Court File No.: A-218-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

– and –

THE PRIVACY COMMISSIONER OF CANADA

Intervener

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

SECOND SUPPLEMENTARY MEMORANDUM OF FACT AND LAW OF THE APPLICANT, IN RESPONSE TO THE ATTORNEY GENERAL OF CANADA

Dated: March 12, 2015

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SECOND SUPPLEMENTARY MEMORANDUM OF FACT AND LAW OF THE APPLICANT, IN RESPONSE TO THE ATTORNEY GENERAL OF CANADA

OVERVIEW

1. The open court principle guarantees public access to all evidence and documents tendered in judicial and quasi-judicial proceedings.

2. Access rights pursuant to the open court principle are constitutionally protected by s. 2(b) of the *Charter*. Consequently, any limitation of such rights is unconstitutional, unless it can be saved under s. 1 of the *Charter*.

3. The definitive and comprehensive test for the constitutionality of limiting openness of proceedings is the *Dagenais/Mentuck* test, which tests conformity of the limitation with s. 1 of the *Charter*. Therefore, any limitation that cannot be justified under the *Dagenais/Mentuck* test is unconstitutional.

4. Undoubtedly, there is a tension between the open court principle and the privacy interests protected by the *Privacy Act*; however, the two are not on an equal footing, as only the open court principle is constitutionally protected.

5. Thus, the legal test for balancing the open court principle against privacy interests remains the *Dagenais/Mentuck* test. Not all privacy interests meet this test: for example, mere preference for personal or financial privacy is insufficient to limit public access to evidence and documents tendered, but preventing identity theft may justify redacting sensitive information (such as an SIN).

6. Therefore, in the context of evidence and documents that are subject to the open court principle, the *Privacy Act* is either redundant or unconstitutional:

(a) if the *Privacy Act* merely prohibits disclosure of information to which public access can be restricted in accordance with the *Dagenais/Mentuck* test, then the *Privacy Act* is redundant;

(b) if, however, the *Privacy Act* also purports to prohibit disclosure of information in cases where restricting public access cannot be justified under the *Dagenais/Mentuck* test, then the prohibition is unconstitutional.

7. The Agency explicitly acknowledged in *Tenenbaum v. Air Canada* that it is subject to the open court principle, being a quasi-judicial tribunal exercising court-like powers, and that public access to its proceedings can be restricted only in accordance with the *Dagenais/Mentuck* test. Therefore, the question of whether every administrative tribunal is subject to the open court principle can be left for another day.

PART I – STATEMENT OF FACTS

8. The Attorney General of Canada ("AGC") misstates and omits key facts. First, contrary to paragraph 10 of the AGC's memorandum of fact and law, Lukács challenges the Agency's practices that:

(a) the public can view only redacted tribunal files, even in cases where a confidentiality order was neither sought by the parties nor made by Member(s) of the Agency; and

(b) Agency Staff, who are not Members of the Agency, purport to make determinations of confidentiality in relation to tribunal files.

These practices are contrary to not only the open court principle, but also the Agency's own policies and rules implementing the open court principle. In addition, Lukács also challenges the specific instance of these practices with respect to File no. M4120-3/3-05726.

Notice of Application, p. 3 **Applicant's Record, Tab 1, p. 3**

9. Second, although the Agency has elaborate procedures for dealing with requests for confidential treatment of documents filed by parties, such a request was neither made nor granted with respect to File no. M4120-3/3-05726.

Bellerose Cross-Examination, Q38, Q45
Applicant's Record, Tab 3, pp. 180-181

10. Third, under the pretext of compliance with the *Privacy Act*, Agency Staff redacted from File no. M4120-3/3-05726 the name of counsel representing Air Canada in the proceeding, names of Air Canada employees involved, and portions of the parties' submissions and evidence tendered.

Lukács Affidavit, Exhibit "I" **Applicant's Record, Tab 2I, pp. 41-163**

11. Fourth, decisions as to what to redact were made by Agency Staff, rather than Members of the Agency who can lawfully exercise the Agency's powers under the *Canada Transportation Act*. Agency Staff were not delegated authority to make such decisions.

Bellerose Cross-Examination, Q47 **Applicant's Record, Tab 3, p. 181**
Bellerose Affidavit, Exhibit "C" **Respondent's Record, pp. 24-29**

12. Finally, the March 26, 2014 letter is not a decision of the Agency, but rather an advisory, informing Lukács that the redacted information was removed in order to allegedly comply with the *Privacy Act*.

Lukács Affidavit, Exhibit "K" **Applicant's Record, Tab 2K, pp. 168-169**

PART II – STATEMENT OF THE POINTS IN ISSUE

13. The submissions of Lukács address issues raised by the AGC:

(i) Does the open court principle apply to tribunals engaged in quasi-judicial functions?

(ii) What is the scope of the open court principle?

(iii) Does the *Privacy Act* conflict with the open court principle?

PART III – STATEMENT OF SUBMISSIONS

A. THE OPEN COURT PRINCIPLE APPLIES TO TRIBUNALS ENGAGED IN QUASI-JUDICIAL FUNCTIONS

14. The Agency has expressly acknowledged that it is subject to the open court principle, and that public access can be restricted only in accordance with the *Dagenais/Mentuck* test:

> [44] The Agency is created pursuant to an act of Parliament, the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA). The Agency's purpose is to implement the national transportation policy, which is found in section 5 of the CTA. [...] In its role as a quasi-judicial administrative tribunal with court-like powers, the Agency ensures that processes are responsive, fair and transparent, and considers the interests of all parties in the national transportation system.
>
> [45] While being subject to specific rules laid down by statutes or regulations, the Agency is also the master of its own procedures. For example, section 40 of the General Rules provides that an application to the Agency shall be made in writing and be commenced by filing with the Agency the full name, address, and telephone number of the applicant or the applicant's representative. The Agency may therefore conclude that an application is not properly filed if it lacks that information. As well, section 23 of the General Rules provides that any document filed in respect of any proceeding will be placed on its public record, unless the person filing the document makes a claim for its confidentiality. The person making the claim must indicate the reasons for the claim. The record of the proceeding will therefore be public unless a claim for confidentiality has been accepted. [...]
>
> [46] The Agency, being a quasi-judicial tribunal, is bound by the rules governing the "open court principle". Consequently, in order to address the motion of the applicant, it must apply the Dagenais/Mentuck test described above.
>
> [Emphasis added.]

***Tenenbaum v. Air Canada*, 219-A-2009, paras. 44-46**
Applicant's Authorities, Tab 16, pp. 688-689

15. In light of the Agency's own acknowledgment that it is subject to the open court principle as a tribunal carrying out quasi-judicial functions, the question of whether every administrative tribunal is subject to the open court principle can be left for another day.

16. The Agency's acknowledgment in *Tenenbaum* is consistent with what courts have held for more than three decades, namely, that the open court principle applies to statutory tribunals exercising judicial or quasi-judicial functions.

> ***Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 329, para. 9** **Applicant's Authorities, Tab 15, p. 681**
>
> ***Travers v. Canada*, [1993] F.C.J. No. 833, paras. 6-7**
> **Applicant's Supplementary Authorities, Tab 22, p. 837**
>
> ***Germain v. Saskatchewan (Automobile Injury Appeal Commission)*, 2009 SKQB 106, para. 104** **Applicant's Authorities, Tab 7, p. 501**

17. The applicability of the open court principle to all exercises of judicial or quasi-judicial powers was affirmed by this Honourable Court on multiple occasions, most recently in upholding the judgment of Joyal, J. in *Travers*.

> ***Travers v. Canada (F.C.A.)*, [1994] F.C.J. No. 932, para. 1**
> **Applicant's Supplementary Authorities, Tab 23, p. 846**
>
> **See also: *Pacific Press Ltd. v. Canada*, [1991] 2 F.C. 327, cited in:**
> ***Southam Inc. v. Canada (Attorney General)*, [1997] 36 O.R. (3d) 721**
> **AGC's Authorities, Tab 7**

18. The Ontario jurisprudence cited by the AGC (para. 13), calling for considering the level of public interest in the subject matter of the proceeding, has never been adopted by the Federal Court or this Honourable Court, and it has been overtaken by the development of the law even in Ontario.

> ***Criminal Lawyers' Association v. Ontario*, [2004] O.J. No. 1214, para. 75**
> **Applicant's Supplementary Authorities, Tab 785, p. 805**

B. SCOPE OF THE OPEN COURT PRINCIPLE

19. The AGC's argument that there is no entitlement to access "all information held by the tribunal" (para. 15) is a straw man: it conflates evidence and documents tendered to a tribunal by the parties in the course of a quasi-judicial proceeding, to which public access is guaranteed by the open court principle, with internal documents, such as employment records of employees of the tribunal, which are not subject to the open court principle.

20. The AGC also confuses the access rights pursuant to the open court principle with access to documents of investigations of non-adjudicative bodies (para. 16) that are not subject to the open court principle. Unlike the case of non-adjudicative bodies, the necessity of public access to (quasi-)judicial proceedings is well established:

> To show that access would further the purposes of s. 2(b), the claimant must establish that access is necessary for the meaningful exercise of free expression on matters of public or political interest: see *Irwin Toy*, at pp. 976 and 1008; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. On this basis, the Court has recognized access to information under s. 2(b) in the judicial context: "members of the public have a right to information pertaining to public institutions and particularly the courts" (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1339).
>
> [Emphasis added.]
>
> ***Ontario v. Criminal Lawyers' Association*, [2010] 1 SCR 815, para. 36**
> **Respondent's Authorities, Tab 9, p. 350**

21. Contrary to the AGC's submission (para. 17), the open court principle does guarantee public access to evidence and documents tendered. This right can only be limited in exceptional cases, and the burden of proof is on the person seeking to restrict public access:

> Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.
>
> [Emphasis added.]
>
> ***Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175**
> **Applicant's Authorities, Tab 10, p. 539**
>
> **See also: Chief Justice Beverley McLachlin: "Openness and the Rule of Law" Privacy Commissioner's Authorities, Tab 14, p. 501**

22. The very essence of the open court principle and the meaning of the presumption of openness is that members of the public can access evidence and documents tendered in proceedings without having to seek permission from a decision-maker on a case-by-case basis; the decision-maker is involved only if a person seeks to restrict public access.

23. This Honourable Court may take judicial notice of the operation of its own court registry, and its exemplary compliance with the open court principle: Unless documents in a file are subject to a confidentiality order, the entire file is "automatically" available for public viewing. Requests to view files do not require the approval of a justice of the Court; members of the public can simply ask the registry to order the file from the archives, and can view all documents in the files (except those that are subject to a confidentiality order) once they arrive.

24. It is submitted that the Agency must comply with the same requirements: the proper avenue for protecting sensitive information filed with the Agency is to seek a confidentiality order in accordance with the Agency's rules. If no confidentiality was sought or granted with respect to documents in an adjudicative file, the public is entitled to access the entire file without further ado.

C. THE OPEN COURT PRINCIPLE VS. THE PRIVACY ACT

25. In the context of evidence and documents tendered to the Agency in adjudicative proceedings, the *Privacy Act* is either redundant or unconstitutional:

(a) if the *Privacy Act* merely prohibits disclosure of information to which public access can be restricted in accordance with the *Dagenais/Mentuck* test, then the *Privacy Act* is redundant;

(b) if, however, the *Privacy Act* also purports to prohibit disclosure of information in cases where restricting public access cannot be justified under the *Dagenais/Mentuck* test, then the prohibition is unconstitutional.

(i) The open court principle is constitutionally protected

26. Access rights pursuant to the open court principle are constitutional rights protected by s. 2(b) of the *Charter*, and as such, they are at the top of the hierarchy of laws.

***CBC v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, para. 23**
Applicant's Authorities, Tab 3, p. 350

27. Constitutional rights can be limited, but only in accordance with s. 1 of the *Charter*. Thus, any limitation of the openness of proceedings is unconstitutional, unless it can be saved under s. 1 of the *Charter*

28. The well-established test for reviewing the constitutionality of limiting the openness of proceedings is the *Dagenais/Mentuck* test, which tests conformity of the limitation with s. 1 of the *Charter*.

***Named Person v. Vancouver Sun*, 2007 SCC 43, para. 94**
Privacy Commissioner's Authorities, Tab 3, p. 131

29. Therefore, every limitation of public access to proceedings must be based on the *Dagenais/Mentuck* test; any limitation that cannot be justified under the *Dagenais/Mentuck* test is unconstitutional.

***Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, paras. 7 and 26-28**
Applicant's Authorities, Tab 18, pp. 728 and 733

***Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41, paras. 53-55**
Privacy Commissioner's Authorities, Tab 10, pp. 406-407

(ii) Privacy under the microscope of the *Dagenais/Mentuck* test

30. There is an obvious tension between the open court principle and the privacy interests protected by the *Privacy Act*: the first calls for a presumption of openness and public access, while the latter generally prohibits disclosure.

31. The open court principle and the *Privacy Act*, however, are not on an equal footing, because only the open court principle is constitutionally protected. In the case of a conflict between the two that cannot be justified under s. 1 of the *Charter*, the *Privacy Act* must yield to the open court principle.

***Ruby v. Canada (Solicitor General)*, 2002 SCC 75, para. 60**
Applicant's Authorities, Tab 12, p. 587

32. Thus, privacy interests are no different than any other interest that a decision-maker may be called to balance against the open court principle—the applicable legal framework remains the *Dagenais/Mentuck* test:

> Without denying the importance of protecting privacy and security, we must preserve the essential core of the open court principle, and the broader principle of freedom of expression.
>
> How do we do this? In Canada, we have established a common law test for balancing the open court principle against other interests. Judges may limit the open court principle if: 1) such an order is necessary to prevent a serious risk to the proper administration of justice because other reasonably alternative measures will not

> prevent the risk; and 2) the salutary effects of the limit on openness outweigh the deleterious effects on the rights and interests of the parties and the public.
>
> [Emphasis added.]
>
> **Chief Justice Beverley McLachlin: "Openness and the Rule of Law"**
> **Privacy Commissioner's Authorities, Tab 14, p. 523**

33. Not all privacy interests meet the *Dagenais/Mentuck* test. For example, mere preference for personal or financial privacy is insufficient to justify limiting public access to evidence and documents tendered.

> ***Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, para. 97**
> **Privacy Commissioner's Authorities, Tab 12, p. 488**
>
> ***Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 SCR 175, pp. 8-9**
> **Applicant's Authorities, Tab 10, pp. 536-537**

34. Therefore, privacy interests conflicting with the open court principle, including those protected by the *Privacy Act*, must be examined under the microscope of the *Dagenais/Mentuck* test. If the *Dagenais/Mentuck* test is not met, then restricting public access is unconstitutional. In particular, any provision of the *Privacy Act* that purports to limit public access to the adjudicative files of the Agency beyond what is justified under the *Dagenais/Mentuck* test cannot be saved under s. 1 of the *Charter*, and is unconstitutional.

(iii) The *Privacy Act* does not confer additional discretion to restrict open court principle rights

35. The AGC misconstrues the interplay between the *Privacy Act* and the open court principle. First, s. 69(2) of the *Privacy Act* is not discretionary; rather, it mandatorily excludes "publicly available" information from the operation of s. 8 of the *Privacy Act*. It is submitted that all evidence and documents that are subject to the open court principle are excluded pursuant to s. 69(2) of the *Privacy Act* due to the presumption of openness.

36. Second, the exemptions pursuant to ss. 8(2)(a), 8(2)(b), and 8(2)(m)(i) of the *Privacy Act* do not confer discretion on the Agency to restrict public access to evidence and documents if the restriction cannot be justified under the *Dagenais/Mentuck* test, because such a discretion would be unconstitutional.

37. Therefore, the correct interpretation of the aforementioned exemptions under s. 8(2) of the *Privacy Act* is that they simply permit the Agency to comply with its public duty under the open court principle to provide public access to the entire content of its adjudicative files, with the exception of documents that are subject to a confidentiality order.

(iv) *Doré* is not applicable

38. The present case can be distinguished from *Doré* cited by the AGC:

(a) the present case does not involve exercise of discretion under the Agency's home statute—no confidentiality order was made;

(b) the Agency has no specialized expertise in interpreting the *Privacy Act* nor in applying the open court principle;

(c) the open court principle is of central importance to the legal system as a whole; and

(d) the Supreme Court of Canada held that decision-makers must use the *Dagenais/Mentuck* test in every decision restricting public access to proceedings.

39. Hence, *Dagenais/Mentuck* is the only test applicable to the present case.

D. COSTS PAYABLE BY THE AGC

40. It is submitted that the undue delay in the AGC advising this Honourable Court about his intention to intervene and in filing his memorandum call for awarding costs against the AGC for the following reasons.

41. Lukács served the Notice of Constitutional Question on the AGC on November 21, 2014.

42. The AGC waited more than three (3) months, until February 26, 2015, and only then, 19 days before the hearing of the application, did he indicate to this Honourable Court that he would be intervening in the present case.

43. The AGC filed his memorandum only 11 days before the hearing, on March 6, 2015.

44. While there is no doubt that the AGC is entitled to intervene in relation to constitutional questions, that right must be exercised with due diligence and in good faith.

45. The timing of the AGC's intervention has caused a significant hardship for Lukács, who is self-represented, by requiring Lukács to divert substantial resources away from final preparations for the hearing of the application to preparing the present supplementary memorandum.

46. It is submitted that this Honourable Court should express its disapproval of the timing of the AGC's intervention by requiring the AGC to pay Lukács costs in the amount of $500.00 in any event of the cause.

PART IV – ORDER SOUGHT

47. The Applicant, Dr. Gábor Lukács, is seeking an Order as set out in the Memorandum of Fact and Law dated September 30, 2014.

Memorandum of Fact and Law **Applicant's Record, Tab 4, p. 223**

48. In addition, the Applicant, Dr. Gábor Lukács, is seeking an Order directing the AGC to pay Lukács costs in the amount of $500.00 in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 12, 2015

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Applicant

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Canadian Charter of Rights and Freedoms,
ss. 2(b) and 24(1)

Canada Transportation Act, S.C. 1996, c. 10,
ss. 1-41

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

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

Privacy Act, R.S.C. 1985, c. P-21
ss. 8(2)(a), 8(2)(b), 8(2)(m)(i), 69(2)

CASE LAW

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480

Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security), [2004] O.J. No. 1214

Coltsfoot Publishing Ltd. v. Foster-Jacques, 2012 NSCA 83

Germain v. Saskatchewan (Automobile Injury Appeal Commission), 2009 SKQB 106

Nova Scotia (Attorney General) v. MacIntyre, [1982] 1 SCR 175

Ontario v. Criminal Lawyers' Association, [2010] 1 SCR 815

Sierra Club v. Canada (Minister of Finance), 2002 SCC 41

CASE LAW (CONTINUED)

Southam Inc. v. Canada (Minister of Employment and Immigration), [1987] 3 F.C. 329

Tenenbaum v. Air Canada, Canadian Transportation Agency, Decision No. 219-A-2009

Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41

Travers v. Canada (Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia), [1993] F.C.J. No. 833

Travers v. Canada (Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia) (F.C.A.), [1994] F.C.J. No. 932

OTHER AUTHORITIES

Chief Justice Beverley McLachlin, "Openness and the Rule of Law," Remarks at the Annual International Rule of Law Lecture (London, U.K., Jan. 8, 2014)