Federal Court  Cour fédérale

**Date: 20160420**

**Dockets: T-911-14**
**T-912-14**

**Citation: 2016 FC 448**

[REVISED ENGLISH CERTIFIED TRANSLATION]

**Ottawa, Ontario, April 20, 2016**

**PRESENT: The Honourable Mr. Justice Noël**

**BETWEEN:**

**THE INFORMATION COMMISSIONER OF CANADA AND DAPHNÉ CAMERON**

**Applicants**

**and**

**THE MINISTER OF TRANSPORT**

**Respondent**

# JUDGMENT AND REASONS

## I. SUMMARY

[1] The co-applicants, Ms. Cameron and the Information Commissioner, are making an application for judicial review of the decision made by Transport Canada's Access to Information and Privacy (ATIP) Director not to disclose the number of persons or the number of

Canadian citizens on the Specified Persons List (SPL). The ATIP Director invokes the exemption found in paragraph 15(1)(*c*) of the *Access to Information Act*, RSC 1985, c A-1, [the ATIA], in order to justify his refusal to disclose. The ATIP Director correctly qualified the information as being protected by the exemption in paragraph 15(1)(*c*); that is to say that it could be expected to be injurious to the detection, prevention or suppression of subversive or hostile activities. However, I find that, in the following step, the ATIP Director failed to exercise reasonable discretion. For the following reasons, I would allow the applications for judicial review in part, and I return the applications, so that they may be examined by a new decision-maker.

## II. FACTS

### A. *General facts*

[2] On March 17, 2010, the applicant, Ms. Cameron, a journalist for the newspaper *La Presse*, filed two ATIP requests with Transport Canada, to obtain the number of Canadian citizens as well as the total number of individuals included on the SPL for the period from 2006-2010 inclusive under Transport Canada's Passenger Protect Program [the PPP].

[3] On June 4, 2013, Transport Canada's ATIP Director [the Director or Mr. O'Reilly] refused to provide the requested information. The Director invoked paragraph 15(1)(*c*) of the ATIA and stated that making this information public could be injurious to the detection, prevention or suppression of subversive or hostile activities.

[4] Following the Director's refusal to disclose the information, Ms. Cameron requested assistance from the Information Commissioner [the Commissioner]. The Commissioner is the second applicant in this case. Each applicant has filed a memorandum of fact and law.

[5] The Government of Canada implemented the PPP following the events of September 11, 2001. The PPP aims to identify those persons who represent a threat to flight safety and to take measures to counter this threat. The Minister of Public Safety has been handling decisions regarding which names to include on the SPL since February 2011. Prior to February 2011, the Minister of Transport handled these decisions. The decision to include an individual's name on the SPL is based on the recommendations of an advisory group comprising Transport Canada, the Canadian Security and Intelligence Service [CSIS] and the Royal Canadian Mounted Police [the RCMP].

[6] When a person whose name appears on the SPL arrives at an airport to board a flight, he or she will be subject to additional screening. The Minister of Transport will be notified and will be asked to determine whether the individual poses an immediate threat. If the individual poses an immediate threat to aviation security, the Minister of Transport may issue an emergency direction to mitigate the threat, particularly by denying the individual boarding. The identity of those individuals on the SPL is not disclosed.

B. *Factual perspective for processing access requests*

[7] The PPP was launched on June 18, 2007. That same day, the Minister of Transport at the time, the Honourable Lawrence Cannon, stated that there were between 500 and 2000 names on the SPL.

[8] On March 17, 2010, Ms. Cameron filed an ATIP request with Transport Canada, requesting disclosure of the number of persons and the number of Canadian citizens on the SPL. Following her request, on April 9, 2010, Transport Canada's ATIP Director at the time, Mr. Réginald Laurent, consulted with the ATIP offices at CSIS and the RCMP in order to determine their positions regarding the information request.

[9] CSIS responded and recommended that the information requested by Ms. Cameron should be exempt from disclosure under subsection 15(1) of the ATIA. The RCMP, for its part, indicated in its response that it was not too worried about disclosing the information. The RCMP's representative indicated that the RCMP would not apply subsection 15(1) of the ATIA in these circumstances, but that the RCMP would not object to Transport Canada invoking the exemption.

[10] After this response, in order to gain clarification, Ms. Nathalie Morin, from Transport Canada's ATIP office, attempted to contact the RCMP's ATIP office on May 18, 2010. The next day (May 19, 2010), the RCMP's ATIP office sent an email indicating that they were not too worried about disclosing this information:

> […] As such, we don't see the need to withhold the information. Even the release of the global number of people does not concern us overmuch. Therefore, we would not apply section 15(1) of the Act to the documents you sent but we also don't have any objections to you applying it.

[11] On June 7, 2010, Mr. Laurent sent a letter to Ms. Cameron, indicating his refusal to disclose the requested information on the basis of paragraph 15(1)(*c*) of the ATIA. On July 28, 2010, Ms. Cameron filed a complaint with the Office of the Information Commissioner regarding the decision made by Transport Canada's ATIP Director not to disclose the requested information.

[12] The Commissioner investigated and shared her observations with Mr. Laurent on September 8, 2011. The Commissioner informed Mr. Laurent that she was not convinced risk of harm to the detection, prevention or suppression of subversive or hostile activities would result from the disclosure of this information, nor was she convinced that the decision-maker had exercised his discretion in denying the request.

[13] Following these observations, Mr. Laurent consulted Mr. Chris Free, an aviation safety specialist working for Transport Canada. Mr. Free contacted his counterpart in charge of the PPP at the RCMP to clarify the RCMP's position. Mr. Free informed Mr. Laurent that those members of the RCMP who were involved with the PPP felt that disclosing the requested information would jeopardize national security, contrary to the opinion of the RCMP's ATIP office.

[14] On November 17, 2011, Mr. Laurent presented his observations to the Commissioner, in compliance with paragraph 35(2)(*b*) of the ATIA. These observations were supported by

assessments from CSIS and from the Minister of Public Safety. Mr. Laurent also indicated that he felt the RCMP had contradicted itself.

[15] Then, during a period of more than a year, the Commissioner investigated and requested additional representations from Transport Canada. On May 10, 2013, at the end of her investigation, the Commissioner issued her recommendations.

[16] On June 4, 2013, Mr. Shaun O'Reilly, who had replaced Mr. Réginald Laurent as Transport Canada's ATIP Director, rejected the Commissioner's recommendations and issued the refusal to disclose the requested information.

[17] On March 4, 2014, Ms. Cameron received the Commissioner's report on the conclusions of her investigation. Ms. Cameron then gave her consent for this application for judicial review of the respondent's decision pursuant to section 42 of the ATIA. On April 15, 2014, the Commissioner filed two applications for judicial review with the Federal Court. On August 12, 2014, the applications were joined by order of the judge responsible for managing the proceeding. The applicant Ms. Cameron then joined the application filed by the Commissioner.

## III. ARGUMENTS

[18] The parties are not in agreement regarding the applicability of principles to the facts, nor regarding the weight that the Court should give to certain legal precepts. In the next section, I divide the parties' arguments into five (5) main topics: public interest and ATIA objectives;

applicable standards of review; appropriate burdens of proof; exercise of qualification; and exercise of discretion.

A. *Public interest and objectives of the Act*

[19] The applicants are asking the Court to rule that the refusal to disclose the requested information was made in a manner contrary to the principles of the ATIA and contrary to its quasi-constitutional status. They submit that the ATIA has a clear objective, namely to increase access to government information by defending the public's right to its disclosure. The necessary exemptions to this right are limited and specific; and decisions regarding disclosure of government information are subject to review, independent of government. In particular, the Canadian public must have the right to obtain the required information on the PPP and the SPL in order to be able to assess the efficiency and effectiveness of these measures and to determine if they are worth the sums invested in them by taxpayers.

[20] The respondent replies that the decision not to disclose the RCI by invoking paragraph 15(1)(*c*) of the ATIA respects these principles. The Court must show a certain deference to the decision-maker, given the executive's institutional expertise with regard to national security.

B. *Applicable standard of review and scope of this standard*

[21] The applicants submit that the reasonableness standard must be tempered. They maintain that the decision-maker's discretionary power, pursuant to the ATIA, in fact falls at the lower

end of the spectrum, and that the Court has full jurisdiction and power to examine both the exemptions invoked and the exercise of discretionary power.

[22] The respondent retorts that a matter that could be injurious to the prevention or suppression of subversive or hostile activities calls for a broad and flexible approach, since the decision-maker must weigh the specific facts as well as the policy in general.

[23] The applicants do not agree with the respondent's argument that the Court should show deference when the decision-maker makes a decision regarding the prevention or suppression of subversive or hostile activities, since the ATIA sets out specific and limited exemptions, which do not apply in this instance.

C. *Burden of proof*

[24] The applicants argue that the ATIP Director did not discharge his heavy burden of proof. In fact, at the qualification stage, the Director did not demonstrate a reasonable risk of probable harm: he did not use a specific approach and did not demonstrate a clear and direct link between the evidence presented and the alleged harm. The applicants also maintain that the ATIP Director did not discharge his burden of proof when exercising his discretion, if he did exercise it at all. If the decision-maker truly did exercise his discretion, he did so in a manner contrary to the analytical framework of section 15, contrary to the objectives of the ATIA, and also contrary to the case law and the factors to be considered.

[25] The respondent replies that direct evidence of danger is not required. Furthermore, the respondent maintains that the decision-maker's conclusion as to the existence of a risk of jeopardizing the prevention or suppression of subversive or hostile activities rests largely on the facts and the policy in a broad sense. The respondent suggests that the evidence regarding past, present and anticipated events could justify a conclusion of the existence of a threat or injury to the prevention or suppression of subversive or hostile activities. Thus, given the matter of national security implicit in the criteria of paragraph 15(1)(*c*) of the ATIA, the respondent argues that the Court must show restraint when assessing a decision regarding any risk of jeopardizing the prevention or suppression of subversive or hostile activities. The respondent feels that the Court should take a broad and flexible approach when dealing with decisions on matters of national security, as well as when some of Canada's international obligations are at play.

D. *Existence of a threat*

[26] The applicants suggest that the arguments invoked by Mr. O'Reilly are speculative, hypothetical and unfounded. The decision-maker did not establish how disclosing the RCI could diminish the effectiveness of the PPP, or how international relations would be damaged. The allegations of injury are general in nature and without any specific link to the requirements of section 15 of the ATIA. Citing generic reasons vaguely related to national security does not constitute sufficient grounds to restrict the public's right to access the RCI; the injury must be greater than a probability or a speculation.

[27] The applicants state that Mr. Free is a public servant who has been obstinately opposed to disclosure since becoming involved. They are also of the opinion that Mr. O'Reilly has only

recently assumed the position of ATIP Director, and that he has almost no experience in matters of national security. The evidence indicates that the RCMP ATIP office had not been opposed to disclosing the information prior to Mr. Free's intervention in the RCMP department that deals with the PPP and the SPL. The RCMP then changed its mind.

[28] The respondent presents no evidence that Canada's international relations with its key partners would be affected if the information about the RCI were disclosed. In fact, Mr. Free was unable to support his speculations after having agreed to produce a document to this effect. Mr. O'Reilly, in cross-examination, was equally unable to underpin his hypotheses about how Canada's international relations would suffer following disclosure of the RCI.

[29] The applicants allege that the PPP and the SPL are redundant components of Canada's security system, and that therefore, Canada would not suffer any injury if the RCI were disclosed. Moreover, the existence of many other complementary deterrent programs argues in favour of disclosure, since their existence further limits any injury that could result from disclosure of the RCI. Furthermore, given that certain SPL criteria are common knowledge, in particular that it does not apply to minors, a terrorist organization could easily circumvent it. Disclosing the RCI, therefore, does not render the program any more vulnerable than it already is.

[30] By contrast, the respondent maintains that the PPP and the SPL are measures that are part of a multi-layered security system that aims to ensure public safety. The respondent criticizes the fact that the applicants are essentially alleging that the PPP is superfluous, useless or ineffective,

and that it is no longer worth protecting information that could compromise the PPP's effectiveness and, incidentally, flight safety in Canada.

[31] The respondent argues that, these days, the approach of trying to ensure infrastructure security using "guns, guards and gates" is outdated, given the scope of the infrastructure at risk and the nature of the threat of modern terrorism. This layered approach, by intermeshing overlapping measures, ensures that if one provision is foiled, then another will still able to prevent an attack. We must not weaken an important measure like the PPP simply because there are other measures that complement it. Furthermore, the respondent alleges that modern flight safety is interconnected with flight safety in Canada's international partner countries. Thus, weakening one layer by disclosing the number of persons and the number of Canadians on the SPL would affect the confidence that other countries have in Canada. Canada could even see its exemption from using the U.S. "No Fly List" revoked.

[32] Lastly, the respondent makes the point that not disclosing the RCI has a deterrent effect on the planning and execution of terrorist attacks, since it leaves these groups with no concrete information with which to measure the risk. Thus, it was reasonable for Mr. O'Reilly to conclude that disclosing the RCI would create a reasonable risk of probable injury, thus allowing him to invoke the exemption in paragraph 15(1)(*c*) of the ATIA. Allowing the disclosure of information, even information that is several years old, would allow individuals with malicious intentions to make several requests over time and to gain an idea of Canada's defence capabilities.

E. *Exercise of discretion*

[33] The applicants argue that the decision-maker indulged in an unthinking or knee-jerk exercise of discretion and qualification, backing up his decision using platitudes, generalizations and hypotheses that are not supported by the evidence. The applicants insist that the decision-maker, Mr. O'Reilly, who has not been in his position for very long, blindly deferred to the opinion of specialists and therefore did not truly use his own judgment. It is also possible that the decision not to disclose the information is some sort of attempt to save face, since the Minister of Transport at the time the PPP was implemented, the Honourable Lawrence Cannon, allegedly stated, according to a *Globe and Mail* article, that there were between 500 and 2000 names on the SPL. This statement can also be seen as a "de facto" disclosure.

[34] The respondent countered that it is not important how long the ATIP Director has held this particular position and that the evidence shows Mr. O'Reilly to be a competent individual. In addition, there is no evidence indicating that any embarrassment or bad faith is at the source of the refusal to disclose the RCI. On the contrary, the evidence shows that Mr. O'Reilly's only concern was the existence of an injury to national security. The respondent is of the opinion that a discretionary decision is unreasonable only if it is determined that the decision was not made in keeping with the Act, that it was made in bad faith, that it was unjustified, that it was made based on irrelevant factors or that it was made without consideration of relevant factors. In light of these criteria, Mr. O'Reilly's exercise of discretion was reasonable. Furthermore, given the circumstances, it was appropriate for the decision-maker to consult specialists as well as the

relevant services and departments. Regarding the minister's statement, the respondent asserts that he cannot make inferences as to the minister's intention.

[35] The applicants suggest that the historical nature of the information was not at all addressed in Mr. O'Reilly's decision. Neither did Mr. O'Reilly comment on the Canadian public's interest in judging the program's efficiency and effectiveness in relation to its cost (approximately $13.8 million per year for the first five (5) years of operation, and $2.9 million for the subsequent years). Consequently, the applicants argue that the injury alleged by the respondent is more likely of a political nature than it is related to factors governed by the exemption under paragraph 15(1)(*c*) of the ATIA. Specifically, if the disclosure of the RCI reveals a small number, the PPP's usefulness will be called into question; whereas if the number is high, it may be thought that the program is too lenient, or that Canada is overflowing with terrorists who threaten civil aviation. The applicants reiterate that it is unacceptable for the decision-maker to assume that there is enough information in the public domain regarding the PPP for the public to be able to evaluate it. This consideration is arbitrary and is contradicted by the simple fact that Ms. Cameron made an ATIP request. Furthermore, even the United States makes the data contained in its No-Fly List available to the public.

[36] The respondent retorts that Mr. O'Reilly, the decision-maker, exercised reasonable discretion. The respondent maintains that Mr. O'Reilly studied all of the relevant factors, having specifically annotated the Commissioner's recommendations, consulted specialists within the relevant departments and services, considered the importance of the information for the public and taken into account that the information requested dates from 2007–2010, as well as the

objectives of the ATIA. In the end, the similar programs and other lists that exist, specifically the RCMP's list of high-risk travellers, are in no way comparable to the SPL, either in who they target or in their goals or inclusion criteria.

## IV. ISSUES

[37] Firstly, the Court must determine whether the decision-maker reasonably qualified the information as falling under subsection 15(1) of the ATIA, allowing him to invoke the exemptions to the general rule requiring the information to be disclosed.

[38] If the answer to the first question is yes, then the Court must also determine whether the minister's representative exercised reasonable discretion in refusing to disclose the information, after the Commissioner's recommendations.

## V. LEGAL CONTEXT

[39] In this section, I will provide a brief summary of the applicable law. Firstly, I will describe the general procedure for making an access to information request. Then, I will outline the relevant legislation. Lastly, I will state the law that applies specifically to judicial review when the decision-maker invokes an exemption under the ATIA.

A. *Procedure for making an ATIP request pursuant to the ATIA*

[40] To provide some context for this application for judicial review, it is useful to understand the progression of an ATIP request. *Bronskill v Canada (Canadian Heritage)*, 2011 FC 983, [2011] FCJ No 1199 (QL), [*Bronskill*], is a good starting point to familiarize oneself with access to information rights. Paragraphs 4–15 and 62–85 of this case law are particularly relevant. The Supreme Court also synthesized the procedure clearly in paragraphs 18–20 of the decision in *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, 331 DLR (4th) 513, [*Commissioner v Defence*]. However, I will not go into as much detail today; here is the gist of it:

[41] Firstly, a sufficiently detailed written request is sent to the organization that has the information. The person in charge at the federal institution is responsible for replying. The individual responsible must grant access to the documents within a reasonable time frame, regardless of who makes the request. If the organization refuses to disclose the information and the person files a complaint, the Information Commissioner must review the refusal. There is no direct process to determine which requests are active and which documents have been requested. The Commissioner can make recommendations and require a report from the organization in question [*Bronskill*, above, at paragraphs 6–7].

[42] Secondly, if, following the Commissioner's recommendations, the organization in question still refuses to disclose the information, the Commissioner informs the person of his or her right to judicial review of the organization's decision before the Federal Court. It should be

noted that the right to judicial review refers to a judicial review of the organization's decision – not a judicial review of the Information Commissioner's decision to support (or not) the individual's request. The Information Commissioner may, together with the individual, acting alone, or jointly, pursue the application for judicial review [*Bronskill*, above, at paragraphs 7–8].

[43] Lastly, the Federal Court must have access to all of the relevant documents. The Federal Court has the responsibility to protect and disclose the information if necessary. Contrary to the procedure pursuant to section 38 of the *Canada Evidence Act*, RSC 1985, c C-5, the Federal Court does not explicitly have the power to publish summaries of the information concerned [*Bronskill*, above, at paragraphs 11, 26–27].

[44] In this case, the Federal Court reviews the last decision made by Transport Canada's ATIP Director in its entirety, namely the exercise of qualification and discretion that followed the Commissioner's recommendations. It is by evaluating the decision as a whole that the Court can then rule on its reasonableness. The Court must, inherently, show a certain deference; however, the Court cannot accept a decision whose conclusions are unreasonable [*3430901 Canada Inc. v Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 FCR 421, [*Telezone*], at paragraph 100 and *Bronskill*, at paragraph 9]. In short, the Court reviews the reasonableness both of the decision regarding the qualification of the information, and of the exercise of discretion in allowing the disclosure of information under section 15 of the ATIA, notwithstanding an exemption authorizing the decision-maker not to disclose the RCI [*Bronskill*, above, at paragraphs 62–64, 69, 76].

B. *Relevant legislation*

[45] The legislation relevant to this case is included in the appendix of this decision.

C. *Specific legal principles*

(1) Scope of the public's right to access to information

[46] Access to government information is essential to ensure a healthy democratic system as indicated in *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403, 148 DLR (4th) 385, [*Dagg*], at paragraph 61, and *Bronskill*, at paragraphs 4–5. In *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23, [*Merck Frosst*], the Supreme Court summarizes this three-point principle at paragraph 21:

> [21] The purpose of the Act is to provide a right of access to information in records under the control of a government institution. The Act has three guiding principles: first, that government information should be available to the public; second, that necessary exemptions to the right of access should be limited and specific; and third, that decisions on the disclosure of government information should be reviewed independently of government (s. 2(1)).

[47] Each day, the government is called upon to make important decisions on behalf of the community. To do so, it bases its decisions on information vital to the decision-making process, prepared by the government apparatus. The public has the right to know this information, with the purpose of ensuring a dialogue surrounding the topics discussed. Without this information, there can be no healthy debate. The ATIA states this public right in section 2. The Supreme

Court has given the ATIA quasi-constitutional status, specifically in the case of *Commissioner v Defence*, above, at paragraph 40 [see also *Bronskill*, above, at paragraphs 4–5].

[48] However, this right to access, which is meant to be broad, is restrained by certain exemptions found in the ATIA. These exemptions must be specific and limited, the principle being that the general rule advocates for access except under clearly identified and justified circumstances [*Bronskill*, above, at paragraphs 4–5].

[49] In order to implement these principles, sections 49 and 50 of the ATIA acknowledge that the Court has a broad remedial power following any government authority's refusal to disclose information [see also *Bronskill*, above, at paragraphs 27, 67, 77, 103, 105, 110, 114].

[50] Paragraph 67 of *Bronskill* briefly outlines the differences between sections 49 and 50 of the ATIA:

> [67] Section 49 gives the Court power to order disclosure or to make any order deemed appropriate arising from the refusal of disclosure under sections of the Act that are not referred to in section 50. Section 50 itself gives the Court power to intervene in matters arising from section 14 (federal-provincial affairs), section 15 of the Act (national security and international affairs), paragraph 16(1)(*c*) (enforcement of laws and conduct of an investigation), paragraph 16(1)(*d*) (security of penal institutions) and paragraph 18(*d*) (financial interests of government). What is common between the refusals reviewed under section 50 is that the head of the government institution refusing disclosure has the discretion to do so, and the exemptions are injury-based, not class-based.

[51] In this case, as I will explain in more detail below, the Court's remedial power is that which is conferred by section 50, given the type of exemption invoked.

(2) General procedure when invoking an exemption in the ATIA

[52] The general rule of the ATIA is that the information must be disclosed. There are two types of exemptions that justify non-disclosure of the requested information: the first type of exemption is class-based. The second type of exemption is injury-based, and is related to the potential injury that could result from disclosure of the requested information. Paragraphs 13 and 15 of *Bronskill* clearly outline this procedure:

> [13] The exemptions laid out in the Act are to be considered in two aspects by the reviewing Court. Firstly, exemptions in the Act are either class-based or injury-based. Class-based exemptions are typically involved when the nature of the documentation sought is sensitive in and of itself. For example, the section 13 exemption is related to information obtained from foreign governments, which, by its nature, is a class-based exemption. Injury-based exemptions require that the decision-maker analyze whether the release of information could be prejudicial to the interests articulated in the exemption. Section 15 is an injury-based exemption: the head of the government institution must assess whether the disclosure of information could "be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities".
>
> […]
>
> [15] The second component of the exemptions under the Act is to determine whether the exemption is mandatory or discretionary. In the case of mandatory exemptions, the provisions of the Act mandate that the decision-maker "shall refuse to disclose" the records when they fall under the exemption (see, *inter alia*, section 19). In the case of discretionary exemptions, the decision-maker "may refuse" to disclose the record. Section 15 is a discretionary

> exemption, the aspects of which will be considered at length in the present reasons.

[53] Before launching into descriptions of the applicable standards and burdens of proof at the various stages, it is worth clarifying that the qualification and the exercise of discretion are reviewed by the Court, taking into account all of the information as well as the roles played by the parties. The Court has before it all of the evidence used by the decision-maker when making decisions, including the position taken by the Commissioner, as well as the grounds that, according to the Commissioner, justify the disclosure of the RCI (*Bronskill*, above, at paragraph 11).

(3) Qualification

[54] In this case, the decision-maker qualifies the information as meeting the criteria for an exemption related to the potential injury that could result from disclosure of the requested information. Transport Canada's ATIP Director feels that disclosing the RCI would go against subsection 15(1) and paragraph 15(1)(*c*) of the ATIA; that is to say, would hinder the detection, prevention or suppression of subversive or hostile activities. It is submitted that disclosing the RCI could facilitate the perpetration of acts of terrorism, including hijacking, in or against Canada or foreign states–the very definition of subversive or hostile activities found in subsection 15(2) of the ATIA.

[55] Paragraph 69 of *Bronskill* provides a good summary of why the reasonableness standard applies:

> … the applicability of the injury-based exemption of section 15 is to be determined on the standard of reasonableness. Firstly, this is what is instructed by section 50 and section 15 themselves ("reasonable grounds to refuse disclosure", "reasonably be expected to be injurious … "). Secondly, this Court has proceeded with the reasonableness standard when dealing with section 15 exemptions (*Do-Ky v Canada (Minister of Foreign Affairs and International Trade)*, (1999) 1999 CanLII 8083 (FCA), 164 FTR 160 (CA), at para 7; *Kitson v Canada (Minister of National Defence)*, above; *Steinhoff v Canada (Minister of Communications)*, above; *X v Canada (Minister of National Defence)*, (Strayer J.), above; *Canada (Information Commissioner) v Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1993] 1 FC 427 (FCTD)). Thirdly, the Court notes the nature of the information falling under section 15 is such that "a range of acceptable outcomes defensible in fact and in law" does exist in terms of what constitutes information injurious to the matters highlighted in section 15. Reasonable people can reasonably disagree as to what falls within section 15. …

[56] In paragraphs 22–27 of the decision in *Attaran v Canada (Foreign Affairs)*, 2011 FCA 182, 420 NR 315, [*Attaran*], the Court of Appeal explores the case law regarding the standard and the burden of proof in various circumstances. In paragraph 24, the Federal Court of Appeal indicates "that the burden of proof would depend upon the circumstances before the Court." [*Attaran* above, at paragraph 24].

[57] In this case, Ms. Cameron did not have access to the RCI or to the closed hearing in which the respondent and the Commissioner participated. The facts in this case differ from those in the existing case law: contrary to *Bronskill* (at paragraphs 125–126), *Attaran* (at paragraphs 25–27), and *Telezone* (at paragraphs 93–96), the Information Commissioner supports Ms. Cameron's application and participates in the proceedings as a co-applicant. Despite the fact that Ms. Cameron had no access to the redacted evidence or to the RCI, the Commissioner did benefit from all of the evidence and the RCI, and participated in both the closed hearing and the

public hearing. The burden of proof at the various stages of analysis is therefore defined according to these facts.

[58] Under these circumstances (that is to say, when the Commissioner participates in the closed hearing and the public hearing), to invoke the exemption found in paragraph 15(1)(*c*) of the ATIA, the decision-maker must show that it was reasonable to determine that the information in question reasonably be expected to cause probable injury to the prevention or suppression of subversive or hostile activities. For this purpose, the relevant factors are: there exists a presumption in favour of disclosing government-held information; the details given in the exercise of qualification pursuant to section 15 of the ATIA must be precise and detailed; the alleged injury must not be abstract or speculative. See *Canada Packers Inc. v Minister of Agriculture*, [1989] 1 FC 47 (FCA), 53 DLR (4th) 246, [*Canada Packers*] and *Canada (Information Commissioner) v Canada (Prime Minister)*, [1993] 1 FCR 427, 12 Admin LR (2d) 81, [*Canada v Prime Minister*].

[59] The decision-maker must do more than simply demonstrate that the injury could occur. Paragraph 196 of *Merck Frosst* elaborates on what this means in practice:

> [196] It may be questioned what the word "probable" adds to the test. At first reading, the "reasonable expectation of probable harm" test is perhaps somewhat opaque because it compounds levels of uncertainty. Something that is "probable" is more likely than not to occur. A "reasonable expectation" is something that is at least foreseen and perhaps likely to occur, but not necessarily probable. When the two expressions are used in combination – "a reasonable expectation of probable harm" – the resulting standard is perhaps not immediately apparent. However, I conclude that this long-accepted formulation is intended to capture an important point: while the third party need not show on a balance

> of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible. Understood in that way, I see no reason to reformulate the way the test has been expressed. [Underlining in the original version]

[60] The Court then discusses the causal link between disclosure and harm:

> [197] … As for the causal link between disclosure and harm, the Court indicated that there need not be a causal relationship as in tort law, but that there must be proof of a "clear and direct connection between the disclosure of specific information and the injury that is alleged" (*Lavigne*, at para. 58; see also *Canada Packers*, at p. 58–59).

[61] If the Court concludes at the first stage, that is to say, during the qualification analysis, that the exemption related to potential harm due to disclosure is justified based on the evidence on record, then it is appropriate to continue on to the second stage for the purposes of subsection 15(1) of the ATIA, namely the analysis of the exercise of discretion, since the decision-maker can envision disclosing the information based on the facts at play.

(4) Exercise of discretion

[62] As indicated in the preceding paragraphs, since the Commissioner has access to all of the relevant information and participated in all of the proceedings, the burden rests firstly with the Commissioner to establish that the decision-maker's exercise of discretion was unreasonable. If the Commissioner succeeds in discharging her burden of proof, then the burden is reversed and the decision-maker must prove that he did in fact exercise his discretion in a reasonable manner. Nevertheless, this standard must take into account the objectives of the ATIA, and the decision-

maker must exercise his discretion, taking the following into account (*Attaran*, above, at paragraphs 19–27, 30, 36 and *Bronskill*, at paragraphs 194, 204).

[63] By consulting the following cases, one can gain a clear understanding of the criteria related to the exercise of discretion when dealing with access to information or protection of personal information: *Canada Packers*, above, at paragraphs 46–48, 66; *Attaran*, above, at paragraph 14; *Dunsmuir v New-Brunswick*, 2008 SCC 9, 291 DLR (4th) 577, [*Dunsmuir*], at paragraph 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, [*Khosa*], at paragraph 59; *Canada (Attorney General) v Abraham*, 2012 FCA 266, [2012] FCJ No 1324 (QL), [*Abraham*], at paragraphs 41–44; *John Doe v Ontario (Finance)*, 2014 SCC 36, [2014] 2 SCR 3, [*John Doe*], at paragraph 52; *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, 319 DLR (4th) 385, [*Ontario Criminal Lawyers*], at paragraph 71; *Dagg*, above, at paragraphs 110–111; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, [*Baker*], at paragraph 53; and *Telezone*, above, at paragraphs 112–116.

[64] Thus, from this corpus, I take away the following essential points: when assessing the reasonableness of the decision-maker's exercise of discretion for the purposes of judicial review of a decision made under the aegis of the ATIA, the Court must consider the grounds for justification invoked by the decision-maker, as well as the transparency and the intelligibility of the decisional path with regard to the facts in evidence. In addition, when the Commissioner is a party to the proceedings, the Court must consider her arguments and suggestions and analyze how the decision-maker discusses them and takes them into consideration. In making his

decision, the decision-maker must show that he understands the access requests, that he understands the arguments in favour of disclosure and that he has carefully considered these arguments, all while taking into account the objectives of the ATIA.

[65] Furthermore, the Court must take into consideration all of the interests at play, including the public interest in the information held by the federal government:

> … the [Minister] must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.
>
> [*Ontario Criminal Lawyers*, above, at paragraphs 66, 211]

[66] That being said, I must reiterate that the decision-maker cannot simply state that he has considered all of the relevant factors; he must concretely demonstrate how he has considered them. To this end, the Court of Appeal explains this important distinction very well at paragraph 36 of *Attaran*:

> [36] … just as the absence of express evidence about the exercise of discretion is not determinative, the existence of a statement in a record that a discretion was exercised will not necessarily be determinative. To find such a statement to be conclusive of the inquiry would be to elevate form over substance, and encourage the recital of boilerplate statements in the record of the decision-maker. In every case involving the discretionary aspect of section 15 of the Act, the reviewing court must examine the totality of the evidence to determine whether it is satisfied, on a balance of probabilities, that the decision-maker understood that there was a discretion to disclose and then exercised that discretion. This may well require the reviewing court to infer from the content of the record that the decision-maker recognized the discretion and then balanced the competing interests for and against disclosure, as discussed by the Court in *Telezone*, at paragraph 116.

[67] Under such circumstances, the decision-maker must show that he has considered not only non-disclosure, but also disclosure, having considered the arguments in favour of disclosure in a complete and transparent fashion. He must weigh these arguments against the objectives of the ATIA. This requires a serious intellectual effort that allows the observer to conclude that the arguments in favour of disclosure were truly considered.

## VI. ANALYSIS

### A. *Introduction*

[68] To address the issues in this case, it is important to properly situate the Passenger Protect Program [the PPP] and the resulting Specified Persons List [the SPL] within the factual context of Canadian aviation safety.

[69] Then, we will proceed in two stages. Firstly, we will analyze the decision-maker's qualification of the information with regard to any probable harm to the prevention or suppression of subversive or hostile activities. Given our agreement with the qualification of the information as being related to paragraph 15(1)(*c*) of the ATIA, we will then proceed with an analysis of the discretion exercised by the decision-maker in arriving at the conclusion that the requested confidential information (RCI) should not be disclosed.

[70] To do this, I will consider the redacted information, the RCI, the submissions heard at the closed hearing, the parties' public records and their submissions presented at the public hearing. I will consider both the decision made by Transport Canada's ATIP Director on June 4, 2013,

and the body of evidence, that is to say, all of the evidence presented since the initial access request was made on June 7, 2010. I also take into account the examinations on the affidavits and the evidence filed by the Commissioner.

[71] There is no need for confidential reasons, since the redacted facts speak for themselves. These grounds clearly explain the reasons for the present decision, while preserving the redacted evidence and the RCI.

[72] Let us now proceed to the analysis of the PPP and the SPL – essential to properly understanding the access requests, the current proceeding and its outcome.

B. *The PPP and the SPL*

[73] Let us recall that the PPP has existed since June 18, 2007. It was at this time that the first SPL was created and implemented. Based on the evidence, the SPL is constantly being revised and periodically modified. Until February 2011, the Minister of Transport was responsible for it, and since that time, the Minister of Public Safety has taken over. For the period in question (2007–2010), a Transport Canada advisory board composed of a senior representative from the Canadian Security and Intelligence Service (CSIS), the Royal Canadian Mounted Police (RCMP) and departmental representatives, as well as representatives from other interested government departments and agencies, created the list using CSIS and RCMP information. The group made recommendations to the Minister of Transport regarding specified persons to be added to the list.

[74] Specified persons, for the purposes of the SPL, are individuals identified by the advisory board as posing immediate threats to flight safety. The factors to be considered in identifying these persons are: any person who is or has been involved with a terrorist group and who might reasonably be suspected of endangering the safety of an airplane, an airport, or the public, or the passengers or crew of domestic or international flights. This list targets a specific class of individuals related to the disruption of flight safety for flights leaving Canada and arriving in Canada or elsewhere, and for flights arriving at Canadian airports.

[75] Individuals on the SPL will not be issued a boarding pass unless it is authorized by a person capable of granting this permission. Consequently, air carriers, secretly having access to this list, must also check their own passenger list, to see if any of them are on the SPL. An individual on the SPL cannot know that he or she is on the list unless he or she travels by air. Individuals on the SPL can contest their name's entry on the list by following set procedures.

[76] The PPP is one of the screening measures used to ensure the safety of passengers travelling to or from Canada by plane. The PPP's other precautionary measures include, but are not limited to: screening every passenger, associating passengers on board the airplane with checked luggage, etc. The SPL is a screening measure that, based on the evidence, is applied before passengers obtain their boarding passes and then again before they board the airplane. This twofold approach does not compare to the other screening tools used. It is an addition to these measures that cannot be replaced by the other means currently in force.

C. *Other lists*

[77] There are other passenger lists that, according to the evidence presented, do not compare to the SPL. We have already explored the criteria that might cause an individual to be placed on the SPL and concluded that the SPL targets a very specific group. Some other lists use some of these criteria as well, but in every case, these other lists also apply other criteria not used by the SPL.

(1) The U.S. "No Fly List"

[78] The U.S. "No Fly List" is a list containing information from a number of organizations, and it applies criteria that are much more general. According to the evidence, it includes more than 16,000 names and, of these, fewer than 500 are U.S. citizens (data from 2011). This U.S. "No Fly List" applies to all flights leaving Canada that will arrive at U.S. airports or that will pass over U.S. territory en route to a destination other than Canada. Flights departing from one Canadian airport to arrive at another Canadian airport after passing over U.S. territory received an exemption from U.S. authorities in March 2012.

(2) The UN List

[79] Another list is that of the United Nations (the UN List), created by the Security Council with the adoption of Resolution 1267 in 1999. Resolution 1267 aimed to encourage UN members to adopt measures against terrorist groups and individuals. The UN List includes approximately 222 names of individuals associated with Al-Qaida or other terrorist groups and approximately

66 designated groups. Each UN member country is responsible for enforcing the list. Although it targets individuals involved with terrorist groups, the UN List does not use the same criteria as the SPL for including names.

(3) Air carrier lists

[80] There are also other lists produced by air carriers, identifying persons that the carriers associate with flight safety based on their behaviour on board the plane or their background information. These lists, which belong to each carrier, cannot be shared with other carriers. These lists, as we see, are not related to the SPL.

(4) The RCMP list

[81] There is one final list, produced by the RCMP, which contains approximately 90 names of persons allegedly planning to travel abroad to participate in combat for terrorist groups. The individuals on this list have a different objective than those included on the SPL.

D. *Conclusions regarding the SPL*

[82] Considering the evidence submitted, it is clear that the SPL is not comparable to the other lists mentioned above. The SPL has a specific purpose that is not reflected in the other lists.

[83] In a 2009 report, the Privacy Commissioner conducted a detailed study of the PPP, having access to all of the information, including the RCI and the names on the list. Evidently, her first concern was protecting the privacy of the persons involved. The Commissioner referred

to the PPP as a secret program dealing with personal information obtained and used without the consent of the persons involved. The report reveals that, at that time, the PPP was centralized at Transport Canada's main office and approximately 20 people worked on it. In 2007, the cost of getting the program up and running was estimated at $13.8 million for the first five (5) years and after that, at a little under $3 million annually.

[84] Considering that which is mentioned above as well as the evidence filed by the parties, it must be concluded that the PPP, as it was designed and implemented, works well and seems to meet the flight safety objectives for which it was created. The evidence submitted does not permit the undersigned to conclude that the list is badly designed or poorly managed or that it contains inconsistencies; in any case, that is not the purpose of this proceeding. The PPP's purpose is to protect passengers, and history shows that since its entry into force in 2007, it has fully achieved its goals.

[85] Before I launch into an analysis of the qualification, I would like to point out that the expression "national security" is not explicitly used in the ATIA. Nevertheless, it is evident that the concept of national security is implicit in exemption 15(1) of the ATIA since the definitions of "subversive or hostile activities" found in subsection 15(2) use the same vocabulary as that used in this field. The Supreme Court notably discussed at length the terminology related to national security in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, [*Suresh*], at paragraphs 80–99. The links between national security and "subversive or hostile activities" are evident. On the whole, I am of the opinion that it is

perfectly acceptable to invoke the concepts and the case law from the field of national security if it is necessary and appropriate to do so in the circumstances at hand.

E. *The information qualification conducted by the decision-maker*

[86] Would publishing the number of individuals and Canadian citizens on the SPL from 2007–2010 reasonably be expected to create probable harm to national security by facilitating the perpetration of acts of terrorism, specifically the hijacking of Canadian or foreign aircraft?

[87] This is the big question that we are asked to answer as a first step; we must therefore analyze the information qualification conducted by the decision-maker. The question that this Court must answer is: "Was the decision-maker's judgment reasonable when he concluded that subsection 15(1) and paragraph 15(1)(*c*) of the ATIA applied in this case?" Mr. Justice Rothstein – while he was with the Federal Court – stated, in the case of *Canada (Information Commissioner) v Canada (Prime Minister)*, at paragraphs 119–123:

> Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.
>
> In addition, allegations of harm from disclosure must be considered in light of all relevant circumstances. In particular, this includes the extent to which the same or similar information that is

> sought to be kept confidential is already in the public realm. While the fact that the same or similar information is public is not necessarily conclusive of the question of whether or not there is a reasonable expectation of harm from disclosure of the information sought to be kept confidential, the burden of justifying confidentiality would, in such circumstances, be more difficult to satisfy.
>
> (*Canada (Information Commissioner) v Canada (Prime Minister)*, [1993] 1 FCR 427, 1992 CanLII 2414 (FC), at paragraphs 119–123)

[88] In this same judgment, Rothstein J. also enumerates a series of very useful factors to consider when a Court must evaluate the qualification given by a decision-maker:

> The Canadian jurisprudence interpreting the *Access to Information Act* has established guidelines that can be useful in assessing whether or not there is a reasonable expectation of probable harm from disclosure in a given situation and the procedures to be followed. The following are not exhaustive:
>
> 1. The exemptions to access require a reasonable expectation of probable harm: *Canada Packers*, *supra*, at page 60.
>
> 2. The considered opinion of the Information Commissioner should not be ignored: *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1989] 1 F.C. 265 (C.A.), at page 272.
>
> 3. Use of the information is to be assumed in assessing whether its disclosure would give rise to a reasonable expectation of probable harm: *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 C.P.R. (3d) 180 (F.C.T.D.), at page 210.
>
> 4. It is relevant to consider if the information sought to be kept confidential is available from sources otherwise available by the public and whether it could be obtained by observation or independent study by a member of the public acting on his or her own: *Air Atonabee*, *supra*, at page 202.
>
> 5. Press coverage of a confidential record is relevant to the issue of expectation of probable harm from its disclosure: *Canada Packers*, *supra*, at page 63; *Ottawa Football Club v. Canada*

> *(Minister of Fitness and Amateur Sports)*, [1989] 2 F.C. 480 (1st), at page 488.
>
> 6. Evidence of the period of time between the date of the confidential record and its disclosure is relevant: *Ottawa Football Club*, *supra*, at page 488.
>
> 7. Evidence that relates to consequences that could ensue from disclosure that describe the consequences in a general way falls short of meeting the burden of entitlement to an exemption from disclosure: *Ottawa Football Club*, *supra*, at page 488; *Air Atonabee*, *supra*, at page 211.
>
> 8. Each distinct record must be considered on its own and in the context of all the documents requested for release, as the total contents of the release are bound to have considerable bearing on the reasonable consequences of its disclosure: *Canada Packers*, *supra*, at page 64.
>
> 9. Section 25 of the Act provides for severance of material in a record that can be disclosed from that which is protected from disclosure under an exemption provision. The severance must be reasonable. To disclose a few lines out of context would be worthless: *Montana Band of Indians v. Can. (Min. of Indian & Nor. Affairs)*, [1988] 5 W.W.R. 151 (F.C.T.D.), at page 166.
>
> 10. Exemptions from disclosure should be justified by affidavit evidence explaining clearly the rationale exempting each record: *Ternette v. Canada (Solicitor General)*, [1992] 2 F.C. 75 (T.D.), at pages 109-110; and *Merck Frosst Canada Inc. v. Canada (Department of Health and Welfare Protection Branch)* (1988), 20 C.P.R. (3d) 177 (F.C.T.D.), at page 179.
>
> (*Canada (Information Commissioner) v Canada (Prime Minister)*, [1993] 1 FCR 427, 1992 CanLII 2414 (FC), at paragraph 34)

[89] In light of this list of potentially useful factors, let us apply those factors that are relevant to the case at hand.

[90] The respondent maintains that Mr. O'Reilly, the decision-maker, correctly concluded that disclosing the RCI could be injurious to the prevention or suppression of subversive or hostile activities, in compliance with paragraph 15(1)(*c*) of the ATIA.

[91] As seen earlier, in order to effectively render such a decision, the decision-maker must show, in his or her reasons, that disclosing the RCI would reasonably be expected to be injurious to the detection, prevention or suppression of subversive or hostile activities. The possible harm to be established must be one that is probable based on the facts and must not be hypothetical or speculative. Nonetheless, the fact remains that the harm does not necessarily have to result from the disclosure, since it would be impossible to obtain evidence of this.

[92] We have already described the PPP, its purpose and its details. The PPP is one of the screening measures used to ensure the safety of passengers travelling to or from Canada by plane. In addition, the SPL is unique and is among the many screening measures essential to ensuring the safety of passengers, crews, and aircraft.

[93] The SPL contains the names of individuals who have been, by their past, linked to terrorist groups; who could be suspected of endangering the safety of persons travelling by plane; who have allegedly been found guilty of crimes threatening flight safety; or who have allegedly committed crimes endangering the lives of individuals and who could threaten flight safety. These criteria are specific and mainly target persons involved with terrorist groups and their potential links to air transport. This is a well-defined category. Mr. O'Reilly, the decision-maker, recognizes this fact in his June 2013 letter, when he writes:

> Upon implementation of these guidelines, specified persons have consistently been individuals, terrorists, and members of terrorists groups who have recorded or historical involvement in acts targeting aviation; have the capability to target aviation; and/or who have a stated intent to target aviation.

[94] The applicants maintain that the alleged harm is less probable since the RCMP initially claimed to be indifferent to the Transport Canada decision-maker's invocation of paragraph 15(1)(*c*) of the ATIA and then changed its mind after communicating with Mr. Free. I am not of the opinion that the RCMP's change of opinion is relevant, since it is just one piece of information among so many others at the decision-maker's disposal.

[95] It is also important to note that the SPL, as constituted, is not comparable to the other lists of travellers prohibited from travelling by plane. As I have already mentioned, the U.S. "No Fly List" and the UN List do not use the same selection criteria as the SPL. Therefore, the SPL, as part of the PPP, serves a unique and specific purpose and cannot be replaced by the other lists that prohibit certain individuals from travelling by plane.

[96] For the purposes of this analysis, and with the goal of clearly understanding the decision-maker's decision, I take into consideration the communications exchanged between the Office of the Information Commissioner and Transport Canada. It is evident that the decision-maker's main justification for refusing to disclose the RCI is the loss of the deterrent effect of the SPL. According to the decision-maker, this loss meets the requirement of the existence of harm necessary to qualify the information under the aegis of paragraph 15(1)(*c*). In both the November 17, 2011, letter and the June 2013 letter, Mr. O'Reilly, the decision-maker, explains in detail that revealing the RCI would provide keen the observer with information that he or she

could use for his or her own purposes. In the modern global context where the threat of violent plots is significant, information and its collection are very important. It is well known that certain groups use information, analyze it and then plan their future actions, at least in part, on this basis.

[97] I am well aware that Canada is a known target for civil aviation terror plots, as history shows: Air India (flight 182); the explosion at Narita International Airport in Japan; the 2006 terrorist plot involving two planes flying from London to Montreal and Toronto; the Underwear Bomber and the flight on Christmas Day, 2009, which passed over Canadian airspace; and the 2013 interception of an individual in possession of explosives at Pierre Elliott Trudeau Airport. In addition, the evidence establishes that Canada remains a target of interest for terrorist groups like Al-Qaida, among others. These groups develop new sophisticated methods for circumventing screening measures.

[98] The SPL is one screening measure among many, which cannot be replaced by another. As already seen, the SPL plays a unique role among all of the screening measures. It is the only Canadian safety precaution that applies to flights coming to Canada from abroad. For foreign airports that do not use the same pre-boarding screening measures as Canada, the SPL is the only obligatory Canadian measure used to screen travellers coming from abroad.

[99] It was proposed that the fact that the United States disclosed the number of names on its list (along with the percentage of American citizens on it) should justify disclosing the Canadian RCI. I disagree. The PPP is a separate program from that of the United States and was not developed to address the same objectives. These two lists cannot be compared. As for the

UN list, it does not have the same objectives either: it addresses just one category of individuals associated with Al-Qaida or similar groups. It cannot be compared to the SPL either, since the SPL has its unique role among the many screening measures in place in Canada. The RCMP list does not target the same type of individuals. Indeed, the RCMP list targets individuals who might leave Canada to participate in terrorist combat abroad. These lists cannot be compared to the SPL either. The same goes for the lists held by various air carriers, targeting individuals that the carriers do not want on board, each for individual specific reasons.

[100] Paragraph 15(1)(*c*) of the ATIA aims specifically to protect information that would be useful to those wishing to engage in subversive or hostile activities such as activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or foreign states.

[101] In his June 2013 letter, on pages 2 and 3, the decision-maker explains in a reasonable manner that publicizing the RCI would provide the keen observer with some very useful information:

> Without deterrence, terrorists would view targeting Canadians or Canadian Bound Aircrafts as soft targets, increasing the likelihood of attack.

[102] Such a statement is not speculation or a hypothesis: disclosing the RCI, namely the total number of individuals and the number of Canadian citizens on the SPL, would allow the keen observer to obtain additional data that he or she could use for his or her own ends. For this observer, in the current state of the matter, this is relevant and useful information. On this basis,

I conclude that disclosing the RCI would create a reasonable risk of probable harm; the how and the why of the harm are evident. In the interest of Canadians and in particular those who travel by air, it is not appropriate to create this probable risk.

[103] In arriving at this conclusion, I have also taken into account the Commissioner's arguments regarding the exemption found in paragraph 15(1)(*c*). I cannot agree with them for the abovementioned reasons. However, I add that my conclusion with regard to the qualification was arrived at based on the specific facts in the case at hand. If the facts change in the future, these findings may also change.

[104] I would like to clarify that such a culmination of the qualification stage is not a determining factor with regard to the following stage, namely the analysis of the reasonableness of the decision-maker's exercise of discretion. Indeed, paragraph 211 of the *Bronskill* case states: "The conferral of discretion by the Act is the embodiment of a clear legislative intent that some information may well be disclosed despite an alleged injury."

F. *The decision-maker's exercise of discretion*

[105] As a reminder, section 15 of the ATIA grants the decision-maker the right to disclose the RCI or not, according to his or her assessment. As explored earlier in the section "Specific legal principles" (see paragraphs 63–64), after analyzing a corpus of case law, I indicated that the Court must consider the grounds for justification invoked by the decision-maker, transparency, and the intelligibility of the decisional path with regard to the facts in evidence. In addition, when the Commissioner is a party to the proceedings, the Court must consider the

Commissioner's arguments and suggestions and analyze how the decision-maker discusses them and takes them into consideration. In making his or her decision, the decision-maker must show that he or she is familiar with the access requests, that he or she understand the arguments in favour of disclosure and that he or she has carefully considered these arguments, all while taking into account the objectives of the ATIA.

[106] It is also plausible for the judge to add factors if the matter requires it. Although the factors put forth by Rothstein J. deal with qualification (see paragraph 88 above), they may also be useful in analyzing the reasonableness of the exercise of discretion.

[107] With respect to the matter before the Court today, the principles that are relevant in analyzing the reasonableness of the exercise of discretion can be synthesized into three central questions:

1. Are the grounds supporting the exercise of discretion sufficient?

2. Do the grounds address the arguments raised by the Commissioner and Applicant Cameron, specifically the public interest?

3. Is the decision as a whole intelligible and justifiable according to its conclusions?

[108] At the step of analyzing the reasonableness of the exercise of discretion, the Commissioner, being fully aware of the matter, bears the burden of establishing the unreasonableness of the decision-maker's decision. Being fully informed, the Commissioner

can put forward all of the arguments she feels appropriate. The Commissioner and Applicant Cameron raise the following points regarding the exercise of discretion:

1. The passage of time and the historical nature of the requested information;
2. The public interest in knowing the RCI;
3. The decision-maker's reliance on other people's opinions;
4. The June 2007 statement made by former Transport Minister, Lawrence Cannon;
5. International relations.

(1) The passage of time and the historical nature of the requested information

[109] The passage of time and the historical nature of the requested information are relevant factors, both in assessing the harm and in the exercise of discretion, as indicated in *Bronskill*, paragraph 218:

> [218] While the passage of time is to be considered in the assessment of the injury resulting from disclosure (*Canada (Information Commissioner) v Canada (Prime Minister)*, above), it is also to be considered under the prism of whether discretion should be exercised. This has been alluded to as obiter by Chief Justice Lutfy in *Kitson*, above, at para 40, in qualifying the Court's refusal to grant the ATI request: "It may be that the outcome would be different if the request were made some time after the CF are no longer engaged in Afghanistan. However, this decision is not one to be made today." As such, if injury is present, yet at a lower end of the spectrum, the passage of time may be an important factor. This is the case because as the times change, so do the bases of "reasonable expectation of probable harm", save for the protection of human sources, current operational interests and similar issues. Justice Strayer also commented on the passage of time in the case of *X v Canada (Minister of National Defence)*, above, at para 8:
>
> > "I can only say that it appears to me quite unreasonable to conclude that the information in these documents which all bear dates of 1941 or

> 1942 and relate to a time when Canada was engaged in a world war, could reveal anything pertinent to the conduct of Canada's international relations and its national defence over 50 years later in time of peace."

[110] Rothstein J. also mentions the passage of time in his decision *Canada v Prime Minister*, above, in paragraphs 34 and 88 of the present case. However, I note that paragraph 219 of *Bronskill* indicates that the passage of time adjusts according to the factual circumstances and that it remains one factor among others:

> [219] The passage of time is a factor, among others. It could well be that the passage of time in regards to the identity of human sources is different, as counsel has acknowledged publicly that there is a "timeframe for confidential sources". And so, indeed, as it is argued by the Respondent, there is no "magic number" for the passage of time, and section 15 provides no direct guidance as to what passage of time is sufficient. This highlights the importance of a considered and thorough analysis of the reasonable expectation of probable harm under section 15 as well as the residual discretion to disclose.

[111] When applied to this case, I note that the passage of time and the historical nature of the requested information are barely addressed in the decision drafted by Mr. O'Reilly in June 2013, except to note that this type of information has always been protected by the respondent (see page 3 of the decision-maker's letter dated June 4, 2013). In short, no specific reason is given for this argument. It is hard to consider this an intelligible explanation under such circumstances.

[112] As for the argument that this type of information has always been protected, this in no way responds to the argument that time has passed and that this type of information no longer holds the same importance it initially did. I note that the first access to information application

dates from March 17, 2010, that the first decision after the complaint was filed with the Commissioner dates from November 17, 2011, and that the second decision dates from June 4, 2013. The first information requested is from 2007, namely six years prior to the June 2013 decision.

[113] The passage of time is important for such a request. In this case, the decision-maker essentially did not take this into account. If he did, the minimal analysis of and references to this factor are completely inadequate. In the review to come, the passage of time will be even more marked.

(2) The public interest in knowing the RCI

[114] The interest of the Canadian public in knowing the requested information also goes nearly unmentioned in the decision-maker's June 2013 letter. In the communications exchanged, the decision-maker states that a lot of information regarding the PPP has already been disclosed to the public and that the public has [TRANSLATION] "enough information".

[115] This response does not justify the refusal to disclose the RCI and does not sufficiently take into account the public's interest in knowing this information.

[116] On this topic, Applicant Cameron, in her July 2010 complaint, explains how the public's interest in knowing the RCI justifies her request: [TRANSLATION] "I feel that the Canadian taxpayers who pay for this program, as well as the readers of La Presse, have the right to know how many people are included on this list. …"

[117] The decision-maker is silent regarding the alleged relevance of the RCI in response to the arguments invoked by the applicant. It seems to me that, at the very least, the decision-maker should have explained why this public interest was not valid and appropriate under the circumstances.

(3) The decision-maker relies on other people's opinions

[118] Applicant Cameron alleges that it was inappropriate for Mr. O'Reilly, the decision-maker, to rely on the opinions of Mr. Christopher Free and Mr. John Davies. I disagree with that. Mr. Free is a civil servant specializing in aviation safety for Transport Canada, and Mr. Davies works for the Minister of Public Safety. Under such circumstances, a decision-maker needs to be able to rely on the knowledge of staff within the departments involved, in order to render appropriate decisions. In this case, the decision-maker benefitted from the opinions of knowledgeable persons; this does not render his decision invalid. I note, however, that the decision-maker must not blindly follow all of the advice given to him. Indeed, the Supreme Court, in *Telezone*, at paragraphs 35–36, upholds that it is acceptable for the decision-maker to rely on the experience of specialists to guide his decisional exercise without, however, abdicating his responsibility. He may consult, but remains the master of his own decision:

> [35] Second, turning to the expertise of the decision-maker, I acknowledge that, like other institutional heads handling access requests, the Minister of Industry has available the experience of the members of a specialized departmental unit who regularly have to interpret and apply the *Access to Information Act* in the course of their work. Further, the Minister and his advisers are well placed to assess whether, if government is to operate effectively to advance the public interest, it is necessary for the effective working of the internal processes of government to maintain a measure of secrecy for communications between officials, and

> between officials and the Minister, in the course of developing policy.
>
> [36] However, this expertise must be balanced against the primary purpose of the Act, namely, the provision of a public right of access to government records, albeit one that is limited by other considerations, and the creation of mechanisms for independent review as the means by which the statutory purpose is pursued. The key to interpreting the scope of the right of access and of the exemptions is to be found in striking an appropriate balance between the competing legislative policies that underlie them, a function for which a body independent of the Executive is better suited than the institution resisting the request for access. As counsel for the Information Commissioner pithily put it in the course of argument, if the Court were to confine its duty under section 41 to review ministerial refusals of access requests by deferring to ministerial interpretations and applications of the Act, it would, in effect, be putting the fox in charge of guarding the henhouse.

[119] To this effect, a simple read-through of the letter dated June 4, 2013, shows that Mr. O'Reilly has a certain knowledge, a mastery of the information, as well as the ability to make this decision independently.

(4) The statement made by Transport Minister Lawrence Cannon

[120] On June 18, 2007, the date upon which the PPP came into force, the Transport Minister at the time, the Honourable Lawrence Cannon, was quoted in a *Globe and Mail* article as stating that there were between 500 and 2000 individuals who met the criteria for inclusion in the SPL. The Commissioner suggests that this statement could be considered a disclosure "fait accompli" or even that Mr. O'Reilly's decision not to disclose the RCI is an attempt to prevent some kind of embarrassment [see *Bronskill*, above, at paragraph 131].

[121] The Transport Minister's statement could be problematic and the decision-maker barely discussed it, except to minimize it by saying that the numbers were approximate and six years old, and that he would only be making assumptions if he tried to infer as to the Minister's intention.

> You have asserted that the Ministry of Transport previously disclosed the approximate number of individuals on the list in 2007. This information is based on a Globe and Mail article. It would be conjecture on our part to reply as to the accuracy of the report, the circumstances that led to the Globe's quote, or the overall context in which the alleged statement was made. Moreover, the alleged disclosure to which you refer is 6 years old and since the implementation of the list in 2007 the Department of Transport has consistently protected the information sought from public disclosure.

[122] To be honest, this appears to me to be a complete abdication of the decision-maker's obligation to clarify the situation under such circumstances. The Minister was quoted by the newspapers in an article from the Canadian press on the same day as the PPP came into force, explicitly stating that there were between 500 and 2000 individuals on the list. This statement was made by a Minister of Transport, the person ultimately responsible for the program, who presumably knew what he was talking about. The decision-maker refuses to clarify this statement, claiming that it was an unverifiable, six-year-old statement. The statement specifically addresses an element of the RCI; namely, the number of individuals on the list, and the decision-maker feels that it is not appropriate to discuss it. This is unacceptable; this constitutes a flagrant lack of transparency and reasonableness in the exercise of discretion, given the circumstances.

(5) International relations

[123] In light of the evidence submitted, I am puzzled by the argument that our international relations will be affected if the RCI is disclosed. I am addressing this at this stage because the argument is used in a general sense to justify the refusal to disclose the information. It is not being used to demonstrate that another exemption applies.

[124] To establish the risk of potential harm, the respondent maintains (at the qualification stage) that international relations between Canada and its key partners will be damaged if the RCI is disclosed. I am of the opinion that this argument is, in fact, more relevant at the discretion analysis stage, given the factual circumstances. The applicants allege that the evidence, particularly the cross-examinations of Mr. O'Reilly and Mr. Free, does not establish this alleged harm.

[125] The explanation given by the respondent to support this point and demonstrate adequate exercise of discretion seems defective and inappropriate to me. Allow me to explain: on page 6 of the decision dated June 4, 2013, it is indicated that disclosing the RCI could suggest to our U.S. and other allies a decrease in the effectiveness of the PPP, and thus have negative repercussions on our relations with these allies. It is also mentioned that Canada is exempt from the U.S. "Secure Flight Program" and the U.S. "No Fly List" for flights departing from one Canadian airport to arrive at another Canadian airport after passing over U.S. territory.

[126] The Commissioner maintains that the respondent failed to prove that this is truly the case, based on the evidence. The questioning of Mr. O'Reilly and Mr. Free attest to this, since neither of them were able to demonstrate any concrete concern, American or otherwise, in this regard. On the contrary, their responses seemed to indicate that they were extrapolating or speculating to this end.

[127] During his cross-examination, Mr. O'Reilly agreed to produce a letter from the U.S. government establishing that the United States was concerned about disclosing the RCI in question.

[128] However, on November 18, 2014, the decision-maker's attorney replied that no response to the commitment had been found:

> [TRANSLATION] "This is a follow-up to the examination of Shawn O'Reilly, on October 10, 2014, during which the following commitment was made by affidavit: "Undertaking no. 1: To provide the letter from the United States government re: concerns of releasing the information on the no-fly."
>
> Our client searched diligently through its records and was unable to find any letter from the United States government.
>
> Consequently, Mr. O'Reilly believes he was mistaken when he stated: "I recall from another file that there was communication with the US on this question."

[129] For his part, Mr. Free stated in his affidavit:

> "Disclosing the number of individuals and/or the number of Canadian citizens on the Specified Persons List XXXXREDACTEDXXXXX and adversely affect our relationship with key allies, and especially in the U.S."

[130] Yet in his cross-examination, Mr. Free could not confirm his statement:

> "Q. That is your own opinion? You don't have any concrete facts? You don't have basis to make that statement? Like you said, international partners never express concern over the releasing of the information.
>
> A. I believe I said I don't – I am not privy to those discussions."
>
> "Q. If Canada goes ahead and discloses the information on the no-fly list, you are not aware of any international partner raising concern about that?
>
> A. No, nor would I expect to be in my position."

[131] For his part, Mr. O'Reilly attempted to describe the harm that would jeopardize international relations, as follows:

> "Q. And explain to me how, because you are actually referring in your affidavit to the negative impact of releasing the information on the international partners. How would the U.S. react if the number were to be released?
>
> A. I don't know how they would react. But I do know from partnerships that I've had that you rely on each other to maintain discretion, to a certain degree of discretion, and I would expect that they would react negatively in some way."

[132] I repeat that the Americans have disclosed the information regarding their list. Nonetheless, it is important to take into account that, according to the witnesses' cross-examinations, the RCI is unknown to U.S. authorities. The quality of the evidence regarding this point is mediocre, so I cannot give it much weight.

[133] All U.S. air carriers whose flights arrive at or depart from Canadian airports receive the Canadian SPL so that they can apply it. Thus, the evidence reveals that U.S. carriers are aware of the number of persons on the list. The parties have not presented any evidence establishing that U.S. authorities are unaware of that which is known to U.S. air carriers. When I re-read the decision-maker's notes on this point, on pages 6 and 7 of his June 2013 decision, I note that he did not really address the topic, except to comment on it in an alarmist fashion. The decision-maker does not render its nuances appropriately. I do not consider this to be an adequate demonstration of reasonableness in exercising his discretion, as is required in such circumstances.

[134] On the contrary, the treatment of this topic is another factor that gives the impression that discretion was not reasonably exercised.

G. *Conclusions on the exercise of discretion*

[135] For the above reasons, I do not believe that discretion was reasonably exercised. Some of the decision-maker's arguments are supported by little or no evidence, or have almost no grounds. In addition, when the decision-maker stated the reasons for his decision, he did not address the arguments raised by the applicants. For example, the argument regarding the Minister's statement was addressed, but in an incomplete fashion and without truly responding to the applicants' arguments on the topic.

[136] The argument alleging potential damage to international relations between Canada and its allies seems to have been conceived in such a way as to impress the reader. In addition, the

grounds cited by the decision-maker are based on the premise that the RCI is unknown to the U.S. authorities, which was not established in a convincing manner by the evidence; in fact, quite the opposite. The grounds put forth on this topic are not supported by the evidence and do not hold up under examination.

[137] There are therefore three reasons why the exercise of discretion is unreasonable: as determined, there are few grounds for addressing the passage of time, a refusal to seriously address the Minister of Transport's statement, and finally a total lack of evidence to support the argument that international relations with the United States and others would be negatively affected.

[138] For these reasons, I return the file to another decision-maker, so that he or she may exercise the necessary discretion and arrive at an informed conclusion. Not having the power to require a new decision within a defined period, I express the wish that this be done within a short time frame (90 days). These applications were made in 2010 – nearly six (6) years ago. Applicant Cameron is entitled to costs, given the result. The Commissioner did not request costs.

**JUDGMENT**

**THE COURT ORDERS AS FOLLOWS:**

1. The applications for judicial review are allowed in part because the exemption invoked (namely, paragraph 15(1)(*c*) of the ATIA) in not disclosing the information requested is justified;

2. However, the exercise of discretion pursuant to subsection 15(1) is declared unreasonable and the file is returned to another decision-maker so that he or she may exercise the discretion set out according to the guidelines hereby issued;

3. All with costs in favour of Applicant Cameron, against the respondent.

Simon Noël
Judge

## APPENDIX – RELEVANT LEGISLATION

| | |
|---|---|
| *Access to Information Act*, RSC, 1985, c A-1 | *Loi sur l'accès à l'information*, LRC (1985), ch A-1 |
| International affairs and defence | Affaires internationales et défense |
| 15(1) The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities, including, without restricting the generality of the foregoing, any such information: | 15(1) Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements dont la divulgation risquerait vraisemblablement de porter préjudice à la conduite des affaires internationales, à la défense du Canada ou d'États alliés ou associés avec le Canada ou à la détection, à la prévention ou à la répression d'activités hostiles ou subversives, notamment : |
| […] | […] |
| (c) relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment, of any military force, unit or personnel or of any organization or person responsible for the detection, prevention or suppression of subversive or hostile activities; | c) des renseignements concernant les caractéristiques, les capacités, le rendement, le potentiel, le déploiement, les fonctions ou le rôle des établissements de défense, des forces, unités ou personnels militaires ou des personnes ou organisations chargées de la détection, de la prévention ou de la répression d'activités hostiles ou subversives; |
| […] | […] |
| Definitions | Définitions |
| (2) In this section, | (2) Les définitions qui suivent s'appliquent au présent article. |
| defence of Canada or any state allied or associated with Canada includes the efforts of Canada and of foreign states toward the detection, prevention or suppression of activities of any foreign state directed toward actual or potential attack or other acts of aggression against Canada or any state allied or associated with Canada; (défense du Canada | défense du Canada ou d'États alliés ou associés avec le Canada Sont assimilés à la défense du Canada ou d'États alliés ou associés avec le Canada les efforts déployés par le Canada et des États étrangers pour détecter, prévenir ou réprimer les activités entreprises par des États étrangers en vue d'une attaque réelle ou éventuelle ou de la perpétration d'autres actes d'agression contre |

ou d'États alliés ou associés avec le Canada)

le Canada ou des États alliés ou associés avec le Canada. (defence of Canada or any state allied or associated with Canada)

subversive or hostile activities means

activités hostiles ou subversives

a) espionage against Canada or any state allied or associated with Canada,

a) L'espionnage dirigé contre le Canada ou des États alliés ou associés avec le Canada;

b) sabotage,

b) le sabotage;

c) activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or foreign states,

c) les activités visant la perpétration d'actes de terrorisme, y compris les détournements de moyens de transport, contre le Canada ou un État étranger ou sur leur territoire;

d) activities directed toward accomplishing government change within Canada or foreign states by the use of or the encouragement of the use of force, violence or any criminal means,

d) les activités visant un changement de gouvernement au Canada ou sur le territoire d'États étrangers par l'emploi de moyens criminels, dont la force ou la violence, ou par l'incitation à l'emploi de ces moyens;

e) activities directed toward gathering information used for intelligence purposes that relates to Canada or any state allied or associated with Canada, and

e) les activités visant à recueillir des éléments d'information aux fins du renseignement relatif au Canada ou aux États qui sont alliés ou associés avec lui;

f) activities directed toward threatening the safety of Canadians, employees of the Government of Canada or property of the Government of Canada outside Canada. (activités hostiles ou subversives)

f) les activités destinées à menacer, à l'étranger, la sécurité des citoyens ou des fonctionnaires fédéraux canadiens ou à mettre en danger des biens fédéraux situés à l'étranger. (subversive or hostile activities)

**Order of Court where no authorization to refuse disclosure found**

**Ordonnance de la Cour dans les cas où le refus n'est pas autorisé**

**49** Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other

**49** La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre

order as the Court deems appropriate.

**Order of Court where reasonable grounds of injury not found**

**50** Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

ordonnance si elle l'estime indiqué.

**Ordonnance de la Cour dans les cas où le préjudice n'est pas démontré**

**50** Dans les cas où le refus de communication totale ou partielle du document s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner communication totale ou partielle à la personne qui avait fait la demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKETS:** | T-911-14 AND T-912-14 |
| **STYLE OF CAUSE:** | THE INFORMATION COMMISSIONER OF CANADA ET AL v THE MINISTER OF TRANSPORT |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF THE CLOSED HEARING:** | January 20, 2016 |
| **DATE OF PUBLIC HEARING:** | January 21, 2016 |
| **JUDGMENT AND REASONS:** | NOËL J. |
| **DATED:** | April 20, 2016 |

**APPEARANCES:**

| | |
|---|---|
| Sylvain Lussier and<br>Diane Therrien | FOR THE APPLICANT<br>INFORMATION COMMISSIONER<br>OF CANADA |
| Christian Leblanc | FOR THE APPLICANT<br>DAPHNÉ CAMERON |
| Sara Gauthier and<br>Marieke Bouchard | FOR THE RESPONDENT<br>THE MINISTER OF TRANSPORT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Osler, Hoskin & Harcourt LLP<br>Montréal (Quebec) | FOR THE APPLICANT<br>INFORMATION COMMISSIONER<br>OF CANADA |
| Office of the Information<br>Commissioner, Gatineau, Quebec | FOR THE APPLICANT<br>INFORMATION COMMISSIONER<br>OF CANADA |
| Fasken Martineau DuMoulin | FOR THE APPLICANT |

Montréal, Quebec | DAPHNÉ CAMERON

William F. Pentney
Deputy Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT
THE MINISTER OF TRANSPORT