

TRANSPORTATION NOTES

Legal Decisions and Developments Affecting the Transportation Industry in Canada

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Canadian Transportation Agency May Not Redact Personal Information

Dr. Gabor Lukács, a mathematician of some renown, is well-known to airlines in Canada and even better known to the Canadian Transportation Agency (the “Agency”) for reasons unrelated to his mathematical prowess. As an air passenger rights advocate, he has brought more than two dozen complaints to the Agency and caused several airlines to change their policies and tariffs. Always self-represented, Dr. Lukács has had frequent success at hearings before the Agency.

Earlier this year, he took on the Agency itself by bringing an application for judicial review to the Federal Court of Appeal. The application concerned the Agency’s refusal to provide unredacted documents to Dr. Lukács. In making its decision, the Federal Court of Appeal had to consider the “duality of the Agency’s functions” and the application of and relationship between the “open court principle” and Canada’s *Privacy Act*. The Privacy Commissioner was granted leave to intervene in Dr. Lukács’ application.

Facts

On February 14, 2014, the Agency made a decision in a complaint brought by a family against Air Canada after their flight from Vancouver to Cancun was delayed. The same day the Cancun decision was released, Dr. Lukács requested copies of materials filed on the Agency’s public record in the matter from the Secretary of the Agency.

About a month later, a staff member of the Agency provided all materials filed in the Cancun matter, but portions of the documents provided had been redacted.

A few days after receiving these documents, Dr. Lukács wrote again to the Secretary of the Agency requesting “unredacted copies of all documents ... with respect to which no confidentiality order was made by a member of the Agency.”

This second request elicited a response from Geoffrey Hare, the Chairperson and CEO of the Agency. In refusing Dr. Lukács’ request, Mr. Hare cited Canada’s *Privacy Act*, which applies to all federal government institutions, including the Agency. In part, Mr. Hare wrote:

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.

In his letter, Mr. Hare recognized that Agency case files are available to the public for consultation but, obviously, the Agency had decided that personal information concerning individuals, such as home addresses, personal phone numbers, dates of birth and driver’s licence numbers, had been properly redacted, pursuant to the Agency’s obligations under the *Privacy Act*.

The Agency and its Rules

The Court recognized that the Agency performs two key functions in fulfilling its broad mandate in transportation matters. First, it is a quasi-judicial tribunal tasked with resolving commercial and consumer disputes relating to transportation. Secondly, it is an economic regulator which issues authorities, licences and permits to carriers, subject to the federal Parliament’s authority. The relevant function here, of course, is its quasi-judicial role.

In this role, the Agency and parties to complaints are subject to rules designed by the Agency. Under those rules, any document filed in a dispute resolution proceeding must be placed on the public record, though a party may request that the Agency issue a confi-

dentiality order to keep particular documents out of the public record. This distinction - between the public record and the confidential record - is made especially clear in the Agency’s annotated version of its new rules, which is quoted at some length in the court’s decision even though they came into effect after Dr. Lukács commenced his application and did not apply.

Open Court Principle

Under the open court principle, court proceedings, including the evidence and documents filed as exhibits in those proceedings, are open to the public. The reason for this openness is to ensure that the public is able to inspect the evidence on which judicial decisions are based and, therefore, to ensure that courts are accountable to the public. This principle is well-recognized in Canada’s courts.

Dr. Lukács, the Agency and the Privacy Commissioner all agreed that the principle applies to the Agency when it is undertaking its dispute resolution function.

The question therefore centred on what the provisions of the *Privacy Act* allowed or required the Agency to do.

The Privacy Act

The *Privacy Act* restricts the collection and use of “personal information” about individuals by Canadian government departments, offices and agencies. Personal information is a defined term under the legislation, but it refers to any information about an identifiable individual that is recorded in any form.

A government institution like the Agency may not collect any personal information unless it relates directly to its official programs or activities. Further, pursuant to s. 7, any information collected may only be used

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for the official purpose for which it was obtained.

As noted in Mr. Hare's letter to Dr. Lukács, s. 8 of the Act is the main provision on which the Agency relied in deciding to redact information from the documents provided to Dr. Lukács. Subsection 8(1) prohibits disclosure of personal information without the consent of the person to whom it relates, though there are several exceptions to this prohibition in s. 8(2).

In addition, s. 69(2) sets out a general exemption from the prohibitions in ss. 7 and 8:

Sections 7 and 8 do not apply to personal information that is publicly available.

The Court's Decision

It was undisputed that there no confidentiality order was made by the Agency; all of the documents considered by the Agency in making its decision in the Cancun matter were put on its public record.

For Dr. Lukács, a former math prodigy who acquired his PhD in mathematics at the age of 20, the argument was a simple matter of deductive reasoning. The documents he requested were on the Agency's public record

and any personal information in them was therefore publicly available. The logical consequence was that the prohibition on disclosure under s. 8 did not apply, pursuant to the broad exemption in s. 69(2).

The Agency and the Privacy Commissioner disputed Dr. Lukács' logic, arguing that a confidentiality order should not be necessary to protect personal information and that to be truly "publicly available", personal information should be obtainable from a source in the public domain other than the Agency. Both disputed the idea that the open court principle rendered personal information in the hands of the Agency publicly available.

The Court analyzed the meanings of "publicly available" and the "public record" and agreed with Dr. Lukács. In its quasi-judicial role, unless the Agency makes a specific ruling to render evidence tendered to it confidential, all of its record should be open and accessible.

The Court decided that placing documents on the Agency's public record is an act of disclosure that renders personal information contained in them publicly available and exempt from s. 8.

Clearly, the same result would flow with respect to any information or documents filed with the Agency by an air carrier when responding to a consumer complaint—failing a confidentiality order to the contrary.

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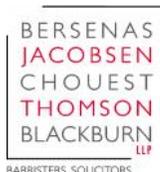
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