

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
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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-

urance 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

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Applicant