind property in the same manner as similar writs or process issued by the provincial superior courts, and the rights of purchasers under the writs or process are the same as those of purchasers under those similar writs or process.

ciale, par le droit de la province où sont situés les biens à saisir. Ils ont les mêmes effets que ces derniers, quant aux biens en question et aux droits des adjudicataires.

Claim against property seized

(4) Every claim made by a person to property seized under a writ of execution or other process issued out of the Federal Court of Appeal or the Federal Court, or to the proceeds of its sale, shall, unless otherwise provided by the Rules, be heard and disposed of as nearly as may be according to the procedure applicable to like claims to property seized under similar writs or process issued out of the courts of the provinces.

Opposition à saisie

(4) Sauf disposition contraire des règles, l'instruction et le jugement de toute contestation en matière de saisie effectuée en vertu d'un moyen de contrainte de la Cour d'appel fédérale ou de la Cour fédérale, ou de toute prétention sur le produit des biens saisis, suivent autant que possible la procédure applicable aux revendications semblables concernant des biens saisis en vertu de moyens de contrainte similaires émanant des tribunaux provinciaux.

(5) [Repealed, 1990, c. 8, s. 18]

(5) [Abrogé, 1990, ch. 8, art. 18]

R.S., 1985, c. F-7, s. 56; 1990, c. 8, s. 18; 2002, c. 8, s. 53.

L.R. (1985), ch. F-7, art. 56; 1990, ch. 8, art. 18; 2002, ch. 8, art. 53.

GENERAL

DISPOSITIONS GÉNÉRALES

Constitutional questions

57. (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

Questions constitutionnelles

57. (1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

Time of notice

(2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, orders otherwise.

Formule et délai de l'avis

(2) L'avis est, sauf ordonnance contraire de la Cour d'appel fédérale ou de la Cour fédérale ou de l'office fédéral en cause, signifié au moins dix jours avant la date à laquelle la question constitutionnelle qui en fait l'objet doit être débattue.

Notice of appeal or application for judicial review

(3) The Attorney General of Canada and the attorney general of each province are entitled to notice of any appeal or application for judicial review made in respect of the constitutional question.

Appel et contrôle judiciaire

(3) Les avis d'appel et de demande de contrôle judiciaire portant sur une question constitutionnelle sont à signifier au procureur général du Canada et à ceux des provinces.

Right to be heard

(4) The Attorney General of Canada and the attorney general of each province are entitled to adduce evidence and make submissions to the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, in respect of the constitutional question.

Droit des procureurs généraux d'être entendus

(4) Le procureur général à qui un avis visé aux paragraphes (1) ou (3) est signifié peut présenter une preuve et des observations à la Cour d'appel fédérale ou à la Cour fédérale et à l'office fédéral en cause, à l'égard de la question constitutionnelle en litige.

Appeal

(5) If the Attorney General of Canada or the attorney general of a province makes submissions, that attorney general is deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

Droit d'appel

(5) Le procureur général qui présente des observations est réputé partie à l'instance aux fins d'un appel portant sur la question constitutionnelle.

R.S., 1985, c. F-7, s. 57; 1990, c. 8, s. 19; 2002, c. 8, s. 54.

L.R. (1985), ch. F-7, art. 57; 1990, ch. 8, art. 19; 2002, ch. 8, art. 54.

Fees to be paid to Receiver General

57.1 All fees payable in respect of proceedings in the Federal Court of Appeal or the Federal Court shall be paid to the Receiver General unless they are, in accordance with an arrangement made by the Minister of Justice, to be received and dealt with in the same manner as amounts paid as provincial court fees, in which case they shall be dealt with as so provided.

Frais payables au receveur général

57.1 Les frais occasionnés par les procédures devant la Cour d'appel fédérale ou la Cour fédérale sont payables au receveur général sauf si s'applique à leur égard un arrangement conclu par le ministre de la Justice, aux termes duquel ils doivent être perçus et traités de la même façon que les sommes payées à titre de frais judiciaires dans une affaire relevant d'un tribunal provincial.

1990, c. 8, s. 19; 2002, c. 8, s. 55.

1990, ch. 8, art. 19; 2002, ch. 8, art. 55.

Law reports editor

58. (1) The Minister of Justice shall appoint or designate a fit and proper person to be editor of the official reports of the decisions of the Federal Court of Appeal and the Federal Court and may appoint a committee of not more than five persons to advise the editor.

Arrêtiste

58. (1) Le ministre de la Justice nomme ou désigne au poste d'arrêtiste une personne qualifiée chargée d'éditer le recueil des décisions de la Cour d'appel fédérale et de la Cour fédérale; il peut aussi nommer un comité de cinq personnes au plus pour conseiller l'arrêtiste.

Contents

(2) The editor shall include in the reports only the decisions or the parts of them that, in the editor's opinion, are of sufficient significance or importance to warrant publication in the reports.

Contenu des recueils

(2) Ne sont publiés dans le recueil que les décisions ou les extraits de décisions considérés par l'arrêtiste comme présentant suffisamment d'importance ou d'intérêt.

Printing and distribution

(3) The official reports shall be printed and shall be distributed with or without charge as the Governor in Council may direct.

Impression et distribution

(3) Le recueil est imprimé et distribué, gracieusement ou non, selon les instructions du gouverneur en conseil.

Official languages

(4) Each decision reported in the official reports shall be published therein in both official languages.

Langues officielles

(4) Les décisions publiées dans le recueil le sont dans les deux langues officielles.

R.S., 1985, c. F-7, s. 58; 2002, c. 8, s. 56.

L.R. (1985), ch. F-7, art. 58; 2002, ch. 8, art. 56.

Police services

59. Any services or assistance in connection with the conduct of the hearings of the Federal Court of Appeal and of the Federal Court, the security of those courts and their premises and of staff of the Courts Administration Service, or in connection with the execution of orders and judgments of those courts, that may, having regard to the circumstances, be found necessary

Police

59. Les services ou l'assistance qui peuvent, compte tenu des circonstances, être jugés nécessaires, en ce qui concerne la conduite des débats de la Cour d'appel fédérale ou de la Cour fédérale, la sécurité de leurs membres, de leurs locaux et du personnel du Service administratif des tribunaux judiciaires, ou l'exécution de leurs ordonnances et jugements, sont

CANADA

CONSOLIDATION

CODIFICATION

Privacy Act

Loi sur la protection des renseignements personnels

R.S.C., 1985, c. P-21

L.R.C. (1985), ch. P-21

Current to September 15, 2014

À jour au 15 septembre 2014

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tions of the Commissioner where, in the opinion of the Commissioner, the matter is of such urgency or importance that a report thereon should not be deferred until the time provided for transmission of the next annual report of the Commissioner under section 38.

dont l'urgence ou l'importance sont telles, selon lui, qu'il serait contre-indiqué d'en différer le compte rendu jusqu'à l'époque du rapport annuel suivant.

Where investigation made

(2) Any report made pursuant to subsection (1) that relates to an investigation under this Act shall be made only after the procedures set out in section 35, 36 or 37 have been followed in respect of the investigation.

1980-81-82-83, c. 111, Sch. II "39".

Cas des enquêtes

(2) Le Commissaire à la protection de la vie privée ne peut présenter de rapport spécial sur des enquêtes qu'après observation des formalités prévues à leur sujet aux articles 35, 36 ou 37.

1980-81-82-83, ch. 111, ann. II « 39 ».

Transmission of reports

40. (1) Every report to Parliament made by the Privacy Commissioner under section 38 or 39 shall be made by being transmitted to the Speaker of the Senate and to the Speaker of the House of Commons for tabling in those Houses.

Remise des rapports

40. (1) La présentation des rapports du Commissaire à la protection de la vie privée au Parlement s'effectue par remise au président du Sénat et à celui de la Chambre des communes pour dépôt devant leurs chambres respectives.

Reference to Parliamentary committee

(2) Every report referred to in subsection (1) shall, after it is transmitted for tabling pursuant to that subsection, be referred to the committee designated or established by Parliament for the purpose of subsection 75(1).

1980-81-82-83, c. 111, Sch. II "40".

Renvoi en comité

(2) Les rapports visés au paragraphe (1) sont, après leur dépôt, renvoyés devant le comité désigné ou constitué par le Parlement en application du paragraphe 75(1).

1980-81-82-83, ch. 111, ann. II « 40 ».

REVIEW BY THE FEDERAL COURT

RÉVISION PAR LA COUR FÉDÉRALE

Review by Federal Court where access refused

41. Any individual who has been refused access to personal information requested under subsection 12(1) may, if a complaint has been made to the Privacy Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Privacy Commissioner are reported to the complainant under subsection 35(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

1980-81-82-83, c. 111, Sch. II "41".

Révision par la Cour fédérale dans les cas de refus de communication

41. L'individu qui s'est vu refuser communication de renseignements personnels demandés en vertu du paragraphe 12(1) et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à la protection de la vie privée peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 35(2), exercer un recours en révision de la décision de refus devant la Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

1980-81-82-83, ch. 111, ann. II « 41 ».

Privacy Commissioner may apply or appear

42. The Privacy Commissioner may

(*a*) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose personal information requested under subsection 12(1) in respect of which an investigation has been carried out by the Privacy Commissioner, if the Commissioner has the consent of the individual who requested access to the information;

Exercice du recours par le Commissaire à la protection de la vie privée, etc.

42. Le Commissaire à la protection de la vie privée a qualité pour :

a) exercer lui-même, à l'issue de son enquête et dans les délais prévus à l'article 41, le recours en révision pour refus de communication de renseignements personnels, avec le consentement de l'individu qui les avait demandés;

b) comparaître devant la Cour au nom de l'individu qui a exercé un recours devant elle en vertu de l'article 41;

(*b*) appear before the Court on behalf of any individual who has applied for a review under section 41; or

(*c*) with leave of the Court, appear as a party to any review applied for under section 41.

1980-81-82-83, c. 111, Sch. II "42".

c) comparaître, avec l'autorisation de la Cour, comme partie à une instance engagée en vertu de l'article 41.

1980-81-82-83, ch. 111, ann. II « 42 ».

Application respecting files in exempt banks

43. In the circumstances described in subsection 36(5), the Privacy Commissioner may apply to the Court for a review of any file contained in a personal information bank designated as an exempt bank under section 18.

1980-81-82-83, c. 111, Sch. II "43".

Recours concernant les fichiers inconsultables

43. Dans les cas visés au paragraphe 36(5), le Commissaire à la protection de la vie privée peut demander à la Cour d'examiner les dossiers versés dans un fichier inconsultable classé comme tel en vertu de l'article 18.

1980-81-82-83, ch. 111, ann. II « 43 ».

Hearing in summary way

44. An application made under section 41, 42 or 43 shall be heard and determined in a summary way in accordance with any special rules made in respect of such applications pursuant to section 46 of the *Federal Courts Act*.

R.S., 1985, c. P-21, s. 44; 2002, c. 8, s. 182.

Procédure sommaire

44. Les recours prévus aux articles 41, 42 ou 43 sont entendus et jugés en procédure sommaire conformément aux règles de pratique spéciales adoptées à leur égard en vertu de l'article 46 de la *Loi sur les Cours fédérales*.

L.R. (1985), ch. P-21, art. 44; 2002, ch. 8, art. 182.

Access to information

45. Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Court may, in the course of any proceedings before the Court arising from an application under section 41, 42 or 43, examine any information recorded in any form under the control of a government institution, other than a confidence of the Queen's Privy Council for Canada to which subsection 70(1) applies, and no information that the Court may examine under this section may be withheld from the Court on any grounds.

1980-81-82-83, c. 111, Sch. II "45".

Accès aux renseignements

45. Nonobstant toute autre loi fédérale ou toute immunité reconnue par le droit de la preuve, la Cour a, pour les recours prévus aux articles 41, 42 ou 43, accès à tous les renseignements, quels que soient leur forme et leur support, qui relèvent d'une institution fédérale, à l'exception des renseignements confidentiels du Conseil privé de la Reine pour le Canada auxquels s'applique le paragraphe 70(1); aucun des renseignements auxquels la Cour a accès en vertu du présent article ne peut, pour quelque motif que ce soit, lui être refusé.

1980-81-82-83, ch. 111, ann. II « 45 ».

Court to take precautions against disclosing

46. (1) In any proceedings before the Court arising from an application under section 41, 42 or 43, the Court shall take every reasonable precaution, including, when appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid the disclosure by the Court or any person of

(*a*) any information or other material that the head of a government institution would be authorized to refuse to disclose if it were requested under subsection 12(1) or contained in a record requested under the *Access to Information Act*; or

(*b*) any information as to whether personal information exists where the head of a government institution, in refusing to disclose the personal information under this Act, does not indicate whether it exists.

Précautions à prendre contre la divulgation

46. (1) À l'occasion des procédures relatives aux recours prévus aux articles 41, 42 ou 43, la Cour prend toutes les précautions possibles, notamment, si c'est indiqué, par la tenue d'audiences à huis clos et l'audition d'arguments en l'absence d'une partie, pour éviter que ne soient divulgués de par son propre fait ou celui de quiconque :

a) des renseignements qui justifient un refus de communication de renseignements personnels demandés en vertu du paragraphe 12(1) ou de renseignements contenus dans un document demandé sous le régime de la *Loi sur l'accès à l'information*;

b) des renseignements faisant état de l'existence de renseignements personnels que le responsable d'une institution fédérale a refu-

R.R.O. 1990, REGULATION 194
RULES OF CIVIL PROCEDURE

RULE 13 INTERVENTION

LEAVE TO INTERVENE AS ADDED PARTY

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding. R.R.O. 1990, Reg. 194, r. 13.01 (1).

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just. R.R.O. 1990, Reg. 194, r. 13.01 (2).

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. R.R.O. 1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1.

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (1); O. Reg. 292/99, s. 4; O. Reg. 186/10, s. 2.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (2); O. Reg. 186/10, s. 2; O. Reg. 55/12, s. 1.

R.R.O. 1990, RÈGLEMENT 194
RÈGLES DE PROCÉDURE CIVILE

RÈGLE 13 INTERVENTION

AUTORISATION D'INTERVENIR EN QUALITÉ DE PARTIE JOINTE

13.01 (1) Une personne qui n'est pas partie à l'instance peut demander, par voie de motion, l'autorisation d'intervenir en qualité de partie jointe, si elle prétend, selon le cas :

a) avoir un intérêt dans ce qui fait l'objet de l'instance;

b) qu'elle risque d'être lésée par le jugement;

c) qu'il existe entre elle et une ou plusieurs des parties à l'instance une question de droit ou de fait commune avec une ou plusieurs des questions en litige dans l'instance. R.R.O. 1990, Règl. 194, par. 13.01 (1).

(2) Après avoir étudié si l'intervention risque de retarder indûment la décision sur les droits des parties à l'instance ou de lui nuire, le tribunal peut joindre l'auteur de la motion comme partie à l'instance et rendre une ordonnance juste. R.R.O. 1990, Règl. 194, par. 13.01 (2).

AUTORISATION D'INTERVENIR À TITRE D'INTERVENANT DÉSINTÉRESSÉ

13.02 Avec l'autorisation d'un juge ou sur l'invitation du juge ou du protonotaire qui préside, quiconque peut, sans devenir partie à l'instance, y intervenir à titre d'intervenant désintéressé aux fins d'aider le tribunal en présentant une argumentation. R.R.O. 1990, Règl. 194, règle 13.02; Règl. de l'Ont. 186/10, art. 1.

AUTORISATION D'INTERVENIR À LA COUR DIVISIONNAIRE OU À LA COUR D'APPEL

13.03 (1) L'autorisation d'intervenir à la Cour divisionnaire en qualité de partie jointe ou à titre d'intervenant désintéressé peut être accordée par un tribunal de juges, par le juge en chef ou le juge en chef adjoint de la Cour supérieure de justice, ou par un juge désigné par l'un de ces derniers. R.R.O. 1990, Règl. 194, par. 13.03 (1); Règl. de l'Ont. 292/99, art. 4; Règl. de l'Ont. 186/10, art. 2.

(2) L'autorisation d'intervenir à la Cour d'appel en qualité de partie jointe ou à titre d'intervenant désintéressé peut être accordée par un tribunal de juges, le juge en chef ou le juge en chef adjoint de l'Ontario ou par un juge désigné par l'un de ces derniers. R.R.O. 1990, Règl. 194, par. 13.03 (2); Règl. de l'Ont. 186/10, art. 2; Règl. de l'Ont. 55/12, art. 1.

Manitoba Regulation 553/88

Court of Queen's Bench Rules

RULE 13

INTERVENTION

LEAVE TO INTERVENE AS ADDED PARTY

Motion for Leave

13.01(1) Where a person who is not a party to a proceeding claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with a question in issue in the proceeding;

the person may move for leave to intervene as an added party.

Order

13.01(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order for pleadings and discovery as is just.

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of the court or at the invitation of the court and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

RÈGLE 13

INTERVENTION

AUTORISATION D'INTERVENTION EN QUALITÉ DE PARTIE JOINTE

Motion en vue d'une autorisation

13.01(1) Une personne qui n'est pas partie à l'instance et qui prétend, selon le cas :

a) avoir un intérêt dans ce qui fait l'objet de l'instance;

b) qu'elle risque d'être lésée par le jugement;

c) qu'il existe entre elle et une ou plusieurs des parties à l'instance une question de droit ou de fait commune avec une question en litige dans l'instance,

peut demander, par voie de motion, l'autorisation d'intervenir en qualité de partie jointe.

Ordonnance

13.01(2) Sur présentation de la motion, le tribunal étudie si l'intervention risque de retarder indûment la décision sur les droits des parties à l'instance ou de lui nuire et peut joindre l'auteur de la motion comme partie à l'instance et rendre une ordonnance juste en ce qui concerne les actes de procédure et l'enquête préalable.

AUTORISATION D'INTERVENTION À TITRE D'INTERVENANT BÉNÉVOLE

13.02 Avec l'autorisation du tribunal ou sur l'invitation de celui-ci, toute personne peut, sans devenir partie à l'instance, y intervenir à titre d'intervenant bénévole aux fins d'aider le tribunal en présentant une argumentation.

SNL1986 c42 Schedule D

Rules of the Supreme Court, 1986
under the
Judicature Act

RULE 7
CAUSES OF ACTION AND PARTIES

Intervenor becoming a party

7.05. (1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto if

(a) that person claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the order therein, or otherwise;

(b) that person's claim or defence and the proceeding have a question of law or fact in common; or

(c) that person has a right to intervene under a statute or rule.

(2) The application for leave to intervene shall be supported by an affidavit containing the grounds thereof and shall have attached thereto, when practical, a pleading setting forth the claim or defence for which intervention is sought.

(3) On the application, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just.

1986 c42 Sch D rule 7.05

Intervenor as amicus curiae

7.06. Any person may, with the leave of the Court and without becoming a party to a proceeding, intervene in the proceeding as a friend of the Court for the purpose of assisting it.

1986 c42 Sch D rule 7.06

PARTIES AND JOINDER

RULE 15

INTERVENTION

15.01 Definition

For the purpose of this rule, *court* means the Court of Queen's Bench, the Court of Appeal or a judge of the Court of Queen's Bench or of the Court of Appeal.

15.02 Leave to Intervene as Added Party

(1) Where a person who is not a party claims

(a) an interest in the subject matter of a proceeding,

(b) that he may be adversely affected by a judgment in a proceeding, or

(c) that there exists between him and one or more of the parties a question of law or fact in common with a question in issue in a proceeding,

he may apply to the court by notice of motion for leave to intervene as an added party.

(2) On a motion under paragraph (1), the court shall consider whether or not the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as to pleadings, production and discovery and impose such conditions as to costs or otherwise as may be just.

15.03 Leave to Intervene as Friend of the Court

Any person may, with leave of the court or at the invitation of the court, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Rule 15: 86-87

PARTIES ET JONCTIONS

RÈGLE 15

INTERVENTION

15.01 Définition

Aux fins de la présente règle, *cour* désigne la Cour du Banc de la Reine, la Cour d'appel ou un juge de ces cours.

15.02 Permission d'intervenir comme partie additionnelle

(1) Toute personne qui n'est pas partie à l'instance et qui

a) prétend avoir un intérêt dans le litige,

b) prétend qu'elle risque d'être lésée par le jugement éventuel, ou

c) prétend qu'il existe entre elle et une ou plusieurs des parties à l'instance une question de droit ou de fait coïncidant avec une ou plusieurs des questions en litige,

peut demander à la cour, sur avis de motion, la permission d'intervenir comme partie additionnelle.

(2) Après avoir pesé les répercussions d'une telle intervention en termes de retards ou de préjudices indus dans la détermination des droits des parties à l'instance, la cour peut, sur motion présentée en application du paragraphe (1), ajouter la personne comme partie à l'instance et rendre toute ordonnance qu'elle estime juste en ce qui concerne les plaidoiries, la production de documents et l'enquête préalable, et imposer toute condition qu'elle estime juste, notamment en matière de dépens.

15.03 Permission d'intervenir à titre d'ami de la cour

Toute personne peut, avec la permission ou à l'invitation de la cour et sans devenir partie, intervenir dans l'instance en vue d'assister la cour à titre d'ami de la cour et d'y présenter une argumentation.

Règle 15 : 86-87

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 (Privacy Commissioner) v. Canada (Attorney General)

Between
The Privacy Commissioner of Canada, plaintiff (respondent), and
The Attorney General of Canada, The Solicitor General of Canada, The Commissioner of The Royal Canadian Mounted Police, defendants (applicants)

[2003] B.C.J. No. 1344

2003 BCSC 862

[2003] 9 W.W.R. 242

14 B.C.L.R. (4th) 359

124 A.C.W.S. (3d) 54

Kelowna Registry No. S57566

British Columbia Supreme Court
Kelowna, British Columbia

Metzger J.

Heard: March 12 - 14, 2003.
Judgment: June 5, 2003.

(23 paras.)

Information technology -- Personal information and privacy -- Electronic surveillance -- Protection of privacy -- Privacy legislation -- The Privacy Commissioner was found not to have the capacity to commence a suit seeking a declaration that RCMP video surveillance violated the public's human rights under international conventions and the Canadian Charter of Rights and Freedoms -- The court had no jurisdiction to hear the matter as the commissioner had no legal capacity to sue; Parliament had not expressly given him the power, nor did it arise impliedly by his appointment

under the Great Seal of Canada.

Statutes, Regulations and Rules Cited:

Privacy Act, R.S. 1985, c. P-21

Counsel:

Morris Manning, Q.C. and Jonathon Feasby, for plaintiff (respondent).
Harry J. Wruck, Q.C., for the defendants (applicants).

[Quicklaw note: A Corrigendum was released by the Court July 28, 2003. The correction has been made to the text and the Corrigendum is appended to this document.]

1 **METZGER J.**:-- The Privacy Commissioner of Canada has commenced an action in the Supreme Court of British Columbia seeking a declaration by the court that the Kelowna RCMP video surveillance violates the plaintiff's and the public's s. 2(d), 6, 7 and 8 Charter rights and is in breach of the United Nations Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

2 The Attorney General of Canada, on behalf of all the defendants, objects to this action on two principal grounds:

1. The court has no jurisdiction to hear the matter as the Privacy Commissioner has no legal capacity to sue, and thus the statement of claim is a nullity.
2. Under Rule 19(24)(a), the Privacy Commissioner has no standing; therefore, the statement of claim should be struck out.

3 The lack of standing and other objections raised by the Attorney General of Canada are not appropriate for an application under Rule 19(24)(a), as there are not plain and obvious answers to the questions raised. These defences are appropriate matters for a trial judge.

4 The Attorney General of Canada submits that as Parliament, in its creation of the Privacy Commissioner through the Privacy Act, R.S. 1985, c. P-21, saw fit to not grant the Commissioner the capacity to sue, the Commissioner cannot initiate this action.

5 The Attorney General of Canada points out that the Privacy Act does not expressly give the Privacy Commissioner the power to sue in any capacity other than to appear in Federal Court for certain prescribed reasons (see the Privacy Act ss. 42-43). The Attorney General submits that it is obvious from these statutory provisions that Parliament considered what access to the courts the

Privacy Commissioner should have, and therefore it is not appropriate for the court to look beyond the four corners of the statute.

6 The Privacy Commissioner submits that there are a number of reasons why the court must go beyond the plain words of the statute and find an implied power to sue. Briefly stated, the reasons for a broad and liberal interpretation to the statute are:

1. The Privacy Commissioner has been compared to an ombudsman by the Supreme Court of Canada;
2. The Privacy Commissioner has been granted intervenor status on many occasions by the Supreme Court of Canada;
3. The title and purpose of the Privacy Act;
4. The quasi-constitutional nature of the Privacy Act;
5. The Privacy Commissioner has been appointed under the Great Seal;
6. The Privacy Commissioner is a special officer of Parliament;
7. This is a question of public importance, and the court has a residual discretion to make certain that important issues are heard on the merits; and
8. The question of jurisdiction is a question to be determined at trial.

Powers and Duties:

7 The powers and duties of the Privacy Commissioner are succinctly described by the Supreme Court of Canada in Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] S.C.J. 55 at para. 32:

> The Privacy Act provides for the appointment of a Commissioner responsible for administering and enforcing the Act. The Privacy Commissioner's duties include:
>
> - receiving (and investigating) complaints from individuals who allege that personal information about themselves held by a government institution has been used or disclosed otherwise than in accordance with s. 7 or 8 (s. 29(1)(a)), and receiving (and investigating) complaints from individuals who have been refused access to personal information requested under s. 12(1) or who allege that they are not being accorded the rights to which they are entitled under s. 12(2) (s. 29(1)(b) and (c));
> - initiating a complaint where the Privacy Commissioner is satisfied there are reasonable grounds to investigate a matter under the Privacy Act (s. 29(3));
> - carrying out investigations of the files contained in personal information banks designated as exempt banks under s. 18, to determine whether the files should in fact be in those banks (s. 36);

- carrying out investigations in respect of compliance with ss. 4 to 8 (collection, retention and protection of personal information) (s. 37);

The Privacy Commissioner has broad powers for the purposes of conducting investigations into complaints that are filed. He has access to all information held by a government institution, with the exception of confidences of the Queen's Privy Council for Canada, and no information to which he has access may be withheld from him (s. 34(2)). He has the right to summon and enforce the appearance of witnesses before him and to compel them to give oral or written evidence on oath and to produce such documents and things as he deems requisite to the full investigation and consideration of the complaint. In addition, he may administer oaths and receive such evidence and other information, whether on oath or by affidavit or otherwise, as the Privacy Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law. The Commissioner may also enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises, converse in private with any person therein, and carry out such inquiries within the Privacy Commissioner's authority under the Privacy Act as he sees fit. Lastly, the Privacy Commissioner may examine or obtain copies of or extracts from books or other records found in the premises occupied by a government institution containing any matter relevant to the investigation (s. 34(1)).

After completing his investigation, the Privacy Commissioner reports his findings to the head of the government institution in question, if he finds that a complaint is well-founded. Where appropriate, the Privacy Commissioner may report his findings to the complainant. In his report, he may ask the head of the government institution in question to disclose the personal information in issue or to make changes in the management or use of personal information (ss. 35, 36 and 37).

Ombudsman Role:

8 In Lavigne, supra, the court compared the Privacy Commissioner's role to that of an ombudsman. They described that role by quoting Dickson C.J. in British Columbia Development Corp. v. British Columbia (Ombudsman), [1984] 2 S.C.R. 447 at pp. 458-59:

> ...the Ombudsman's main function came to be the investigation of complaints of maladministration on behalf of aggrieved citizens and the recommendation of corrective action to the governmental official or department involved.

9 The Attorney General of Canada submits that an ombudsman's role does not give the Privacy Commissioner the capacity to sue. An ombudsman is required to examine both sides of a complaint, assess the harm done and then recommend ways of remedying the harm in the manner set out in the statute, thereby avoiding the limitations of legal proceedings. An ombudsman is not counsel for the complainant (see Lavigne, supra, paras. 38-39). I am satisfied that to be likened to an ombudsman does not and cannot imply that the Privacy Commissioner has the capacity to sue.

Intervenor Status:

10 The Privacy Commissioner maintains that, as he has been granted intervenor status by the Supreme Court of Canada on many occasions, without an express power to intervene provided for in the statute, it is obvious that the statute has to be interpreted broadly.

11 The Attorney General of Canada replies that the conferring of intervenor status on an applicant does not in any way confer on that body the power to sue. I agree. Intervenor status has been granted on many occasions to many different bodies wishing to present a particular interpretation of a statute or the common law. The granting of such status does not change the statutory makeup of that body. In Canadian National Railway Co. v. Canadian Transport Commission, [1988] 2 F.C. 437 at p. 450, the court quoted with approval Lord Reid's statement in Essex Incorporated Congregational Church Union v. Essex County Council, [1963] A.C. 808 (H.L.) at pp. 820-821:

> ...in my judgment, it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction,...

Title of Act:

12 The Privacy Commissioner argues that the long title of the Privacy Act is an important part of determining the scope and purview of the statute itself. That long title is "An Act to extend the present laws of Canada that protect the privacy of individuals and that provide individuals with a right of access to personal information about themselves." The Privacy Commissioner submits the court must imply the power to sue, in order for him to effect the purpose of the statute. (See Hudon v. United States Borax & Chemical Corp. et al. (1970), 11 D.L.R. (3d) 345 (Sask. Q.B.) and R. v. Thompson, [1990] 2 S.C.R. 1111 para. 27). I am satisfied that these cases do not stand for the proposition that the courts are to add a power that Parliament has seen fit not to grant. The Privacy Act provides the necessary powers for the Privacy Commissioner to effect its purpose and fulfill his obligation.

Quasi-constitutional Statute:

13 The Privacy Commissioner points out that in Lavigne, supra, the Supreme Court of Canada recognized the Privacy Act as having quasi-constitutional status. I note the court went on to say at

para. 25:

> However, that status does not operate to alter the traditional approach to the interpretation of legislation, defined by Driedger in Construction of Statutes (2d ed. 1983), at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> The quasi-constitutional status of the...Privacy Act is one indicator to be considered in interpreting [it], but it is not conclusive in itself. The only effect of this Court's use of the expression "quasi-constitutional" to describe [the Act] is to recognize [its] special purpose.

14 The court goes on to describe the objectives and purposes of the Privacy Act and the powers and duties of the Privacy Commissioner. I am satisfied that nowhere in Lavigne, supra, does the court conclude or suggest that the Privacy Commissioner should have the capacity to pursue the formal and expensive path of court proceedings. That route is always open to an individual or statutory body with the power to sue. The scheme, object and wording of the Act make clear that the intention of Parliament was not to grant the Privacy Commissioner the power to commence such a suit.

Officer of Parliament - Great Seal of Canada:

15 The Privacy Commissioner submits that he is an officer of Parliament appointed under the Great Seal of Canada and, as such, has the capacity to sue because such an appointment carries with it all rights of the Crown. The Commissioner argues that as the Crown and its officers have had the privilege to commence lawsuits, the Privacy Commissioner's privilege to seek this declaratory relief should not be taken away without a full trial on the issue. (See Canada v. Sayward Trading and Ranching Co., [1924] Ex. C.R. 15; Farwell v. Canada (Attorney General) (1894), 22 S.C.R. 553; McArthur v. Canada, [1943] Ex. C.R. 77; Perepelytz v. Ontario (Minister of Highways), [1958] S.C.R. 161; Privacy Act, s. 53(1); The Eastern Trust Co. v. MacKenzie, Mann and Co. Limited (1915), 22 D.L.R. 410 (J.C.P.C.); Glazer v. Union Contractors Ltd. and Thornton (1960), 25 D.L.R. (2d) 653 (B.C.S.C.); Referenced re: Troops in Cape Breton, [1930] S.C.R. 554; Re Saskatchewan Natural Resources Reference, [1931] 4 D.L.R. 712 (J.C.P.C.))

16 The Privacy Act clearly sets out the Privacy Commissioner's statutory duties. The Privacy Commissioner is not a servant of the Crown. He is considered an employee of the Crown only for the purposes of certain compensation claims (s. 54(4) of the Privacy Act). I am satisfied that the

Privacy Commissioner's appointment under the Great Seal of Canada does not confer on him a power that Parliament did not expressly grant, in particular the capacity to commence a lawsuit such as this one.

Important Issue:

17 The Privacy Commissioner submits that the Supreme Court of Canada made it clear in Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157 case that there is a residual discretion in the courts to decide cases of public importance on their merits, even where it may appear the plaintiff has no status to maintain the action. The court stated at para. 34:

> In our opinion, it is now time to expand the exception to allow corporations to invoke the Charter when they are defendants in civil proceedings instigated by the state or a state organ pursuant to a regulatory scheme.

18 As that case involved a determination of standing, it is of no assistance to the Privacy Commissioner at this stage of the hearing. Standing should usually be heard by the trail judge. The preliminary matter before me is not one of standing; it is a matter of jurisdiction. Without the capacity to commence the action, there is no question for the court to consider as the statement of claim would be a nullity.

Trial Judge Decision:

19 The Privacy Commissioner submits that the matter of jurisdiction should be before the trial judge. However, in Jamieson et al. v. Attorney-General of British Columbia (1971), 21 D.L.R. (3d) 313 (B.C.S.C.), Mr. Justice Aikins had this to say at p. 323:

> If I were to accede to Mr. Berger's argument I would be driven to accept this as a sound proposition of law: that in a case where it is objected in limine that the plaintiff has no standing to maintain the action, and it is found on hearing the objection that indeed the plaintiff has no status, then there is a discretion in the Court to allow the plaintiff to go ahead with the action and to hear the case, even although, putting it in a rather colloquial way, the plaintiff had no business bringing the action at all. I have not been given nor have I been able to find authority for this proposition and I do not think it to be sound in law.

20 I am satisfied that it is appropriate to determine the question of jurisdiction before trial, as it may be that the plaintiff "...had no business bringing the action at all". I note that the Privacy Commissioner has estimated the length of this trial at 10 days, while the Attorney General's estimate is for 40 days.

Conclusion:

21 The Privacy Commissioner brings this suit not as a private individual but in his official capacity with all of the authority and expertise of his office. The Privacy Commissioner asserts that when litigation is involved, constitutionally he cannot be separated from his individual capacity as a natural person. I disagree. The Privacy Commissioner argues that somehow access to the court is restricted or denied when that is clearly not the case given the rights of a natural person. He is attempting to extend the authority of his office when, as a matter of legislative policy, parliament has not given the Privacy Commissioner such statutory authority.

22 I am satisfied that the Privacy Commissioner does not have the capacity to commence this suit; therefore, the statement of claim is a nullity.

23 Costs to the applicant/defendant, party and party, Scale 3.

METZGER J.

* * * * *

CORRIGENDUM

Released: July 28, 2003

Corrigendum to the Reasons for Judgment issued by Mr. Justice R.W. Metzger advising that reference to Mr. Jonathon Feasby as counsel for the plaintiff was inadvertently omitted on the title page. The Reasons for Judgment are amended accordingly. In all other aspects, the Reasons stand.

cp/i/qw/qlsng/qlbrl

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]

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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:

Forest Ethics Advocacy Assn. v. Canada (National Energy Board)

Between
Forest Ethics Advocacy Association and Donna Sinclair,
Applicants, and
The National Energy Board and the Attorney General of Canada,
Respondents

[2013] F.C.J. No. 1068

2013 FCA 236

233 A.C.W.S. (3d) 47

64 Admin. L.R. (5th) 80

450 N.R. 166

2013 CarswellNat 3547

Docket A-273-13

Federal Court of Appeal
Ottawa, Ontario

Stratas J.A.

Heard: In writing.
Judgment: October 4, 2013.

(40 paras.)

Administrative law -- Judicial review and statutory appeal -- Practice and procedure -- Parties -- Motions by Enbridge Pipelines Inc and Valero Energy Inc for orders adding them as respondents to judicial review application allowed and dismissed, respectively -- Applicants sought judicial review of National Energy Board's refusal to accept individual applicant's letter of comment on Enbridge's application for approval of pipeline, in which Valero intervened and which Valero supported -- Judicial review directly affected Enbridge as its project could be delayed or rejected -- As Valero

had a commercial relationship with Enbridge, but was not proponent of project, any prejudice it suffered would be indirect -- Valero's presence was unnecessary and would not assist court.

Civil litigation -- Civil procedure -- Parties -- Adding or substituting -- Necessary or proper -- On own motion -- Intervenors -- Motions by Enbridge Pipelines Inc and Valero Energy Inc for orders adding them as respondents to judicial review application allowed and dismissed, respectively -- Applicants sought judicial review of National Energy Board's refusal to accept individual applicant's letter of comment on Enbridge's application for approval of pipeline, in which Valero intervened and which Valero supported -- Judicial review directly affected Enbridge as its project could be delayed or rejected -- As Valero had a commercial relationship with Enbridge, but was not proponent of project, any prejudice it suffered would be indirect -- Valero's presence was unnecessary and would not assist court.

Natural resources law -- Oil and gas -- Pipelines -- Motions by Enbridge Pipelines Inc and Valero Energy Inc for orders adding them as respondents to judicial review application allowed and dismissed, respectively -- Applicants sought judicial review of National Energy Board's refusal to accept individual applicant's letter of comment on Enbridge's application for approval of pipeline, in which Valero intervened and which Valero supported -- Judicial review directly affected Enbridge as its project could be delayed or rejected -- As Valero had a commercial relationship with Enbridge, but was not proponent of project, any prejudice it suffered would be indirect -- Valero's presence was unnecessary and would not assist court.

Motions by Enbridge Pipelines Inc and Valero Energy Inc for orders adding them as respondents to the application for judicial review. Enbridge applied to the National Energy Board for approval to expand the capacity of a pipeline, reverse a segment of that pipeline and allow the pipeline to transport bitumen. Valero was an intervener in the Board's proceedings and supported Enbridge's application for approval. It entered into a transportation services agreement with Enbridge, contingent upon the approval of Enbridge's project. The individual applicant sought to submit to the Board a letter of comment on Enbridge's application for approval, which was denied. The applicants, being the individual who submitted the letter and an environmental organization, sought judicial review of the Board's decision. They sought a declaration s. 55.2 of the National Energy Board Act, which the Board interpreted as giving it the power to create a rigorous application process for those wishing to make representations to it, violated the guarantee of freedoms of expression and was therefore invalid. They also sought an order setting aside the Board's decision to issue a form to those wishing to make representations and require it be completed, and an injunction preventing the Board from acting until the judicial review was decided. In addition, they sought an order requiring the Board to accept all letters of comment from those wanting to participate in the proceedings.

HELD: Motion by Enbridge allowed; motion by Valero dismissed. Enbridge should have been a respondent to the application for judicial review as it would be directly affected by the order sought.

While the relief sought in the judicial review, if granted, would cause real, tangible prejudice to both Enbridge and Valero, only Enbridge would be prejudiced in a direct way. If the relief sought was granted, the proceedings before the Board would have to be re-run to some extent, which would delay Enbridge's project. Potentially many more people and organizations would have the right to participate and the Board might accept some of their arguments and reject Enbridge's application. As Valero had a commercial relationship with Enbridge, but was not a proponent of the project, it could be prejudiced, but not in a direct way. Valero's presence in the judicial review was not necessary. Valero had not shown how its participation would assist the court.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 2(b)

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1(1), s. 28(1)(f)

Federal Court Rules, C.R.C. 1978, c. 663, Rule 1602(3)

Federal Courts Rules, SOR/98-106, Rule 104(1)(b), Rule 109(1), Rule 109(2), Rule 109(2)(b), Rule 303(1)(a)

National Energy Board Act, R.S.C. 1985, c. N-7, s. 55.2

Counsel:

Written representations by:

Joshua A. Jantzi, for the proposed Respondents, Enbridge Pipelines Inc.

Paul Edwards, for the proposed Respondents, Valero Energy Inc.

Clayton Ruby and Nader R. Hasan, for the Applicants.

REASONS FOR ORDER

1 STRATAS J.A.:-- Enbridge Pipelines Inc. and Valero Energy Inc. each move for an order adding it as a party respondent in this application for judicial review. In the alternative, they each move for an order adding it as an intervener.

A. The nature of the application for judicial review

2 The application for judicial review comes to this Court under paragraph 28(1)(*f*) of the *Federal*

Courts Act, R.S.C. 1985, c. F-7. It arises from proceedings before the National Energy Board.

3 The proceedings before the National Energy Board concern Enbridge's application to the Board for approval to expand the capacity of a pipeline and to reverse a segment of that pipeline. Also included in Enbridge's application is a request to allow the pipeline to transport bitumen, the petroleum product derived from the Alberta oil sands. The Board's proceedings are ongoing.

4 The application for judicial review targets a section recently added to the *National Energy Board Act*, R.S.C. 1985, c. N-7, and the Board's interpretation and application of that section.

5 The section, section 55.2, affects who may make representations to the Board. Section 55.2 reads as follows:

> **55.2.** On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive.
>
> * * *
>
> **55.2.** Si une demande de certificat est présentée, l'Office étudie les observations de toute personne qu'il estime directement touchée par la délivrance du certificat ou le rejet de la demande et peut étudier les observations de toute personne qui, selon lui, possède des renseignements pertinents ou une expertise appropriée. La décision de l'Office d'étudier ou non une observation est définitive.

6 In their notice of application in this Court, the applicants say that the Board interpreted its power under this section "to create a rigorous application process for those individuals and groups who seek to participate in [the Board's] proceedings." Among other things, the Board required those intending to participate to complete a detailed form.

7 The applicants, Forest Ethics Advocacy Association and Donna Sinclair, are, respectively, an environmental organization and an individual. The Board denied Donna Sinclair the right to submit a letter of comment on Enbridge's application for approval. The applicants seek a declaration that section 55.2 violates the guarantee of freedom of expression in subsection 2(*b*) of the Charter and, thus, is invalid. They also seek an order setting aside the Board's decision to issue the form and require that it be completed, and an injunction preventing the Board from acting until the judicial review has been decided. Finally, they seek an order requiring the Board to accept all letters of comment from those wanting to participate in the proceedings.

8 Enbridge, the applicant for approval before the Board, is the proponent of the pipeline project

under scrutiny. Valero is an intervener in the Board's proceedings, supporting Enbridge's application for approval. Valero stands to benefit from a Board approval of Enbridge's application. Approval would permit Valero to receive western Canadian crude oil, oil that is cheaper than that from offshore sources. To that end, Valero has entered into a transportation services agreement with Enbridge, contingent upon the approval of Enbridge's project. Valero plans to invest between $110 million and $200 million to upgrade its facilities in order to handle the anticipated supply of western Canadian crude oil.

B. The provisions of the *Federal Courts Rules* that govern these motions

9 Three provisions in the *Federal Courts Rules*, SOR/98-106, govern the motions before me: Rule 104(1)(*b*) (adding a party); Rule 109(1) and (2) (intervening in proceedings); and Rule 303(1)(*a*) (who must be named as a respondent to an application for judicial review).

10 These Rules read as follows:

> **104.** (1) At any time, the Court may
>
> ...
>
> (*b*) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.
>
> **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.

303. (1) Subject to subsection (2), an applicant shall name as a respondent every person

(*a*) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; ...

* * *

104. (1) La Cour peut, à tout moment, ordonner :

...

b) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne.

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.

303. (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :

a) toute personne directement touchée par l'ordonnance recherchée, autre

que l'office fédéral visé par la demande;...

C. Should Enbridge and Valero be added as respondents?

11 Under Rule 104(1)(*b*), parties may be added as respondents where

(1) they should have been respondents in the first place; or
(2) their presence before the Court is necessary.

Satisfaction of either of these requirements is sufficient. Enbridge and Valero say they satisfy both requirements.

(1) Should Enbridge and Valero have been respondents in the first place?

12 Whether Enbridge and Valero should have been respondents in the first place is determined by Rule 303(1)(*a*). Under that rule, those who are "directly affected" by the order sought in the application for judicial review must be named as respondents.

13 What is the meaning of "directly affected" in Rule 303(1)(*a*)? There are very few authorities on point.

14 All parties cite the order made by this Court in *Sweetgrass First Nation v. National Energy Board*, file 08-A-30 (May 30, 2008) but that order does not shed light on the meaning of "directly affected" in Rule 303(1)(*a*).

15 All parties cite *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2008 FC 735. However, that case is of limited usefulness. In*Brokenhead*, the Federal Court did not examine in any detail the words"directly affected."

16 Further, most of the cases placed before the Federal Court in *Brokenhead* were decided under Rule 1602(3) of the old *Federal Court Rules*, C.R.C. 1978, c. 663 (now repealed) or relied upon cases interpreting old Rule 1602(3). But old Rule 1602(3) is quite different from today's Rule 303(1)(*a*).

17 Old Rule 1602(3) required that an "interested person who [was] adverse in interest to the applicant" before the tribunal being reviewed be named as a respondent. Rule 303(1)(*a*) is narrower, requiring that a party be"directly affected" by the order sought in the application for judicial review. Accordingly, cases based on old Rule 1602(3) should be regarded with caution.

18 The words "directly affected" in Rule 303(1)(*a*) mirror those in subsection 18.1(1) of the *Federal Courts Act*. Under that subsection, only the Attorney General or "anyone directly affected by the matter in respect of which relief is sought" may bring an application for judicial review. Rule 303(1)(*a*) restricts the category of parties who must be added as respondents to those who, if the tribunal's decision were different, could have brought an application for judicial review themselves.

19 Accordingly, guidance on the meaning of "direct interest" in Rule 303(1)(*a*) can be found in the case law concerning the meaning of "direct interest" in subsection 18.1(1) of the *Federal Courts Act*. This was the approach of the Federal Court in *Reddy-Cheminor, Inc. v. Canada*, 2001 FCT 1065, 212 F.T.R. 129, aff'd 2002 FCA 179, 291 N.R. 193 and seems to have been the approach implicitly adopted by the Federal Court in *Cami International Poultry Inc. v. Canada (Attorney General)*, 2013 FC 583 at paragraphs 33-34.

20 A party has a "direct interest" under subsection 18.1(1) of the *Federal Courts Act* when its legal rights are affected, legal obligations are imposed upon it, or it is prejudicially affected in some direct way: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307 at paragraphs 57-58; *Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.)*, [1976] 2 F.C. 500 (C.A.); *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116.

21 Translating this to Rule 303(1)(*a*), the question is whether the relief sought in the application for judicial review will affect a party's legal rights, impose legal obligations upon it, or prejudicially affect it in some direct way. If so, the party should be added as a respondent. If that party was not added as a respondent when the notice of application was issued, then, upon motion under Rule 104(1)(*b*), it should be added as a respondent.

22 The relief sought in the judicial review is described in paragraph 7, above. The interests of Enbridge and Valero are described in paragraph 8, above.

23 I accept that the relief sought in the judicial review, if granted, would cause real, tangible prejudice to Enbridge and Valero within the meaning of the *Odynsky* test, not just general inconvenience or general impact on their businesses as a result of detrimental or unhelpful jurisprudence. But Enbridge and Valero must go further under the *Odynsky* test and show that they will be prejudiced in a direct way.

24 In Enbridge's case, the prejudice is direct. The Board's proceeding is about whether Enbridge's project should be approved. If the relief sought in the judicial review is granted, the proceedings before the Board will have to be rerun to some extent, delaying Enbridge's project. Further, if the relief sought is granted, potentially many persons and organizations from different perspectives will have rights of participation where, before, they did not. The Board might accept some of the new participants' arguments, leading to the rejection of Enbridge's application for approval of its project. The risk of that happening directly affects Enbridge, the proponent of the project.

25 Valero, however, stands in a different position. It is in a commercial relationship with Enbridge, the proponent of the project. The success of that relationship depends upon the approval of the project. But it is not itself the proponent of the project.

26 Those in a commercial relationship with the proponent of a project who stand to gain from the approval of the project of course will suffer financially if the project is not approved. But that financial interest is merely consequential or indirect.

27 Valero stands in the same position as any suppliers of materials for the project and any workers involved in the construction of the project. The project will provide them with income and work. But if it is not approved, it will not go forward, and the income and work will be lost. Their interests, no doubt significant, are consequential or indirect, contingent on the proponent of the project getting its approval.

28 One way to test this result is to consider a hypothetical situation and the concept of "direct interest"under subsection 18.1(1) of the *Federal Courts Act.* Suppose that the Board rules against Enbridge's application for approval. Suppose that Enbridge decides not to bring an application for judicial review. In those circumstances, could Valero maintain that since it stood to benefit economically from the approval it has a "direct interest" and, thus, has standing to bring an application for judicial review? Could all others who also stood to benefit economically in some way from the pipeline approval - construction companies and their employees, suppliers and transporters of construction materials, potential buyers of refined petroleum products - say the same thing? I think not.

29 I do not doubt that Valero's interest is most significant: see Exhibit "A" to the Affidavit of Louis Bergeron. However, Rule 303(1)(*a*) refers to a "direct interest," not a"significant interest." Valero does not have a "direct interest" and so it could not have been named as a respondent in the first place.

(2) Is Valero's presence in the judicial review necessary?

30 Valero also submits that it should now be a respondent in the judicial review because it falls under the second branch of under Rule 104(1)(*b*): its presence before the Court is "necessary to ensure that all matters in dispute in the application for judicial review may be effectually and completely determined."

31 To succeed in this submission, Valero must satisfy the demanding test of necessity set out in cases such as *Shubenacadie Indian Band v. Canada (Minister of Fisheries and Oceans),* 2002 FCA 509, 236 F.T.R. 160 and *Laboratoires Servier v. Apotex Inc.*, 2007 FC 1210.

32 In my view, Valero has not satisfied that test. It has not pointed to "a question in the [application for judicial review] which cannot be effectually and completely settled unless [it] is a party": *Shubenacadie Indian Band, supra* at paragraph 8, citing *Amon v. Raphael Tuck& Sons Ltd.*, [1956] 1 Q.B. 357 at page 380.

33 Therefore, Valero's motion to be added as a respondent must fail.

D. Should Valero be permitted to intervene?

34 As we have seen, not all parties before an administrative tribunal will be parties with a "direct interest" or necessary for the judicial review - in other words, not all parties will be entitled to be

respondents in the application for judicial review. But many may be able to satisfy the test for intervention and become interveners in the judicial review. Their level of participation as interveners varies depending on the circumstances. Where warranted, their level of participation can approach that of respondents. The grand prize of being a respondent is one thing. But the consolation prize of being an intervener is often not bad.

35 Mindful of this, Valero seeks an order permitting it to intervene in the judicial review. However, Valero has failed to discharge the legal burden of proof upon it.

36 Under Rule 109(2)(*b*), Valero must describe "how [its] participation will assist the determination of a factual or legal issue related to the proceeding." This requires not just an *assertion* that its participation will assist, but a *demonstration* of *how* it will assist. Valero has not done this.

37 In its notice of motion, Valero submits that "there is a justiciable issue and a veritable public interest that could benefit from Valero's participation in this proceeding." This does not discharge the burden of proof imposed upon it by Rule 109(2)(*b*).

38 In the affidavit offered in support of its motion, Valero asserts that it "has a perspective which is unique and distinct from that of Enbridge"as "a refiner which proposes to access western crude" through the pipeline. Valero does not explain how a refiner's perspective differs from that of a pipeline builder and how that difference will assist in determining the administrative law and constitutional law issues before the Court.

39 Finally, in its written submissions, Valero asserts - without explanation - that the "interests of justice would be served" and the Court "would [be] assist[ed]...in coming to a fair and just conclusion" by allowing it to intervene. It says nothing more. The Court is left to speculate as to what role Valero would play as an intervener and whether that role would be of any assistance at all.

E. Disposition of the motions

40 Enbridge Pipelines Inc. shall be added as a party respondent and the style of cause shall be amended to reflect that fact. It shall receive its costs of the motion in any event of the cause. The motion of Valero Energy Inc. shall be dismissed with costs in any event of the cause.

STRATAS J.A.

Indexed as:

John Doe v. Ontario (Information and Privacy Commissioner)

IN THE MATTER OF the Order P-237 of the Information and Privacy Commissioner, dated August 6, 1991
AND IN THE MATTER OF Freedom of Information and Protection Act, 1987, as amended
AND IN THE MATTER OF the Judicial Review Procedure Act, R.S.O. 1980, c. 224, as amended
Between
John Doe, James Doe, Jack Doe and George Doe, Applicants, and Information and Privacy Commissioner, Solicitor General of Ontario, and Theodore Matlow, Respondents

[1991] O.J. No. 2334

87 D.L.R. (4th) 348 p

53 O.A.C. 196

53 O.A.C. 236

7 C.P.C. (3d) 33

31 A.C.W.S. (3d) 58

Action No. 525/91

(incl. supp. reasons)

(incl. suppl. reasons)

(incl. supp. reasons)

Ontario Court of Justice - General Division
Divisional Court - Toronto, Ontario

Steele J.

Heard: November 9, 1991
Judgment: December 23, 1991

(10 pp.)

[Ed. note: Supplementary Reasons, released January 13, 1992, appended to judgment.]

Practice -- Parties -- Intervenor status -- Canadian Civil Liberties Association (CCLA) -- Judicial proceedings -- Intervenor to make representations on behalf of judge presiding over previous proceedings.

The Canadian Civil Liberties Association (CCLA) moved for leave to intervene as an added party, or, in the alternative, as a friend of the court, in a judicial review of a decision of the Privacy Commissioner.

HELD: The motion was dismissed. The CCLA's motion arose under the following circumstances. In a criminal case presided over by M, a finding was made that certain police officers had acted improperly and that some of them had lied in court. The Ontario Provincial Police (OPP) conducted an investigation into the matter. M requested access to the OPP report under the Freedom of Information and Protection of Privacy Act, and the Privacy Commissioner issued an order that most of the report be released. Four police officers affected by that order applied for judicial review of the decision of the Privacy Commissioner. M took the position that because he was a justice of the Ontario Court of Justice (General Division), and therefore entitled to sit on the Divisional Court, in which the application for judicial review was brought, he would prefer not to enter the proceedings, but to have the CCLA make the representations that he would have made on the judicial review. The court held that the court should treat a judge involved in his personal capacity in the same manner as any other litigant. M, or any other party, having started a procedure, must either proceed or withdraw totally. He could not ask another person to argue his case. M was the proper party to the application. He was capable of appearing and his mere reluctance to do so was not grounds for granting status to the CCLA. Furthermore, M had not stated that he would not appear on the application for judicial review, so the CCLA's motion was, in any event, premature.

STATUTES, REGULATIONS AND RULES CITED:

Freedom of Information and Protection of Privacy Act, S.O. 1987, c. 25, s. 23.
Judicial Review Procedure Act, R.S.O. 1980, c. 224.
Ontario Rules of Civil Procedure, Rules 13.01, 13.02.

W. Ian C. Binnie, Q.C., for the Applicant, The Canadian Civil Liberties Association.
Stephen T. Goudge, Q.C. and Richard Stephenson, for the Respondents, John Doe, James Doe, Jack Doe and George Doe.

S.N. Manji, for the Information and Privacy Commissioner.

STEELE J.:-- This is a motion by The Canadian Civil Liberties Association ("CCLA") for leave to intervene as an added party or, in the alternative, to intervene as a friend of the court in this proceeding. The CCLA is a well recognized organization with an active interest in open government and the control of state power, including police power. It alleges that it has an interest in the subject matter of the proceeding and may be adversely affected by a judgment in the proceeding, and that it will not unduly delay or prejudice the determination of the rights of the parties. In addition, it states that Theodore Matlow ("Matlow") has consented to it representing his interests in the application for judicial review.

The applicants, John Doe, James Doe, Jack Doe and George Doe ("the Does") oppose the motion. Counsel for the Information and Privacy Commissioner ("the Commissioner") advised the court that it would defend its order and oppose the application for judicial review, but that it may not feel free to argue all issues of law that Matlow could argue, because of possible involvement in future decisions. No one appeared for the Solicitor General of Ontario or for Matlow. Whether or not the Solicitor General will take a position on the judicial review, is not known at this time.

From the material filed, it is not entirely clear whether or not Matlow will appear on the judicial review. His affidavit states that he supports the Commissioner's order and is prepared to instruct counsel. He does not say whether those counsel are his own or those of CCLA. He states that because he is a justice of the Ontario Court of Justice (General Division), and therefore entitled to sit on the Divisional Court, to which the application for judicial review is being made, he considers it undesirable for him to litigate the matter personally, and that he would prefer the CCLA to make the representations that he would have made as the requestor to the Commission. He states that he has no unique personal interest in the outcome of the proceeding. With respect, I cannot agree with this latter submission. In my opinion, he wants the CCLA to stand in his exact position to present the case that he could make himself, and I believe that he has a strong personal interest.

The background to the judicial review application is as follows:

(1) In a criminal case over which Matlow presided, he made a finding that certain police officers of the Metropolitan Toronto Police Department had acted improperly and that some of them had lied in giving their evidence before him in court.
(2) This finding was given wide news media coverage.
(3) As a result, the Ontario Provincial Police ("OPP") conducted an investigation and it was reported in the news media that the inquiry had found no evidence of wrong doing on the part of the police officers in question.

(4) Matlow requested access to the OPP report under the Freedom of Information and Protection of Privacy Act, 1987, S.O. c. 25 ("the Act").
(5) The Commissioner, relying on s. 23 of the Act, issued an order that most of the OPP investigation report be released on the ground that the public interest outweighed the interest of privacy of the Does.
(6) On September 24, 1991, Matlow was served with a notice of application for judicial review of the Commissioner's decision in the names of the Does, who are stated to be the four police officers affected by the order.
(7) Matlow objects to being brought before the court by anonymous applicants and supports the Commissioner's order.

In my opinion, the court should treat a judge involved in his personal capacity in the same manner as any other litigant. Matlow, or any other party, once having started a procedure in motion, must either proceed or withdraw totally. He cannot ask another person to be allowed to argue his case. The judicial review in question is not a constitutional or charter matter, but the Commissioner has found it to be a public interest matter. Greater latitude is often given in public interest cases than in private cases. Notwithstanding this finding of the Commissioner, Matlow is the person with the greatest interest in the decision. He may personally learn of some matters that were not before him in evidence and will be able to compare his reasons with the reasons of the OPP report.

In my opinion, the matters to be considered on whether a person should be granted the right to intervene on a public interest basis, are: (1) the nature of the case; (2) the issues which arise; and (3) the likelihood of the applicant being able to make a useful contribution to the resolution of the matter without causing injustice to the immediate parties.

Rule 13.01 sets out three separate grounds upon which a person may apply to intervene. In my opinion, the CCLA has no greater interest in the subject matter of the proceeding than any member of the general public. To be an interested party the person must have an actual interest in the lis between the parties. (See Re Schofield and Ministry of Commercial and Consumer Relations, 28 O.R. (2d) 764 at 769.) The CCLA has no such interest.

Another ground is that the person may be adversely affected by a judgment in the proceeding. The CCLA will not be affected in a greater way than any member of the general public. Another ground is that the CCLA must show that there exists between it and one or more of the parties a question of law or fact in common with one or more of the questions in issue in the proceeding. The CCLA has not asserted that it is involved in any other proceeding. It merely asserts a general public interest and the possibility that there may be some general effect upon it. This is not sufficient. I therefore refuse to permit the CCLA to be added as an intervenor party.

Rule 13.02 gives a wide discretion to the court to permit a person to intervene as a friend of the court to render assistance to the court by way of argument. I adopt the following headnote in Re Clarke et al. and A.G. of Canada, 81 D.L.R. (3d) 33, as being the proper principle to be applied:

> Interventions amici curiae should be restricted to those cases in which the Court is clearly in need of assistance because there is a failure to present the issues (as, for example, where one side of the argument has not been presented to the Court). Where the intervention would only serve to widen the lis between the parties or introduce a new cause of action, the intervention should not be allowed.

In my opinion, Matlow is the proper party to the application. He is capable of appearing and his mere reluctance to do so is not grounds for granting status to the CCLA. I am not satisfied that the CCLA can assist the court in any way different from the position of Matlow. In my opinion, it is Matlow who should appear and not the CCLA. He commenced the process and he has a personal interest in the result. He should be prepared to carry the process through if he believes that the matter is important to him.

Matlow has not stated that he will not appear on the application for judicial review, and unless and until he withdraws, there is no additional perspective that the CCLA can bring to the court. The motion is premature and is dismissed, without prejudice to any new application being brought by CCLA if the circumstances should change.

No submissions were made to the court with respect to costs, and the parties may speak to me about them if they so desire. If I do not hear from the parties in writing on or before December 31, 1991, I would direct that there should be no costs.

STEELE J.

* * * * *

Supplementary Reasons

Released: January 13, 1992

STEELE J.:-- I have received written submissions concerning costs from the parties, other than the Commissioner. The respondents were successful and costs normally follow the event. The Canadian Civil Liberties Association ("CCLA") submits that it was acting in the public interest and no costs should be awarded. While this may be true in part, it was also applying because Matlow had consented to it representing his interests. The CCLA was therefore not acting entirely in the public interest, and there is no reason why costs should not be awarded against it. An order will issue that the CCLA shall pay to the respondents forthwith a sum of $1,250 plus GST.

STEELE J.

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:

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.

Case Name:

Pfizer Ltd. v. Ratiopharm Inc.

Between
Pfizer Limited, Appellant, and
Ratiopharm Inc., Respondent

[2009] F.C.J. No. 1536

[2009] A.C.F. no 1536

2009 FCA 339

78 C.P.R. (4th) 447

398 N.R. 261

Docket A-281-09

Federal Court of Appeal
Ottawa, Ontario

Layden-Stevenson J.A.

Heard: In writing.
Judgment: November 19, 2009.

(10 paras.)

Civil litigation -- Civil procedure -- Parties -- Intervenors -- Requirement of interest -- Motion by BIOTECanada, Eli Lilly Canada Inc. and Eli Lilly and Company for leave to intervene in this appeal dismissed -- BIOTECanada was a not-for-profit, non-government association -- Eli Lilly was one of Canada's leading innovative research-based pharmaceutical companies -- Intervenors' interest in appeal was jurisprudential, which was insufficient to grant intervenor status -- Proposed intervenors had not demonstrated that they would provide a relevant and useful point of view which the appellant would not present.

Motion by BIOTECanada, Eli Lilly Canada Inc. and Eli Lilly and Company for leave to intervene

in this appeal and make joint written and oral submissions at the hearing. BIOTECanada was a not-for-profit, non-government association and represented more than 250 member companies encompassing a broad spectrum from the biotechnology sector. Eli Lilly was one of Canada's leading innovative research-based pharmaceutical companies. The proposed intervenors submitted that in finding the appellant's patent invalid on the basis of utility and s. 53 of the Patent Act, the judge significantly changed established law relating to utility and s. 53 of the Act. The proposed intervenors also claimed to have specialized expertise in patent law and practices around the world, which the parties themselves would not be able to fully canvass.

HELD: Motion dismissed. The nature of the proposed intervenors' interest in the appeal was jurisprudential, which was insufficient to grant intervenor status. Since the proposed intervenors explicitly stated that they did not seek to introduce new evidence on the appeal, the prospect of them adding a new perspective respecting international patent law and practice was seriously undermined. The proposed intervenors had not demonstrated that they would provide a relevant and useful point of view which the appellant would not present.

Counsel:

Written representations by:

Tony Creber, Chantal Saunders and John Norman, for the Proposed intervener - BIOTECanada, Eli Lilly Canada Inc., Eli Lilly and Company for the Appellant.

John B. Laskin and W. Grant Worden, for the Appellant.

David W. Aitken and Marcus Klee, for the Respondent.

REASONS FOR ORDER

1 **LAYDEN-STEVENSON J.A.**:-- BIOTECanada is a not-for-profit, non-government association and represents more than 250 member companies encompassing a broad spectrum from the biotechnology sector including agriculture, aquaculture, bioinformatics, food, healthcare research, industrial biotechnology and renewable energy.

2 Eli Lilly Canada Inc. is one of Canada's leading innovative research-based pharmaceutical companies. Eli Lilly and Company is one of the world's leading research-based pharmaceutical companies and is involved in developing pharmaceutical products for the world.

3 BIOTECanada, Eli Lilly Canada Inc. and Eli Lilly and Company (the proposed interveners), by

motion in writing, seek leave to intervene in this appeal and make joint written and oral submissions at the hearing. They do not seek to introduce any new evidence.

4 The appellant, Pfizer Limited, in correspondence dated October 30 2009 indicates that it supports the motion because the "proposed intervention would assist in illuminating the issues on appeal." The respondent, ratiopharm inc., opposes the motion.

5 Leave to intervene may be granted if each intervener has an interest in the outcome of the litigation, has rights that may be adversely affected by the outcome and will assist the court by bringing a perspective to the proceedings different from that of the parties: *Novopharm Limited v. Eli Lilly Canada Inc. et al*., 2009 FCA 24.

6 The proposed interveners submit that in finding the '393 Patent invalid on the basis of utility and s. 53 of the *Patent Act*, R.S. 1985, c. P-4 (the Act), Hughes J. significantly changed established law relating to utility and s. 53 of the Act. They contend that the change in law in respect of these two grounds of invalidity significantly lowers the threshold needed to demonstrate invalidity on these grounds. Further, the proposed interveners claim to have specialized expertise in patent law and practises around the world which the parties themselves will not be able to fully canvas. Based upon this special expertise, the proposed interveners are in an optimal position to assist the court and "will be able to provide the court with (sic) how the decision of Hughes J. accords with international patent laws and practice."

7 Aside from the issue of international patent law and practice, the nature of the proposed interveners' interest in the appeal is jurisprudential. They have not established that they are directly affected by the outcome of the appeal. To the contrary, they state that they have no interest in the particular facts of the case and no interest in the specific pharmaceutical product in dispute. A jurisprudential interest is not sufficient to grant intervener status: *Eli Lilly Canada Inc., v. Canada (Minister of Health)* (2001), 10 C.P.R. (4th) 310 (F.C.) aff'd. (2001), 11 C.P.R. (4th) 486 (F.C.A.).

8 As for the issue of international patent law and practice, it is evident from the affidavits filed in support of the motion that this submission requires the interveners to demonstrate a difference between patentability requirements in Canada and foreign countries. Evidence on the state of foreign law would be necessary. Yet, the proposed interveners explicitly state that they do not seek to introduce evidence on the appeal. Therefore, the prospect of adding a new perspective to the dispute is seriously undermined.

9 Finally, I am not satisfied that the proposed interveners will present the court with submissions that are useful and different from those that Pfizer will make. Both the issues of utility and section 53 of the Act constitute grounds of appeal and are addressed in Pfizer's memorandum of fact and law. The proposed interveners have not demonstrated that they will provide a relevant and useful point of view which Pfizer will not present. Nor do they contend that the court is unable to decide this appeal on its merits without their involvement. In short, although they do not disclose the specific contents of their proposed submissions, it appears that their arguments will simply bolster

those made by Pfizer.

10 For the foregoing reasons, the motion will be dismissed with costs to ratiopharm inc.

LAYDEN-STEVENSON J.A.

cp/e/qlaim/qlpwb/qlaxw/qlcas/qlhcs/qlsxr

Case Name:

State Farm Mutual Automobile Insurance Co. v. Canada (Privacy Commissioner)

Between
State Farm Mutual Automobile Insurance Company, Applicant, and Privacy Commissioner of Canada, and Attorney General of Canada, Respondents

[2010] F.C.J. No. 889

[2010] A.C.F. no 889

2010 FC 736

[2010] I.L.R. I-5028

87 C.C.L.I. (4th) 9

376 F.T.R. 59

7 Admin. L.R. (5th) 77

2010 CarswellNat 2225

Docket T-604-09

Federal Court
Halifax, Nova Scotia

Mainville J.

Heard: April 13, 2010.
Judgment: July 9, 2010.

(120 paras.)

Government law -- Access to information and privacy -- Protection of privacy -- Corporate or commercial information -- Appeals and judicial review -- Privacy and information commissioners --

Discretion -- Application by insurer for judicial review of assumption of jurisdiction by Privacy Commissioner allowed -- Insurer conducted surveillance of complainant in defence of personal injury tort claim against insured -- Complainant sought recourse with Commissioner after insurer refused request for disclosure under Personal Information Protection and Electronic Documents Act (PIPEDA) -- Collection of evidence in context of defending tort action for insured did not constitute commercial activity for purpose of PIPEDA -- Commissioner had no authority to assume jurisdiction in light of insurer's privilege claim -- Personal Information Protection and Electronic Documents Act, ss. 2, 26(2)(b).

Insurance law -- Actions -- By third parties against insured -- Practice and procedure -- Evidence -- Application by insurer for judicial review of assumption of jurisdiction by Privacy Commissioner allowed -- Insurer conducted surveillance of complainant in defence of personal injury tort claim against insured -- Complainant sought recourse with Commissioner after insurer refused request for disclosure under Personal Information Protection and Electronic Documents Act (PIPEDA) -- Collection of evidence in context of defending tort action for insured did not constitute commercial activity for purpose of PIPEDA -- Commissioner had no authority to assume jurisdiction in light of insurer's privilege claim -- Personal Information Protection and Electronic Documents Act, ss. 2, 26(2)(b).

Application by State Farm Mutual Automobile Insurance for judicial review challenging the jurisdiction of the Privacy Commissioner of Canada to carry out an investigation under the Personal Information Protection and Electronic Documents Act (PIPEDA) and compel access to privileged information. The applicant provided insurance to a driver involved in a motor vehicle accident. The applicant retained legal counsel for the driver in contemplation of litigation being initiated by the other party, Gaudet. On advice of counsel, the applicant hired investigators to conduct video surveillance of Gaudet both before and after the commencement of a personal injury tort action against the driver. Shortly before initiating the action, Gaudet requested information from the applicant pursuant to PIPEDA, including copies of any surveillance reports or tapes. The applicant denied the request on the basis that PIPEDA did not apply. In the course of the tort proceeding, the driver claimed litigation privilege over the surveillance reports and video tapes listed in the affidavit of documents. Gaudet complained to the Privacy Commissioner on the basis that the applicant had denied access to his personal information, disclosed his personal information to a third party without his consent and had not provided adequate safeguards to protect his personal information. The Commissioner informed the applicant of the complaint. The applicant took the position that the Commissioner had no jurisdiction to proceed. The Commissioner appointed a privacy investigator who wrote the applicant stating the Commissioner's position that it had jurisdiction, and requesting copies of the surveillance report and tapes. The applicant sought judicial review.

HELD: Application allowed. The predicate application was not premature. The collection of evidence by the applicant acting for the driver in the defence of a third party tort action did not constitute "commercial activity" within the meaning of the PIPEDA. The collection of evidence was

not a transaction and lacked any commercial character associated with that activity. The dominant factor was the primary characterization of the conduct in issue, not the incidental relationship between those who sought carry out the conduct. The fact that an investigator was paid to conduct surveillance did not render the evidence collection commercial any more than retention of a law firm to defend the action was commercial for the purpose of the PIPEDA. The investigation reports and related documents and videos concerning Gaudet were not subject to PIPEDA. In the event that the Commissioner had serious doubt regarding a claim of privilege, there was recourse to the courts. In light of the privilege claim asserted by the applicant, the Commissioner had no authority to issue the letter purporting to assume jurisdiction or to request justifications from the applicant in respect of its claim.

Statutes, Regulations and Rules Cited:

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 92(14), s. 96

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.3(1), s. 50

New Brunswick Evidence Act, R.S.N.B., c. E-11, s. 43.1

New Brunswick Insurance Act, R.S.N.B., c. I-12, s. 237(b), s. 244(1)(c)

New Brunswick Rules of Court, N.B. Reg. 82-73, Rule 31.09

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, s. 2(1), s. 2(1), s. 2(1), s. 2(1), s. 2(2), s. 3, s. 4(1)(a), s. 4(2)(b), s. 5, s. 7(1), s. 7(2), s. 7(3), s. 9(3), s. 11(1), s. 11(4), s. 12(1), s. 12(4), s. 13(1)(a), s. 13(1)(d), s. 13(3), s. 14(1), s. 15, s. 16, s. 26(2)(b), s. 30(1), s. 30(2)

Counsel:

Peter M. Rogers, Q.C., Jane O'Neill, David T.S. Fraser, for the Applicant.

Frederick C McElman, Q.C., Nicholas Russon, for the Respondents.

REASONS FOR JUDGMENT AND JUDGMENT

1 MAINVILLE J.:-- This judgment concerns an application for judicial review challenging the jurisdiction of the Privacy Commissioner of Canada ("Privacy Commissioner") to carry out an investigation under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5 ("PIPEDA") and to compel access to information which is covered by solicitor-client privilege or litigation privilege in the New Brunswick courts.

2 The main issue in these proceedings is whether the provisions of PIPEDA apply to evidence collected by an insurer on behalf of an insured in order to defend that insured in a third party tort action. For the reasons which follow, I conclude that they do not.

Background

3 The Applicant, State Farm Mutual Automobile Insurance Company ("State Farm") is licensed to carry on business as a motor vehicle insurer in New Brunswick.

4 In March of 2005, Jennifer Vetter and Gerald Gaudet were involved in a motor vehicle accident which occurred in New Brunswick. Ms. Vetter was then insured with State Farm under a standard automobile policy prescribed by New Brunswick insurance legislation and which provided that her insurer had a duty to defend her. State Farm thus retained legal counsel for Ms. Vetter in contemplation of litigation to be initiated by Mr. Gaudet against her.

5 On advice of counsel, State Farm hired private investigators to inquire about the activities of Mr. Gaudet. These private investigators used video surveillance on several occasions both before and after the commencement of a personal injury tort action by Mr. Gaudet against Ms. Vetter initiated in the New Brunswick Court of Queen's Bench in December of 2005.

6 Shortly before initiating his tort action, in November of 2005, Mr. Gaudet, through his legal counsel, requested from State Farm, pursuant to PIPEDA, any and all of the information it had collected on him, and in particular copies of any surveillance reports or tapes. State Farm denied this request on the ground that PIPEDA did not apply. That request under PIPEDA was renewed by Mr. Gaudet on January 21, 2006 and again denied by State Farm on the same ground.

7 In the course of the personal injury tort proceeding against her in the New Brunswick Court of Queen's Bench, Ms. Vetter's legal counsel, who had been retained by State Farm to defend her, submitted to Mr. Gaudet's legal counsel in February 2006 a draft affidavit of documents, as is the usual practice in such matters. In this draft affidavit, litigation privilege was claimed by Ms. Vetter over the narrative surveillance reports and related video tapes concerning Mr. Gaudet. The final affidavit of documents was provided in April of 2006.

8 On February 22, 2006, Mr. Gaudet complained to the Privacy Commissioner under PIPEDA, alleging that, in violation of the provisions of PIPEDA, State Farm had denied access to his personal information, disclosed his personal information to a third party without his consent and had not provided adequate safeguards to protect his personal information. The Privacy Commissioner informed State Farm of this complaint, but kept that matter in abeyance pending receipt of representations from State Farm and the appointment of an investigator. State Farm conveyed its position that the Privacy Commissioner had no jurisdiction to proceed under PIPEDA.

9 On May 17, 2007, Privacy Investigator Arn Snyder wrote the following letter to State Farm concerning the complaint by Mr. Gaudet:

I am writing to notify you that I have been assigned the responsibility of investigating the complaint under the *Personal Information Protection and Electronic Documents Act (PIPEDA)* received from the above-named individual.

I have reviewed the correspondence received from David T.S. Fraser from the law firm McInnes Cooper, dated August 28, 2006. Mr. Fraser indicates that he is counsel to State Farm Mutual Automobile Insurance Company (State Farm) on this matter. I will now address the issues raised by Mr. Fraser and will then outline what information I will require from State Farm.

1) Jurisdiction: The Office of the Privacy Commissioner (OPC) is of the opinion that it has jurisdiction. The comments of the court in *Ferenczy* concerning [sic] application of PIPEDA were strictly obiter and are not viewed as precedent by the OPC.
2) Other Grievance Procedure: The complainant sent State Farm correspondence dated January 31, 2006 and received a reply from State Farm dated February 14. 2006. The OPC correspondence to State Farm is dated July 24, 2007.
3) Further Particulars: The complainant's allegations are outlined in the initial notification letter dated July 24, 2006 sent to you by OPC.

To conduct my investigation I will require the following information:

1) A list of all the documents (or other format such as videotape) containing Gerald Gaudet's personal Information held by State Farm at the time of his request.
2) A list of the documents (or other format such as videotape) which have been released to Gerald Gaudet by State Farm.
3) A list of all the documents (or other format such as videotape) which have been denied access and a notation as to under what authority was the access denied.
4) In the event that State Farm is denying access under solicitor client privilege on any documents (or other format such as videotape) I will require this information in the following format: the date of the document, the document type, the author, the recipient, and the grounds for privilege. In order to increase the value of the evidence of the list will require that:

    a) the list be in the format of a sworn affidavit (similar to a Schedule B

format) and,

b) the affidavit contains a statement from the organization's counsel that they explained the concept of solicitor-client privilege to the affiant prior to the affiant taking the oath. Also, please remember that while your organization is not compelled to disclose these documents to us for our review, it is possible for you to do so and we would keep the documents confidential. Moreover, if it turns out that you cannot adequately prove to our satisfaction that these remaining documents are privileged, we will have no choice, as the Federal Court of Appeal has suggested in the Blood Tribe decision, but to make an application to the Federal Court for a determination on the validity of your claim.

5) In the event that State Farm is denying access for any other reason I will require access to those documents (or other format such as videotape).
6) A copy of State Farm's Privacy Policy.
7) A description of the circumstances where State Farm disclosed Gerald Gaudet's personal information including the type of information disclosed, the date and recipient.
8) A confirmation that State Farm hired a third party to conduct surveillance on Gerald Gaudet, a copy of the Agreement between State Farm and the third party and/or any directions provided to the third party by State Farm.
9) A confirmation as to whether State Farm retains the personal information of Gerald Gaudet solely in Canada.

I appreciate receiving this information by June 22, 2007 [...]

10 Following receipt of this letter, State Farm initiated proceedings before the New Brunswick Court of Queen's Bench seeking a declaration that the Privacy Commissioner did not have statutory or constitutional authority to investigate, make recommendations, or otherwise act upon the complaint of Mr. Gaudet. The Court of Queen's Bench, however, decided that the Federal Court was the appropriate forum to determine these issues: *State Farm v. Privacy Commissioner and A.G. of Canada*, 2008 NBQB 33, 329 N.B.R. (2d) 151.

11 State Farm appealed this ruling to the Court of Appeal of New Brunswick, which ruled that since the Federal Court had exclusive jurisdiction over the statutory *vires* question regarding the Privacy's Commissioner's authority to act under PIPEDA, and concurrent jurisdiction to hear the constitutional validity issue, it was the proper forum for the resolution of the dispute raised by State Farm: *State Farm Mutual Automobile Insurance Company v. Canada (Privacy Commissioner)*, 2009 NBCA 5, 307 D.L.R. (4th) 495, 341 N.B.R. (2d) 1, [2009] N.B.J. No. 10 (QL).

12 Consequently, this judicial review proceeding was initiated by State Farm before the Federal Court on April 17, 2009, and a notice of constitutional question was submitted shortly thereafter.

The position of State Farm

13 State Farm first submits that this case can be decided without reference to constitutional considerations and on the simple basis of the interpretation of the language of PIPEDA.

14 Part 1 of PIPEDA applies to every organization in respect of personal information that the organization collects, uses or discloses in the course of "commercial activities". The expression "commercial activity" is defined in subsection 2(1) of PIPEDA as an act or transaction or course of action that is of a "commercial character." State Farm submits that a defendant in a civil action, and a defendant's agents, are not engaged in "commercial activity" *vis à vis* the plaintiff in that action in view of the ordinary meaning of those words. Here, Mr. Gaudet is attempting to use PIPEDA in order to obtain information beyond what he is entitled to under the rules of tort litigation in New Brunswick and without having any commercial relationship with Ms. Vetter or State Farm.

15 State Farm thus submits that the analysis carried out in *Ferenczy v. MCI Clinics* (2004), 70 O.R. (3d) 277, [2004] O.J. No 1775 (QL) ("*Ferenczy*") is correct. That case involved an insurer defending an insured and using video surveillance to do so. The issue was whether the video surveillance and the disclosure thereof to counsel were in violation of PIPEDA. *Ferenczy* held that the principle of agency applied in such circumstances; consequently it was the defendant in the civil case who was the person collecting the information, albeit through his insurer, and the information was thus not covered by PIPEDA in view of paragraph 4(2)(b) thereof which excludes information that an individual collects, uses or discloses for personal or domestic purposes.

16 State Farm submits that *Ferenczy* is good law, particularly on the ground that when a federal statute can be properly interpreted so as to not interfere with a provincial statute, such an interpretation is to be applied in preference to another construction that would bring about a conflict between the statutes.

17 In the event this interpretation of PIPEDA should not be accepted by this Court, State Farm submits, in the alternative, that those provisions of PIPEDA making that legislation applicable to organizations engaged in provincially regulated commercial activity are unconstitutional.

18 State Farm argues that the provisions of PIPEDA covering provincially regulated commercial activities conflict with the provincial powers over Property and Civil Rights and over the Administration of Justice contemplated in section 92 of the *Constitution Act, 1867*, and also conflict with section 96 of the *Constitution Act, 1867*.

19 Property and Civil Rights cover the vast bulk of commercial activities in a province. This includes jurisdiction and regulatory authority over insurers in the provinces and enables the provinces to legislate with respect to motor vehicle accidents and the law of torts in general.

Property and Civil Rights also allow a province to regulate privacy rights.

20 Section 92(14) of the *Constitution Act, 1867* specifically confers on the provincial legislatures the exclusive power to make laws in relation to the administration of justice, which includes procedure in civil matters before the provincial superior courts. The rules applicable in New Brunswick recognize litigation privileges and the right not to disclose the existence of surveillance evidence intended to be used solely on cross-examination. The application of PIPEDA proposed by the Privacy Commissioner would seriously encroach on these rules and hence on the provincial power over the administration of justice. The present case is an apt illustration of the mischief at hand: a federal agency is seeking to intervene, directly or through the Federal Court's supervisory authority, in a tort litigation evidentiary matter falling squarely within the provincial sphere of competence and that of section 96 courts.

21 All steps taken in the course of civil litigation, including the collection, disclosure or non-disclosure of evidence, have been within the jurisdiction of section 96 superior courts since before Confederation, as have the rules of solicitor-client privilege. State Farm contends that PIPEDA deprives section 96 courts of the right to control their own processes, and consequently infringes upon the core jurisdiction of section 96 courts.

22 State Farm adds that the provisions of PIPEDA covering provincially regulated commercial activity are not a valid exercise of the general branch of the federal Trade and Commerce power since they do not meet the *indicia* or factors for the valid exercise of that power as enumerated in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255.

23 In particular, to be valid under the federal Trade and Commerce power, the legislation must be concerned with trade as a whole rather than a particular industry; in this case, PIPEDA addresses a specific commodity, namely "information". Moreover, the legislation must be of such a nature that the provinces, together or independently, would be constitutionally incapable of enacting it; yet privacy and personal information have been regulated by the provinces under various provincial legislative frameworks. Finally, it must be shown that the failure to include one or more provinces in the legislative scheme would jeopardize the successful operation of the scheme in other parts of the country; however, the simple fact that national rules on a particular subject may seem convenient does not, by itself, make the subject one of national concern.

24 If the federal government is to use the Trade and Commerce power to displace provincial authority over commerce within the provinces, it should be required to show that there is a pressing and substantial concern calling for a federal regulatory scheme, that the scheme is rationally connected to that objective, that it impairs the provincial legislative authority no more than necessary, and that the impairment of provincial authority is not excessive or disproportionate having regard to the importance of the federal objective. PIPEDA's regulatory scheme addresses information beyond the electronic commerce setting in which its purposes are to be found. It is accordingly excessively broad and encroaches on the exclusive provincial domain of Property and

Civil Rights.

25 Consequently, State Farm submits that PIPEDA is to be read down so that its ambit is restricted to *intra vires* contexts, or alternatively, that paragraph 4(1)(a) of PIPEDA be struck down and declared of no force or effect so that PIPEDA will have no operational effect beyond the federal undertakings sector.

The position of the Privacy Commissioner

26 The Privacy Commissioner submits that the application brought by State Farm before this Court is premature. Under subsection 12(1) of PIPEDA, the Privacy Commissioner must conduct an investigation in respect of a complaint. Under subsection 13(1) of PIPEDA, the Privacy Commissioner must prepare a report of findings and recommendations with respect to a complaint. However, these recommendations are not binding. It is through an application to the Federal Court that recommendations may eventually become binding by way of a court order.

27 In this case, the Privacy Commissioner argues that the May 17, 2007 letter which gave rise to this judicial review application is interlocutory in nature. In view of the case law of this Court, the Privacy Commissioner argues that interlocutory decisions are subject to judicial review only where exceptional circumstances exist. There are no such exceptional circumstances in this case.

28 To date, the Privacy Commissioner has made no rulings, recommendations or decisions regarding the complaint of Mr. Gaudet against State Farm and regarding the issue whether State Farm is in compliance with PIPEDA, or not. The Privacy Commissioner submits that if she is given an opportunity to complete her investigation and issue a report, the questions raised in State Farm's judicial review application may very well become entirely moot.

29 Moreover, the Privacy Commissioner also submits that, in view of State Farm's pre-emptive refusal to provide any information to her and its decision to bring the matter first before the New Brunswick Courts and then the Federal Court, the present application is hypothetical in nature and there is no live controversy that allows this Court to adequately examine the constitutional argument.

30 In response to State Farm's substantive arguments, the Privacy Commissioner argues that the only questions at issue are whether she has jurisdiction to commence an investigation into the complaint of Mr. Gaudet against State Farm and to require the documents in question.

31 The questions of law to be determined in this judicial review proceeding are therefore whether the Privacy Commissioner correctly interpreted sections 4 and 12 of PIPEDA in commencing an investigation and in requesting lists of documents and certain information from State Farm. In making these determinations, the Privacy Commissioner was interpreting her home statute. In view of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*") and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, recent decisions of the

Supreme Court of Canada, the standard of review applicable to decisions of administrative tribunals interpreting their home statute is that of reasonableness.

32 Section 12 of PIPEDA is clear and unambiguous: the Privacy Commissioner is required to conduct an investigation whenever she is in receipt of a complaint. It is also clear that, pursuant to paragraph 12(1)(c) of PIPEDA, the Privacy Commissioner may seek evidence in order to carry out such an investigation. The Privacy Commissioner, through the letter of May 17, 2007, took jurisdiction to conduct an investigation as she was required to under section 12 of PIPEDA, but this did not constitute a decision as to whether the conduct complained of occurred in the course of "commercial activity." A decision on this issue would follow the investigation. It is submitted by the Privacy Commissioner that her interpretation and application of these provisions of PIPEDA were reasonable and should not be interfered with.

33 In any event, in the alternative, the Privacy Commissioner submits that the collection of the surveillance information in question in the complaint from Mr. Gaudet constituted "commercial activity". State Farm collected the information because of its insurance contract concluded with Ms. Vetter as part of its insurance business. The relationship between State Farm and Ms. Vetter is entirely commercial in nature and the surveillance of Mr. Gaudet pertained to this relationship: State Farm had an obvious interest in minimizing what amounts it must pay out under that insurance contract.

34 Finally, the Privacy Commissioner submits that this Court should not consider the constitutional issues raised by State Farm since there is no proper factual foundation on which the constitutional questions raised in this application can be determined.

35 The Privacy Commissioner also raises an objection as to certain portions of the affidavits submitted by State Farm in support of its application before this Court. This will be discussed further below.

The position of the Attorney General of Canada

36 For similar reasons to those of the Privacy Commissioner, the Attorney General of Canada submits that at the investigation stage of the process conducted by the Privacy Commissioner, judicial review is premature. Judicial review may indeed become unnecessary, depending on the Privacy Commissioner's ultimate recommendation. If State Farm is unsatisfied with the eventual recommendations of the Privacy Commissioner, it will then have the right to have those recommendations reviewed before this Court.

37 On the substantive issues, should this Court conclude that the investigation conducted by the Privacy Commissioner is reviewable, the Attorney General of Canada agrees with State Farm that the appropriate standard of review is that of correctness.

38 The Attorney General of Canada submits that the Privacy Commissioner correctly requested

the information in conducting her investigation pursuant to PIPEDA.

39 The Attorney General of Canada further submits, as to the constitutional validity of PIPEDA, that it has been duly enacted under the general branch of the Trade and Commerce power. PIPEDA is a regulatory scheme designed to protect personal information in the Canadian marketplace. PIPEDA protects the privacy of individuals by imposing restrictions on the flow of personal information in the Canadian economy, regardless of whether that information is itself collected, used or disclosed as a commodity or whether it is being collected, used or disclosed in some other commercial context.

40 Under PIPEDA, personal information is regulated only insofar as it relates to how the Canadian economy functions and operates. The legislation promotes consumer confidence by protecting personal information when it is collected, used or disclosed in the course of commercial activity in the Canadian market. The significant relationship between personal information use and economic activity has developed with advances in information and communication technologies and the extensive adoption of such technologies by businesses.

41 The protection of personal information is important to the well-being of all participants in the entire Canadian marketplace. Information has become the fundamental raw material of the modern economy. The private sector has become a significant collector and user of personal information in the marketplace, and information flows are an increasingly integral part of operations in all sectors in the economy. As a result, the use of personal information in commerce contributes to a nation's gross domestic product, national competitiveness and overall economic growth. Thus, ensuring the protection of personal information in the course of commercial activity is a matter that concerns the entire Canadian economy.

42 National regulation is necessary because the effectiveness of any provincial law protecting an individual's information is completely undermined once personal information flows out of the province. Given the great national and international mobility of personal information in today's economy, universal rules are not merely convenient, they are necessary. A national scheme is consequently necessary to ensure the integrity and effectiveness of the protection of personal information.

43 As for the arguments raised by State Farm concerning section 96 of the *Constitution Act, 1867*, the Attorney General of Canada submits that this section does not prevent Parliament from conferring on a federal tribunal or some other federal body certain functions normally exercised by a superior court.

44 Moreover, the Attorney General of Canada also submits that the authority of the Privacy Commissioner to investigate allegations of breaches of the Act did not exist at the time of Confederation and therefore it does not relate to a power exercised by a superior court at the time of Confederation. Further, the Office of the Privacy Commissioner under PIPEDA is not judicial in nature; hence, no violation of section 96 has occurred. The Privacy Commissioner's power to

compel the production of documents in the course of an investigation does not affect the jurisdiction of superior courts in any way.

45 The Attorney General of Canada has also offered abundant affidavit evidence concerning the context in which PIPEDA was adopted, and did not raise any argument based on an insufficiency of the evidentiary record in his written submissions. However, at the hearing of this Application, counsel for the Attorney General informed this Court that, a few days prior to the hearing, a new position was being put forward. Indeed, the Attorney General of Canada now also supports the Privacy Commissioner's argument that the evidentiary record is insufficient to allow this Court to properly adjudicate the constitutional questions raised by State Farm.

The issues

46 The issues in this case may be briefly stated as follows:

a. Is some of the evidence submitted inadmissible?
b. Is the application premature?
c. If the application is not premature, what is the applicable standard of review?
d. Is the collection of evidence by an insurer acting for one of its insured in the defence of a third party tort action "commercial activity" within the meaning of PIPEDA?
e. In the affirmative, is the application of PIPEDA to organizations that are not federal works, undertakings or businesses beyond the constitutional authority of Parliament?

Is some of the evidence submitted inadmissible?

47 In February of 2006, Anthony Fudge, a plaintiff in a personal action before the New Brunswick courts against another insured of State Farm, filed a complaint with the Privacy Commissioner alleging that State Farm had refused to give him access to personal information. State Farm also challenged in that case the jurisdiction of the Privacy Commissioner under PIPEDA. Nevertheless, the Privacy Commissioner completed an investigation into the complaint of Mr. Fudge, prepared a detailed and lengthy written report of findings, and concluded that the complaint was well-founded.

48 Similar complaints under PIPEDA were made against State Farm in May of 2006 in the case of Allan Mason and, in July of 2006, in the case of Douglas Nash; both also plaintiffs in personal injury actions in New Brunswick involving parties insured by State Farm. The Privacy Commissioner also completed investigations into these complaints, prepared detailed and lengthy written reports of findings, and concluded that both complaints were well-founded.

49 In July of 2009, with the consent of Fudge, Mason and Nash respectively, the Privacy Commissioner then initiated applications under paragraph 15(a) of PIPEDA before the Federal

Court under file numbers T-1187-09 (the "Fudge proceeding"), T-1188-09 (the "Mason proceeding") and T-1189-09 (the "Nash proceeding").

50 The Fudge, Mason and Nash proceedings were stayed pursuant to Rule 105(b) of the *Federal Courts Rules*, SOR/98-106 with the consent of the parties, pending the outcome of this proceeding concerning the complaint of Mr. Gaudet.

51 The Privacy Commissioner is seeking the exclusion of some of the affidavit evidence offered by State Farm. In the main, this challenge is directed at information and documents relating to the Nash, Fudge and Mason proceedings referred to above and which were offered by State Farm. The objection also concerns communications exchanged between State Farm and the lawyer representing Mr. Gaudet and a publicly available document published on the internet by the Privacy Commissioner and concerning covert video surveillance.

52 The specific affidavit evidence objected to are subparagraph 7(k) and paragraphs 8 through 14 and related exhibits of the affidavit of Rick Cicin sworn May 15, 2009 and paragraphs 10 through 22 and related exhibits of the affidavit of Rick Cicin sworn on October 21, 2009.

53 The main ground for the objection of the Privacy Commissioner is that this evidence, for the most part, post-dated the May 17, 2007 letter from the Office of the Privacy Commissioner and therefore should not be considered in this judicial review proceeding since it was not before her when the May 17, 2007 letter was drafted. As a corollary argument, the Privacy Commissioner adds that the information is irrelevant to the present proceeding.

54 It is trite law that a judicial review proceeding is conducted on the basis of the record which was before the decision maker whose decision is being reviewed. However, there are exceptions to this well-known principle, most notably when the affidavit and exhibits are produced as background information concerning the issues to be addressed in judicial review: *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273, [1999] F.C.J. No. 835, *Sha v. Canada (Minister of Citizenship and Immigration*), 2010 FC 434 at paras. 15 to 19, where the evidence concerns the jurisdiction of the decision maker or of the Federal Court itself to hear and determine the matter*: In Re McEwen*, [1941] S.C.R. 542 at 561-62*; Kenbrent Holdings Ltd. v. Atkey* (1995), 94 F.T.R. 103 at para. 7, or were the evidence pertains to violations of natural justice or procedural fairness by the decision maker: *Abbot Laboratories Ltd. v. Canada (Attorney General)*, 2008 FCA 354, [2009] 3 F.C.R. 547, [2008] F.C.J. No. 1580 at para. 38; *Liidlii Kue First Nation v. Canada (Attorney General)*, (2000) 187 F.T.R. 161, [2000] F.C.J. No. 1176 at paras. 31-32, or again were the evidence relates to a constitutional issue raised within the framework of the proceedings.

55 In this case, I conclude that the evidence offered by State Farm and which is challenged by the Privacy Commissioner is admissible, since this evidence concerns background information on the issues to be addressed in this judicial review proceeding and also concerns the jurisdiction of the Privacy Commissioner and of the Federal Court to hear and determine the matter.

56 I add that this evidence is relevant to the issues that are to be decided in this case. I note in particular that the information and documentation concerning the Fudge, Mason and Nash proceedings are highly relevant for the purposes of deciding in its proper context the issue of prematurity raised by the Respondents.

57 Consequently, I reject the objection of the Privacy Commissioner. The entire record, as constituted by the parties, is thus both admissible and relevant for the purposes of this proceeding.

Is the application premature?

58 The Privacy Commissioner, with the support of the Attorney General, submits that the application filed by State Farm is premature. The Privacy Commissioner argues that the letter of May 17, 2007, which gave rise to this application, is interlocutory in nature and that the case law provides that interlocutory decisions are not reviewable, save exceptional circumstances, and there are none in this case. She relies on *Canada (Attorney General) v. Brar*, 2007 FC 1268, 78 Admin. L.R. (4th) 163, [2007] F.C.J. No. 1629 (QL); *Fairmount Hotels Inc. v. Director Corporations Canada*, 2007 FC 95, 308 F.T.R. 163, [2007] F.C.J. No. 133; and *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68, [2008] F.C.J. No. 312 ("*Greater Moncton Airport*"), to support the proposition that "judicial review of interlocutory decisions should only be undertaken in the most exceptional circumstances" (*Greater Moncton Airport* at para. 1).

59 In my view, the objection based on prematurity is unfounded in the particular circumstances of this case. The full context in which this application was initiated sheds much light on this issue.

60 First, the complaint of Mr. Gaudet was submitted to the Privacy Commissioner on February 22, 2006. Though the Privacy Commissioner is correct in asserting that she had a legal duty to investigate this complaint pursuant to subsection 12(1) of PIPEDA, she fails to mention that, pursuant to subsections 13(1) and (3) of PIPEDA, she also had a legal duty to prepare a report "within one year after the day on which the complaint is filed" and send this report to both Mr. Gaudet and State Farm. This report triggers a right for the complainant, Mr. Gaudet, to apply to the Federal Court for a hearing pursuant to section 14 of PIPEDA.

61 The targeted organization (in this case State Farm) has no right to apply to the Federal Court for a hearing pursuant to section 14 of PIPEDA. Both subsection 14(1) and paragraph 15(a) of PIPEDA provide that such an application solely avails to the complainant. Thus, should a complainant decline to apply to the Federal Court for a hearing pursuant to section 14 or refuse to consent that the Privacy Commissioner apply for such a hearing, no hearing can be held before the Federal Court pursuant to these provisions. Consequently, State Farm can only be heard by the Federal Court pursuant to sections 14 or 15 of PIPEDA if the Privacy Commissioner's report is issued and if the complainant himself initiates, or consents to, such proceedings.

62 The statutory period in which the Commissioner was to prepare a report and send it to the

parties expired one year after the filing of the complaint from Mr. Gaudet. However, in this case, the Privacy Commissioner did not prepare a report within that period and has yet to do so. The net result of this situation is that Mr. Gaudet has not submitted, or consented to the submission of an application pursuant to sections 14 or 15 of PIPEDA.

63 Consequently, what is significant is that State Farm is unable to address the issues it raises here through sections 14 and 15 of PIPEDA without Mr. Gaudet initiating or authorizing an application under these provisions. If one were to follow the argument of the Respondents to its logical conclusion, the right of State Farm to have its issues addressed by this Court would be entirely contingent on Mr. Gaudet's decision to pursue the matter further. This cannot be.

64 Rather than issuing a report within one year as required by PIPEDA, the Privacy Commissioner, through her delegate, decided in the May 17, 2007 letter to assume jurisdiction over the complaint notwithstanding the strong objections of State Farm. The Privacy Commissioner made that decision after the one year period provided for by PIPEDA. Had the Privacy Commissioner issued a timely report as required by the Act based on the information then available to it, Mr. Gaudet might have filed an application before this Court under PIPEDA and the issues raised here may have possibly then been addressed through that judicial process. However this is speculation. The fact of the matter is that the Privacy Commissioner did not comply with her statutory duty to issue her report within one year, and instead of issuing a report, she decided on May 17, 2007 to assume jurisdiction over the matter.

65 The decisions in the May 17, 2007 letter were initially challenged by State Farm before the New Brunswick courts on jurisdictional and constitutional grounds similar to those raised in this application. Both the Privacy Commissioner and the Attorney General of Canada contested these New Brunswick proceedings on the ground that the issues raised should be addressed before the Federal Court pursuant to sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The Privacy Commissioner or the Attorney General of Canada did not argue before the New Brunswick courts that the issues should be decided first by the Privacy Commissioner and then submitted to the Federal Court though an application pursuant to sections 14 or 15 of PIPEDA. Indeed, they could not make such an argument since the only person who could actually initiate such an application, Mr. Gaudet, was not a party to the proceedings, and there was no way of knowing what Mr. Gaudet would decide if a report were issued.

66 The position of the Privacy Commissioner was clearly explained by her counsel during oral argument before Justice Clendening of the Court of Queen's Bench of New Brunswick (Exhibit 5 to the affidavit of Rick Cicin sworn October 21, 2009 at pages 32 -33 of the Supplementary Record of State Farm):

> For, on the record, I'm instructed to advise the court that the Privacy Commissioner will not oppose a request for an extension of time by, by State Farm if the court's decision is that portion of the application means that the, the

application must be pursued in Federal Court. And the court, the Federal Court Judge does have jurisdiction to extend the time. So the Privacy Commissioner will not be opposing any such application.

So, My Lady, 18(1) [of the *Federal Courts Act*] commits the Federal Court with exclusive original jurisdiction for declaratory relief, which my friend is seeking, for a matter on the, that regards the actions and conduct of a federal agency. And 18.1 [of the *Federal Courts Act*] then gives the procedure, which includes the grounds. And, again, going back to the Record, the grounds are clearly grounds raised by State Farm that fall within what the Federal Court is allowed to consider in making an order.

So to, to summarize, I think I've, I've gone into both of my first two points, My Lady, actually rather than keeping them separate. But to summarize with respect to those two points, the submission of the Privacy Commissioner is that the Record is clear, the very Record that has been put before the court by State Farm that they object to actions taken by a federal tribunal. They object to the federal tribunal or agency making a decision to investigate. They object to that federal agency asking them, or attempting to compel them, to produce information. And they do all of that otherwise the Privacy Commissioner would not be part of this, this application. And that being so then the cases are clear that the matter falls within the jurisdiction of the Federal Court.

What does that mean? What does that mean? What it means is that the Federal Court is the only one that can deal with those particular aspects of this application. And it also has jurisdiction to deal with constitutional issues, just as this court has jurisdiction to deal with constitutional issues. So it's not a case of the Privacy Commissioner putting State Farm out of court, it's simply saying in order to deal with this matter completely, in order to deal with those aspects that involve the conduct, declaratory relief, and, and orders against a federal agency, those matters must go before the Federal Court because otherwise we'll end up with two proceedings.

67 The Court of Queen's Bench of New Brunswick agreed with those arguments and referred the matter to the Federal Court in order to deal with the issues raised pursuant to its authority under section 18 of the *Federal Courts Act*. This decision was upheld by the New Brunswick Court of Appeal. Paragraphs 6 to 9 of Justice Clendening's decision read as follows (*State Farm v. Privacy Commissioner and A.G. of Canada*, 2008 NBQB 33, 329 N.B.R. (2d) 151):

> **6** The Applicant seeks a declaratory order that the Privacy Commissioner has no authority to investigate a complaint of an individual against State Farm. This individual, Gerald Gaudet, commenced an action against Jennifer Vetter, who is insured by State Farm. The insurer has been investigating this claim, and it appears that Gerald Gaudet is not happy about surveillance of his activities by State Farm. The Privacy Commissioner has decided to investigate and demands that State Farm send to them the material they have collected on surveillance for a review by the Privacy Commissioner. I will not comment on this aspect of the motion. State Farm has refused to comply, and it filed this Application with the Court of Queen's Bench of New Brunswick.
>
> **7** All parties agree that the Court of Queen's Bench of New Brunswick and the Federal Court have concurrent jurisdiction to rule on the applicability and constitutional validity of federal legislation. However, the Federal Court has exclusive jurisdiction to hear applications for judicial review of a Federal Board, Commission or other Tribunal. The jurisdiction is derived from the various subsections of section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.
>
> **8** It is my view that the Application before me involves both questions of constitutional validity of legislation and a judicial review of the authority of the Privacy Commissioner. It is that simple. Consequently, both the constitutional validity of the *Personal Information Protection and Electronic Documents Act*, R.S.C. 2000 c. 5 (PIPEDA) and the judicial review should be heard by the Federal Court. Otherwise the bifurcation of proceedings would not be in the best interests of the parties.
>
> **9** The Application before this Court shall be stayed because the Federal Court is the appropriate forum to determine whether the Applicant is entitled to the declarations requested.

68 Moreover, while these judicial proceedings in New Brunswick were taking place, the Privacy Commissioner and State Farm continued to be embroiled in disputes raising issues similar to those raised in the proceedings initiated following Mr. Gaudet's complaint. Indeed, the Fudge, Mason and Nash proceedings referred to above raise issues almost identical to those raised in this judicial review application.

69 In the Fudge, Mason and Nash proceedings, the Privacy Commissioner did prepare and send reports pursuant to section 12 of PIPEDA, even though such reports were issued well beyond the one year statutory period provided for under section 13 of PIPEDA. In each of these reports, the

Privacy Commissioner clearly took the position that she had jurisdiction over the complaints and that the expression "commercial activity" in PIPEDA was broad enough to encompass the investigation and defence by State Farm of claims made against those it insured, positions which are identical to those the Privacy Commissioner takes in the present case.

70 The Fudge, Mason and Nash proceedings did lead to applications before the Federal Court pursuant to sections 14 and 15 of PIPEDA. However these proceedings were stayed pending the final determination of this application for judicial review. The exchange of correspondence is illuminating as to the reason for such stays.

71 The correspondence dated August 18, 2009 from State Farm's attorney to the Office of the Privacy Commissioner sets out this proceeding concerning the complaint of Mr. Gaudet as a test case which will serve to also resolve the Fudge, Mason and Nash proceedings (Exhibit 17 of the affidavit of Rick Cicin sworn October 21, 2009, at page 137 of the Supplementary Record of State Farm):

> Upon reviewing the four Notices of Application, it is evident the three Applications filed on July 22, 2009 [the Fudge, Mason and Nash proceedings] raise substantially the same issues as those in the Application for Judicial Review filed by State Farm in T-604-09. In particular, the "commercial activity" issue is central to each of the cases. A determination of the issues in T-604-09, including the constitutional issues, will, in all likelihood, resolve the other three matters.
>
> We propose that the parties, on consent, bring a motion to the Court pursuant to Rule 105(b) of the *Federal Court* (sic) *Rules 1998* to stay files T-1187-09, T-1188-09 and T-1189-09 until there is a final determination of State Farm's Application for Judicial Review in T-604-09. Proceeding in this manner will avoid a multiplicity of proceedings and promote an expeditious and inexpensive determination of the issues in all four matters. It will also avoid the necessity of State Farm having to raise the constitutional issues already raised in T-604-09 [and] will avoid having to involve the Attorney General in the three matters.

72 The answer from the Privacy Commissioner was provided in an email dated August 24, 2009 whereby she not only consented to the stays, but also instituted a procedure so that all other similar complaints concerning State Farm would be left in abeyance pending the outcome of this judicial review application involving the complaint of Mr. Gaudet. The pertinent paragraph of this email concerning the Fudge, Mason and Nash proceedings reads as follows (Exhibit 18 of the affidavit of Rick Cicin sworn October 21, 2009, at page 139 of the Supplementary Record of State Farm):

> The parties will consent to a Court Order staying the three judicial review applications recently commenced in Ottawa against State Farm (*Nash* (T-1189-09), *Mason* (T-1188-09), *Fudge* (T-1187-09)). The stay of proceedings

> will expire 30 days following the final resolution of Court file No. T-604-09 between the parties, at which time State Farm will then have a further 30 days to file its supporting affidavit(s), if any. [...]

73 In light of the context set out above, and for the reasons below, I do not accept the prematurity arguments raised by the Respondents.

74 First, the argument that the Privacy Commissioner should be given an opportunity to prepare and develop a position on the scope of the expression "commercial activity" found in PIPEDA is without merit. The Privacy Commissioner has clearly expressed her position on this matter in this judicial proceeding, and that position is identical in every respect with the one she put forward in the reports issued in the Fudge, Mason and Nash proceedings. There is no expectation whatsoever that the Privacy Commissioner would issue a report in the Gaudet complaint which would offer an interpretation of "commercial activity" other than the one already extensively and thoroughly articulated in these proceedings. To dismiss this application on this ground would result in a complete waste of time, energy and money for all parties.

75 Second, within the context of the litigation in the New Brunswick courts, the Respondents clearly confirmed that the issues raised by State Farm were to be resolved before this Court by way of a judicial review proceeding initiated pursuant to sections 18 and 18.1 of the *Federal Courts Act* rather than pursuant to an application initiated under sections 14 or 15 of PIPEDA.

76 Third, even if this judicial review were dismissed on the ground of prematurity in order to allow the Privacy Commissioner to issue a report on the complaint of Mr. Gaudet, there is no guarantee that Mr. Gaudet would himself initiate or consent to the filing of an application before this Court pursuant to sections 14 or 15 of PIPEDA; that would potentially leave State Farm without an effective judicial forum in which to adjudicate its claims.

77 Fourth, the Privacy Commissioner has had many years to issue a report concerning the Gaudet complaint and chose not to do so. She cannot now use her inaction in order to hinder State Farm's right of access to the courts. The Privacy Commissioner's assertion that no report has been issued because State Farm has not collaborated in the investigation is simply not credible in light of the reports issued in the Fudge, Mason and Nash proceedings based on a similar record as that available to her in the Gaudet complaint.

78 Fifth, it appears clearly from the record that the Privacy Commissioner and State Farm have used this judicial review proceeding as a test case to resolve a series of outstanding litigations and complaints, and it would consequently not be in the interest of justice nor a proper use of limited judicial resources for this Court to decline to decide the merits of this application.

79 Finally, the principle of judicial non-interference with ongoing administrative processes has simply no application in this case since State Farm has no right to access this Court through an application pursuant to sections 14 and 15 of PIPEDA. Only complainants may initiate applications

under these provisions. State Farm's access to this Court in order to have its jurisdictional and constitutional submissions adjudicated cannot be contingent on the consent of the complainant Mr. Gaudet. Consequently, State Farm can access this Court through a judicial review application under sections 18 and 18.1 of the *Federal Courts Act* in order to challenge the May 17, 2007 decisions of the Privacy Commissioner to assume jurisdiction under PIPEDA and to carry out an investigation pursuant to section 12 thereof.

80 In this context, the principle set out in *Canada (Attorney General) v. Brar*, *supra*, *Fairmont Hotels Inc. v. Director Corporations Canada*, *supra* and *Greater Moncton Airport* does not apply. I add that the principle of judicial non-interference with ongoing administrative processes has been recently reiterated by the Federal Court of Appeal in *C.B. Powell Ltd. v. Canada (Border Services Agency)*, 2010 FCA 61, 400 N.R. 367, [2010] F.C.J. No. 274. This principle is sound. However it is simply not at issue in this case.

The standard of review

81 *Dunsmuir* at para. 62 sets out a two-step process for determining the standard of review: "[f]irst, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review".

82 The main issues in this case are the interpretation of the expression "commercial activity" found in PIPEDA and the constitutional authority of Parliament to make the provisions of PIPEDA applicable beyond the operations of federal works, undertakings or businesses.

83 As noted by the Supreme Court of Canada in *Dunsmuir* at paragraph 58, the correctness standard of review will apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867* as well as regarding other constitutional questions. Moreover administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. True jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter (*Dunsmuir*, at paragraph 59).

84 In addition, the Federal Court of Appeal and the Federal Court have consistently held that the standard of review of correctness applies in proceedings initiated pursuant to sections 14 and 15 of PIPEDA, including over matters concerning the interpretation of that legislation: *Englander v. Telus Communications Inc.*, 2004 FCA 387, [2005] 2 F.C.R. 572, 247 D.L.R. (4th) 275; [2004] F.C.J. No. 1935 (QL) at para. 48 (*Englander*); *Rousseau v. Canada (Privacy Commissioner)*, 2008 FCA 39, 373 N.R. 301, [2008] F.C.J. No. 151 (QL) at para. 25 (*Rousseau*); *Blood Tribe Department of Health v. Canada (Privacy Commissioner*, 2006 FCA 334, [2007] 2 F.C.R. 561, 274 D.L.R. (4th) 665, [2006] F.C.J. No. 1544 at para. 11; *Johnson v. Bell Canada*, 2008 FC 1086, [2009] 3 F.C.R. 67, 299 D.L.R. (4th) 296, 334 F.T.R. 44, [2008] F.C.J. No. 1368 (QL)at para. 20; *Lawson v.*

Accusearch Inc., 2007 FC 125, [2007] 4 F.C.R. 314, 280 D.L.R. (4th) 358, 308 F.T.R. 186, [2007] F.C.J. No. 164 (QL) at para 21; *Morgan v. Alta Flights (Charter) Inc.*, 2005 FC 421, 271 F.T.R. 298, [2005] F.C.J. No. 523 (QL) at paras. 16-17. There is no cogent reason why this should not also be the appropriate standard with respect to proceedings commenced pursuant to sections 18 and 18.1 of the *Federal Courts Act* raising questions related to the interpretation and application of PIPEDA.

85 Taking into account this jurisprudence, State Farm and the Attorney General of Canada both agree that the standard of correctness is appropriate in this case.

86 However, the Privacy Commissioner disagrees in respect to the interpretation of PIPEDA, arguing that her interpretation of that statute, and particularly of the expression "commercial activity" found therein, should be given deference and should consequently only be reviewed by this Court according to a standard of reasonableness, in view of *Dunsmuir*, at para. 54, which held that deference will usually be called for where a tribunal is interpreting its own statute or statutes closely connected to its function. The question raised by the Privacy Commissioner is therefore whether *Dunsmuir* has modified the standard for reviewing decisions of the Privacy Commissioner involving the interpretation of PIPEDA from that of correctness to that of reasonableness.

87 For the reasons which follow, I conclude that the applicable standard of review is that of correctness.

88 First, PIPEDA contains no privative clause concerning the Privacy Commissioner.

89 Second, the role of the Privacy Commissioner under PIPEDA is incompatible with a standard of deference. Indeed, in the exercise of her mandate under PIPEDA, the Privacy Commissioner may become adverse in interest to the party whose documents she wants to have access to: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574 at para. 23 (*Blood Tribe*). The Privacy Commissioner is clearly not acting in an adjudicative capacity under PIPEDA, and may appear as a party to a hearing before the Federal Court under that statute; this has important consequences on the standard of review. As noted by Justice Décary in *Englander* at para. 48, "[t]o show deference to the Commissioner's report would give a head start to the Commissioner when acting as a party and thus could compromise the fairness of the hearing."

90 Third, the nature of the question at issue, though involving the interpretation of certain provisions of PIPEDA, is fundamentally jurisdictional. In this case, a true question of jurisdiction has been raised by State Farm. Indeed, in the May 17, 2007 letter itself, the decisions made by the Privacy Commissioner are set out in jurisdictional terms.

91 Finally, the Privacy Commissioner has no special expertise in the interpretation of the provisions of PIPEDA since that statute itself entrusts the Federal Court with the authority and mandate to do so, notably through its sections 14 and 15.

92 Consequently, the issues raised by these proceedings will be reviewed under a standard of correctness.

The relevant legislation

93 The pertinent provisions of PIPEDA are included in its Part I entitled "Protection of personal information in the private sector" and in its Schedule 1. The relevant provisions are reproduced in a schedule to this judgment. For ease of reference, the provisions of this legislation which are of particular interest are also reproduced below:

> **2.** (1) The definitions in this subsection apply in this Part.
>
> "commercial activity" means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.
>
> **4.** (1) This Part applies to every organization in respect of personal information that
>
> (*a*) the organization collects, uses or discloses in the course of commercial activities;
>
> (2) This Part does not apply to
>
> [...]
>
> (b) any individual in respect of personal information that the individual collects, uses or discloses for personal or domestic purposes and does not collect, use or disclose for any other purpose;
>
> **5.** (1) Subject to sections 6 to 9, every organization shall comply with the obligations set out in Schedule 1.
>
> [...]

(3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

7. (1) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may collect personal information without the knowledge or consent of the individual only if

(*a*) the collection is clearly in the interests of the individual and consent cannot be obtained in a timely way;

(*b*) it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province;

(*c*) the collection is solely for journalistic, artistic or literary purposes;

(*d*) the information is publicly available and is specified by the regulations; or

(*e*) the collection is made for the purpose of making a disclosure

(i) under subparagraph (3)(*c.1*)(i) or (*d*)(ii), or
(ii) that is required by law.

26. (2) The Governor in Council may, by order,

[...]

(*b*) if satisfied that legislation of a province that is substantially similar to this Part applies to an organization, a class of organizations, an activity or a class of activities, exempt the organization, activity or class from the application of this Part in respect of the collection, use or disclosure of personal information that occurs within that province.

30. (1) This Part does not apply to any organization in respect of personal information that it collects, uses or discloses within a province whose legislature has the power to regulate the collection, use or disclosure of the information, unless the organization does it in connection with the operation of a federal work, undertaking or business or the organization discloses the information outside the province for consideration.

(2) Subsection (1) ceases to have effect three years after the day on which this section comes into force.

SCHEDULE 1

(Section 5)

4.3 Principle 3 -- Consent

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

4.5 Principle 5 -- Limiting Use, Disclosure, and Retention

Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfillment of those purposes.

4.9 Principle 9 -- Individual Access

Upon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

* * *

2. (1) Les définitions qui suivent s'appliquent la présente partie.

"activité commerciale" Toute activité régulière ainsi que tout acte isolé qui revêtent un caractère commercial de par leur nature, y compris la vente, le troc ou la location de listes de donneurs, d'adhésion ou de collecte de fonds.

4. (1) La présente partie s'applique à toute organisation à l'égard des renseignements personnels :

a) soit qu'elle recueille, utilise ou communique dans le cadre d'activités commerciales;

(2) La présente partie ne s'applique pas :

[...]

b) à un individu à l'égard des renseignements personnels qu'il recueille, utilise ou communique à des fins personnelles ou domestiques et à aucune autre fin;

5. (1) Sous réserve des articles 6 à 9, toute organisation doit se conformer aux obligations énoncées dans l'annexe 1.

[...]

(3) L'organisation ne peut recueillir, utiliser ou communiquer des renseignements personnels qu'à des fins qu'une personne raisonnable estimerait acceptables dans les circonstances.

7. (1) Pour l'application de l'article 4.3 de l'annexe 1 et malgré la note afférente, l'organisation ne peut recueillir de renseignement personnel à l'insu de l'intéressé et sans son consentement que dans les cas suivants :

a) la collecte du renseignement est manifestement dans l'intérêt de l'intéressé et le consentement ne peut être obtenu auprès de celui-ci en

temps opportun;

b) il est raisonnable de s'attendre à ce que la collecte effectuée au su ou avec le consentement de l'intéressé puisse compromettre l'exactitude du renseignement ou l'accès à celui-ci, et la collecte est raisonnable à des fins liées à une enquête sur la violation d'un accord ou la contravention du droit fédéral ou provincial;

c) la collecte est faite uniquement à des fins journalistiques, artistiques ou littéraires;

d) il s'agit d'un renseignement réglementaire auquel le public a accès;

e) la collecte est faite en vue :

(i) soit de la communication prévue aux sous-alinéas (3)*c.1*)(i) ou *d*)(ii),
(ii) soit d'une communication exigée par la loi.

26. (2) Il peut par décret :

[...]

b) s'il est convaincu qu'une loi provinciale essentiellement similaire à la présente partie s'applique à une organisation -- ou catégorie d'organisations -- ou à une activité -- ou catégorie d'activités --, exclure l'organisation, l'activité ou la catégorie de l'application de la présente partie à l'égard de la collecte, de l'utilisation ou de la communication de renseignements personnels qui s'effectue à l'intérieur de la province en cause.

30. (1) La présente partie ne s'applique pas à une organisation à l'égard des renseignements personnels qu'elle recueille, utilise ou communique dans une province dont la législature a le pouvoir de régir la collecte, l'utilisation ou la communication de tels renseignements, sauf si elle le fait dans le cadre d'une entreprise fédérale ou qu'elle communique ces renseignements pour contrepartie à l'extérieur de cette province.

(2) Le paragraphe (1) cesse d'avoir effet trois ans après l'entrée en vigueur du présent article.

ANNEXE 1

(article 5)

4.3 Troisième principe -- Consentement

Toute personne doit être informée de toute collecte, utilisation ou communication de renseignements personnels qui la concernent et y consentir, à moins qu'il ne soit pas approprié de le faire.

4.5 Cinquième principe -- Limitation de l'utilisation, de la communication et de la conservation

Les renseignements personnels ne doivent pas être utilisés ou communiqués à des fins autres que celles auxquelles ils ont été recueillis à moins que la personne concernée n'y consente ou que la loi ne l'exige. On ne doit conserver les renseignements personnels qu'aussi longtemps que nécessaire pour la réalisation des fins déterminées

4.9 Neuvième principe -- Accès aux renseignements personnels

Une organisation doit informer toute personne qui en fait la demande de l'existence de renseignements personnels qui la concernent, de l'usage qui en est fait et du fait qu'ils ont été communiqués à des tiers, et lui permettre de les consulter. Il sera aussi possible de contester l'exactitude et l'intégralité des renseignements et d'y faire apporter les corrections appropriées.

94 The New Brunswick *Insurance Act*, R.S.N.B., c. I-12, at paragraphs 237(b) and 244(1)(c) and at subsection 244(2), provides that insurers must defend their insured against third party claims:

237 Every contract evidenced by a motor vehicle liability policy shall provide that, where a person insured by the contract is involved in an accident resulting from the ownership, use or operation of an automobile in respect of which insurance is provided under the contract and resulting in loss or damage to persons or property, the insurer shall,

[...]

> *(b)* defend in the name and on behalf of the insured and at the cost of the insurer any civil action that is at any time brought against the insured on account of loss or damage to persons or property;

244 (1) Every motor vehicle liability policy issued in New Brunswick shall provide that, in the case of liability arising out of the ownership, use or operation of the automobile in any province or territory of Canada,

[...]

> *(c)* the insured, by acceptance of the policy, constitutes and appoints the insurer his irrevocable attorney to appear and defend in any province or territory of Canada in which an action is brought against the insured arising out of the ownership, use or operation of the automobile.

244 (2) A provision in a motor vehicle liability policy in accordance with paragraph (1)(c) is binding on the insured.

* * *

237 Tout contrat constaté par une police de responsabilité automobile doit stipuler que, lorsqu'une personne assurée par le contrat est impliquée dans un accident découlant de la propriété, de l'usage ou de la conduite d'une automobile couverte par le contrat et causant des pertes ou des dommages à des personnes ou à des biens, l'assureur doit,

[...]

> *b)* se charger à ses frais de la défense, aux nom et place de l'assuré, dans toute action civile intentée en tout temps contre l'assuré et fondée sur des pertes ou des dommages causés à des personnes ou à des biens;

244 (1) Toute police de responsabilité automobile émise au Nouveau-Brunswick

> doit stipuler qu'en cas de responsabilité découlant de la propriété, de l'usage ou de la conduite de l'automobile dans l'une des provinces ou des territoires du Canada,
>
> [...]
>
> *c)* l'assuré, en acceptant la police, constitue et nomme irrévocablement l'assureur son fondé de pouvoir aux fins de comparution et de défense dans toute province ou tout territoire où une action relative à la propriété, l'usage ou la conduite de l'automobile est intentée contre l'assuré.
>
> **244** (2) Une disposition conforme à l'alinéa (1)c) dans une police de responsabilité automobile lie l'assuré.

95 Moreover, section 43.1 of the New Brunswick *Evidence Act*, R.S.N.B., c. E-11 sets out the following litigation privilege, which has been held by the New Brunswick Court of Appeal to extend to surveillance videotapes in *Main v. Goodine*, (1997) 192 N.B.R. (2d) 230, 1997 N.B.J. No 370 (QL):

> **43.1** An investigative report that is prepared for the dominant purpose of being submitted to a solicitor for advice with respect to, or use in, contemplated or pending litigation, or any part of an investigative report in which an opinion is expressed, regardless of the purpose for which that report was prepared, is privileged from disclosure and production in civil proceedings.
>
> * * *
>
> **43.1** Un rapport d'enquête préparé dans le but principal d'être soumis à un avocat pour conseil relativement à, ou pour usage dans un litige envisagé ou en instance, ou toute partie d'un rapport d'enquête dans lequel une opinion est exprimée indépendamment du but pour lequel le rapport a été préparé, est protégé contre la divulgation et la production dans les procédures civiles.

96 Finally, Rule 31.09 of the *New Brunswick Rules of Court*, N.B. Reg. 82-73 exceptionally allows the use of a document for which privilege has been claimed in order to contradict a witness:

> **31.09 Effect of Failure to Abandon Claim of Privilege**
>
> Where a party

(a) has claimed privilege with respect to a document,
(b) has not abandoned that claim on or before the Motions Day on which the proceeding is set down for trial, by

(i) giving to all parties notice in writing of the abandonment, and
(ii) serving a copy of the document on each party or by producing it for inspection, without request,

he may not use the document at trial except to contradict a witness or by leave of the court.

* * *

31.09 Effets du défaut de renoncer à la revendication de privilège

Toute partie

a) qui a revendiqué un privilège sur un document,
b) qui n'y a pas renoncé avant ou lors de la séance des motions au cours de laquelle l'instance est mise au rôle,

(i) en donnant, à toutes les parties, un avis par écrit de la renonciation et
(ii) en signifiant une copie de ce document à chacune des parties ou en le produisant pour examen, sans en être priée,

ne peut utiliser ce document au procès que pour mettre en doute la déposition d'un témoin ou qu'avec la permission de la cour.

Is the collection of evidence by an insurer acting for one of its insured in the defence of a third party tort action "commercial activity" within the meaning of PIPEDA?

97 This Court must decide whether the collection of evidence by an insurer acting for one of its insured in the defence of a third party tort action is "commercial activity" within the meaning of PIPEDA.

98 The collection of evidence on a plaintiff by an individual who is a defendant in a tort action

brought by that plaintiff would clearly not constitute a "particular transaction, act or conduct that is of a commercial character" as set out in the definition of "commercial activity" found in subsection 2(1) of PIPEDA. Indeed, the fact that an individual defendant collects evidence himself or herself for the purpose of a defence to a civil tort action is clearly not a commercial activity on the part of that defendant since there is no "commercial character" associated to that activity.

99 The Privacy Commissioner, however, submits that since Ms. Vetter has paid an insurer to defend her against such a claim, such collection of evidence has now assumed a "commercial character" and is thus now prohibited under subsection 7(1) of PIPEDA unless the plaintiff, here Mr. Gaudet, consents thereto. The Privacy Commissioner's logic would also extend to the law firm retained to defend Ms. Vetter in this action since that law firm would also be involved in a "particular transaction, act or conduct that is of a commercial character" by being paid to assist Ms. Vetter in gathering evidence about the plaintiff on her behalf. This logic would also extend to a private investigator whom Ms. Vetter could possibly hire to assist her in collecting evidence in the defence of the claim made against her by Mr. Gaudet.

100 In short, the logic of the Privacy Commissioner is such that all collection of evidence about a plaintiff by third parties retained by a defendant in response to a tort action would now be prohibited by PIPEDA unless the plaintiff were to consent to such collection of evidence. Presumably this would also extend to all collection of evidence about a defendant by third parties retained by a plaintiff to assist in prosecuting a tort action. I cannot accept that such was the intention of Parliament in adopting PIPEDA.

101 The history and purpose of PIPEDA have been extensively canvassed in *Englander* and need not be repeated here. Suffice it to note that PIPEDA is a compromise between competing interests, and its provisions must be interpreted and applied with flexibility, common sense and pragmatism. As noted by Justice Décary in *Englander* at paragraph 46:

> All of this to say that, even though Part 1 and Schedule 1 of the Act purport to protect the right of privacy, they also purport to facilitate the collection, use and disclosure of personal information by the private sector. In interpreting this legislation, the Court must strike a balance between two competing interests. Furthermore, because of its non-legal drafting, Schedule 1 does not lend itself to typical rigorous construction. In these circumstances, flexibility, common sense and pragmatism will best guide the Court.

102 Reasonableness is moreover the overriding standard set out in PIPEDA itself in its section 3 which reads as follows [emphasis added]:

> **3.** The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal

information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

* * *

3. La présente partie a pour objet de fixer, dans une ère où la technologie facilite de plus en plus la circulation et l'échange de renseignements, des règles régissant la collecte, l'utilisation et la communication de renseignements personnels d'une manière qui tient compte du droit des individus à la vie privée à l'égard des renseignements personnels qui les concernent et du besoin des organisations de recueillir, d'utiliser ou de communiquer des renseignements personnels à des fins qu'une personne raisonnable estimerait acceptables dans les circonstances.

103 The Attorney General of Canada, in paragraph 32 his Memorandum of Fact and Law in these proceedings, submits that the purposes of PIPEDA are related to electronic commerce:

> In the PIPEDA, personal information is regulated only insofar as it relates to how the Canadian economy functions and operates. The scheme promotes consumer confidence by protecting personal information when it is collected, used or disclosed in the course of commercial activity in the Canadian market. The significant relationship between personal information use and economic activity has developed with advances in information and communication technologies and the extensive adoption of such technologies by businesses. In the Preamble to the *APEC Privacy Framework* (16th APEC Ministerial Meeting, Santiago, Chile, November 17-18, 2004 it is pointed out that:
>
> > "Information and communications technologies, including mobile technologies, that link to the internet and other information networks have made it possible to collect, store and access information from anywhere in the world. These technologies offer great potential for social and economic benefits for business, individuals and governments, including increased consumer choice, market expansion, productivity, education and product innovation. However, while these technologies make it easier and cheaper to collect, link and use large quantities of information, they also often make these activities undetectable to individuals. Consequently, it can be more difficult for individuals to retain a measure of control over their personal information. As a result, individuals have become concerned about the harmful consequences that may arise from the misuse of their information. Therefore, there is a need to promote and enforce ethical and trustworthy information practices in on- and off-line contexts to bolster the

confidence of individuals and businesses."

104 These purposes are reflected in the long title of PIPEDA [emphasis added]:

> An Act to support and promote electronic commerce by protecting personal information that is collected, used or disclosed in certain circumstances, by providing for the use of electronic means to communicate or record information or transactions and by amending the Canada Evidence Act, the Statutory Instruments Act and the Statute Revision Act.

105 The collection of information in order to properly defend a civil tort action has little or nothing to do with these purposes.

106 I conclude that, on a proper construction of PIPEDA, if the primary activity or conduct at hand, in this case the collection of evidence on a plaintiff by an individual defendant in order to mount a defence to a civil tort action, is not a commercial activity contemplated by PIPEDA, then that activity or conduct remains exempt from PIPEDA even if third parties are retained by an individual to carry out that activity or conduct on his or her behalf. The primary characterization of the activity or conduct in issue is thus the dominant factor in assessing the commercial character of that activity or conduct under PIPEDA, not the incidental relationship between the one who seeks to carry out the activity or conduct and third parties. In this case, the insurer-insured and attorney-client relationships are simply incidental to the primary non-commercial activity or conduct at issue, namely the collection of evidence by the defendant Ms. Vetter in order to defend herself in the civil tort action brought against her by Mr. Gaudet.

107 I therefore rule that the investigation reports and related documents and videos concerning Mr. Gaudet and prepared by or for State Farm or its lawyers to defend Ms. Vetter in the civil tort action taken against her by Mr. Gaudet are not subject to PIPEDA.

108 I am comforted in this interpretation of PIPEDA by paragraph 26(2)(b) of that statute which allows the Governor in Council to exempt an organization, activity or a class thereof from the application of Part 1 of PIPEDA "if satisfied that legislation of a province that is substantially similar to this Part applies" to that organization or activity. Pursuant to this provision, the Governor in Council has exempted from the application of PIPEDA almost all organizations in British Columbia, Alberta and Quebec which are not a federal work, undertaking or business: *Organizations in the Province of Alberta Exemption Order*, SOR/2004-219, *Organizations in the Province of British Columbia Exemption Order*, SOR/2004-220 and *Organizations in the Province of Quebec Exemption Order*, SOR/2003-374.

109 Paragraphs 14(d), 17(d) and 20(m) of the Alberta *Personal Information Protection Act*, S. A. 2003 c. P-6.5 specifically provide that an organization may collect, use and disclose personal information about an individual without that individual's consent if the collection, use or disclosure of the information is reasonable for the purposes of an investigation or legal proceeding.

110 Paragraphs 12(1(k) and (l), 15(1)(h.1) and 18(4)(a) of the British Columbia *Personal Information Protection Act*, S.B.C. 2003, c. 63 contain similar provisions.

111 Moreover, although the Quebec *Act respecting the protection of personal information in the private sector*, R.S.Q., chapter P-39.1 does not contain similar specific provisions, it has been interpreted in such a manner as to have the same effect: *Duchesne c. Great-West compagnie d'assurance-vie*, J.E. 95-263, AZ-95021090 (Que. S.C.). The provisions of that legislation must also be read in conjunction with the provisions of articles 35 to 41 of the *Civil Code of Quebec*, S.Q., 1991, c. 64, and of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 concerning privacy and which have been interpreted by the courts in Quebec as allowing evidence gathering through videotapes, or otherwise, for the purposes of a defense to a civil action, insofar as the evidence gathering is rationally connected to the claim and is reasonable: *Syndicat des travailleuses et travailleurs de Bridgestone/Firestone de Joliette (CSN) c. Trudeau*, [1999] R.J.Q. 2229 (C.A.) at paras. 74 to 79; *Servant c. Excellence (L'), compagnie d'assurance-vie*, 2008 QCCA 2180 at para. 1; *Lefort c. Desjardins Sécurité financière*, 2007 QCCQ 10192, [2007] R.R.A. 1213, at paras. 171 to 206; *Bolduc c. S.S.Q Société d'assurance-vie inc.*, J.E. 2000-337, [2000] R.R.A. 207, at paras. 408 to 422.

112 I find it significant that the Governor in Council has found these statutes to be "substantially similar" to PIPEDA. Since the collection, use or disclosure of personal information for the purposes of a legal proceeding can be carried out under these acts without the consent of the concerned individuals, and since these statutes have been found by the Governor in Council to be substantially similar to PIPEDA, it is not an unreasonable inference to conclude that the Governor in Council does not deem these activities to be prohibited under PIPEDA. Though Parliament's intentions under PIPEDA are not necessarily to be surmised from the Governor in Council's interpretation of this act, the fact remains that Parliament entrusted the Governor in Council with the authority to exempt the application of PIPEDA on finding provincial legislation to be "substantially similar" to its provisions. These findings of the Governor in Council are therefore entitled to some weight in the context of PIPEDA.

113 This is not, however, the end of the matter. Although I have ruled that the investigation reports and related documents and videos concerning Mr. Gaudet are not subject to PIPEDA, this does not necessarily mean that the Privacy Commissioner is without authority to investigate under PIPEDA following the complaint of Mr. Gaudet. Indeed, though the reports and related documents and videos are not subject to PIPEDA, there must nevertheless still be mechanisms in place to test the *bona fides* of the exemption or non-application claim.

114 Indeed, under subsection 12(1) of PIPEDA, the Privacy Commissioner must conduct an investigation in respect of a complaint made under that act. However, where such as here, the organization being investigated raises solicitor-client privilege or litigation privilege, the Privacy Commissioner's investigative authority is limited.

115 In *Blood Tribe* at paragraph 2, the Supreme Court of Canada held that the Privacy Commissioner had no right under PIPEDA to access solicitor-client documents, even for the limited purpose of determining whether privilege is properly claimed. In *Privacy Commissioner of Canada v. Air Canada*, 2010 FC 429, [2010] F.C.J. No. 504, the Federal Court further held that the Privacy Commissioner had no authority under PIPEDA to require an organisation to justify its assertion of privilege. I note that the principles applicable to the solicitor-client privilege raised pursuant to a complaint under PIPEDA also extend to a litigation privilege which is raised within the context of such a complaint: *Rousseau v. Wyndowe*, 2006 FC 1312, 302 F.T.R. 134, [2006] F.C.J. No. 1631 at para. 34; *Privacy Commissioner of Canada v. Air Canada*, *supra* at paras. 32-35.

116 If the Privacy Commissioner has serious doubts concerning a claim of litigation privilege or solicitor-client privilege, she has two options under *Blood Tribe* (at paragraphs 32 to 34): she can either refer the question to the Federal Court under subsection 18.3(1) of the *Federal Courts Act* or issue a report under section 13 of PIPEDA and, with the agreement of the complainant, bring an application to the Federal Court for relief under section 15 of that statute.

117 Where litigation privilege or solicitor-client privilege is being raised in relation to pending litigation before a provincial superior court, the role of the Federal Court in such circumstances is not to substitute itself for the provincial superior court in determining the admissibility of evidence in the pending litigation, but rather to ascertain the *bona fides* of the privilege claim for the purposes of PIPEDA and, where appropriate, to stay the proceedings before it pursuant to section 50 of the *Federal Courts Act*. This ensures that judicial comity is maintained between federal and provincial superior courts while also ensuring that proper judicial mechanisms are available at the Federal Court in order to avoid that the provisions of PIPEDA be circumvented through spurious privilege claims.

118 Applying these principles to this case, in light of the privilege claimed by State Farm, I conclude that the Privacy Commissioner had no authority to issue the May 17, 2007 letter under which she purported to assume jurisdiction over the matter, nor did she have the authority to request justifications from State Farm in regard to its privilege claims.

119 In light of my conclusions above, it will not be necessary to address the constitutional questions raised by State Farm. It is indeed a well-established principle that a court is not bound to answer a constitutional question when it may dispose of the case before it without doing so: *Skoke-Graham v. The Queen*, [1985] 1 S.C.R. 106 at pages 121-22; *R. v. Nystrom*, 2005 CMAC 7 at para. 7.

Costs

120 Costs shall be awarded to State Farm against both the Privacy Commissioner and the Attorney General of Canada for two counsels, at the high end of column IV of Tariff B.

JUDGMENT

THIS COURT DECIDES AS FOLLOWS:

1. The application for judicial review is granted.
2. The May 17, 2007 decision made by Privacy Investigator Arn Snyder is declared invalid, quashed and set aside.
3. The following declaration is issued: the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 does not apply to document disclosure or privilege within the framework of the defence by State Farm Mutual Automobile Insurance Company for Jennifer Vetter of the personal injury tort action claim instituted against her before the New Brunswick Court of Queen's Bench.
4. Costs are awarded to State Farm Mutual Automobile Insurance Company against both the Privacy Commissioner of Canada and the Attorney General of Canada for two counsels at the high end of column IV of Tariff B.

MAINVILLE J.

* * * * *

SCHEDULE

PERTINENT PROVISIONS OF PIPEDA

2. (1) The definitions in this subsection apply in this Part.

"commercial activity" means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

"Commissioner" means the Privacy Commissioner appointed under section 53 of the Privacy Act.

"Court" means the Federal Court.

"personal information" means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization.

(2) In this Part, a reference to clause 4.3 or 4.9 of Schedule 1 does not include a reference to the note that accompanies that clause.

3. The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

4. (1) This Part applies to every organization in respect of personal information that

(*a*) the organization collects, uses or discloses in the course of commercial activities

(2) This Part does not apply to

(*b*) any individual in respect of personal information that the individual collects, uses or

discloses for personal or domestic purposes and does not collect, use or disclose for any other purpose;

5. (1) Subject to sections 6 to 9, every organization shall comply with the obligations set out in Schedule 1.

(2) The word "should", when used in Schedule 1, indicates a recommendation and does not impose an obligation.

(3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

7. (1) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may collect personal information without the knowledge or consent of the individual only if

(*a*) the collection is clearly in the interests of the individual and consent cannot be obtained in a timely way;

(*b*) it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province;

(*c*) the collection is solely for journalistic, artistic or literary purposes;

(*d*) the information is publicly available and is specified by the regulations; or

(*e*) the collection is made for the purpose of making a disclosure

(i) under subparagraph (3)(*c.1*)(i) or (*d*)(ii), or

(ii) that is required by law.

(2) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may, without the knowledge or consent of the individual, use personal information only if

(*a*) in the course of its activities, the organization becomes aware of information that it has

reasonable grounds to believe could be useful in the investigation of a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, and the information is used for the purpose of investigating that contravention;

(*b*) it is used for the purpose of acting in respect of an emergency that threatens the life, health or security of an individual;

(*c*) it is used for statistical, or scholarly study or research, purposes that cannot be achieved without using the information, the information is used in a manner that will ensure its confidentiality, it is impracticable to obtain consent and the organization informs the Commissioner of the use before the information is used;

(*c.1*) it is publicly available and is specified by the regulations; or

(*d*) it was collected under paragraph (1)(*a*), (*b*) or (*e*).

(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

(*a*) made to, in the Province of Quebec, an advocate or notary or, in any other province, a barrister or solicitor who is representing the organization;

(*b*) for the purpose of collecting a debt owed by the individual to the organization;

(*c*) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

(*c.1*) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

(i) it suspects that the information relates to national security, the defence of Canada or the conduct of international affairs,
(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law, or
(iii) the disclosure is requested for the purpose of administering any law of Canada or a province;

(*c.2*) made to the government institution mentioned in section 7 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* as required by that section;

*(*c.2*) made to the government institution mentioned in section 7 of the *Proceeds of Crime (Money*

Laundering) Act as required by that section;

* [Note: Paragraph 7(3)(*c.2*), as enacted by paragraph 97(1)(*a*) of chapter 17 of the Statutes of Canada, 2000, will be repealed at a later date.]

(*d*) made on the initiative of the organization to an investigative body, a government institution or a part of a government institution and the organization

(i) has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, or
(ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;

(*e*) made to a person who needs the information because of an emergency that threatens the life, health or security of an individual and, if the individual whom the information is about is alive, the organization informs that individual in writing without delay of the disclosure;

(*f*) for statistical, or scholarly study or research, purposes that cannot be achieved without disclosing the information, it is impracticable to obtain consent and the organization informs the Commissioner of the disclosure before the information is disclosed;

(*g*) made to an institution whose functions include the conservation of records of historic or archival importance, and the disclosure is made for the purpose of such conservation;

(*h*) made after the earlier of

(i) one hundred years after the record containing the information was created, and
(ii) twenty years after the death of the individual whom the information is about;

(*h.1*) of information that is publicly available and is specified by the regulations;

(*h.2*) made by an investigative body and the disclosure is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province; or

(*i*) required by law.

9. (3) Despite the note that accompanies clause 4.9 of Schedule 1, an organization is not required to give access to personal information only if

(*a*) the information is protected by solicitor client privilege;

(*b*) to do so would reveal confidential commercial information;

(*c*) to do so could reasonably be expected to threaten the life or security of another individual;

(*c.1*) the information was collected under paragraph 7(1)(*b*);

(*d*) the information was generated in the course of a formal dispute resolution process;

or

(*e*) the information was created for the purpose of making a disclosure under the *Public Servants Disclosure Protection Act* or in the course of an investigation into a disclosure under that Act.
However, in the circumstances described in paragraph (*b*) or (*c*), if giving access to the information would reveal confidential commercial information or could reasonably be expected to threaten the life or security of another individual, as the case may be, and that information is severable from the record containing any other information for which access is requested, the organization shall give the individual access after severing.

11. (1) An individual may file with the Commissioner a written complaint against an organization for contravening a provision of Division 1 or for not following a recommendation set out in Schedule 1.

(4) The Commissioner shall give notice of a complaint to the organization against which the complaint was made.

12. (1) The Commissioner shall conduct an investigation in respect of a complaint and, for that purpose, may

(*a*) summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath and to produce any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record;

(*b*) administer oaths;

(*c*) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law;

(*d*) at any reasonable time, enter any premises, other than a dwelling-house, occupied by an organization on satisfying any security requirements of the organization relating to the premises;

(*e*) converse in private with any person in any premises entered under paragraph (*d*) and otherwise carry out in those premises any inquiries that the Commissioner sees fit; and

(*f*) examine or obtain copies of or extracts from records found in any premises entered under

paragraph (*d*) that contain any matter relevant to the investigation.

(4) The Commissioner or the delegate shall return to a person or an organization any record or thing that they produced under this section within ten days after they make a request to the Commissioner or the delegate, but nothing precludes the Commissioner or the delegate from again requiring that the record or thing be produced.

13. (1) The Commissioner shall, within one year after the day on which a complaint is filed or is initiated by the Commissioner, prepare a report that contains

(*a*) the Commissioner's findings and recommendations;

[...]

(*d*) the recourse, if any, that is available under section 14.

(3) The report shall be sent to the complainant and the organization without delay.

14. (1) A complainant may, after receiving the Commissioner's report, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report, and that is referred to in clause 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 or 4.8 of Schedule 1, in clause 4.3, 4.5 or 4.9 of that Schedule as modified or clarified by Division 1, in subsection 5(3) or 8(6) or (7) or in section 10.

15. The Commissioner may, in respect of a complaint that the Commissioner did not initiate,

(*a*) apply to the Court, within the time limited by section 14, for a hearing in respect of any matter described in that section, if the Commissioner has the consent of the complainant;

(*b*) appear before the Court on behalf of any complainant who has applied for a hearing under section 14; or

(*c*) with leave of the Court, appear as a party to any hearing applied for under section 14.

16. The Court may, in addition to any other remedies it may give,

(*a*) order an organization to correct its practices in order to comply with sections 5 to 10;

(*b*) order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or not ordered to correct them under paragraph (*a*); and

(*c*) award damages to the complainant, including damages for any humiliation that the complainant has suffered.

26. (2) The Governor in Council may, by order,

(*a*) provide that this Part is binding on any agent of Her Majesty in right of Canada to which the *Privacy Act* does not apply; and

(*b*) if satisfied that legislation of a province that is substantially similar to this Part applies to an organization, a class of organizations, an activity or a class of activities, exempt the organization, activity or class from the application of this Part in respect of the collection, use or disclosure of personal information that occurs within that province.

30. (1) This Part does not apply to any organization in respect of personal information that it collects, uses or discloses within a province whose legislature has the power to regulate the collection, use or disclosure of the information, unless the organization does it in connection with the operation of a federal work, undertaking or business or the organization discloses the information outside the province for consideration.

(2) Subsection (1) ceases to have effect three years after the day on which this section comes into force.

SCHEDULE 1

(Section 5)

PRINCIPLES SET OUT IN THE NATIONAL STANDARD OF CANADA ENTITLED MODEL CODE FOR THE PROTECTION OF PERSONAL INFORMATION, CAN/CSA-Q830-96

4.3 Principle 3 -- Consent

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

Note: In certain circumstances personal information can be collected, used, or disclosed without the knowledge and consent of the individual. For example, legal, medical, or security reasons may make it impossible or impractical to seek consent. When information is being collected for the detection and prevention of fraud or for law enforcement, seeking the consent of the individual might defeat the purpose of collecting the information. Seeking consent may be impossible or inappropriate when the individual is a minor, seriously ill, or mentally incapacitated. In addition, organizations that do not have a direct relationship with the individual may not always be able to seek consent. For example, seeking consent may be impractical for a charity or a direct-marketing firm that wishes to acquire a mailing list from another organization. In such cases, the organization providing the list would be expected to obtain consent before disclosing personal information.

4.5 Principle 5 -- Limiting Use, Disclosure, and Retention

Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall

be retained only as long as necessary for the fulfilment of those purposes.

4.9 Principle 9 -- Individual Access

Upon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

Note: In certain situations, an organization may not be able to provide access to all the personal information it holds about an individual. Exceptions to the access requirement should be limited and specific. The reasons for denying access should be provided to the individual upon request. Exceptions may include information that is prohibitively costly to provide, information that contains references to other individuals, information that cannot be disclosed for legal, security, or commercial proprietary reasons, and information that is subject to solicitor-client or litigation privilege.

* * *

2. (1) Les définitions qui suivent s'appliquent à la présente partie.

"activité commerciale" Toute activité régulière ainsi que tout acte isolé qui revêtent un caractère commercial de par leur nature, y compris la vente, le troc ou la location de listes de donneurs, d'adhésion ou de collecte de fonds.

"commissaire" Le Commissaire à la protection de la vie privée nommé en application de l'article 53 de la *Loi sur la protection des renseignements personnels*.

"Cour" La Cour fédérale.

"renseignement personnel" Tout renseignement concernant un individu identifiable, à l'exclusion du nom et du titre d'un employé d'une organisation et des adresse et numéro de téléphone de son lieu de travail.

(2) Dans la présente partie, la mention des articles 4.3 ou 4.9 de l'annexe 1 ne vise pas les notes afférentes.

3. La présente partie a pour objet de fixer, dans une ère où la technologie facilite de plus en plus la circulation et l'échange de renseignements, des règles régissant la collecte, l'utilisation et la communication de renseignements personnels d'une manière qui tient compte du droit des individus à la vie privée à l'égard des renseignements personnels qui les concernent et du besoin des organisations de recueillir, d'utiliser ou de communiquer des renseignements personnels à des fins qu'une personne raisonnable estimerait acceptables dans les circonstances.

4. (1) La présente partie s'applique à toute organisation à l'égard des renseignements personnels :

a) soit qu'elle recueille, utilise ou communique dans le cadre d'activités commerciales;

(2) La présente partie ne s'applique pas :

b) à un individu à l'égard des renseignements personnels qu'il recueille, utilise ou communique à des fins personnelles ou domestiques et à aucune autre fin;

5. (1) Sous réserve des articles 6 à 9, toute organisation doit se conformer aux obligations énoncées dans l'annexe 1.

(2) L'emploi du conditionnel dans l'annexe 1 indique qu'il s'agit d'une recommandation et non d'une obligation.

(3) L'organisation ne peut recueillir, utiliser ou communiquer des renseignements personnels qu'à des fins qu'une personne raisonnable estimerait acceptables dans les circonstances.

7. (1) Pour l'application de l'article 4.3 de l'annexe 1 et malgré la note afférente, l'organisation ne peut recueillir de renseignement personnel à l'insu de l'intéressé et sans son consentement que dans les cas suivants :

a) la collecte du renseignement est manifestement dans l'intérêt de l'intéressé et le consentement ne peut être obtenu auprès de celui-ci en temps opportun;

b) il est raisonnable de s'attendre à ce que la collecte effectuée au su ou avec le consentement de l'intéressé puisse compromettre l'exactitude du renseignement ou l'accès à celui-ci, et la collecte est raisonnable à des fins liées à une enquête sur la violation d'un accord ou la contravention du droit fédéral ou provincial;

c) la collecte est faite uniquement à des fins journalistiques, artistiques ou littéraires;

d) il s'agit d'un renseignement réglementaire auquel le public a accès;

e) la collecte est faite en vue :

(i) soit de la communication prévue aux sous-alinéas (3)*c.1*)(i) ou *d*)(ii),

(ii) soit d'une communication exigée par la loi.

(2) Pour l'application de l'article 4.3 de l'annexe 1 et malgré la note afférente, l'organisation ne peut utiliser de renseignement personnel à l'insu de l'intéressé et sans son consentement que dans les cas suivants :

a) dans le cadre de ses activités, l'organisation découvre l'existence d'un renseignement dont elle a des motifs raisonnables de croire qu'il pourrait être utile à une enquête sur une contravention au droit fédéral, provincial ou étranger qui a été commise ou est en train ou sur le point de l'être, et l'utilisation est faite aux fins d'enquête;

b) l'utilisation est faite pour répondre à une situation d'urgence mettant en danger la vie, la santé ou la sécurité de tout individu;

c) l'utilisation est faite à des fins statistiques ou à des fins d'étude ou de recherche érudites, ces fins ne peuvent être réalisées sans que le renseignement soit utilisé, celui-ci est utilisé d'une manière qui en assure le caractère confidentiel, le consentement est pratiquement impossible à obtenir et l'organisation informe le commissaire de l'utilisation avant de la faire;

c.1) il s'agit d'un renseignement réglementaire auquel le public a accès;

d) le renseignement a été recueilli au titre des alinéas (1)*a*), *b*) ou *e*).

(3) Pour l'application de l'article 4.3 de l'annexe 1 et malgré la note afférente, l'organisation ne peut communiquer de renseignement personnel à l'insu de l'intéressé et sans son consentement que dans les cas suivants :

a) la communication est faite à un avocat -- dans la province de Québec, à un avocat ou à un notaire -- qui représente l'organisation;

b) elle est faite en vue du recouvrement d'une créance que celle-ci a contre l'intéressé;

c) elle est exigée par assignation, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de documents;

c.1) elle est faite à une institution gouvernementale -- ou à une subdivision d'une telle institution -- qui a demandé à obtenir le renseignement en mentionnant la source de l'autorité légitime étayant son droit de l'obtenir et le fait, selon le cas :

(i) qu'elle soupçonne que le renseignement est afférent à la sécurité nationale, à la défense du Canada ou à la conduite des affaires internationales,
(ii) que la communication est demandée aux fins du contrôle d'application du droit canadien, provincial ou étranger, de la tenue d'enquêtes liées à ce contrôle d'application ou de la collecte de renseignements en matière de sécurité en vue de ce contrôle d'application,
(iii) qu'elle est demandée pour l'application du droit canadien ou provincial;

c.2) elle est faite au titre de l'article 7 de la *Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes* à l'institution gouvernementale mentionnée à cet article;

**c.2*) elle est faite au titre de l'article 7 de la *Loi sur le recyclage des produits de la criminalité*à l'institution gouvernementale mentionnée à cet article;

* [Note : L'alinéa 7(3)*c.2*), édicté par l'alinéa 97(1)*a*) du chapitre 17 des Lois du Canada (2000),

sera abrogé ultérieurement.]

d) elle est faite, à l'initiative de l'organisation, à un organisme d'enquête, une institution gouvernementale ou une subdivision d'une telle institution et l'organisation, selon le cas, a des motifs raisonnables de croire que le renseignement est afférent à la violation d'un accord ou à une contravention au droit fédéral, provincial ou étranger qui a été commise ou est en train ou sur le point de l'être ou soupçonne que le renseignement est afférent à la sécurité nationale, à la défense du Canada ou à la conduite des affaires internationales;

e) elle est faite à toute personne qui a besoin du renseignement en raison d'une situation d'urgence mettant en danger la vie, la santé ou la sécurité de toute personne et, dans le cas où la personne visée par le renseignement est vivante, l'organisation en informe par écrit et sans délai cette dernière;

f) elle est faite à des fins statistiques ou à des fins d'étude ou de recherche érudites, ces fins ne peuvent être réalisées sans que le renseignement soit communiqué, le consentement est pratiquement impossible à obtenir et l'organisation informe le commissaire de la communication avant de la faire;

g) elle est faite à une institution dont les attributions comprennent la conservation de documents ayant une importance historique ou archivistique, en vue d'une telle conservation;

h) elle est faite cent ans ou plus après la constitution du document contenant le renseignement ou, en cas de décès de l'intéressé, vingt ans ou plus après le décès, dans la limite de cent ans;

h.1) il s'agit d'un renseignement réglementaire auquel le public a accès;

h.2) elle est faite par un organisme d'enquête et est raisonnable à des fins liées à une enquête sur la violation d'un accord ou la contravention du droit fédéral ou provincial;

i) elle est exigée par la loi.

9. (3) Malgré la note afférente à l'article 4.9 de l'annexe 1, l'organisation n'est pas tenue de communiquer à l'intéressé des renseignements personnels dans les cas suivants seulement :

a) les renseignements sont protégés par le secret professionnel liant l'avocat à son client;

b) la communication révélerait des renseignements commerciaux confidentiels;

c) elle risquerait vraisemblablement de nuire à la vie ou la sécurité d'un autre individu;

c.1) les renseignements ont été recueillis au titre de l'alinéa 7(1)*b*);

d) les renseignements ont été fournis uniquement à l'occasion d'un règlement officiel des différends;

e) les renseignements ont été créés en vue de faire une divulgation au titre de la *Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles* ou dans le cadre d'une enquête menée sur une divulgation en vertu de cette loi. Toutefois, dans les cas visés aux alinéas *b*) ou *c*), si les renseignements commerciaux confidentiels ou les renseignements dont la communication risquerait vraisemblablement de nuire à la vie ou la sécurité d'un autre individu peuvent être retranchés du document en cause, l'organisation est tenue de faire la communication en retranchant ces renseignements.

11. (1) Tout intéressé peut déposer auprès du commissaire une plainte contre une organisation qui contrevient à l'une des dispositions de la section 1 ou qui omet de mettre en oeuvre une recommandation énoncée dans l'annexe 1.

(4) Le commissaire donne avis de la plainte à l'organisation visée par celle-ci.

12. (1) Le commissaire procède à l'examen de toute plainte et, à cette fin, a le pouvoir :

a) d'assigner et de contraindre des témoins à comparaître devant lui, à déposer verbalement ou par écrit sous la foi du serment et à produire les documents ou pièces qu'il juge nécessaires pour examiner la plainte dont il est saisi, de la même façon et dans la même mesure qu'une cour supérieure d'archives;

b) de faire prêter serment;

c) de recevoir les éléments de preuve ou les renseignements -- fournis notamment par déclaration verbale ou écrite sous serment -- qu'il estime indiqués, indépendamment de leur admissibilité devant les tribunaux;

d) de visiter, à toute heure convenable, tout local -- autre qu'une maison d'habitation -- occupé par l'organisation, à condition de satisfaire aux normes de sécurité établies par elle pour ce local;

e) de s'entretenir en privé avec toute personne se trouvant dans le local visé à l'alinéa *d*) et d'y mener les enquêtes qu'il estime nécessaires;

f) d'examiner ou de se faire remettre des copies ou des extraits des documents contenant des éléments utiles à l'examen de la plainte et trouvés dans le local visé à l'alinéa *d*).

(4) Le commissaire ou son délégué renvoie les documents ou pièces demandés en vertu du présent article aux personnes ou organisations qui les ont produits dans les dix jours suivant la requête que celles-ci lui présentent à cette fin, mais rien n'empêche le commissaire ou son délégué d'en réclamer une nouvelle production.

13. (1) Dans l'année suivant, selon le cas, la date du dépôt de la plainte ou celle où il en a pris l'initiative, le commissaire dresse un rapport où :

a) il présente ses conclusions et recommandations;

[...]

d) mentionne, s'il y a lieu, l'existence du recours prévu à l'article 14.

(3) Le rapport est transmis sans délai au plaignant et à l'organisation.

14. (1) Après avoir reçu le rapport du commissaire, le plaignant peut demander que la Cour entende toute question qui a fait l'objet de la plainte -- ou qui est mentionnée dans le rapport -- et qui est visée aux articles 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 ou 4.8 de l'annexe 1, aux articles 4.3, 4.5 ou 4.9 de cette annexe tels que modifiés ou clarifiés par la section 1, aux paragraphes 5(3) ou 8(6) ou (7) ou à l'article 10.

15. S'agissant d'une plainte dont il n'a pas pris l'initiative, le commissaire a qualité pour :

a) demander lui-même, dans le délai prévu à l'article 14, l'audition de toute question visée à cet article, avec le consentement du plaignant;

b) comparaître devant la Cour au nom du plaignant qui a demandé l'audition de la question;

c) comparaître, avec l'autorisation de la Cour, comme partie à la procédure.

16. La Cour peut, en sus de toute autre réparation qu'elle accorde :

a) ordonner à l'organisation de revoir ses pratiques de façon à se conformer aux articles 5 à 10;

b) lui ordonner de publier un avis énonçant les mesures prises ou envisagées pour corriger ses pratiques, que ces dernières aient ou non fait l'objet d'une ordonnance visée à l'alinéa *a*);

c) accorder au plaignant des dommages-intérêts, notamment en réparation de l'humiliation subie.

26. (2) Il peut par décret :

a) prévoir que la présente partie lie tout mandataire de Sa Majesté du chef du Canada qui n'est pas assujetti à la *Loi sur la protection des renseignements personnels*;

b) s'il est convaincu qu'une loi provinciale essentiellement similaire à la présente partie s'applique à une organisation -- ou catégorie d'organisations -- ou à une activité -- ou catégorie d'activités --, exclure l'organisation, l'activité ou la catégorie de l'application de la présente partie à l'égard de la collecte, de l'utilisation ou de la communication de renseignements personnels qui s'effectue à l'intérieur de la province en cause.

30. (1) La présente partie ne s'applique pas à une organisation à l'égard des renseignements personnels qu'elle recueille, utilise ou communique dans une province dont la législature a le

pouvoir de régir la collecte, l'utilisation ou la communication de tels renseignements, sauf si elle le fait dans le cadre d'une entreprise fédérale ou qu'elle communique ces renseignements pour contrepartie à l'extérieur de cette province.

(2) Le paragraphe (1) cesse d'avoir effet trois ans après l'entrée en vigueur du présent article.

ANNEXE 1

(article 5)

PRINCIPES ÉNONCÉS DANS LA NORME NATIONALE DU CANADA INTITULÉE CODE TYPE SUR LA PROTECTION DES RENSEIGNEMENTS PERSONNELS, CAN/CSA-Q830-96

4.3 Troisième principe -- Consentement

Toute personne doit être informée de toute collecte, utilisation ou communication de renseignements personnels qui la concernent et y consentir, à moins qu'il ne soit pas approprié de le faire.

Note : Dans certaines circonstances, il est possible de recueillir, d'utiliser et de communiquer des renseignements à l'insu de la personne concernée et sans son consentement. Par exemple, pour des raisons d'ordre juridique ou médical ou pour des raisons de sécurité, il peut être impossible ou peu réaliste d'obtenir le consentement de la personne concernée. Lorsqu'on recueille des renseignements aux fins du contrôle d'application de la loi, de la détection d'une fraude ou de sa prévention, on peut aller à l'encontre du but visé si l'on cherche à obtenir le consentement de la personne concernée. Il peut être impossible ou inopportun de chercher à obtenir le consentement d'un mineur, d'une personne gravement malade ou souffrant d'incapacité mentale. De plus, les organisations qui ne sont pas en relation directe avec la personne concernée ne sont pas toujours en mesure d'obtenir le consentement prévu. Par exemple, il peut être peu réaliste pour une oeuvre de bienfaisance ou une entreprise de marketing direct souhaitant acquérir une liste d'envoi d'une autre organisation de chercher à obtenir le consentement des personnes concernées. On s'attendrait, dans de tels cas, à ce que l'organisation qui fournit la liste obtienne le consentement des personnes concernées avant de communiquer des renseignements personnels

4.5 Cinquième principe -- Limitation de l'utilisation, de la communication et de la conservation

Les renseignements personnels ne doivent pas être utilisés ou communiqués à des fins autres que celles auxquelles ils ont été recueillis à moins que la personne concernée n'y consente ou que la loi ne l'exige. On ne doit conserver les renseignements personnels qu'aussi longtemps que nécessaire pour la réalisation des fins déterminées.

4.9 Neuvième principe -- Accès aux renseignements personnels

Une organisation doit informer toute personne qui en fait la demande de l'existence de renseignements personnels qui la concernent, de l'usage qui en est fait et du fait qu'ils ont été communiqués à des tiers, et lui permettre de les consulter. Il sera aussi possible de contester l'exactitude et l'intégralité des renseignements et d'y faire apporter les corrections appropriées.

Note : Dans certains cas, il peut être impossible à une organisation de communiquer tous les renseignements personnels qu'elle possède au sujet d'une personne. Les exceptions aux exigences en matière d'accès aux renseignements personnels devraient être restreintes et précises. On devrait informer la personne, sur demande, des raisons pour lesquelles on lui refuse l'accès aux renseignements. Ces raisons peuvent comprendre le coût exorbitant de la fourniture de l'information, le fait que les renseignements personnels contiennent des détails sur d'autres personnes, l'existence de raisons d'ordre juridique, de raisons de sécurité ou de raisons d'ordre commercial exclusives et le fait que les renseignements sont protégés par le secret professionnel ou dans le cours d'une procédure de nature judiciaire.

cp/e/qlhbb/qljxr/qlcas/qlcas/qlced/qlcas/qlhcs

LAW OF INTERVENTION

STATUS AND PRACTICE

Paul R. Muldoon

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Canada Law Book Inc.
240 Edward Street, Aurora, Ontario

will be redundant owing to the fact that the interest or views will already be fully canvassed.[21]

The difference in the application of this consideration to added party and friend of the court intervention relates to the role and nature of the intervenor. In added party intervention, the intervenor seeks to protect a specific or general interest; hence the question is whether that interest is already fully protected in the litigation. In friend of the court intervention, the intervenor seeks to assist the court by revealing a unique or different point of view or approach to an issue in the litigation, exploring a relevant issue that would not otherwise be examined, or presenting opinions or views of a constituency that would be affected by the litigation. In the end, the question in added party intervention is whether the interests sought to be protected by the applicant are being fully and fairly protected by the existing parties; in friend of the court intervention, the question is whether there is an issue, point of view, or other perspective that the court would find useful and helpful in its deliberations.

(c) Widening the *Lis* Between the Parties

A friend of the court intervenor is not a party to the proceeding. An interesting, and perhaps perplexing, question therefore arises as to whether a friend of the court intervenor can interject a new cause of action or widen the *lis* between the parties to the proceeding.

In *Re Clark et al. and A.-G. Can.*,[22] the now classic statement was enunciated: "Where the intervention would only serve to widen the *lis* between the parties or introduce a new cause of action, the intervention should not be allowed." In a more recent British Columbia Court of Appeal case, *A.-G. Can. et al. v. Aluminum Co. of Canada et al.; B.C. Wildlife Federation, Intervenor*,[23] the Court reiterated the principle. In that case, however, the issue was discussed in relation to added party intervention although the Court expressly recognized the principle with respect to friend of the court intervention.[24]

On the other hand, there would seem to be no conceptual barrier for a friend of the court intervenor to raise a new issue or widen the *lis* of the proceeding. In appropriate circumstances, the court may find the raising of a new issue or the challenging of a statute entirely appropriate. Judicial discretion, once again, seems to be the determining factor. This issue is

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[21] This would seem to be what the thrust of McRae J.'s comments is in *Brewer v. Maple Leaf Gardens Ltd.* (1985), summarized in 1 W.D.C.P. 457 (Ont. H.C.J.).

[22] *Re Clark et al. and A.-G. Can.* (1977), 81 D.L.R. (3d) 33 at p. 38, 17 O.R. (2d) 593, 34 C.P.R. (2d) 91 (H.C.J.).

[23] *A.-G. Can. et al. v. Aluminum Co. of Canada et al.; B.C. Wildlife Federation, Intervenor* (1987), 35 D.L.R. (4th) 495, [1987] 3 W.W.R. 193, 10 B.C.L.R. (2d) 371 (C.A.).

[24] *Ibid.*, at pp. 508-9 D.L.R.