Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

MOTION RECORD OF THE APPLICANT, AIR PASSENGER RIGHTS

Show Cause Motion for Contempt of Court
(pursuant to Rules 467(1) and 369.2 of the *Federal Courts Rules*)

VOLUME 1 of 2

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Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

NOTICE OF MOTION
(Show Cause Motion for Contempt of Court)

TAKE NOTICE THAT THE MOVING PARTY will make a motion in writing to the Court under Rule 369.2 of the *Federal Courts Rules*, S.O.R./98-106.

THE MOTION IS FOR:

1. An Order that within five (5) calendar days of the Court's Order, the Canadian Transportation Agency [**CTA**] shall transmit to the Court and to the Applicant the Withheld Materials as defined in Schedule "A";

2. A direction that within one (1) calendar day of the Court's Order, the solicitor of record for the CTA shall bring the Court's Order and the October 15, 2021 Order to the attention of the following individuals at the CTA:

    (a) Ms. France Pégeot, Chairperson and Chief Executive Officer of the CTA;
    (b) Ms. Elizabeth C. Barker, Vice-Chairperson of the CTA; and
    (c) Ms. Valérie Lagacé, Secretary and Senior General Counsel of the CTA;

3. A direction that within two (2) calendar days of the Court's Order, counsel for the CTA shall confirm to the Court compliance with paragraph 2;

4. An Order directing that if the Withheld Materials are not disclosed in accordance with paragraph 1, on proof by affidavit evidence of such a failure to comply, an Order in the form set out in Schedule "B" be issued to the persons below pursuant to Rule 467(1) for non-compliance with both the October 15, 2021 Order of Gleason, J.A. and this Order:

   (a) the Canadian Transportation Agency;
   (b) Ms. France Pégeot, Chairperson and Chief Executive Officer of the CTA;
   (c) Ms. Elizabeth C. Barker, Vice-Chairperson of the CTA; and
   (d) Ms. Valérie Lagacé, Secretary and Senior General Counsel of the CTA;

5. An Order under Rule 147 validating the service of this motion record on:

   (a) Ms. France Pégeot, Chairperson and Chief Executive Officer of the CTA;
   (b) Ms. Elizabeth C. Barker, Vice-Chairperson of the CTA; and
   (c) Ms. Valérie Lagacé, Secretary and Senior General Counsel of the CTA;

6. An Order under Rule 467(4) that the Rule 467(1) Order in paragraph 4 above, as well as any further documents relating to the Rule 467(1) Order, shall be served on the Alleged Contemnors by the Applicant via email as specified in paragraph 4 of Schedule "B";

7. A direction that the Registry email and deliver by regular post the Rule 467(1) Order in paragraph 4 above to the Alleged Contemnors upon issuance of that Order, as specified in paragraph 5 of Schedule "B";

8. Costs and/or reasonable out-of-pocket expenses of this motion, payable by the CTA forthwith and in any event of the cause; and

9. Such further and other relief or directions as the counsel may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. At the outset of the COVID-19 pandemic, on March 25, 2020, the CTA widely disseminated a public statement entitled "Statement on Vouchers" [the **Statement on Vouchers**], purporting to inform, or otherwise influence the perception of, the travelling public regarding their rights to refunds of unused airfares for flights affected during the COVID-19 pandemic.

2. The Applicant is a non-profit group that advocates for the rights of the travelling public, seeking judicial review on behalf and for the benefit of the travelling public in respect of the Publications on two distinct and independent grounds:

   (a) **Reasonable Apprehension of Bias Ground** [**RAB Ground**] — the CTA's issuing of the Statement on Vouchers is contrary to the CTA's own *Code of Conduct*, **and** gives rise to a reasonable apprehension of bias with respect to the CTA as a whole, or alternatively, the CTA's members who supported and/or endorsed the Statement on Vouchers; and

   (b) **Misinformation Ground** — the content of the Statement on Vouchers contains misinformation and omissions about passengers' legal rights vis-à-vis the airlines, and infuses confusion for the travelling public.

3. The RAB Ground is two-fold and concerns, first, the pre-judgement by the CTA as an institution, or, in the alternative, by its constituent members of passengers' entitlement to reimbursement for flights cancelled due to the COVID-19 pandemic and, second, external third-party influence in the development of the impugned Statement on Vouchers.

4. On October 2, 2020, Webb, J.A. dismissed the CTA's motion to strike, and ruled that the application for judicial review should be heard on the merits, and reaffirmed that the RAB Ground raises a *serious issue to be tried*.

The October 15, 2021 Disclosure Order of Gleason, J.A.

5. On October 15, 2021, Gleason, J.A. ordered, *inter alia*, that within 60 days of that Order the CTA shall disclose to the Applicant in electronic format:

   (a) all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020 [**CTA Member Correspondences**];

   (b) all non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020 [**Third-Party Correspondences**]; and

   (c) all non-privileged documents related to any meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the statement on vouchers posted on the CTA's website on March 25, 2020 was discussed [**Meeting Documents**].

6. The October 15, 2021 Order of Gleason, J.A. [**Disclosure Order**] was not appealed, and the CTA did not seek any clarification of the Disclosure Order.

7. In her reasons for the Disclosure Order, Gleason J.A. stated that:

> [23] For clarity, meetings include telephone conversations, video conferences and internet meetings as well as in-person meetings and third parties include anyone other than a member or employee of the CTA.

The CTA's Continued Failure to Comply with the Disclosure Order

8. On December 14, 2021, the CTA disclosed only a limited number of documents, but failed to disclose at least fifteen (15) sets of documents that clearly exist and fall within the Disclosure Order's scope.

9. The CTA failed to disclose the fifteen (15) sets of missing documents despite the CTA acknowledging receipt of the Applicant's multiple requests for compliance with the Disclosure Order and production of the missing fifteen (15) sets of documents. On December 24, 2021, the CTA provided an incomplete response:

   (a) The CTA provided only three (3) out of the fifteen (15) sets of the missing documents in an alternative scanned paper format, rather than the electronic Microsoft Word format that contained metadata;

   (b) The CTA also provided a partial response to another three (3) of the fifteen (15) sets of the missing documents; and

   (c) The CTA did not deny that the remaining nine (9) sets of missing documents exist, but the CTA failed to provide a legal justification for why the CTA would be excused from providing those documents.

10. On January 11, 2022, the Applicant delivered to the CTA a particularized list of the twenty-one (21) missing items, consisting of the Withheld Materials set out in Schedule ”A”, taking into account the CTA's partial response on December 24, 2021, and includes six additional items that the Applicant subsequently discovered were missing.

Key Personnel Shielded from Knowledge of the Disclosure Order

11. Pursuant to ss. 13-14 and 21 of the *Canada Transportation Act*, the CTA's Chairperson, Vice-Chairperson, and Secretary are key personnel having supervision and/or control of Agency members, staff, and/or the Withheld Materials.

12. Counsel for the CTA has been shielding the CTA's key personnel from provable knowledge of the Disclosure Order and responsibility for breaches of same.

   (a) On December 20 and 30, 2021, the Applicant requested counsel for the CTA to bring the Disclosure Order and the Applicant's December 17, 2021 letter to the attention of: (1) the Chairperson; (2) the Vice-

Chairperson; and (3) the Secretary and Senior General Counsel.

(b) Despite the two requests from the Applicant, counsel for the CTA has consistently and repeatedly refused to confirm whether the Disclosure Order was brought to the attention of the CTA's key personnel.

Progressive Enforcement of the Disclosure Order

13. The Applicant has established the constituent elements of a *prima facie* case of contempt of court by the CTA:

(a) the Disclosure Order exists;

(b) the CTA has knowledge of the Disclosure Order; and

(c) the CTA knowingly disobeyed the Disclosure Order by refusing to disclose some or all of the Withheld Materials.

14. The Applicant is seeking this Court's assistance in progressively enforcing the Disclosure Order, bearing in mind that the Court's contempt power is a last resort for an order's enforcement: *Hyundai Motor America v. Cross Canada Auto Body Supply (West) Limited*, 2007 FC 120 (*per* Dawson, J. as she then was).

15. While the Disclosure Order is clear and unambiguous, it would serve the interests of judicial economy and efficiency if the Court first issued a specific Order compelling the CTA to disclose the Withheld Materials in Schedule ''A", thereby affording the CTA and its key personnel a final opportunity to comply with their obligations under the Disclosure Order.

16. If the CTA continues to disobey the Disclosure Order, then an order for a contempt of court hearing ought to be issued under Rule 467 without further delay.

Statutes and Regulations Relied Upon

17. *Canada Transportation Act*, S.C. 1996, c. 10, and in particular, sections 7, 13-14, and 21;

18. *Federal Courts Act*, R.S.C. 1985, c. F-7, and in particular, sections 3, 18.1, 28, and 44; and

19. *Federal Courts Rules*, S.O.R./98-106, and in particular, Rules 63, 127, 138, 139, 365, 369.2, and 466-472; and

20. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Certified Tribunal Record (Material in Possession of the Canadian Transportation Agency), filed on December 24, 2021.

2. Affidavit of Dr. Gábor Lukács, affirmed on January 16, 2022.

3. Such further and additional materials as counsel may advise and this Honourable Court may allow.

January 16, 2022

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SCHEDULE "A"
(the "Withheld Materials")

A. CTA Member Correspondences

A1. **The Microsoft Word Files for the Statement on Vouchers.** The original Microsoft Word files for the Statement on Vouchers, and drafts of the Statement on Vouchers, attached to emails that were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 9, 2020 and March 25, 2020.

A2. **Documents Regarding the Statement on Vouchers on March 23, 2020.** All documents regarding the Statement on Vouchers that were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) on or about March 23, 2020.

A3. **Documents Regarding the Statement on Vouchers on March 24, 2020.** All documents regarding the Statement on Vouchers that were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) on or about March 24, 2020 between 8:30AM and 7:00PM.

A4. **Documents Regarding the Announcement of the Statement on Vouchers to Third-Parties.** All documents regarding Ms. Jones's email on March 24, 2020 with the subject line "message to carriers - signals check" that was sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 24, 2020 and March 25, 2020.

A5. **Chairperson's Template Response to Media in MS Word Format.** The original Microsoft Word file(s) for the template media response in the March 24, 2020 at 7:34PM email sent by the Chairperson with subject line "Answer," which were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 24, 2020 and March 25, 2020.

A6. **Ms. Jones's Draft FAQs about the Statement on Vouchers.** All documents in respect of Ms. Jones's draft FAQs first circulated on March 24, 2020 in response in the email with subject line "RE: Answer," which was sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 24, 2020 and March 25, 2020.

B. Third-Party Correspondences

B1. **Original Email Announcing the Statement on Vouchers.** Original version of the e-mail sent by Ms. Marcia Jones on March 25, 2020 with the subject line "Update: CTA measures/Mise à jour: mesures prises par l'OTC."

B2. **Original Email from Transport Canada on March 18, 2020.** Original version of the e-mail sent by Mr. Colin Stacey at Transport Canada to Ms. Marcia Jones on March 25, 2020 with the subject line "FW: From MinO:[Redacted]," including all attachments to that email.

B3. **Correspondences in respect of Ms. Jones's and the Assistant Deputy Minister's Meeting(s)**. All non-privileged correspondences in respect of the meeting(s) between Ms. Marcia Jones and the Assistant Deputy Minister of Transport on or about March 21-22, 2020.

B4. **CTA's Info Email and Twitter Messages.** All non-privileged documents sent to or from the CTA in respect of the Statement on Vouchers between March 9, 2020 and March 25, 2020 using:

(a) the CTA's Info email account (*info@otc-cta.gc.ca*); and

(b) the CTA's Twitter accounts in English (*CTA_gc*) and French (*OTC_gc*), including but not limited to Private Messages.

B5. **Correspondences to/from PIAC**. All non-privileged correspondences to/from PIAC between March 9, 2020 and March 25, 2020 regarding the Statement on Vouchers.

C. Meeting Documents

C1. **Documents for the March 19 EC Call.** All non-privileged documents in respect of the CTA's EC call on March 19, 2020, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meeting's decisions and deliverables.

C2. **Documents for the March 20 EC Call.** All non-privileged documents in respect of the CTA's EC call on March 20, 2020, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;

(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meeting's decisions and deliverables.

C3. **CTA Chairperson's March 21-22, 2020 Weekend Meeting(s)**. All non-privileged documents in respect of the meeting(s) between the CTA's Chairperson, the Deputy Minister of Transport, an unidentified individual, and/or some of them over the course of the weekend of March 21-22, 2020 about the Statement on Vouchers, including but not limited to:

(a) documents sent to/from those third-parties before or after the meeting(s), including draft(s) of the Statement on Vouchers;
(b) the meeting agenda;
(c) correspondences to schedule and/or set up the meeting;
(d) video or audio recordings of the meeting;
(e) meeting minutes;
(f) notes taken by or on behalf of any of the participants; and
(g) correspondences of the meeting's decisions and deliverables.

C4. **CTA Chairperson's March 21 and/or 22, 2020 Discussions with Vice-Chairperson**. All non-privileged documents in respect of the meeting(s) between the CTA's Chairperson and Vice-Chairperson over the course of the weekend of March 21-22, 2020 about the Statement on Vouchers, including but not limited to:

(a) documents circulated between them before or after their meeting(s), including draft(s) of the Statement on Vouchers;
(b) the meeting agenda;
(c) correspondences to schedule and/or set up the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences regarding the meeting(s).

C5. **Documents for the March 22 CTA Key Personnel Call.** All non-privileged documents in respect of the call on March 22, 2020 at or about 10:30AM, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meeting's decisions and deliverables.

C6. **Documents for the March 23 EC Call.** All non-privileged documents in respect of the CTA's EC call on March 23, 2020, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meeting's decisions and deliverables.

C7. **Documents for the March 24 CTA Members' Call.** All non-privileged documents in respect of the CTA Members' Call on March 24, 2020, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meeting's decisions and deliverables.

C8. **Documents for the March 25 Discussions Involving Chair and/or Vice-Chair.** All non-privileged documents in respect of the discussions involving the Chairperson or Vice-Chairperson, and/or other persons on March 25, 2020 regarding the Statement on Vouchers, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meetings' decisions and deliverables.

C9. **Documents for the Cancelled March 25 Call.** All non-privileged documents for the March 25, 2020 meeting originally scheduled for 10:00AM, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting; and
(c) draft documents circulated prior to the scheduled meeting.

C10. **The CTA Chairperson's Discussion(s) with "Other Federal Players".** All non-privileged documents in respect of the discussion(s) between the Chairperson and "other federal players" on or before March 23, 2020 regarding the Statement on Vouchers, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meeting's decisions and deliverables.

SCHEDULE "B"
(Draft *Show Cause* Order)

Date: 2022____

Docket: A-102-20

Ottawa, Ontario, ______________, 2022

Present: ___________________

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

CANADIAN TRANSPORTATION AGENCY

Intervener

ORDER

UPON motion of the applicant for an order that the Canadian Transportation Agency (the "**CTA**"), the Chairperson of the CTA (Ms. France Pégeot), the Vice-Chairperson of the CTA (Ms. Elizabeth C. Barker), and the Secretary of the CTA (Ms. Valérie Lagacé) comply with the Court's Order dated October 15, 2021, and that these persons appear before a judge to answer charges for contempt of court;

AND UPON reading the materials filed;

AND UPON the Court issuing an order on ______________ that the CTA disclose the Withheld Materials within five (5) calendar days of that order;

AND UPON reading the Applicant's affidavit that the CTA has not complied with the order dated ______________ within the deadline;

THIS COURT ORDERS that:

1. The following persons (the "**Alleged Contemnor(s)**") shall appear before a judge of this Court on ______________ at ______________, ______________ (the "**Contempt of Court Hearing**"):

    a. the Canadian Transportation Agency;

    b. Ms. France Pégeot;

    c. Ms. Elizabeth C. Barker; and

    d. Ms. Valérie Lagacé;

2. At the Contempt of Court Hearing, the Alleged Contemnors shall be prepared to present any defence they may have for the charges below;

3. The Alleged Contemnors are being charged for civil contempt of court in respect of the order of this court dated October 15, 2021 and/or the order of this court dated ______________) (collectively, the "**Orders**"), the particulars of which are as follows:

    a. The CTA failed to disclose some or all of the Withheld Materials (as defined in **Schedule "A"**) by the deadline fixed in the Orders.

b. Ms. France Pégeot has, with knowledge of the Orders:

i. failed to cause the CTA to disclose some or all of the Withheld Materials by the deadline fixed in the Orders, or

ii. aided and abetted the CTA in disobeying either of the Orders.

c. Ms. Elizabeth C. Barker has, with knowledge of the Orders:

i. failed to cause the CTA to disclose some or all of the Withheld Materials by the deadline fixed in the Orders, or

ii. aided and abetted the CTA in disobeying either of the Orders.

d. Ms. Valérie Lagacé has, with knowledge of the Orders:

i. failed to cause the CTA to disclose some or all of the Withheld Materials by the deadline fixed in the Orders, or

ii. aided and abetted the CTA in disobeying either of the Orders.

4. The Applicant shall serve a copy of this Order, and a list of the witnesses that the Applicant proposes to call at the Contempt of Court Hearing, on

the Alleged Contemnors in the following manner:

(a) the Canadian Transportation Agency by email to Ms. Barbara Cuber (the solicitor of record for the CTA) at *Barbara.Cuber@otc-cta.gc.ca*;

(b) Ms. France Pégeot, Chairperson and Chief Executive Officer of the CTA by email to *France.Pegeot@otc-cta.gc.ca*;

(c) Ms. Elizabeth C. Barker, Vice-Chairperson of the CTA by email to *Liz.Barker@otc-cta.gc.ca*; and

(d) Ms. Valérie Lagacé, Secretary and Senior General Counsel of the CTA by email to *valerie.lagace@otc-cta.gc.ca*;

5. Upon issuance of this Order, without delay, the Registry shall deliver a copy of this Order to the Alleged Contemnors at the aforementioned email addresses, and by regular postal delivery to "Canadian Transportation Agency, Ottawa, Ontario K1A 0N9" and addressed to each of the Alleged Contemnors.

____

J.A.

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: January 16, 2022)

I, **DR. GÁBOR LUKÁCS**, of the City of Halifax in the Province of Nova Scotia, AFFIRM THAT:

1. I am the President and a Director of the Applicant, Air Passenger Rights. As such, I have personal knowledge of the matters to which I depose, except as to those matters stated to be on information and belief, which I believe to be true.

A. The Applicant: Air Passenger Rights

2. Air Passenger Rights [**APR**] is a non-profit organization, formed in May 2019 under the *Canada Not-for-profit Corporations Act*, SC 2009, to expand and continue the air passenger advocacy work that I have initiated in my personal capacity for the last decade. A copy of APR's articles of incorporation are attached and marked as **Exhibit "A"**.

3. I am the president and a director of APR. I actively lead all the work of APR. Mr. Simon Lin, counsel representing APR on this judicial review, is also one

of the directors of APR. APR operates on a non-profit basis and its board of directors, including myself, are not paid any remuneration.

4. APR's mandate is to engage in public interest advocacy for air passengers, continuing the same work that I have been engaging in personally for the past decade, including advocating on behalf of the travelling public before Parliament, administrative agencies and tribunals, and the courts, when necessary.

5. APR is funded solely by small donations from passengers. Those donations only cover some out-of-pocket expenses incurred in undertaking APR's public interest advocacy work.

6. APR promotes passenger rights by referring passengers to information and resources through the press, social media, and the AirPassengerRights.ca website.

7. Since the commencement of this application for judicial review, Mr. Lin's legal services in this matter have been provided on a *pro bono* basis. APR's board of directors has agreed that any costs awarded in this judicial review would be assigned to Mr. Lin's law office, less any disbursements that APR incurred. Mr. Lin did not take part in this board decision. For greater clarity, I am providing this information only for the purpose of supporting APR's request for costs on this motion, and should not be construed as a waiver of any applicable privilege, including solicitor-client privilege and/or litigation privilege.

8. The fact that Mr. Lin has been acting on a *pro bono* basis for APR on this judicial review was previously disclosed in paragraph 78 of my affidavit affirmed on April 7, 2020 in this proceeding. Said affidavit was served on the Canadian Transportation Agency [**CTA**] on or about April 9, 2020.

B. Background

9. On March 25, 2020, the CTA posted a "Statement on Vouchers" [**Statement on Vouchers**] on its website, a copy of which is attached and marked as **Exhibit "B"**. The CTA widely disseminated the Statement on Vouchers to passengers and the travel industry through various channels, including its website, Twitter, an email announcement to carriers, in template responses to passengers' inquiries, and a *pro forma* auto-response email for formal complaints received.

10. Since publishing the Statement on Vouchers, the CTA has been unresponsive as to what occurred behind the scenes leading up to the CTA drafting and issuing the unattributed Statement on Vouchers, or who drafted or approved that Statement on Vouchers.

11. A copy of the CTA's "Organization and mandate" page as it was archived on March 30, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "C"**.

12. The *Code of Conduct of Members of the Agency* [***Code of Conduct***] provides under the heading "Interactions with non-Agency individuals and organizations," in part, that:

> (39) Members shall not communicate with political actors or officials of other federal departments and agencies, provincial or foreign governments, or international organizations regarding a matter that is, was, or could be before the Agency.
>
> (40) Members shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.

A copy of the CTA's *Code of Conduct* is attached and marked as **Exhibit "D"**.

13. For greater certainty, I am attaching Exhibits "C" and "D" only for the purpose of placing before the Court the list of the CTA's appointed members from March 30, 2020 and the *Code of Conduct*, respectively. I do not agree with, nor accept, any other content within those documents as correctly reflecting the CTA's mandate under the *Canada Transportation Act*.

14. Based on my past experience and previous dealings with the CTA, I believe that meetings of the CTA's Members are recorded with formal meeting minutes. For example, a redacted copy of the September 20, 2011 meeting of CTA's Members, which the CTA served on me in File No. A-460-12, is attached and marked as **Exhibit "E"**.

15. A copy of the "Policy on Information Management" issued by the Treasury Board and in force between April 1, 2018 and March 31, 2020 is attached and marked as **Exhibit "F"**.

C. Chronology of Documents Relating to the Statement on Vouchers

16. Since the October 15, 2021 Order of Gleason J.A. [**Disclosure Order**], APR received materials relating to the Statement on Vouchers from the CTA and the Attorney General of Canada [**AGC**] in four (4) separate packages:

(a) On December 14, 2021, the CTA disclosed a 165-page PDF file entitled "Material in Possession of the Canadian Transportation Agency" [**Dec. 14 Docs**], which was ultimately filed in court on December 24, 2021.

(b) On December 14, 2021, the AGC served and filed a 16-page PDF file containing an informal motion for extension of time to claim privilege over portions of two documents, which is in the Court docket as Doc. Nos. 92-94 [**Extension Motion**].

(c) On December 14, 2021, the AGC served and filed a 44-page PDF file containing an informal motion to claim privilege over two documents, which is in the Court docket as Doc. Nos. 96-98 [**Privilege Motion**].

(d) On December 24, 2021, the CTA provided a 16-page PDF file containing a 3-page letter and 13 pages of materials relating to the Statement on Vouchers [**Dec. 24 Docs**].

17. In this section, I have chronologically ordered and separately labelled some of the key documents found in the aforementioned four packages.

(i) Wednesday, March 18, 2020

18. A copy of the redacted email correspondence between Mr. Colin Stacey, the Director General of Air Policy at Transport Canada, and Ms. Marcia Jones, the former Chief Strategy Officer at the CTA, dated March 18, 2020, found on page 7 of the Extension Motion, is attached and marked as **Exhibit "G"**.

19. A copy of an email chain between Mr. George Petsikas, Transat's Senior Director of Government and Industry Affairs, and Ms. Jones, subsequently forwarded to Mr. Scott Streiner, the CTA's former Chairperson, dated March 18, 2020, found on pages 110-111 of the Dec. 14 Docs, is attached and marked as **Exhibit "H"**.

20. A copy of Mr. Streiner's reply email to Ms. Jones, with copy to Mr. Sébastien Bergeron (Chief of Staff), dated March 18, 2020 at 22:14, found on pages 34-35 of the Dec. 14 Docs, is attached and marked as **Exhibit "I"**.

(ii) Thursday, March 19, 2020

21. A copy of Ms. Jones's email exchange with Mr. Petsikas, dated March 19, 2020, found on pages 112-114 of the Dec. 14 Docs, is attached and marked as **Ex-**

hibit "J".

(iii) Friday, March 20, 2020

22. A copy of Mr. Streiner's redacted email with the subject line "RE: EC March 20 - Decisions and Follow-ups," dated March 20, 2020 at 17:00, found on pages 29-30 of the Privilege Motion, is attached and marked as **Exhibit "K"**.

(iv) Sunday, March 22, 2020

23. A copy of Mr. Streiner's email to some senior CTA personnel with one attachment entitled "Statement.docx", dated March 22, 2020 at 08:54, found on pages 36-37 of the Dec. 14 Docs, is attached and marked as **Exhibit "L"**.

24. A copy of Mr. Streiner's email to the CTA Members, with copy to Ms. Barker, with one attachment entitled "Statement.docx", dated March 22, 2020 at 11:24, found on pages 38-39 of the Dec. 14 Docs, is attached and marked as **Exhibit "M"**.

25. CTA Members' replies to Mr. Streiner's 11:24 email (Exhibit "M"):

(a) A copy of the email of Ms. Mary Tobin Oates, CTA Member, to Mr. Streiner and other CTA Members, with copy to Ms. Barker, with one attachment entitled "Statement mto.docx", dated March 22, 2020 at 12:55, found on pages 101-102 of the Dec. 14 Docs, is attached and marked as **Exhibit "N"**.

(b) A copy of the email of Mr. Mark MacKeigan, CTA Member, to Mr. Streiner and other CTA Members, with copy to Ms. Barker, with one attachment entitled "Statement mto_mm.docx", dated March 22, 2020 at 13:11, found on pages 96-98 of the Dec. 14 Docs, is attached and marked as **Exhibit "O"**.

(c) A copy of the email of Ms. Lenore Duff, CTA Member, to Mr. Streiner and Ms. Barker and other CTA Members, with one attachment entitled "Statement.docx", dated March 22, 2020 at 13:12, found on pages 103-104 of the Dec. 14 Docs, is attached and marked as **Exhibit "P"**.

(d) A copy of a chain of emails sent by Ms. Heather Smith and Mr. Gerald Dickie, CTA, Members, to Mr. Streiner and other CTA Members, with copy to Ms. Barker, found on pages 99-100 of the Dec. 14 Docs, is attached and marked as **Exhibit "Q"**.

26. A copy of the letter of Mr. Jean-Marc Estache, Transat's President, to Mr. Streiner, dated March 22, 2020, found on pages 163-165 of the Dec. 14 Docs, is attached and marked as **Exhibit "R"**.

27. A copy of Mr. Streiner's email to EC with one attachment entitled "20-03-22 Scott Streiner.pdf.DRF", dated March 22, 2020 at 13:59, found on pages 12-16 of the Dec. 24 Docs, is attached and marked as **Exhibit "S"**.

(v) Monday, March 23, 2020

28. A copy of redacted email correspondence between Transport Canada and CTA personnel, dated March 23, 2020, found on pages 9-10 of the Extension Motion, is attached and marked as **Exhibit "T"**.

29. A copy of Mr. Streiner's email to Ms. Valérie Lagacé (Secretary and Senior General Counsel of the CTA) and copied to Ms. Barker, dated March 23, 2020 at 11:37, found on pages 48-49 of the Dec. 14 Docs, is attached and marked as **Exhibit "U"**.

30. A copy of Mr. Streiner's email to Ms. Barker, dated March 23, 2020 at 11:56, found on pages 50-52 of the Dec. 14 Docs, is attached and marked as **Ex-**

hibit "V".

31. A copy of Mr. Streiner's email to Ms. Lagacé and copied to Ms. Barker and Ms. Jones, dated March 23, 2020 at 12:00, found on pages 53-55 of the Dec. 14 Docs, is attached and marked as **Exhibit "W"**.

32. A copy of Mr. Streiner's email to Ms. Lagacé and copied to Ms. Barker and Ms. Jones, dated March 23, 2020 at 12:09, found on pages 56-57 of the Dec. 14 Docs, is attached and marked as **Exhibit "X"**.

(vi) Tuesday, March 24, 2020

33. A copy of Mr. Streiner's email to Ms. Lagacé and Ms. Jones with copy to Mr. Bergeron, with one attachment entitled "Statement.docx", dated March 24, 2020 at 07:40, found on pages 58-59 of the Dec. 14 Docs, is attached and marked as **Exhibit "Y"**.

34. A copy of Mr. Streiner's email to Ms. Jones and Ms. Lagacé, with copy to Mr. Bergeron, dated March 24, 2020 at 08:40, found on pages 17-18 of the Dec. 14 Docs, is attached and marked as **Exhibit "Z"**.

35. A copy of page 80 of the Dec. 14 Docs is attached and marked as **Exhibit "AA"**.

36. A copy of Mr. Vincent Turgeon's email to Ms. Jones and Mr. Bergeron, with copy to Ms. Alysia Lau, Mr. Tim Hillier, and Ms. Martine Maltais, dated March 24, 2020 at 17:13, found on pages 136-137 of the Dec. 14 Docs, is attached and marked as **Exhibit "AB"**.

37. A copy of Mr. Streiner's email to Ms. Jones and Mr. Bergeron, with one attachment entitled "Answer.docx", dated March 24, 2020 at 19:34, found on pages 60-61 of the Dec. 14 Docs, is attached and marked as **Exhibit "AC"**.

38. A copy of Ms. Jones's email to Mr. Streiner and Mr. Bergeron, dated March 24, 2020 at 20:53, found on pages 123-124 of the Dec. 14 Docs, is attached and marked as **Exhibit "AD"**.

(vii) Wednesday, March 25, 2020

39. A copy of Mr. Streiner's email to Ms. Barker, dated March 25, 2020 at 08:47, found on page 63 of the Dec. 14 Docs, is attached and marked as **Exhibit "AE"**.

40. A copy of Mr. Streiner's email to Ms. Barker, with one attachment entitled "Statement.docx", dated March 25, 2020 at 09:32, found on pages 64-66 of the Dec. 14 Docs, is attached and marked as **Exhibit "AF"**.

41. A copy of Mr. Streiner's email to Ms. Lagacé, with copies to Ms. Jones, Mr. Tom Oommen (Chief Compliance and Enforcement Officer), Mr. Bergeron, and Ms. Lesley Robertson (Executive Coordinator, Office of the Chair and CEO), with one attachment entitled "Statement.docx", dated March 25, 2020 at 09:45, found on pages 15-16 of the Dec. 14 Docs, is attached and marked as **Exhibit "AG"**.

42. A copy of Mr. Streiner's email to Ms. Jones and Mr. Bergeron, with copy to Ms. Barker, dated March 25, 2020 at 09:53, found on pages 67-68 of the Dec. 14 Docs, is attached and marked as **Exhibit "AH"**.

43. A copy of Mr. Streiner's email to EC, with one attachment entitled "Dispatches from the living room.docx", dated March 25, 2020 at 12:00, found on pages 69-71 of the Dec. 14 Docs, is attached and marked as **Exhibit "AI"**.

44. A copy of Mr. Streiner's email to Ms. Jones, with copy to Mr. Bergeron and Ms. Barker, with one attachment entitled "Statement.docx", dated March 25, 2020 at 13:35, found on pages 75-76 of the Dec. 14 Docs, is attached and marked as **Exhibit "AJ"**.

45. A copy of Ms. Jones's email to Renée Langlois, with copy to Mr. Tim Hillier, Mr. Vincent Turgeon, Ms. Lagacé, and Ms. Caitlin Hurcomb, with one attachment entitled "Statement.docx", dated March 25, 2020 at 13:55, found on pages 5-6 of the Dec. 14 Docs, is attached and marked as **Exhibit "AK"**.

46. A copy of Mr. Petsikas's email to Ms. Jones, copied to several CTA personnel, dated March 25, 2020 at 15:18, found on pages 152-154 of the Dec. 14 Docs, is attached and marked as **Exhibit "AL"**.

47. A copy of the email of Mr. Jason Kerr, Senior Director, Government Relations of the Canadian Automobile Association (CAA), to Ms. Jones, copied to several CTA personnel, dated March 25, 2020 at 16:11, found on pages 157-159 of the Dec. 14 Docs, is attached and marked as **Exhibit "AM"**.

48. A copy of Ms. Barker's email to Mr. Streiner, with copy to Mr. Bergeron, with one attachment entitled "RDIM-#2124145-v2-Web_FAQs_-_COVID-19.docx", dated March 25, 2020 at 16:11, found on pages 91-95 of the Dec. 14 Docs, is attached and marked as **Exhibit "AN"**.

D. The CTA's Continued Failure to Comply with the Disclosure Order

49. A copy of the letter of Mr. Simon Lin, APR's counsel, to Mr. Lorne Ptrack and Mr. Sandy Graham, counsels for the AGC, and Ms. Barbara Cuber, counsel for the CTA, dated December 17, 2021, is attached and marked as **Exhibit "AO"**.

50. A copy of Mr. Lin's letter to Ms. Cuber, dated December 20, 2021, is attached and marked as **Exhibit "AP"**.

51. A copy of Ms. Cuber's letter to Mr. Lin, dated December 24, 2021 with the Dec. 24 Docs, is attached and marked as **Exhibit "AQ"**.

52. A copy of Mr. Lin's letter to Ms. Cuber, dated December 30, 2021, is attached and marked as **Exhibit "AR"**.

53. A copy of Ms. Cuber's letter to Mr. Lin, dated January 4, 2022, is attached and marked as **Exhibit "AS"**.

54. A copy of APR's letter, signed by me as the president, sent to key CTA personnel (Ms. France Pégeot, the Chairperson; Ms. Elizabeth C. Barker, Vice-Chairperson; and Ms. Valérié Lagacé, Secretary and Senior General Counsel), dated January 4, 2022, is attached and marked as **Exhibit "AT"**.

55. A copy of Ms. Cuber's letter to Mr. Lin, dated January 7, 2022, is attached and marked as **Exhibit "AU"**.

56. A copy of Mr. Lin's letter to Ms. Cuber, dated January 11, 2022, is attached and marked as **Exhibit "AV"**.

57. Up to the time of commissioning this affidavit, Ms. Cuber has not responded to Mr. Lin's January 11, 2022 letter (Exhibit "AV").

E. Electronic Documents: Terminology and Technical Information

58. A printout of the article entitled "Word Metadata and Electronic Evidence" by Ira Rothken, retrieved on January 15, 2022 from the website of "casetext" (https://casetext.com/analysis/word-metadata-and-electronic-evidence), is attached and marked as **Exhibit "AW"**. I believe the content of Exhibit "AW" to be true and accurate.

59. A printout of the article entitled "Security Tip (ST04-008)" explaining the meaning and use of Bcc (blind carbon copy) in emails, retrieved on January 15, 2022 from the website of the United States Cybersecurity and Infrastructure Secu-

rity Agency's website (https://www.cisa.gov/uscert/ncas/tips/ST04-008), is attached and marked as **Exhibit "AX"**. I believe the content of Exhibit "AX" to be true and accurate.

F. Miscellaneous

60. A copy of the CTA's "Organization and mandate" page, as shown on January 16, 2022, is attached and marked as **Exhibit "AY"**.

61. A copy of the CTA's "Organizational chart" page, as shown on January 16, 2022, is attached and marked as **Exhibit "AZ"**.

62. For greater certainty, I am attaching Exhibit "AY" only for the purpose of placing before the Court the list of the CTA's appointed members as of January 16, 2022. I do not agree with, nor accept, any other content within that document as correctly reflecting the CTA's mandate under the *Canada Transportation Act*.

63. I conducted a search on Canada411.ca for "France Pégeot", which returned an address at 300 Queen Elizabeth Dr, Ottawa ON, K1S 3M6 with a phone number of (343) 488-2572. I did a further search with the address "300 Queen Elizabeth Dr, Ottawa ON" and learned that it is a condo building. The Canada411.ca search result did not include a unit number for the address. I have also attempted to call this phone number on multiple occasions, and I heard a recording that the call could not be completed.

AFFIRMED remotely by Dr. Gábor Lukács at the City of Halifax, Nova Scotia before me at the City of Coquitlam, British Columbia on January 16, 2022, in accordance with O. Reg. 431/20, *Administering Oath or Declaration Remotely*.

____
Commissioner for Taking Affidavits

Simon (Pak Hei) Lin, ***Barrister & Solicitor***
LSO #: 76433W
4388 Still Creek Drive, Suite 237
Burnaby, BC V5C 6C6

____
Dr. Gábor Lukács

Halifax, NS
Tel:
lukacs@AirPassengerRights.ca

CERTIFICATE OF COMMISSIONER FOR TAKING AFFIDAVITS

I, Simon Lin, a Commissioner for taking Affidavits in Ontario, certify that:

1. This certificate is provided in accordance with the *COVID-19 Notice No. 2* of the Supreme Court of British Columbia.
2. On January 16, 2022, I commissioned the Affidavit of Dr. Gábor Lukács [**Deponent**] in this matter [**Affidavit**]. The Affidavit was commissioned remotely using video technology and a secure electronic signature platform, as permitted by the Law Society of Ontario and O. Reg. 431/20, *Administering Oath or Declaration Remotely*.
3. I was satisfied that the process was necessary because it was medically unsafe, for reasons associated with COVID-19, for the Deponent and a commissioner to be physically present together.
4. The Affidavit was loaded in PDF format by the commissioner onto a secure electronic signature platform, which:
   a. does not permit the Deponent to add or remove any of the pages;
   b. required both the commissioner and Deponent to apply their initials on each page of the Affidavit; and
   c. required both the commissioner and Deponent to apply their electronic signatures where a signature is required.
5. The Deponent was emailed a link to the platform to securely sign the Affidavit, Thereafter, the following process was followed while the commissioner and Deponent was connected via video technology:
   a. The Deponent showed me the front and back of the Deponent's current government-issued photo identification [**ID**], which I have retained screenshots of.
   b. I compared the video image of the Deponent and the information on the ID and was satisfied that it was the same person.
   c. The copy of the Affidavit before the commissioner and Deponent were on the same electronic platform and are identical.
   d. I administered the oath to the Deponent who affirmed/swore to the truth of the facts in the Affidavit and the Deponent applied their electronic signature.

January 16, 2022

Signature of Simon Lin
Commisioner for Taking Affidavits

This is **Exhibit "A"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

Innovation, Science and Economic Development Canada
Corporations Canada

Innovation, Sciences et Développement économique Canada
Corporations Canada

Form 4001 Articles of Incorporation
Canada Not-for-profit Corporations Act (NFP Act)

Formulaire 4001 Statuts constitutifs
Loi canadienne sur les organisations à but non lucratif (Loi BNL)

1 Corporate name
Dénomination de l'organisation

Air Passenger Rights

2 The province or territory in Canada where the registered office is situated
La province ou le territoire au Canada où est maintenu le siège

NS

3 Minimum and maximum number of directors
Nombres minimal et maximal d'administrateurs

Min. 3 Max. 9

4 Statement of the purpose of the corporation
Déclaration d'intention de l'organisation

See attached schedule / Voir l'annexe ci-jointe

5 Restrictions on the activities that the corporation may carry on, if any
Limites imposées aux activités de l'organisation, le cas échéant

See attached schedule / Voir l'annexe ci-jointe

6 The classes, or regional or other groups, of members that the corporation is authorized to establish
Les catégories, groupes régionaux ou autres groupes de membres que l'organisation est autorisée à établir

See attached schedule / Voir l'annexe ci-jointe

7 Statement regarding the distribution of property remaining on liquidation
Déclaration relative à la répartition du reliquat des biens lors de la liquidation

See attached schedule / Voir l'annexe ci-jointe

8 Additional provisions, if any
Dispositions supplémentaires, le cas échéant

See attached schedule / Voir l'annexe ci-jointe

9 **Declaration:** I hereby certify that I am an incorporator of the corporation.
Déclaration : J'atteste que je suis un fondateur de l'organisation.

Name(s) - Nom(s)	Signature
Gabor Lukacs	Gabor Lukacs

A person who makes, or assists in making, a false or misleading statement is guilty of an offence and liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than six months or to both (subsection 262(2) of the NFP Act).

La personne qui fait une déclaration fausse ou trompeuse, ou qui aide une personne à faire une telle déclaration, commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 5 000 $ et un emprisonnement maximal de six mois ou l'une de ces peines (paragraphe 262(2) de la Loi BNL).

You are providing information required by the NFP Act. Note that both the NFP Act and the *Privacy Act* allow this information to be disclosed to the public. It will be stored in personal information bank number IC/PPU-049.

Vous fournissez des renseignements exigés par la Loi BNL. Il est à noter que la Loi BNL et la *Loi sur les renseignements personnels* permettent que de tels renseignements soient divulgués au public. Ils seront stockés dans la banque de renseignements personnels numéro IC/PPU-049.

Schedule / Annexe

Purpose Of Corporation / Déclaration d'intention de l'organisation

1. To educate air passengers and the public at large as to their rights and the means for the enforcement of these rights, by researching and making available the results of such research on the matter of the law relating to air passenger rights on domestic and international flights.

2. To act as a liaison between other public interest or citizens' groups engaged in public interest advocacy.

3. To assist in and promote the activity of public interest group representation throughout Canada and elsewhere.

4. To make representations to governing authorities on behalf of the public at large and on behalf of public interest groups with respect to matters of public concern and interest with respect to air passenger rights, and to teach public interest advocacy skills and techniques.

Schedule / Annexe

Restrictions On Activities / Limites imposées aux activités de l'organisation

The Corporation shall have all the powers permissible by the Canada Not-for-profit Corporations Act, save as limited by the by-laws of the Corporation.

Nothing in the above purposes, however, shall be construed or interpreted as in any way empowering the Corporation to undertake functions normally carried out by barristers and solicitors.

Schedule / Annexe
Classes of Members / Catégories de membres

There shall be two classes of members: Ordinary Members and voting General Members. The criteria for admission to both classes shall be governed by the by-laws of the Corporation.

Schedule / Annexe

Distribution of Property on Liquidation / Répartition du reliquat des biens lors de la liquidation

Upon liquidation, the property of the Corporation shall be disposed of by being donated to an eligible donee, as defined in the Income Tax Act (Canada).

Schedule / Annexe

Additional Provisions / Dispositions supplémentaires

a) Any amendment or repeal of the Corporation's By-Laws shall require confirmation by a Special Resolution of two-thirds of the General Membership prior to taking effect.

b) The Corporation shall be carried on without the purpose of gain for its Members, and any profits or other accretions shall be used in furtherance of its purposes.

c) Directors shall serve without remuneration, and no Director shall directly or indirectly receive any profit from his or her position as such, provided that Directors may be reimbursed for reasonable expenses incurred in the performance of their duties.

This is **Exhibit "B"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

Home

Statement on Vouchers

The COVID-19 pandemic has caused major disruptions in domestic and international air travel.

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

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Date modified:
2020-03-25

This is **Exhibit "C"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

Organization and mandate

Our organization and mandate

Members

Organizational chart

Partner organizations

At the Heart of Transportation: A Moving History

The Canadian Transportation Agency (CTA) is an independent, quasi-judicial tribunal and regulator that has, with respect to all matters necessary for the exercise of its jurisdiction, all the powers of a superior court.

The CTA is made up of five full-time Members; up to three temporary Members may also be named. The Members, who are all based in the National Capital Region, are supported in their decision-making process by some 240 employees and administrative staff.

The CTA has three core mandates

- We help ensure that the national transportation system runs efficiently and smoothly in the interests of all Canadians: those who work and invest in it; the producers, shippers, travellers and businesses who rely on it; and the communities where it operates.
- We protect the human right of persons with disabilities to an accessible transportation network.
- We provide consumer protection for air passengers.

Our tools

To help advance these mandates, we have three tools at our disposal:

- **Rule-making:** We develop and enforce ground rules that establish the rights and responsibilities of transportation service providers and users and that level the playing field among competitors. These rules can take the form of binding regulations or less formal guidelines, codes of practice or interpretation notes.
- **Dispute resolution:** We resolve disputes that arise between transportation providers on the

one hand, and their clients and neighbours on the other, using a range of tools from facilitation and mediation to arbitration and adjudication.
- **Information provision:** We provide information on the transportation system, the rights and responsibilities of transportation providers and users, and the Agency's legislation and services.

Our values

Our Code of Values and Ethics outlines the core values and expected behaviours that guide us in all activities related to our professional duties. Our guiding values are:

Respect for democracy - We uphold Canadian parliamentary democracy and promote constructive and timely exchange of views and information.
Respect for people - We treat people with dignity and fairness and foster a cooperative, rewarding working environment. Integrity - We act with honesty, fairness, impartiality and transparency.
Stewardship - We use and manage our resources wisely and take full responsibility for our obligations and commitments.
Excellence - We provide the highest quality service through innovation, professionalism and responsiveness.

Members

- Scott Streiner, Chair and CEO
- Elizabeth C. Barker, Vice-Chair
- William G. McMurray, Member
- Mark MacKeigan, Member
- Mary Tobin Oates, Member
- Heather Smith, Member
- Gerald Dickie, temporary Member
- Lenore Duff, temporary Member

Scott Streiner, Chair and CEO

Scott Streiner began a five-year term as Chair and CEO of the Canadian Transportation Agency (CTA) on July 20, 2015. Since that time, he has taken a series of steps to enhance the CTA's ability to respond to the needs of a rapidly evolving national transportation system, its customers, and the communities in which the system operates. These steps include: realigning the CTA's internal structure and recruiting top-notch talent to serve on the executive team; putting in place an action plan to foster a healthy, high-performing organization; increasing public awareness of the CTA's roles and services through speeches, media

interviews, and social media; introducing innovative approaches to delivering the CTA's regulatory and adjudicative mandates; and launching a broad review of the full suite of regulations, codes, and guidelines administered by the CTA.

Scott also led the revitalization of the Council of Federal Tribunal Chairs in 2016 and 2017, and is currently a member of the Board of Directors of the Council of Canadian Administrative Tribunals.

Prior to joining the CTA, Scott had a 25-year career in the federal public service. As Assistant Secretary to the Cabinet, Economic and Regional Development Policy, he served as Secretary to the Cabinet Committee on Economic Prosperity and played a key role in preparing advice to the Prime Minister on economic, environmental and trade matters, including in the areas of transportation and infrastructure. As Assistant Deputy Minister, Policy with Transport Canada, he led the development of policy options and advice on issues touching all modes of the national transportation system, and ran the Department’s international, intergovernmental and data analysis functions.

Earlier positions included Executive Director of the Aerospace Review; Assistant Deputy Minister with the Labour Program; Vice President, Program Delivery with the Canadian Environmental Assessment Agency; Director General, Human Resources with the Department of Fisheries and Oceans; Director of Operations for the Reference Group of Ministers on Aboriginal Policy; Machinery of Government Officer at the Privy Council Office; and Director of Pay Equity with the Canadian Human Rights Commission.

Scott has led Canadian delegations abroad, including to India, China, and the International Labour Organization. He has also served as the Government Member with NAV Canada, Canada's Ministerial Designee under the North American Agreement on Labour Cooperation, Chair of the Council of Governors of the Canadian Centre for Occupational Health and Safety, and a Director on the Board of the Soloway Jewish Community Centre.

Scott received a bachelor’s degree in East Asian Studies from the Hebrew University, a master’s degree in International Relations from the Norman Paterson School of International Affairs, and a PhD in Political Science from Carleton University. He spent a year at Carleton University as a Public Servant in Residence and has taught courses, published articles, and made conference presentations on human rights, Middle Eastern history and politics, and public policy.

Elizabeth C. Barker, Vice-Chair

Liz Barker began a five-year term as Vice-Chair and Member of the Canadian Transportation Agency (CTA) on April 3, 2018.

Liz joined the CTA's predecessor, the National Transportation Agency, in 1991 as counsel. She has held several positions at the CTA, including, most recently, Chief Corporate Officer, Senior General Counsel and Secretary. She has worked in all areas of the Agency’s mandate over the years, but has specialized in advising the tribunal in complex dispute adjudications and oral hearings on controversial subjects including rail level of service complaints, a wide range of complex accessible transportation disputes, and ministerial inquiries into marine pilotage and the accessibility of inter-city

motor coach services. She has also worked extensively in the development of the Agency's approach to its human rights mandate, administrative monetary penalties regime, alternative dispute resolution, final offer arbitration, and rail level of service arbitration. She has appeared as counsel before all levels of court, including the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada, as co-counsel in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650.

Liz was a recipient of the Queen's Diamond Jubilee Medal in 2016 for her work at the Agency, in particular in accessible transportation, the administrative monetary penalties program, and for her leadership of the Legal Services Branch.

Liz received her law degree from Osgoode Hall Law School in 1987 and her B.A. (Honours in Law) from Carleton University in 1984. She has been a member of the Law Society of Ontario since 1989.

William G. McMurray, Member

William G. McMurray became a Member of the Canadian Transportation Agency on July 28, 2014.

Prior to his appointment to the Agency, he served as Vice-Chairperson of the Canada Industrial Relations Board.

A lawyer, Mr. McMurray practised administrative law and litigation in the private sector for over 23 years. He acted as counsel for some of Canada's largest employers in the federal transportation industry. He successfully pleaded complex cases before a number of federal administrative tribunals, including the Agency and its predecessors. He has argued cases, in both official languages, before the Federal Court, the Federal Court of Appeal and has appeared in all levels of the civil courts. While practising law, he also taught "transportation law and regulation" at McGill University in Montréal for over ten years.

He studied common law and civil law at the University of Ottawa and studied political economy at Université Laval in Québec City and at the University of Toronto. Mr. McMurray completed his articles of clerkship while working in the Law Department of the former Canadian Transport Commission.

He has been a member of the Law Society of Upper Canada since 1986.

Mark MacKeigan, Member

Mark MacKeigan began a four-year term as a Member of the Canadian Transportation Agency on May 28, 2018.

He comes to the Agency from The St. Lawrence Seaway Management Corporation, the not-for-profit operator of the federal government's Seaway assets, where he was Chief Legal Officer and Corporate Secretary from 2014.

Mark is not entirely new to the Agency, having served previously as a Member from 2007 to 2014 and as legal counsel on specific files in a contract position during 1996.

His transportation law experience includes six years as senior legal counsel with the International Air Transport Association in Montréal from 2001 to 2007, focusing on competition law, cargo services, aviation regulatory and public international law matters. From 1996 to 2000, he was legal counsel with NAV CANADA, the country's provider of civil air navigation services.

Mark began his legal career in private practice in Toronto. After earning a Bachelor of Arts with highest honours in Political Science from Carleton University, Mark obtained his law degree from the University of Toronto and a Master of Laws from the Institute of Air and Space Law at McGill University. He also holds a postgraduate diploma in European Union Competition Law from King's College London.

He is a member of the Bars of Ontario and the State of New York and is admitted as a solicitor in England and Wales.

Mary Tobin Oates, Member

After 25 years of public service, Mary Tobin Oates joined the Canadian Transportation Agency on 9 July 2018. As a lawyer, Mary practised in different areas of law, largely in public and administrative law. She appeared before the Pension Appeals Board and the Federal Court of Appeal regarding disability benefits under the Canada Pension Plan and the Old Age Security Act. Mary served as a Board member of the Veterans Review and Appeal Board where she determined eligibility for disability benefits for members of the Canadian Forces and the Royal Canadian Mounted Police. Mary provided legal and policy advice on indigenous issues to the Department of Justice and to Indian and Northern Affairs Canada. She also served as Board member to Tungasuvvingat Inuit, a not-for-profit, charitable organization that provides services to and advocates on behalf of Inuit who live in southern Canada.

Before becoming a lawyer, Mary worked as a technical editor for the Canadian Transportation Accident and Safety Board (now Transportation Safety Board).

Mary received her Bachelor of Arts from Memorial University of Newfoundland and graduated from Osgoode Hall Law School. She has been a member of the Law Society of Ontario (formerly the Law Society of Upper Canada) since February 1997.

Heather Smith, Member

Heather Smith became a full-time Member of the Canadian Transportation Agency on August 27, 2018. Heather was most recently Vice-President, Operations at the Canadian Environmental Assessment Agency. In previous positions, Heather was Executive Director in the Government Operations Sector of Treasury Board Secretariat, and Director General in the Strategic Policy Branch at Agriculture and Agri-Food Canada (AAFC). Heather held several management positions within Justice Canada, as General Counsel and Head of AAFC Legal Services, General Counsel and Head of Legal Services at the Canadian Environmental Assessment Agency, and General Counsel in the Legal Services Unit of Social Development Canada/Human Resources and Skills Development Canada.

Heather also served as legal counsel at Environment Canada Legal Services and Manager of the Canadian Environmental Protection Act Office at Environment Canada. Heather holds a B.A.(Hons.) from the University of King's College and an L.L.B. from the University of Toronto. She has also earned the Chartered Director (C.Dir.) designation from the McMaster/DeGroote Directors College.

Gerald Dickie, temporary Member

Gerald Dickie comes to the Canadian Transportation Agency after having worked for 36 years in the grain industry at different port locations. He spent the first 6 years in Thunder Bay at the Cargill Terminal. The next 30 years, he worked at the Port of Metro Vancouver. He initially worked on the rehabilitation of the Alberta Wheat Pool Terminal (now Cascadia Terminal) and was part of the team that automated the facility and introduced unit train unloading capabilities. In July of 2007, as a result of the ownership change of Agricore United, he moved to the North Vancouver Cargill Facility (formerly SWP) as the General Manager. He is an experienced manager of people, capital projects, business

operations, labour negotiations, supply chains and strategy.

The 30 years he spent working at the Port of Vancouver included being part of several external groups. He has held every position within the Vancouver Terminal Elevator Association, from President to Secretary. He was a member of the Senior Port Executive Committee Group, the Port Competitiveness Committee, BC Terminals Association and North Shore Waterfront Industry Association. This included leadership roles and active work in everything from port education for the community to Low Level Road Initiative and social licence activities. This experience included a good exposure to the issues that all port tenants, railway companies, vessel companies and customers faced.

He has worked with Transport Canada on the Winter Rail Contingency Meeting programs and on supply chain issues with a number of groups. He is familiar with marine and rail supply chains and with the producers, shippers and customers that rely on these chains.

Gerald has an MBA from Royal Roads University and a BScF from Lakehead University.

Lenore Duff, temporary Member

Lenore Duff is a former public service executive with 28 years of service with the Government of Canada whose positions included Director General, Strategic Initiatives at the Labour Program; Director General, Surface Transportation Policy at Transport Canada; and Senior Privy Council Officer supporting the Social Affairs Committee of Cabinet. Her primary focus throughout her career has been on the development of policy and legislation across a broad range of economic and social policy areas.

As Director General, Surface Transportation Policy at Transport Canada, Lenore was responsible for developing policy options and providing advice on strengthening the freight rail liability and compensation regime, as well as on reforming freight rail provisions as part of the recent modernization of the Canada Transportation Act. At the Labour Program, her work included leading the development of a series of legislative initiatives designed to enhance protections for federally regulated employees. Prior to that, Lenore was responsible for the development of policy initiatives related to income, employment and disability.

In the course of her career, Lenore has also had the opportunity to conduct consultations with a broad range of industry, civil society and government stakeholders to inform the development of policy and legislation.

Lenore earned both a Bachelor of Arts (Honours Sociology) and Master of Arts in Sociology from Carleton University.

Date modified:

2019-05-02

This is **Exhibit "D"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

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Signature

Home

Code of Conduct for Members of the Agency

A. CONTEXT

Mandate of the Agency

(1) The Canadian Transportation Agency (Agency) is an independent, quasi-judicial, expert tribunal and regulator which has, with respect to all matters necessary for the exercise of its jurisdiction, all the powers of a superior court.

(2) The Agency and has three core mandates:

a. Helping ensure that the national transportation system runs efficiently and smoothly in the interests of all Canadians: those who work and invest in it; the producers, shippers, travellers and businesses who rely on it; and the communities where it operates.
b. Protecting the fundamental human right of persons with disabilities to an accessible transportation network.
c. Providing consumer protection for air passengers.

Roles of the Agency's Chair, Vice-Chair, Members, and staff

(3) The Agency is comprised of up to five regular Members appointed by the Governor in Council (GIC), including the Agency's Chair and Vice-Chair, and up to three temporary Members appointed by the Minister of Transport from a roster approved by the GIC.

(4) Members make adjudicative decisions and regulatory determinations [1]. Their responsibilities in these regards cannot be delegated.

(5) The Chair, who is the also Chief Executive Officer (CEO) and a Member, is responsible for overall leadership of the Agency. He or she sets the Agency's strategic priorities, serves as its public voice, reports on its plans and results to Parliament through the Minister of Transport, and handles relations with Ministers, Parliamentarians, Deputy Ministers, and analogous bodies in other jurisdictions. He or she assigns cases to Members, supervises and directs their work, and chairs regular Members meetings. And as CEO, he or she is the most senior manager of the public servants working in the organization, serves as Deputy Head and Accounting Officer with a broad range of related responsibilities under the Financial Administration Act and other statutes, and chairs the Executive Committee.

(6) The Vice-Chair, who is also a Member, sits on the Executive Committee and assumes the responsibilities of the Chair if the Chair is absent or incapacitated.

(7) Members other than the Chair and Vice-Chair do not have any managerial functions within the Agency.

(8) All Members are supported in the discharge of their decision-making duties by the Agency's public servants, who are responsible for giving Members frank, impartial, evidence-based advice; fully implementing Members' direction; and other tasks assigned to them by the Chair, their managers, or legislation.

B. GENERAL PROVISIONS

Purpose, guiding principles, and application of the Code

(9) This Code establishes the standards for the conduct of Members and applies to all regular and temporary Members. It supplements, and should be read in conjunction with, any applicable requirements and standards set out in the Canada Transportation Act; other legislation administered by the Agency; other legislation establishing ethical and conduct obligations, such as the Conflict of Interest Act; relevant regulations, policies, and guidelines; other relevant codes; and letters of appointment.

(10) The Code reflects:

a. the Agency's commitment to independent, impartial, fair, transparent, credible, and efficient decision making; and
b. the Agency's organizational values of respect for democracy, respect for people, integrity, stewardship, and excellence.

(11) Members shall:

a. adhere to all elements of the Code and other applicable instruments;
b. uphold the highest ethical standards at all times;
c. arrange their private affairs in a manner that ensures they have no conflicts of interest;
d. conduct themselves with integrity, avoid impropriety or the appearance of impropriety, and eschew any action that could cast doubt on their ability to perform their duties with impartiality;
e. not accept gifts, hospitality, or other advantages or benefits from any party that has an interest in matters handled by the Agency;
f. recuse themselves from any proceeding where they know or reasonably should know that, in the making of the decision, they would be in a conflict of interest, or where their participation might create a reasonable apprehension of bias. In such case, they shall immediately inform the Chair and provide reason for their recusal. Members are encouraged to seek the advice of the Chair and the General Counsel when dealing with any situation where recusal is contemplated; and
g. immediately inform to the Chair if they become aware of a situation that may adversely affect the integrity or the credibility of the Agency, including possible non-compliance with the Code.

(12) The Chair is responsible for the administration of the Code, including any matters regarding its interpretation. Members are accountable to the Chair for their compliance with the Code.

Members' expertise and work arrangements

(13) Members have a responsibility to maintain the highest levels of professional competence and expertise required to fulfil their duties. Members are expected to pursue the development of knowledge and skills related to their work, including participation in training provided by the Agency.

(14) Regular, full-time Members must devote at least 37.5 hours per week to the performance of their duties during their term of appointment. If a regular Member is authorized by the Chair to continue to hear

one or more matters before them upon expiry of their term, they shall only request remuneration for actual time worked during the period of continuation.

(15) When temporary Members are appointed on a full-time basis, they must devote at least 37.5 hours per week to the performance of their duties. When temporary Members are appointed on a part-time basis, they shall only request remuneration for actual time worked.

(16) Members' designated workplace is at the Agency's head office. They shall only work from home or other off-site locations with the prior written approval of the Chair.

C. DECISION MAKING

Impartiality

(17) Members must approach each case with an open mind and must be, and be seen to be, impartial and objective at all times.

Natural justice and fairness

(18) Members must respect the rules of natural justice and procedural fairness.

(19) Members must ensure that proceedings are conducted in a manner that is transparent, fair, and seen to be fair.

(20) Members shall render each decision on the merits of the case, based on the application of the relevant legislation and jurisprudence to the evidence presented during the proceeding.

(21) Members shall not be influenced by extraneous or improper considerations in their decision making. Members shall make their decisions free from the improper influence of any other person, institution, stakeholder or interest group, or political actor.

Preparation

(22) Members shall carefully review and consider relevant material – including applications, pleadings, briefing notes, and draft decisions – before attending case-related briefing sessions, meetings, or oral hearings.

Timeliness

(23) Members shall take all reasonable steps to ensure that proceedings progress in a timely fashion, avoiding unnecessary delays but always complying with the rules of natural justice and procedural fairness. Members shall render decisions as soon as possible after pleadings have closed and ensure, to the greatest extent possible, that statutory timelines and internal service standards for the issuance of decisions are met.

Quality

(24) Members shall ensure that their decisions are written in a manner that is clear, logical, complete without being unnecessarily repetitive or lengthy, and consistent with any guidelines or standards established by the Agency regarding the quality and format of decisions.

Consistency

(25) Members shall be cognizant of the importance of consistency in Agency decisions, notwithstanding the fact that prior decisions on similar matters do not constitute binding precedents. Members should not depart from the principles established in previous decisions unless they have a reasonable basis, and provide well-articulated reasons, for doing so.

Respect for parties and participants

(26) Members shall conduct proceedings, including oral hearings, in a courteous and respectful manner, while ensuring that proceedings are orderly and efficient.

(27) Members shall conduct proceedings such that those who have cases before the Agency understand its procedures and practices and can participate meaningfully, whether or not they are represented by counsel.

(28) Members must be responsive to accessibility-related needs and implement reasonable accommodation measures to facilitate meaningful participation of parties and other participants with disabilities in Agency hearings.

(29) Members shall be responsive to diversity, gender, and other human rights considerations when conducting proceedings; for example, in the affirmation/swearing in of witnesses and the scheduling of oral hearings. Members shall avoid words, phrases, and actions that could be understood to manifest bias or prejudice based on factors such as disability, race, age, national origin, gender, religion, sexual orientation, or socio-economic status, and shall never draw inferences on a person's credibility on the basis of such factors.

Case-related communications

(30) Members shall not communicate directly or indirectly with any party, counsel, witness, or other non-Agency participants appearing before them in a proceeding with respect to that proceeding, except in the presence of all parties or their counsel.

(31) Members shall not disclose information about a case or discuss any matter that has been or is in the process of being decided by them or the Agency, except as required in the performance of, and in the circumstances appropriate to, the formal conduct of their duties. Members shall refrain from discussing any case or Agency-related matter in public places.

D. WORKING RELATIONS AND INTERACTIONS

Relations with other Members

(32) Members shall foster civil, collegial relations with other Members.

(33) Members should have frank discussions and openly debate issues, while showing respect for one another's expertise, opinions, and roles. Members shall not comment on another Member's views, decisions, or conduct, except directly and privately to that Member himself or herself, or to the Chair pursuant to subsection 11.g of this Code.

(34) Members assigned together to a Panel should strive to reach consensus decisions whenever

possible, but respectfully agree to disagree and prepare a majority opinion and a dissenting opinion where consensus cannot be achieved within a reasonable time period.

(35) Members should share their knowledge and expertise with other Members as requested and appropriate, without attempting to influence decisions in cases to which they are not assigned.

Relation with Agency staff

(36) Members shall at all times treat Agency staff with courtesy and be respectful of their views and recommendations, recognizing that staff are professional public servants who are required to offer their best advice to Members, who make the final decisions.

(37) Any concerns about staff performance should not be communicated directly to working-level employees but rather should be shared with the relevant Branch Head if the concerns are relatively minor and with the Chair if they are significant or systemic.

Interactions with non-Agency individuals and organizations

(38) Members shall not communicate with the news media. Enquiries from the media or members of the public shall be referred to the Chair's Office.

(39) Members shall not communicate with political actors or officials of other federal departments and agencies, provincial or foreign governments, or international organizations regarding a matter that is, was, or could be before the Agency.

(40) Members shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.

(41) Members shall not disclose or make known, either publicly or privately, any information of a confidential nature that was obtained in their capacity as a Member.

(42) Members shall not use their position or the Agency's resources (e.g., an Agency email account or letterhead) for personal gain.

(43) Members should exercise caution when using social media for personal purposes, and should not identify themselves as Members of the Agency on social media sites, except professional sites such as LinkedIn.

E. OUTSIDE ACTIVITIES

(44) Members shall not accept invitations to attend social events such as receptions or dinners with stakeholder representatives or with persons who are, or may become, a party, counsel, witness, or other non-Agency participants in an Agency proceeding, except in rare instances where there is a compelling justification and the Chair provides prior written approval.

(45) Members may take part in other outside activities that are not incompatible with their official duties and responsibilities and do not call into question their ability to perform their duties objectively, with the prior written approval of the Chair. Such activities may include participation in conferences and training seminars, speeches, teaching assignments, and volunteering.

(46) Requests for the Chair's approval of participation in social events or other outside activities must be

made in writing at least two weeks before those events or activities begin, and must fully disclose all relevant details. Members are also responsible for obtaining any other approval required by applicable legislation, guidelines, codes, or other instruments.

(47) Notwithstanding the foregoing, the Chair may, from time to time, confer with stakeholder representatives, counsel, or other parties in his role as the Agency's public voice, to discuss matters unrelated to any specific proceeding.

F. AFFIRMATION

(48) Members shall review and affirm their commitment to and compliance with the Code upon initial appointment and every year thereafter on or near the anniversary of their appointment.

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1 In this Code, "decisions" shall be understood to refer to both adjudicative decisions, which deal with disputes between parties, and regulatory determinations, which deal typically involve a single party.

- Code of Conduct for Members of the Agency last update: March 26, 2018

Date modified:
2014-01-22

Share this page

This is **Exhibit "E"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

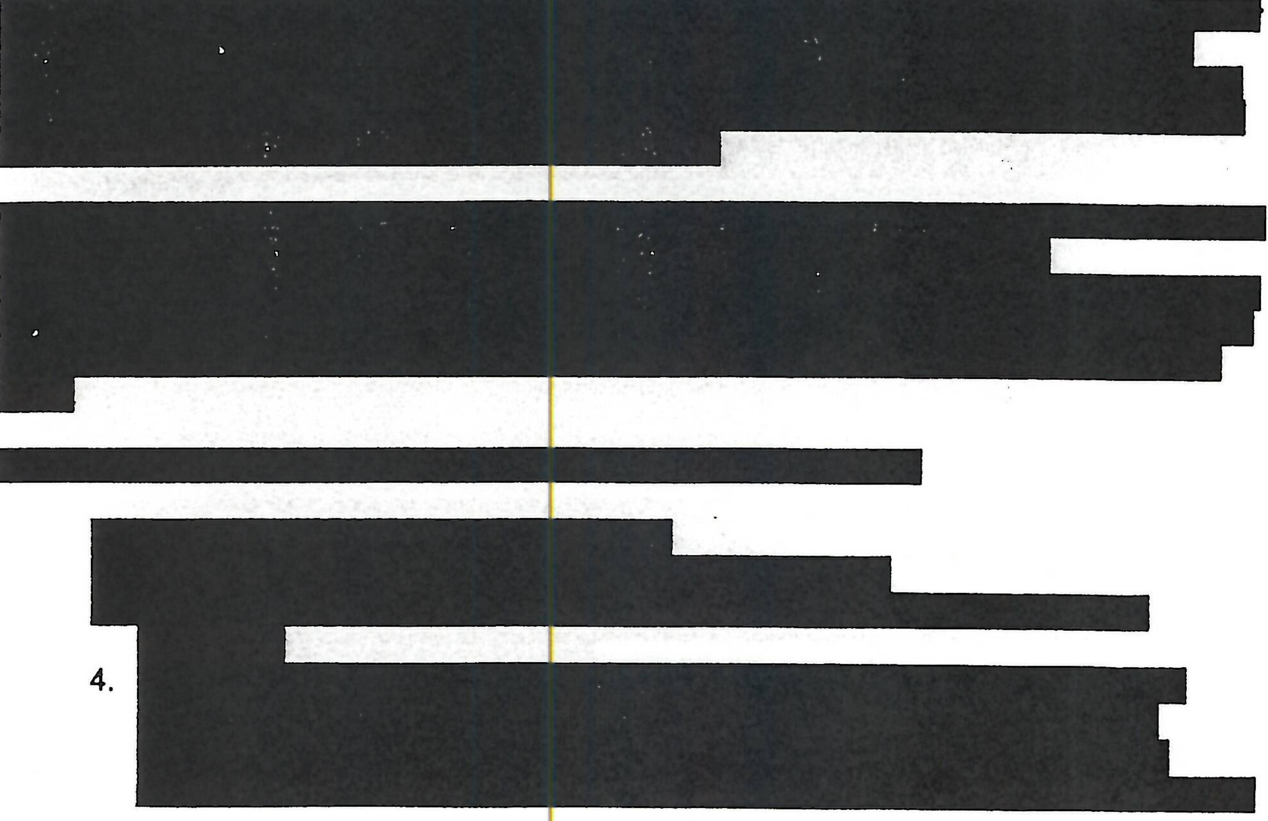
CANADIAN TRANSPORTATION AGENCY
Minutes of the Members' Meeting

September 20, 2011, 14:00, Room 1960

Members Present:
Geoffrey C. Hare, Chair
John Scott, Vice-Chair
Raymon J. Kaduck
Mark J. MacKeigan
Jean-Denis Pelletier

Staff Present:
Liz Barker, Inge Green, Annick Koster, *Legal Services Branch*
Ghislain Blanchard, *Industry Regulation and Determinations Branch*
Nina Frid, *Dispute Resolution Branch*
Jacqueline Bannister, *Communications Directorate*
Cathy Murphy, *Agency Secretary and Secretariat Directorate*
Julie Cauvier, *Secretary*

Item 1 – Proposed Agency Rules of Procedures for Adjudicating Disputes (Approval Item)



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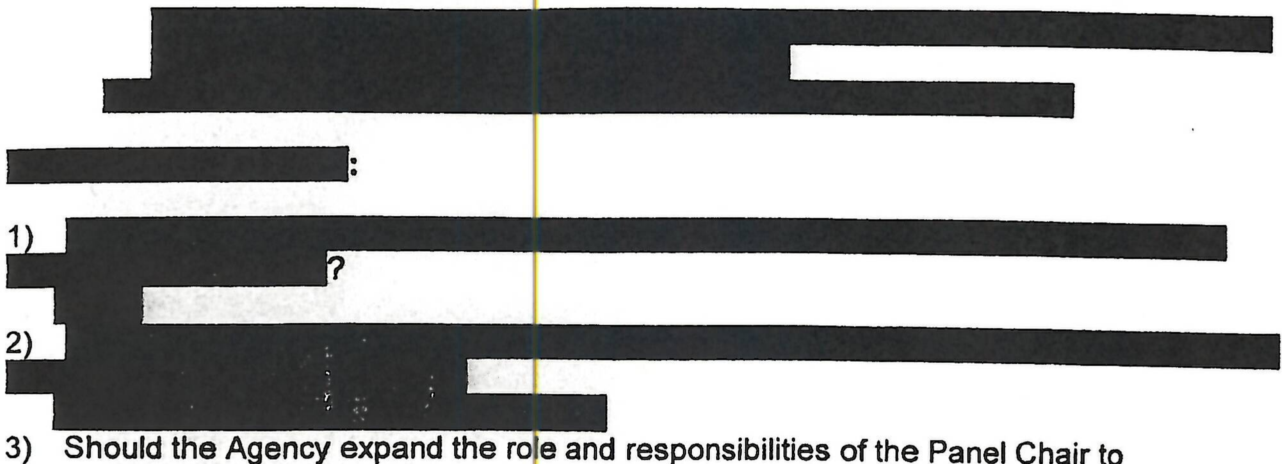

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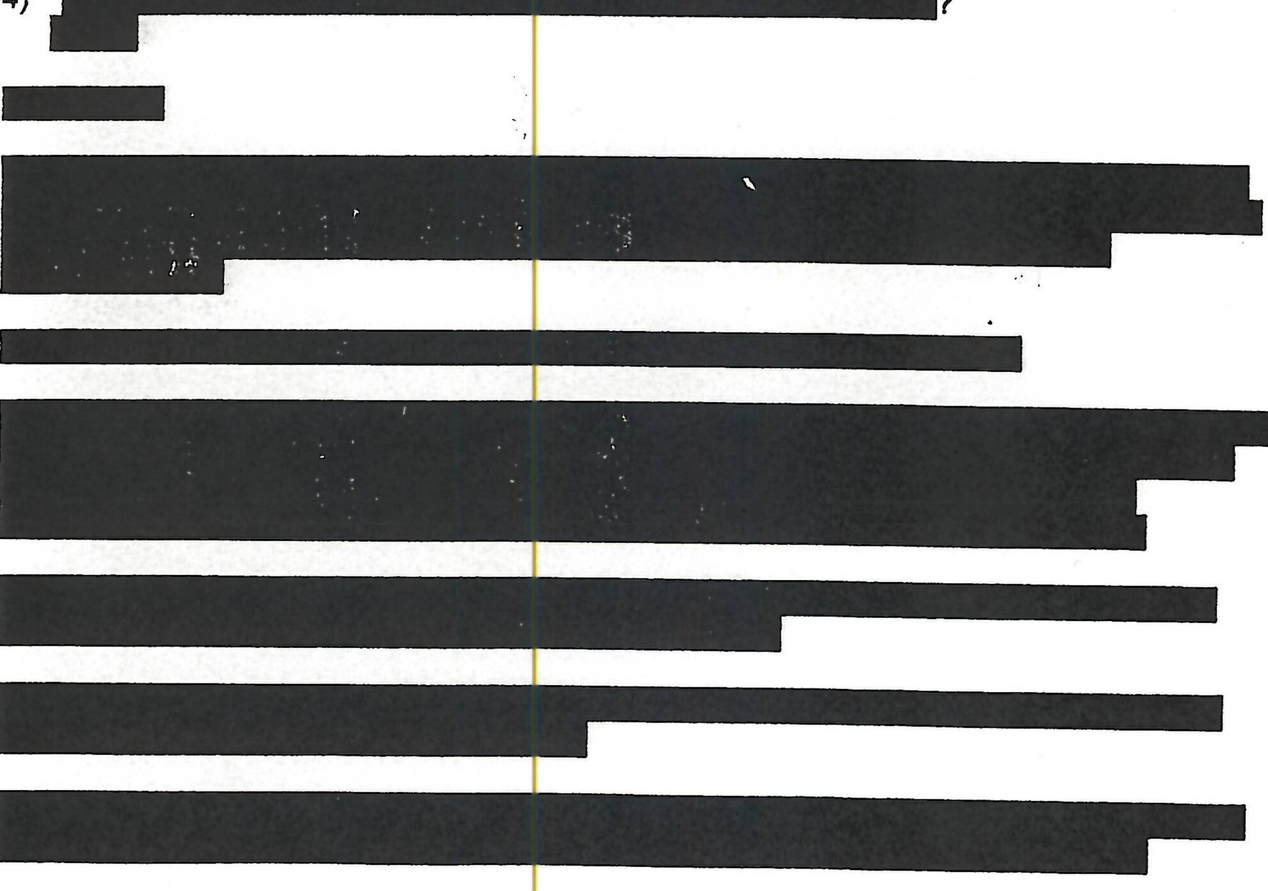
1) ?

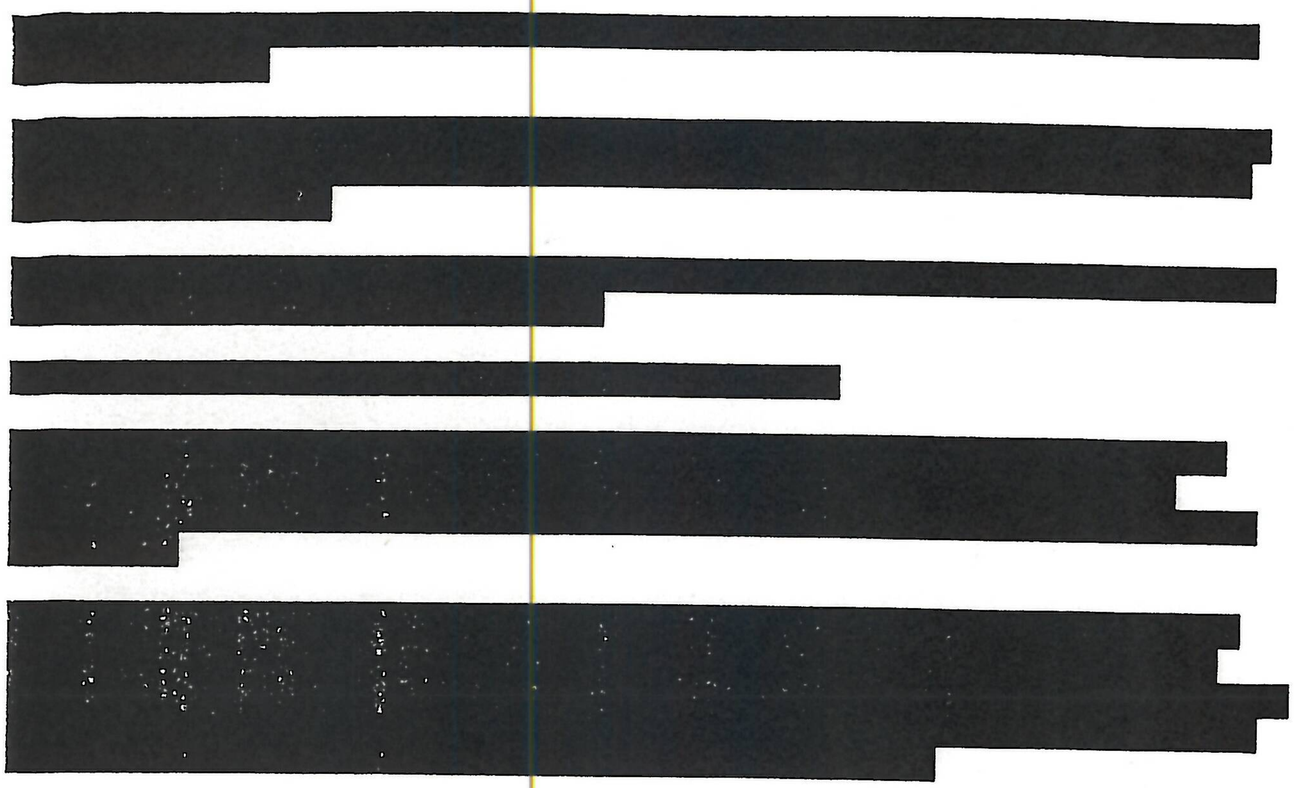
2)

3) Should the Agency expand the role and responsibilities of the Panel Chair to incorporate one-Member quorum responsibilities and, if so, to what extent?

- Yes. The Panel Chair would deal with administrative / procedural rulings to advance a file as far as possible (until either the end of pleadings or until a substantive matter arises which requires the addition of the other Panel Member(s); where substantive issues arise within a procedural matter, the Panel Chair can recommend to the Agency Chair that a panel be struck and, based on the nature of the case, provide guidance and advice on the number of Members to be assigned.

4) ?





Geoffrey C. Hare
Chair and CEO

This is **Exhibit “F”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

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Signature

Government of Canada Gouvernement du Canada

Archived [2020-03-31] - Policy on Information Management

This page has been archived on the Web

Information identified as archived is provided for reference, research or recordkeeping purposes. It is not subject to the Government of Canada Web Standards and has not been altered or updated since it was archived. Please contact us to request a format other than those available.

Note to reader

The Policy on Information Management is no longer in effect. It was replaced by the *Policy on Service and Digital* and the *Directive on Service and Digital* on April 1, 2020.

1. Effective date

1.1 This policy takes effect on July 1, 2007, and incorporates updates effective April 1, 2018.

2. Application

2.1 This policy applies to departments as defined in section 2 of the Financial Administration Act (FAA), unless excluded by specific acts, regulations, or Orders in Council.

2.2 Those portions of sections 6.4.2, 6.4.3, and 7.1 relating to the role of the Treasury Board Secretariat in monitoring compliance and directing consequences for non-compliance do not apply with respect to the Office of the Auditor General, the Office of the Privacy Commissioner, the Office of the Information Commissioner, the Office of the Chief Electoral Officer, the Office of the Commissioner of Lobbying, the Office of the Commissioner of Official Languages and the Office of the Public Sector Integrity Commissioner. The deputy heads of these organizations are solely responsible for monitoring and ensuring compliance with this policy within their organizations, as well as for responding to cases of non-compliance in accordance with any Treasury Board

instruments that address the management of compliance.

3. Context

3.1 Information is an essential component of effective management across departments. The availability of high-quality, authoritative information to decision makers supports the delivery of programs and services, thus enabling departments to be more responsive and accountable to Canadians.

Managing information and records using a whole-of-government approach where legislation permits, supports managers' ability to transform organizations, programs and services in response to the evolving needs of Canadians. While information management encompasses records, as well as documents, data, library services, information architecture, etc., records and their management are mentioned at key points in the policy for the purpose of emphasis. Integrating information management considerations into all aspects of government business enables information to be used and recognized as a valuable asset. All these activities are indicative of a culture that values information.

Information is managed to meet requirements for the government as a whole, including official languages legislation and policies, what information is used, how it is organized, described, etc., as well as the specific requirements determined by departmental operational needs and accountabilities. As the Government of Canada increasingly uses information technologies to implement these requirements, integrating information management requirements with technology planning ensures that digital information is accessible, shareable, and usable over time and through technological change.

All employees are responsible for applying information management principles, standards, and practices as expressed in Treasury Board and departmental frameworks, policies, directives, and guidelines in the performance of their duties, and for documenting their activities and decisions. Expert services such as records, library, and data management provide specialized information management support to departments.

3.2 The deputy head is responsible for effective and well-coordinated information management throughout his or her department.

3.3 This policy is issued under the authority of section 7 of the FAA.

3.4 The Treasury Board has delegated to the Secretary of the Treasury Board the authority to issue, amend, and rescind directives and standards concerning information management roles and responsibilities, and recordkeeping to support this policy.

3.5 This policy is to be read in conjunction with the Policy Framework for Information and Technology, and supporting directives and standards

3.6 Additional mandatory requirements are set out in the directives and standards listed in Appendix B.

4. Definitions

4.1 For the purpose of this policy, information includes information and data, both structured and unstructured, under the control of the Government of Canada, regardless of medium or form.

4.2 Definitions to be used in the interpretation of this policy are in Appendix A.

5. Policy statement

5.1 **Objective**

The objective of this policy is to achieve efficient and effective information management to support program and service delivery; foster informed decision making; facilitate accountability, transparency, and collaboration; and preserve and ensure access to information and records for the benefit of present and future generations.

5.2 **Expected results**

5.2.1 Government programs and services provide convenient access to relevant, reliable, comprehensive and timely information.

5.2.2 Information and records are managed as valuable assets to support the outcomes of programs and services, as well as operational needs and accountabilities.

5.2.3 Governance structures, mechanisms and resources are in place to ensure the continuous and effective management of information.

6. Policy requirements

6.1 **Deputy heads are responsible for:**

6.1.1 ensuring that departmental programs and services integrate information requirements into development, implementation, evaluation, and reporting activities;

6.1.2 ensuring that decisions and decision making processes are documented to account for and support the continuity of departmental operations, permit the reconstruction of the evolution of policies and programs, and allow for independent evaluation, audit, and review;

6.1.3 ensuring that information is shared within and across departments to the greatest extent possible, while respecting security, privacy and confidentiality requirements;

6.1.4 ensuring that all information is managed to respect user agreements, licensing conditions, or both and for ensuring the relevance, authenticity, quality, and cost-effectiveness of the information for as long as it is required to meet operational needs and accountabilities;

6.1.5 ensuring electronic systems are the preferred means of creating, using, and managing information;

6.1.6 ensuring departmental participation in setting government-wide direction for information and recordkeeping;

6.1.7 designating the departmental Chief Information Officer as the departmental information management senior official for the purposes of this policy;

6.1.8 approving the departmental information management (IM) plan, which may be included as part of an integrated IM and information technology (IT) plan;

6.1.9 informing the Treasury Board of Canada Secretariat of their departments' participation in developing national and international information standards as those activities relate to this policy; and,

6.1.10 maximizing the release of departmental information under an open and unrestrictive, unless otherwise specified, licence designated by the Treasury Board of Canada Secretariat.

6.2 **Departmental CIO's are responsible for:**

6.2.1 approving the IM component of all departmental strategies, plans, initiatives and projects; and,

6.2.2 ensuring that senior management is informed of IM risks, and has sufficient context to make decisions about allocating resources to IM initiatives, as part of an integrated approach to managing information and technology investments.

6.3 **The Chief Information Officer of the Government of Canada is responsible for:**

6.3.1 Providing strategic advice in relation to the management of information to the Secretary of the Treasury Board and, through the Secretary, to the President of the Treasury Board and to the Clerk of the Privy Council, and to deputy heads and Chief Information Officers.

6.4 Monitoring and reporting

6.4.1 Within departments

- Deputy heads are responsible for monitoring adherence to this policy within their departments, consistent with the provisions of the Treasury Board's Policy on Results and Policy on Internal Audit. They are responsible for ensuring that appropriate remedial action is taken to address any deficiencies within their departments.

6.4.2 By departments

- Deputy heads report information management concerns to the Treasury Board of Canada Secretariat in a timely manner.
- Deputy heads with national or policy responsibilities related to information management are responsible for providing to the Treasury Board of Canada Secretariat, on an annual basis, the names and responsibilities of their officers who are involved in national and international information standards, to ensure a comprehensive understanding of the Government of Canada's involvement and contribution.

6.4.3 Government-wide

- The Treasury Board of Canada Secretariat will monitor compliance with all aspects of this policy and the achievement of expected results in a variety of ways, including but not limited to assessments under the Management Accountability Framework, examinations of Treasury Board submissions, Departmental Performance Reports, results of audits, evaluations, and studies, in addition to working directly with departments.
- The Treasury Board of Canada Secretariat (Chief Information Officer) will review this policy, its associated directives and standards, and their effectiveness at the five year mark of implementation of the policy (or earlier for certain directives and standards). When substantiated by risk analysis, the Chief Information Officer Branch will also ensure an evaluation is conducted.

7. Consequences

7.1 Consequences of non-compliance can include informal follow-ups and requests from the Treasury Board of Canada Secretariat, external audits, or formal direction on corrective measures.

7.2 Consequences of non-compliance with this policy can include any measure allowed by the Financial Administration Act that the Treasury Board would determine as appropriate and acceptable in the circumstances.

8. Responsibilities of other government organizations

Note: This section identifies other departments that have a role in the Policy on Information Management. In and of itself, this section does not confer an authority.

8.1 **Treasury Board of Canada Secretariat**

The Treasury Board of Canada Secretariat:

8.1.1 provides interpretive advice on this policy;

8.1.2 develops and promotes, in consultation with other federal government departments, a program and framework for the management of information; enterprise information architecture, including principles, methods, processes and standards, to enable consistent information architecture across domains such as finance, human resources, etc., as well as standards, procedures, directives, guidelines, tools, and best practices that achieve the goals and expected results of this policy;

8.1.3 promotes functional communities for the management of information as required to develop and sustain information management functional specialist capacity and practices; and

8.1.4 develops competency and other professional standards for information management functional specialists as required.

8.2 **Library and Archives Canada**

Library and Archives Canada (LAC) is responsible for administering the Library and Archives of Canada Act. Specifically, LAC:

8.2.1 acquires, preserves, makes known and facilitates access to the documentary heritage of Canada;

8.2.2 preserves the published heritage of the nation and of the Government of Canada;

8.2.3 provides direction and assistance on recordkeeping for the Government of Canada;

8.2.4 identifies, selects, acquires and preserves government records, as defined in the Library and Archives of Canada Act, in all media considered to be of enduring value to Canada as documentary heritage;

8.2.5 issues records disposition authorities, pursuant to section 12 of the Library and Archives of Canada Act, to enable departments to carry out their records retention and disposition plans;

8.2.6 manages and protects the essential records and less frequently referenced material of federal government departments; and

8.2.7 assists federal government departments in ensuring that all of their published information is easily accessible to decision makers and is available to the public.

8.3 **Statistics Canada**

Statistics Canada is responsible for administering the Statistics Act. Specifically, Statistics Canada:

8.3.1 collaborates with and provides assistance to federal government departments in the collection, compilation, analysis and publication of statistical information, including statistics derived from the activities of federal government departments; and

8.3.2 recognizes and addresses opportunities to avoid duplication in statistical collection across the Government of Canada.

8.4 **Canada School of Public Service**

The Canada School of Public Service is responsible for the development and delivery of a government-wide core learning strategy and program for all public servants involved in the management of information. These tasks are performed in consultation with the relevant functional authority centres and are consistent with the Policy on Learning, Training and Development.

9. References

9.1 Relevant legislation

- Access to Information Act
- Canada Evidence Act
- Copyright Act
- Criminal Records Act
- Emergency Preparedness Act
- Library and Archives of Canada Act
- Official Languages Act
- Security of Information Act
- Personal Information Protection and Electronic Documents Act (Part 2)
- Privacy Act
- Statistics Act
- Shared Services Canada Act

9.2 Related Treasury Board policies

- Policy on Access to Information
- Common Services Policy
- Policy on Communications and Federal Identity
- Policy on Results
- Policy on Government Security
- Policy on Official Languages
- Policy on Learning, Training and Development
- Policy on Management of Information Technology
- Policy on Internal Audit
- Policy on Service
- Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service
- Policy on Privacy Protection

9.3 Other publications

- Foundation Framework for Treasury Board Policies
- Enhanced Management Framework
- Management Accountability Framework
- Information and Documentation-Records Management (ISO/TR 15489: 2001)

10. Enquiries

Please direct enquiries about this policy to your department's headquarters. For interpretation of this policy, departmental headquarters should contact:

Chief Information Officer Branch
Treasury Board of Canada Secretariat
Ottawa ON K1A 0R5
E-mail: Cio-dpi@tbs-sct.gc.ca

Appendix A: Definitions

The definitions in this appendix pertain to terms used in the policy and to other terms that, though not in the policy, will facilitate understanding of its requirements.

Essential record (document essentiel)

A record essential to continuing or re-establishing critical institutional functions.

Functional specialist (spécialiste fonctionnel)

An employee who carries out roles and responsibilities that require function-specific knowledge, skills and attributes in the following priority areas: finances, human resources, internal audit, procurement, materiel management, real property, and information management.

Information architecture (architecture d'information)

The structure of the information components of an enterprise, their interrelationships, and principles and guidelines governing their design and evolution over time. Information architecture enables the sharing, reuse, horizontal aggregation, and analysis of information.

Information management (gestion de l'information)

A discipline that directs and supports effective and efficient management of information and data in an organization, from planning and systems development to disposal or long-term preservation.

Publication (publication)

Any library matter that is made available in multiple copies or at multiple locations, whether without charge or otherwise, to the public generally or to qualifying members of the public by subscription or otherwise. Publications may be made available through any medium and may be in any form, including printed material, on-line items or recordings.

Recordkeeping (tenue des documents)

A framework of accountability and stewardship in which records are created, captured, and managed as a vital business asset and knowledge resource to support effective decision making and achieve results for Canadians.

Record (document)

For the purpose of this policy, records are information created, received, and maintained by an organization or person for business purposes, legal obligations, or both, regardless of medium or form.

Appendix B: Additional Mandatory Requirements

B.1 Directives

- Directive on Information Management Roles and Responsibilities
- Directive on Recordkeeping

B.2 Standards

- Standard on Metadata
- Standard on Geospatial Data
- Standard on Electronic Documents and Records Management Solutions

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ISBN: 978-0-660-09918-7

Date modified: 2019-08-02

This is **Exhibit “G”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

AL

Salmasi, Aysa

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Wednesday, March 18, 2020 5:28 PM
To: Stacey, Colin
Cc: Caitlin Hurcomb; Allan Burnside; Davis, Mark; Millette, Vincent
Subject: RE: From MinO: [redacted]

Categories: ATIP Retrieval Notice A-2020-00167BB, ATIP Retrieval Notice / A-2020-00091

Hi Colin,
I am sending this unencryped as our remote network access is patchy and we are not able to open encrypted emails on our Samsungs at the Agency.

I would note that for situations outside of the carrier's control, no refunds are required under the APPR. As you know, the Agency issued a determination on Friday to clarify some situations flowing from COVID-19 that are considered to be in that category.

[redacted]

If a flight cancellation is within the carrier's control, or within the carrier's control but required for safety, a refund is required [redacted]

Looping in Cait in case she has anything to add.

I hope this is helpful.
Thanks,
Marcia

> **From:** Stacey, Colin <colin.stacey@tc.gc.ca>
> **Sent:** Wednesday, March 18, 2020 2:57 PM
> **To:** Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
> **Cc:** Davis, Mark <mark.davis@tc.gc.ca>; Millette, Vincent <vincent.millette@tc.gc.ca>
> **Subject:** FW: From MinO: [redacted]
>
> Hi Marcia,
>
> [redacted]
>
> Have you heard anything about this? Are you available to discuss?
>
> Thanks,
>
> cs

This is **Exhibit "H"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Marcia Jones
Sent: March 18, 2020 10:05 PM
To: Scott Streiner
Cc: Sébastien Bergeron
Subject: Fwd: Request for recognition and acceptance of travel voucher solutions

Scott, I had a long call this evening and have a better understanding of the concern, now outlined in this email.

Perhaps we can discuss tomorrow or at the special EC.

Marcia

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: George Petsikas
Date: 2020-03-18 8:16 PM (GMT-05:00)
To: Marcia Jones
Subject: Request for recognition and acceptance of travel voucher solutions

Marcia

Many thanks for taking time to speak with me this evening.

As discussed, we are currently under enormous pressure from Canada's bank-owned credit card processors as a result of their charge back guarantees to their customers where the merchant is unable to provide the service nor refund the money paid to this end with the card. This is a pretty standard commitment per the credit card agreements offered by the big players such as Mastercard and Visa.

Consequently, one of the conditions imposed by these companies when doing business with large merchants such as Transat is to demand financial guarantees to cover their exposure per their voluntary commitments to their customers in the event we can't deliver or refund regardless of circumstances, including beyond our control and/or force majeure.

The net result is with the avalanche of recent COVID cancellations, consumers are invoking their charge back guarantees directly with the cards / banks, who in turn are demanding that the merchant makes them whole through the guarantees in question. This is putting enormous strain on our desperate attempts to manage the collapse in our revenues and stabilize our business and avoid ultimate failure and job losses.

As explained, this matter was actively addressed in France and Italy recently, two countries enormously dependant on the stability of their important travel and tourism and tourism sectors that have been severely impacted by the crisis. In brief, the relevant travel industry oversight authorities in these countries publicly recognized and accepted the offering of travel vouchers valid for up to 24 months as a satisfactory resolution of the consumer's claim for a cash refund in the current extraordinary circumstances.

This recognition of this option by state authorities in turn allowed the banks / card processors in those countries to invoke this voucher in lieu of a cash refund approach as evidence the merchant had fulfilled its obligations per the sale and thus allowed them to deny the charge back claim. The result was subsequently the suspension or significant alleviation of cash guarantee demands on the travel industry merchant by the banks.

Consequently, Transat respectfully requests that the Agency give active and urgent consideration to publishing a similar statement with respect to the existing travel voucher programs now being offered by Canadian air carriers including ourselves and Air Canada, among others. Again, the purpose is not to create any form of obligation in this sense but simply to recognize them as a satisfactory resolution of any cash refund claims against airlines. This of course would be temporary while we ride out the worst of the storm over the next few months.

Thank you in advance for your assistance and expeditious consideration of the present and please don't hesitate if you have any questions or require further information.

Kind regards - GP

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This is **Exhibit "I"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

From: Scott Streiner
Sent: March 18, 2020 10:14 PM
To: Marcia Jones
Cc: Sébastien Bergeron
Subject: RE: Request for recognition and acceptance of travel voucher solutions

Thanks, Marcia. I'm not sure we have a clear role here, as this seems to boil down to a commercial dispute between the carrier and the credit card companies. That said, these are extraordinary times, and if there's something we can do to ease threats to industry viability while protecting passengers, we should at least consider it. Let's discuss during EC tomorrow.

S

From: Marcia Jones
Sent: Wednesday, March 18, 2020 10:05 PM
To: Scott Streiner
Cc: Sébastien Bergeron
Subject: Fwd: Request for recognition and acceptance of travel voucher solutions

Scott, I had a long call this evening and have a better understanding of the concern, now outlined in this email.

Perhaps we can discuss tomorrow or at the special EC.

Marcia

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: George Petsikas <George.Petsikas@transat.com>
Date: 2020-03-18 8:16 PM (GMT-05:00)
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: Request for recognition and acceptance of travel voucher solutions

Marcia

Many thanks for taking time to speak with me this evening.

As discussed, we are currently under enormous pressure from Canada's bank-owned credit card processors as a result of their charge back guarantees to their customers where the merchant is unable to provide the service nor refund the money paid to this end with the card. This is a pretty standard commitment per the credit card agreements offered by the big players such as Mastercard and Visa.

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This is **Exhibit “J”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

From: Marcia Jones
Sent: March 19, 2020 4:19 PM
To: George Petsikas
Cc: Bernard Bussières; Agnieszka Charysz; Howard Liebman; Allan Burnside; Caitlin Hurcomb
Subject: RE: Request for recognition and acceptance of travel voucher solutions

Follow Up Flag: Assurer un suivi
Flag Status: Flagged

Hi George,

Thanks for your message. Please rest assured we are looking into this – there is a lot going on in government/the Agency at this time, as you can imagine. We do appreciate how much pressure you are facing.

I will definitely keep you posted of any updates.
Marcia

From: George Petsikas
Sent: Thursday, March 19, 2020 12:55 PM
To: Marcia Jones
Cc: Bernard Bussières ; Agnieszka Charysz ; Howard Liebman
Subject: RE: Request for recognition and acceptance of travel voucher solutions
Importance: High

Hi Marcia,

Would you be able to provide a status update regarding our urgent request hereunder?

Copying my colleagues who are on need-to-know basis.

Thanks again for your vital cooperation.

George Petsikas
Directeur principal Affaires gouvernementales et de l'industrie
Senior Director, Government and Industry Affairs

T 514-842-9612
C 514-781-1525

Transat A.T. inc.
300, rue Léo-Pariseau, bureau 600
Montréal (Québec) H2X 4C2

De : Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Envoyé : 18 mars 2020 22:19
À : George Petsikas <George.Petsikas@transat.com>
Objet : Re: Request for recognition and acceptance of travel voucher solutions

CYBERSÉCURITÉ ***Courriel d'une source externe:*** Ne cliquer sur aucun lien et aucune pièce jointe sauf si vous faites confiance à l'expéditeur et que le contenu est légitime.
CYBERSECURITY ***Email from an external source:*** Don't open links and attachments unless you trust the sender and know the content is safe.

Hi George,
Thank you for your message and explaining the situation in more detail. I will be checking into this and I appreciate it is highly urgent.

Regards,
Marcia

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: George Petsikas <George.Petsikas@transat.com>
Date: 2020-03-18 8:16 PM (GMT-05:00)
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Subject: Request for recognition and acceptance of travel voucher solutions

Marcia

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The net result is with the avalanche of recent COVID cancellations, consumers are invoking their charge back guarantees directly with the cards / banks, who in turn are demanding that the merchant makes them whole through the guarantees in question. This is putting enormous strain on our desperate attempts to manage the collapse in our revenues and stabilize our business and avoid ultimate failure and job losses.

As explained, this matter was actively addressed in France and Italy recently, two countries enormously dependant on the stability of their important travel and tourism and tourism sectors that have been severely impacted by the crisis. In brief, the relevant travel industry oversight authorities in these countries publicly recognized and accepted the offering of travel vouchers valid for up to 24 months as a satisfactory resolution of the consumer's claim for a cash refund in the current extraordinary circumstances.

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Consequently, Transat respectfully requests that the Agency give active and urgent consideration to publishing a similar statement with respect to the existing travel voucher programs now being offered by Canadian air carriers including ourselves and Air Canada, among others. Again, the purpose is not to create any form of obligation in this sense but simply to recognize them as a satisfactory resolution of any cash refund claims against airlines. This of course would be temporary while we ride out the worst of the storm over the next few months.

Thank you in advance for your assistance and expeditious consideration of the present and please don't hesitate if you have any questions or require further information.

Kind regards - GP

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This is **Exhibit “K”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

From: Scott Streiner
Sent: March 20, 2020 5:00 PM
To: Sébastien Bergeron
Subject: RE: EC March 20 - Decisions and Follow-ups

Great work, Alysia. Just a few additions below. Also, let's remove the "refunds and vouchers" item, since we're not quite sure yet what will be done on this front or how.

Let's make sure the cover message when you send these out invites EC members to let you know if they believe any items are missing or should be edited.

Thanks,

S

From: Sébastien Bergeron
Sent: Friday, March 20, 2020 4:49 PM
To: Scott Streiner
Subject: TR: EC March 20 - Decisions and Follow-ups

Scott,

See below. Anything's missing in your opinion ? Kudos to Alysia for being able to work so fast ! For me, it's good to go. It's for your consideration.

EC Member(s) Tasked	EC Decision(s)	Deliverable(s)	Expected Deadline
All Branch Heads	-	• Prepare list of potential projects to assign to staff during teleworking period.	March 23/24
	-	• Identify annual publications and reports that the Agency should continue to monitor and work on. • ***Marcia*** – includes Annual Report • ***Chair's Office*** to compile a list → ***Please send your items to Alysia in advance if possible.***	March 25
Chair's Office	-	• Work with Mireille and Comms to create internal "teleworking haiku" competition for staff on The Hub.	Next week
Marcia	-	• Comms will work with ATC and other groups to post public messaging on website to communicate delivery of Agency services during COVID-19:	As soon as feasible

		○ The Agency is continuing to deliver its services to the extent possible. ○ Complaints can continue to be filed with the Agency; however, there may be a longer response time. ○ Dispute proceedings involving airlines have been temporarily suspended. • Comms will update the Agency's helplines and other public-facing platforms to reflect the above messaging.	
	-	• Prepare and circulate draft statement with respect to air passenger refunds and vouchers during COVID-19.	Next week
Mireille	-	• Daily staff update – Include acknowledgment of challenges staff facing working from home e.g. child care	March 20
	• The Agency is not invoking the BCP at this time, but should prepare itself for the possibility. • The BCP will be invoked in extraordinary circumstances (e.g. direction from Central Agencies, unavailability of staff due to sickness). • If the BCP is invoked, the Agency will continue to receive complaints. • If the BCP is invoked, non-critical services will continue to be provided to the extent possible. These will be managed on a day-to-day basis.	• Daily staff update – Inform staff that the Agency has not invoked the BCP and will continue to provide as many of its regular services as possible in the circumstances, but is making preparations should the possibility arise. The BCP would only be invoked in extraordinary circumstances.	March 20
	-	• Update Committee on call with TBS with respect to fiscal year-end contracts.	March 23/24
Valérie	-	• [redacted]	March 23
	-	• Prepare options regarding approaches to VRCPI in context of COVID-19 and possible BCP situation.	Next week

This is **Exhibit “L”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Scott Streiner
Sent: March 22, 2020 8:54 AM
To: Liz Barker; Marcia Jones; Valérie Lagacé; Tom Oommen; Sébastien Bergeron
Subject: Draft
Attachments: Statement.docx

Good morning, folks. The attached will be one item for discussion on our 10:30 call. Talk soon.

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. In addition, some airlines' tariffs provide for refunds in certain cases, but have clauses that relieve the airline of such obligations in *force majeure* situations.

All these documents were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of mass cancellations that have taken place over recent weeks as a result of the COVID-19 pandemic. It's important to consider how to strike a fair and sensible balance between passenger concerns and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance and have to find other ways of getting home should not simply be out-of-pocket for the cost of cancelled flights. They should be "kept whole" in some manner. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could put their very survival at risk.

While any specific situations brought before the CTA will be examined on their merits, the CTA believes that, generally speaking, an appropriate solution could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time.

This is **Exhibit "M"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Scott Streiner
Sent: March 22, 2020 11:24 AM
To: Mark MacKeigan; Heather Smith; Mary Tobin Oates; Lenore Duff; Gerald Dickie
Cc: Liz Barker
Subject: Draft statement
Attachments: Statement.docx

Hi, Colleagues. I hope all of you and your family and friends remain healthy and are doing OK despite our current isolation in our homes.

As you know, there have been many questions about what (if any) entitlements passengers have, and what (if any) obligations carriers have, when flights are disrupted as a result of the COVD-19-related mass cancellations.

After some analysis, reflection, and discussion with other federal players, we're considering issuing a statement (draft attached) that acknowledges the current rule-set never really contemplated the present circumstances and indicates that vouchers/credits would be an appropriate way of protecting passengers from a total loss without pushing carriers closer towards insolvency.

Because this statement is a policy signal of sorts and could inform -- though of course, not fetter – future Agency decisions, Liz and I wanted to share it with all Members. We're looking at releasing it as early as tomorrow, so could you please let us know by 2 pm if you concur with it, and whether you have any questions or comments?

Many thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

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While any specific situations brought before the CTA will be examined on their merits, the CTA believes that, generally speaking, an appropriate solution could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time.

This is **Exhibit "N"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

From: Mary Tobin Oates
Sent: March 22, 2020 12:55 PM
To: Scott Streiner; Mark MacKeigan; Heather Smith; Lenore Duff; Gerald Dickie
Cc: Liz Barker
Subject: RE: Draft statement
Attachments: Statement mto.docx

Hey there!

Thank you for the opportunity to review this document. I think that there should be a short introductory sentence that states that cause of the issuance of a statement. That it's the pandemic is buried. I also wonder which situations are captured by our recommendation: flights returning to Canada or future flights. Thanks, MTO

From: Scott Streiner
Sent: Sunday, March 22, 2020 11:24 AM
To: Mark MacKeigan ; Heather Smith ; Mary Tobin Oates ; Lenore Duff ; Gerald Dickie
Cc: Liz Barker
Subject: Draft statement

Hi, Colleagues. I hope all of you and your family and friends remain healthy and are doing OK despite our current isolation in our homes.

As you know, there have been many questions about what (if any) entitlements passengers have, and what (if any) obligations carriers have, when flights are disrupted as a result of the COVD-19-related mass cancellations.

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Because this statement is a policy signal of sorts and could inform -- though of course, not fetter – future Agency decisions, Liz and I wanted to share it with all Members. We're looking at releasing it as early as tomorrow, so could you please let us know by 2 pm if you concur with it, and whether you have any questions or comments?

Many thanks,

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Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

The COVID-19 pandemic has caused disruptions in daily lives around the world. For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. In addition, some airlines' tariffs provide for refunds in certain cases, but have clauses that relieve the airline of such obligations in *force majeure* situations. The COVIC-19 pandemic would be considered a *force majeure*.

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All these documents were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of mass cancellations that have taken place over recent weeks as a result of the COVID-19 pandemic. It's important to consider how to strike a fair and sensible balance between passenger concerns and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance and have to find other ways of getting home should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could put their very survival at risk.

Commented [MTO1]: Are only repatriation flights being considered? The next sentence seems to contemplate ongoing disruptions.

While any specific situations brought before the CTA will be examined on their merits, the CTA believes that, generally speaking, an appropriate solution could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time.

This is **Exhibit "O"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

From: Mark MacKeigan
Sent: March 22, 2020 1:11 PM
To: Mary Tobin Oates; Scott Streiner; Heather Smith; Lenore Duff; Gerald Dickie
Cc: Liz Barker
Subject: RE: Draft statement
Attachments: Statement mto_mm.docx

Scott, Mary, and all,

I think Mary's changes improve the document. I agree with the policy statement being necessary and I agree with its contents. I have made a few further changes in the attached for colouring and limitation of this policy re: perception of fettering.

Mark

From: Mary Tobin Oates
Sent: Sunday, March 22, 2020 12:55 PM
To: Scott Streiner ; Mark MacKeigan ; Heather Smith ; Lenore Duff ; Gerald Dickie
Cc: Liz Barker
Subject: RE: Draft statement

Hey there!

Thank you for the opportunity to review this document. I think that there should be a short introductory sentence that states that cause of the issuance of a statement. That it's the pandemic is buried. I also wonder which situations are captured by our recommendation: flights returning to Canada or future flights. Thanks, MTO

From: Scott Streiner
Sent: Sunday, March 22, 2020 11:24 AM
To: Mark MacKeigan <Mark.MacKeigan@otc-cta.gc.ca>; Heather Smith <Heather.Smith@otc-cta.gc.ca>; Mary Tobin Oates <Mary.TobinOates@otc-cta.gc.ca>; Lenore Duff <Lenore.Duff@otc-cta.gc.ca>; Gerald Dickie <Gerald.Dickie@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: Draft statement

Hi, Colleagues. I hope all of you and your family and friends remain healthy and are doing OK despite our current isolation in our homes.

As you know, there have been many questions about what (if any) entitlements passengers have, and what (if any) obligations carriers have, when flights are disrupted as a result of the COVD-19-related mass cancellations.

After some analysis, reflection, and discussion with other federal players, we're considering issuing a statement (draft attached) that acknowledges the current rule-set never really contemplated the present circumstances and indicates that vouchers/credits would be an appropriate way of protecting passengers from a total loss without pushing carriers closer towards insolvency.

Because this statement is a policy signal of sorts and could inform -- though of course, not fetter – future Agency decisions, Liz and I wanted to share it with all Members. We're looking at releasing it as early as tomorrow, so could you please let us know by 2 pm if you concur with it, and whether you have any questions or comments?

Many thanks,

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Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

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All these documents were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the COVID-19 pandemic. It's important to consider how to strike a fair and sensible balance between passenger concerns and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance and have to find other ways of getting home should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could put their very survival at risk.

While any specific situations brought before the CTA will be examined on their merits, the CTA believes that, in the context of the current pandemic, generally speaking, an appropriate solution could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time.

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Commented [MM1]: While this document may have been drafted in the context of our Canadian carriers, international licensees are also covered. This text might add a bit of useful colouring.

Commented [MTO2]: Are only repatriation flights being considered? The next sentence seems to contemplate ongoing disruptions.

Commented [MM3R2]: Mary raises a good point.

Commented [MM4]: Again, emphasizing the specific nature of the circumstances. Might help on the fettering issue.

This is **Exhibit “P”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

From: Lenore Duff
Sent: March 22, 2020 1:12 PM
To: Scott Streiner; Liz Barker; Mark MacKeigan; Heather Smith; Mary Tobin Oates; Gerald Dickie
Subject: Statement
Attachments: Statement.docx

Hi Scott & Liz (and colleagues):

Thank you for the opportunity to comment. I have taken a look at this and have a few comments. A couple are for clarity, and one is a "communications" concern, but I have tried to respect the content and format that you and Liz have taken. Please feel free to ignore any or all of my comments – afterall, I will not be around to deal with the fall out from the current crisis when we finally turn the corner. And by not be around, I mean at the Agency rather than on the earth, I hope!

Beyond that, I was wondering about two things:

- What happened in the past with respect to large scale disruptions of air travel, as in 9/11 and the Iceland volcano in Europe. I have noted that in my comments, but was wondering if what we are saying now is consistent with that. I realize it does not have to be consistent and the current crisis is worse, but it might prove useful.
- I am wondering about the timing of this statement. Are we responding to questions from the airlines or the public – if so will be saying something like "in response to concerns/questions raised by the industry and the public… ." I just would want to be careful to not be looking to set a policy standard, which may appear more favourable to industry, without some context. You mention in your email that you have been discussing with other federal colleagues, so this may be a more coordinated federal response, so that may address that concern.

Hope this is helpful, no need to answer my questions, they are largely rhetorical.

Lenore

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. In addition, some airlines' tariffs provide for refunds in certain cases, but have clauses that relieve the airline of such obligations in *force majeure* situations.

All these documents were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of mass cancellations that have taken place over recent weeks as a result of the COVID-19 pandemic. It's important to consider how to strike a fair and sensible balance between passenger concerns and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance and have to find other ways of getting home should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues, because of circumstances largely beyond their control should not be expected to take steps that could put their very survival at risk.

While any specific situation~~s~~ brought before the CTA will be examined on its ~~their~~ merits, the CTA believes that, generally speaking, an appropriate response ~~solution~~ could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits take the current situation fully into account, and do not expire in an unreasonably short period of time.

Commented [LD1]: Not sure what we mean by **documents** here; is it tariffs, or legislation referred to above, or both? I would probably broaden this to instead say: "The legislative framework that governs air travel is primarily designed to address relatively localized and short-term disruptions."

That said, I don't know what happened after 9/11(or, grant it, to a lesser extent), the Iceland volcano, but perhaps there is some experience on which to draw in terms of a broad scale disruption of air traffic. I think what will set this one apart will be the duration.

Commented [LD2]: Definitely would nix this language, as I can see individuals coming back to say that this is putting their personal survival at risk – not good optics. Maybe you could replace with:
… take steps that threaten their overall economic viability; or
… take steps that threaten their continued operations.

This is **Exhibit "Q"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Heather Smith
Sent: March 22, 2020 10:32 PM
To: Gerald Dickie; Scott Streiner; Mark MacKeigan; Mary Tobin Oates; Lenore Duff
Cc: Liz Barker
Subject: RE: Draft statement

Hi all!

I agree with the comments that Mary, Mark and Lenore have already made on the draft text. I would also encourage you to look again at the last phrase of the statement "as long as these vouchers or credits do not expire in an unreasonably short period of time". It is ambiguous about what "an unreasonably short period of time" would be, and in many provinces, consumer protection legislation does not allow vouchers and credits to have expiry dates. It seems to be injecting unnecessary questions or potential for media controversy where the Agency is trying to provide guidance and reassurance. I would delete that last thought altogether, or - if you have incorporated Lenore's suggested changes to that sentence re "taking the current circumstances fully into account", I suggest that you end the sentence there.

Cheers!

Heather

From: Gerald Dickie
Sent: Sunday, March 22, 2020 10:04 PM
To: Scott Streiner ; Mark MacKeigan ; Heather Smith ; Mary Tobin Oates ; Lenore Duff
Cc: Liz Barker
Subject: Re: Draft statement

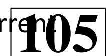
No comments from me other than the letter is well timed and valuable to the reader. Its the right thing to do in terms of Crisis Management.

Gerry

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-22 11:24 AM (GMT-05:00)
To: Mark MacKeigan <Mark.MacKeigan@otc-cta.gc.ca>, Heather Smith <Heather.Smith@otc-cta.gc.ca>, Mary Tobin Oates <Mary.TobinOates@otc-cta.gc.ca>, Lenore Duff <Lenore.Duff@otc-cta.gc.ca>, Gerald Dickie <Gerald.Dickie@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: Draft statement

Hi, Colleagues. I hope all of you and your family and friends remain healthy and are doing OK despite our current isolation in our homes.



As you know, there have been many questions about what (if any) entitlements passengers have, and what (if any) obligations carriers have, when flights are disrupted as a result of the COVD-19-related mass cancellations.

After some analysis, reflection, and discussion with other federal players, we're considering issuing a statement (draft attached) that acknowledges the current rule-set never really contemplated the present circumstances and indicates that vouchers/credits would be an appropriate way of protecting passengers from a total loss without pushing carriers closer towards insolvency.

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Many thanks,

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Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

This is **Exhibit "R"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

March 22, 2020

Transmission by e-mail
scott.streiner@otc-cta.gc.ca

Mr. Scott Streiner
Chairman and Chief Executive Officer
Canadian Transportation Agency
15 Eddy Street, 17th Floor
Gatineau, Quebec J8X 4B3

RE: Request for further public clarification of air carrier obligations per the *Air Passenger Protection Regulations* ("APPR") in the context of the current extraordinary circumstances

Dear Mr. Streiner:

As you are aware, the global air transport and tourism industries are dealing with a wholly-unprecedented collapse in world travel demand, as well as with the resulting operational and financial calamity in terms of drastically cutting capacity and preserving liquidity in an attempt to prevent our businesses from failing and putting tens of thousands of Canadians out of work. Obviously, Transat A.T. and our subsidiary travel units, including Air Transat and Transat Holidays, have not been spared the brunt of this disaster.

Indeed, we have recently announced, as a result of borders closing, the suspension of all outbound travel sales on our flights and the imminent grounding of almost all of our fleet until April 30, 2020, except for the small remainder of our flights that are conducting emergency repatriation operations of Canadians abroad in coordination with the federal government. Furthermore, we are confronted to making extremely difficult decisions where an important number of employees will be put on leave until the situation stabilizes and until we can hopefully and eventually contemplate a return to some sense of normalcy in the future.

In the meantime, while our industry fights to survive, we urgently need the federal government and our oversight authorities such as the CTA to provide assistance, both in the form of financial support and relief in terms of the substantial easing of existing regulatory costs and burdens. I have already written to Ministers Garneau and Morneau with regards to the first objective, and I am now hereby addressing myself to you with respect to the second.

Please be assured that I appreciated the Agency's efforts on March 13, 2020 to provide much-needed clarification to both industry and consumers concerning the application and enforcement of certain provisions of the APPR in the context of the current extraordinary circumstances.

Transat A.T. inc.
Place du Parc
300, rue Léo-Pariseau, bureau 600
Montréal, Québec, Canada H2X 4C2

Téléphone : 514 987-1660
www.transat.com

However, we need more to be done on an urgent basis in order to establish proper certainty and support the industry's impact mitigation efforts to date.

Specifically, I hereby request that the Agency publicly and unequivocally recognize the uncontrollable nature of the crisis and that all changes to schedules and capacity reductions are measures needed to manage the devastating losses this crisis is causing. Quite simply, these changes are not within the control of air carriers and our regulator should be clear to this end, as well as for the purposes of the application of the APPR.

Furthermore, the limited scope of the exemption on March 13, 2020 is problematic as our personnel have almost no ability to provide alternative travel arrangements at this time given the above-mentioned folding of flight schedules. Consequently, and as additional support and relief, I hereby request the following:

- Clearly recognize that all delays, cancellations, and denied boarding occurring at this time of crisis are outside of Air Transat's control;
- Clarify that the uncontrollable nature of the crisis means that no refunds to passengers are required under the APPR. This is essential to avoid unnecessary confusion among consumers and to pre-empt a spike in the increase of complaints and lawsuits;
- Recognize the offering of travel voucher options in lieu of cash refunds as an acceptable means to address consumer requests for refunds which, in turn, would allow credit card companies and their processors to deny customer chargeback claims and thereafter cease otherwise resulting and destructive financial guarantee demands on air carrier merchants;
- Exempt airlines from the obligation to respond to compensation claims within 30 days;
- Exempt airlines from all obligations to provide alternate travel arrangements; and
- Ensure that all exemptions ordered by the Agency, including those found in Determination No. A-2020-42, are in effect until such time as the industry has fully recovered, which is expected to take longer than April 30, 2020, and at the very least, 90 days.

I would also like to take this opportunity to request a minimum one-year suspension of enforcement action and the levying of fines for non-compliance per the APPR and ATPDR. Again, we are not trying to conveniently avoid our obligations *in normal circumstances,* but rather to ensure that our reduced levels of human resources going forward are able to focus on actively

managing the crisis and minimizing as much as possible disruptions to the system and our eventual efforts at recovery.

I wish to thank you in advance for your understanding and expeditious consideration of the present request. Also, please accept my best wishes for the continued health and well-being of yourself, your loved ones and your staff in these unimaginably difficult times.

Sincerely,

Jean-Marc Eustache
Chairman, President and
Chief Executive Officer

c.c. Hon. Marc Garneau, PC, MP – Minister of Transport
Marcia Jones, Chief Strategy Officer - CTA
Miled Hill, Office of the Hon. Marc Garneau, PC, MP
Lawrence Hanson, Assistant Deputy Minister of Transport (Policy)
Colin Stacey, Director General of Air Policy – Transport Canada
George Petsikas, Senior Director, Government and Industry Affairs – Transat A.T. Inc.

This is **Exhibit "S"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Scott Streiner
Sent: March 22, 2020 1:59 PM
To: +_EC
Subject: FW: Letter from Jean-Marc Eustache
Attachments: 20-03-22 Scott Streiner.pdf.DRF

Importance: High

Hi, all. Some of these items were covered in our discussion on Friday or the call I have with several of you this morning. Others weren't. We'll talk about all of them tomorrow.

S

From: Jean-Marc Eustache <Jean-Marc.Eustache@transat.com>
Sent: Sunday, March 22, 2020 1:52 PM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Cc: mintc@tc.gc.ca; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; miled.hill@tc.gc.ca; lawrence.hanson@tc.gc.ca; colin.stacey@tc.gc.ca; George Petsikas <George.Petsikas@transat.com>; Jean-Marc Eustache <Jean-Marc.Eustache@transat.com>
Subject: Letter from Jean-Marc Eustache
Importance: High

Dear Mr. Streiner,

Please find enclosed a letter from Mr. Jean-Marc Eustache.

Best Regards,

Francine Giroux
Adjointe au président
Assistant to the President
T 514-987-1660, 4055

Transat A.T. inc.
300, rue Léo-Pariseau, bureau 600
Montréal (Québec) H2X 4C2

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March 22, 2020

Transmission by e-mail
scott.streiner@otc-cta.gc.ca

Mr. Scott Streiner
Chairman and Chief Executive Officer
Canadian Transportation Agency
15 Eddy Street, 17th Floor
Gatineau, Quebec J8X 4B3

RE: Request for further public clarification of air carrier obligations per the *Air Passenger Protection Regulations* ("APPR") in the context of the current extraordinary circumstances

Dear Mr. Streiner:

As you are aware, the global air transport and tourism industries are dealing with a wholly-unprecedented collapse in world travel demand, as well as with the resulting operational and financial calamity in terms of drastically cutting capacity and preserving liquidity in an attempt to prevent our businesses from failing and putting tens of thousands of Canadians out of work. Obviously, Transat A.T. and our subsidiary travel units, including Air Transat and Transat Holidays, have not been spared the brunt of this disaster.

Indeed, we have recently announced, as a result of borders closing, the suspension of all outbound travel sales on our flights and the imminent grounding of almost all of our fleet until April 30, 2020, except for the small remainder of our flights that are conducting emergency repatriation operations of Canadians abroad in coordination with the federal government. Furthermore, we are confronted to making extremely difficult decisions where an important number of employees will be put on leave until the situation stabilizes and until we can hopefully and eventually contemplate a return to some sense of normalcy in the future.

In the meantime, while our industry fights to survive, we urgently need the federal government and our oversight authorities such as the CTA to provide assistance, both in the form of financial support and relief in terms of the substantial easing of existing regulatory costs and burdens. I have already written to Ministers Garneau and Morneau with regards to the first objective, and I am now hereby addressing myself to you with respect to the second.

Please be assured that I appreciated the Agency's efforts on March 13, 2020 to provide much-needed clarification to both industry and consumers concerning the application and enforcement of certain provisions of the APPR in the context of the current extraordinary circumstances.

However, we need more to be done on an urgent basis in order to establish proper certainty and support the industry's impact mitigation efforts to date.

Specifically, I hereby request that the Agency publicly and unequivocally recognize the uncontrollable nature of the crisis and that all changes to schedules and capacity reductions are measures needed to manage the devastating losses this crisis is causing. Quite simply, these changes are not within the control of air carriers and our regulator should be clear to this end, as well as for the purposes of the application of the APPR.

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- Exempt airlines from the obligation to respond to compensation claims within 30 days;
- Exempt airlines from all obligations to provide alternate travel arrangements; and
- Ensure that all exemptions ordered by the Agency, including those found in Determination No. A-2020-42, are in effect until such time as the industry has fully recovered, which is expected to take longer than April 30, 2020, and at the very least, 90 days.

I would also like to take this opportunity to request a minimum one-year suspension of enforcement action and the levying of fines for non-compliance per the APPR and ATPDR. Again, we are not trying to conveniently avoid our obligations *in normal circumstances,* but rather to ensure that our reduced levels of human resources going forward are able to focus on actively

managing the crisis and minimizing as much as possible disruptions to the system and our eventual efforts at recovery.

I wish to thank you in advance for your understanding and expeditious consideration of the present request. Also, please accept my best wishes for the continued health and well-being of yourself, your loved ones and your staff in these unimaginably difficult times.

Sincerely,

Jean-Marc Eustache
Chairman, President and
Chief Executive Officer

c.c. Hon. Marc Garneau, PC, MP – Minister of Transport
Marcia Jones, Chief Strategy Officer - CTA
Miled Hill, Office of the Hon. Marc Garneau, PC, MP
Lawrence Hanson, Assistant Deputy Minister of Transport (Policy)
Colin Stacey, Director General of Air Policy – Transport Canada
George Petsikas, Senior Director, Government and Industry Affairs – Transat A.T. Inc.

This is **Exhibit “T”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

UL

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Millette, Vincent

From: Millette, Vincent
Sent: Monday, March 23, 2020 11:10 AM
To: Stacey, Colin
Subject: FW: CTA announcement tomorrow

Categories: ATIP Retrieval Notice A-2020-00167BB, ATIP Retrieval Notice / A-2020-00091

See response below from the Agency. It doesn't seem that the announcement would impact carriers that do not currently refund (AC) – perhaps just make them look bad.

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Monday, March 23, 2020 11:04 AM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Vincent,
This statement indicates what the CTA views as appropriate given this situation – an approach that would ensure passengers aren't totally out of pocket while taking into account concerns from airlines. The statement indicates that the CTA would consider vouchers acceptable "refunds" for those airlines that do require reimbursement in their tariff.

The statement does not force other airlines – whose tariffs do not require reimbursement in force majeure situations – to provide passengers with vouchers or credits. It indicates what we view as a good practice that would help make passengers whole

If a complaint were brought forward to the CTA, it would be assessed on its own merits, of course.

Happy to discuss further,
Cait

> **From:** Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
> **Sent:** Monday, March 23, 2020 10:20 AM
> **To:** Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
> **Subject:** RE: CTA announcement tomorrow
>
> Would your approach force in any way carriers that do not have refunds specified in their tariff to start refunding or their current tariff still apply?
>
> **From:** Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
> **Sent:** Monday, March 23, 2020 10:15 AM
> **To:** Millette, Vincent <vincent.millette@tc.gc.ca>
> **Subject:** RE: CTA announcement tomorrow
>
> Hi Vincent,
> I understand there is a plan to release a statement indicating that, generally speaking, for cancelled flights, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers

or credits for future travel. This was discussed between the Chair, the DM and the [redacted] and Marcia spoke with your ADM over the weekend as well.

It has been noted, though, that some airlines may not wish to provide vouchers, if their tariffs do not have any reimbursement requirement for force majeure situations.

Let me know if you'd like to discuss further.

Cait

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Monday, March 23, 2020 10:02 AM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: CTA announcement tomorrow

Hi Cait – I am on a Min/DM call and I'm sure the question will come up. Any insight you can provide quickly?

Thanks

From: Millette, Vincent
Sent: Sunday, March 22, 2020 2:22 PM
To: 'Caitlin Hurcomb' <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: CTA announcement tomorrow

Hi Cait - I was just on a conference call with Lawrence, our ADM, where he briefed us on an announcement the Agency would do tomorrow regarding the refund and voucher issue.

[redacted]

We are not entirely sure we understand this. Can you explain?

Feel free to call me if easier 343-996-9858

Thanks!

Sent from my BlackBerry 10 smartphone on the Rogers network.

This is **Exhibit "U"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

From: Scott Streiner
Sent: March 23, 2020 11:37 AM
To: Valérie Lagacé
Cc: Liz Barker
Subject: RE: Revised statement

Hi, Valérie. Liz and I are leaning towards leaving the statement as is. Have you already sent it for translation? Even if we tweak the expiry language, most of the statement will remain unchanged – and ideally, we'd like post it this afternoon (Comms is on standby).

Thanks,

S

From: Valérie Lagacé
Sent: Monday, March 23, 2020 9:23 AM
To: Tom Oommen ; Scott Streiner ; +_EC
Subject: RE: Revised statement

I agree with Tom on this. my least favorite option is to say nothing and let air carriers issue useless vouchers.

De : Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Envoyé : 23 mars 2020 09:21
À : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Objet : RE: Revised statement

In my view, given the nature of the statement, suggesting that 24 months could be considered reasonable, is a good approach. Tom

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-23 9:09 AM (GMT-05:00)
To: +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

Hi again, everyone. One issue that's been raised by a Member: should we retain language on expiry dates and if so, is the current text the best approach? While it comes across as balanced, it may be a bit vague and beg immediate questions on what we'd see as reasonable. Alternatives:

- Say vouchers/credits shouldn't have any expiry date. This would be consistent with the APPR and spread people travelling on vouchers over a longer period, but might be seen negatively by carriers who are trying to manage liabilities as losses pile up.

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- Indicate more specifically what we think is reasonable – perhaps 24 months. This would provide clarity, but might seem a bit arbitrary in a highly fluid situation. Passengers might also object, given that the APPR prohibit expiry dates (albeit for different circumstances).
- Remain silent on the matter. This would avoid the complications noted above, but we know short expiry periods are being used by some carriers and that passengers find this frustrating and inconsistent with the spirit (if not the letter) of the APPR.

Please email any views on this question in the next hour or so.

Thanks,

S

From: Scott Streiner
Sent: Sunday, March 22, 2020 2:57 PM
To: +_EC <_EC@otc-cta.gc.ca>
Subject: Revised statement

Hi, all. The attached version reflects feedback from Members. Please let me know this afternoon if you have any additional comments.

Valérie, let's have the secretariat ready to translate the statement and a s.64 decision tomorrow morning.

Thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

This is **Exhibit "V"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Scott Streiner
Sent: March 23, 2020 11:56 AM
To: Liz Barker
Subject: FW: Revised statement

Leave as is, I think. If you agree, I'll ask staff to proceed and we'll explain on the Members' call tomorrow why we decided not to be more specific in these highly fluid circumstances.

From: Valérie Lagacé
Sent: Monday, March 23, 2020 11:43 AM
To: Scott Streiner
Cc: Liz Barker
Subject: RE: Revised statement

Yes, Secretariat is working as fast as they can on this. The sooner they have a finalized version, the better as they have also formatting to do. Valérie

---

De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Envoyé : 23 mars 2020 11:37
À : Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc : Liz Barker <Liz.Barker@otc-cta.gc.ca>
Objet : RE: Revised statement

Hi, Valérie. Liz and I are leaning towards leaving the statement as is. Have you already sent it for translation? Even if we tweak the expiry language, most of the statement will remain unchanged – and ideally, we'd like post it this afternoon (Comms is on standby).

Thanks,

S

From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Sent: Monday, March 23, 2020 9:23 AM
To: Tom Oommen <Tom.Oommen@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

I agree with Tom on this. my least favorite option is to say nothing and let air carriers issue useless vouchers.

De : Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Envoyé : 23 mars 2020 09:21
À : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Objet : RE: Revised statement

In my view, given the nature of the statement, suggesting that 24 months could be considered reasonable, is a good approach. Tom

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-23 9:09 AM (GMT-05:00)
To: +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

Hi again, everyone. One issue that's been raised by a Member: should we retain language on expiry dates and if so, is the current text the best approach? While it comes across as balanced, it may be a bit vague and beg immediate questions on what we'd see as reasonable. Alternatives:

- Say vouchers/credits shouldn't have any expiry date. This would be consistent with the APPR and spread people travelling on vouchers over a longer period, but might be seen negatively by carriers who are trying to manage liabilities as losses pile up.
- Indicate more specifically what we think is reasonable – perhaps 24 months. This would provide clarity, but might seem a bit arbitrary in a highly fluid situation. Passengers might also object, given that the APPR prohibit expiry dates (albeit for different circumstances).
- Remain silent on the matter. This would avoid the complications noted above, but we know short expiry periods are being used by some carriers and that passengers find this frustrating and inconsistent with the spirit (if not the letter) of the APPR.

Please email any views on this question in the next hour or so.

Thanks,

S

From: Scott Streiner
Sent: Sunday, March 22, 2020 2:57 PM
To: +_EC <_EC@otc-cta.gc.ca>
Subject: Revised statement

Hi, all. The attached version reflects feedback from Members. Please let me know this afternoon if you have any additional comments.

Valérie, let's have the secretariat ready to translate the statement and a s.64 decision tomorrow morning.

Thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

This is **Exhibit "W"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Scott Streiner
Sent: March 23, 2020 12:00 PM
To: Valérie Lagacé
Cc: Liz Barker; Marcia Jones
Subject: RE: Revised statement

OK, let's finalize and post the statement as provided yesterday evening. No further changes.

From: Valérie Lagacé
Sent: Monday, March 23, 2020 11:43 AM
To: Scott Streiner
Cc: Liz Barker
Subject: RE: Revised statement

Yes, Secretariat is working as fast as they can on this. The sooner they have a finalized version, the better as they have also formatting to do. Valérie

---

De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Envoyé : 23 mars 2020 11:37
À : Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc : Liz Barker <Liz.Barker@otc-cta.gc.ca>
Objet : RE: Revised statement

Hi, Valérie. Liz and I are leaning towards leaving the statement as is. Have you already sent it for translation? Even if we tweak the expiry language, most of the statement will remain unchanged – and ideally, we'd like post it this afternoon (Comms is on standby).

Thanks,

S

From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Sent: Monday, March 23, 2020 9:23 AM
To: Tom Oommen <Tom.Oommen@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

I agree with Tom on this. my least favorite option is to say nothing and let air carriers issue useless vouchers.

De : Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Envoyé : 23 mars 2020 09:21
À : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Objet : RE: Revised statement

In my view, given the nature of the statement, suggesting that 24 months could be considered reasonable, is a good approach. Tom

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-23 9:09 AM (GMT-05:00)
To: +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

Hi again, everyone. One issue that's been raised by a Member: should we retain language on expiry dates and if so, is the current text the best approach? While it comes across as balanced, it may be a bit vague and beg immediate questions on what we'd see as reasonable. Alternatives:

- Say vouchers/credits shouldn't have any expiry date. This would be consistent with the APPR and spread people travelling on vouchers over a longer period, but might be seen negatively by carriers who are trying to manage liabilities as losses pile up.
- Indicate more specifically what we think is reasonable – perhaps 24 months. This would provide clarity, but might seem a bit arbitrary in a highly fluid situation. Passengers might also object, given that the APPR prohibit expiry dates (albeit for different circumstances).
- Remain silent on the matter. This would avoid the complications noted above, but we know short expiry periods are being used by some carriers and that passengers find this frustrating and inconsistent with the spirit (if not the letter) of the APPR.

Please email any views on this question in the next hour or so.

Thanks,

S

From: Scott Streiner
Sent: Sunday, March 22, 2020 2:57 PM
To: +_EC <_EC@otc-cta.gc.ca>
Subject: Revised statement

Hi, all. The attached version reflects feedback from Members. Please let me know this afternoon if you have any additional comments.

Valérie, let's have the secretariat ready to translate the statement and a s.64 decision tomorrow morning.

Thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

This is **Exhibit "X"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Scott Streiner
Sent: March 23, 2020 12:09 PM
To: Valérie Lagacé
Cc: Liz Barker; Marcia Jones
Subject: RE: Revised statement

Yes (yesterday afternoon, not evening!). Thanks.

-------- Original message --------
From: Valérie Lagacé
Date: 2020-03-23 12:07 p.m. (GMT-05:00)
To: Scott Streiner
Cc: Liz Barker , Marcia Jones
Subject: RE: Revised statement

Just to be certain I should use the version provided in your email of 2:57 pm yesterday (see in green below)?

De : Scott Streiner
Envoyé : 23 mars 2020 12:00
À : Valérie Lagacé
Cc : Liz Barker ; Marcia Jones
Objet : RE: Revised statement
OK, let's finalize and post the statement as provided yesterday evening. No further changes.

From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Sent: Monday, March 23, 2020 11:43 AM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: RE: Revised statement
Yes, Secretariat is working as fast as they can on this. The sooner they have a finalized version, the better as they have also formatting to do. Valérie

De : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Envoyé : 23 mars 2020 11:37
À : Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc : Liz Barker <Liz.Barker@otc-cta.gc.ca>
Objet : RE: Revised statement
Hi, Valérie. Liz and I are leaning towards leaving the statement as is. Have you already sent it for translation? Even if we tweak the expiry language, most of the statement will remain unchanged – and ideally, we'd like post it this afternoon (Comms is on standby).
Thanks,
S

From: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Sent: Monday, March 23, 2020 9:23 AM
To: Tom Oommen <Tom.Oommen@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

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De : Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Envoyé : 23 mars 2020 09:21
À : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Objet : RE: Revised statement

In my view, given the nature of the statement, suggesting that 24 months could be considered reasonable, is a good approach. Tom
Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-23 9:09 AM (GMT-05:00)
To: +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

Hi again, everyone. One issue that's been raised by a Member: should we retain language on expiry dates and if so, is the current text the best approach? While it comes across as balanced, it may be a bit vague and beg immediate questions on what we'd see as reasonable. Alternatives:

- Say vouchers/credits shouldn't have any expiry date. This would be consistent with the APPR and spread people travelling on vouchers over a longer period, but might be seen negatively by carriers who are trying to manage liabilities as losses pile up.
- Indicate more specifically what we think is reasonable – perhaps 24 months. This would provide clarity, but might seem a bit arbitrary in a highly fluid situation. Passengers might also object, given that the APPR prohibit expiry dates (albeit for different circumstances).
- Remain silent on the matter. This would avoid the complications noted above, but we know short expiry periods are being used by some carriers and that passengers find this frustrating and inconsistent with the spirit (if not the letter) of the APPR.

Please email any views on this question in the next hour or so.
Thanks,
S

From: Scott Streiner
Sent: Sunday, March 22, 2020 2:57 PM
To: +_EC <_EC@otc-cta.gc.ca>
Subject: Revised statement

Hi, all. The attached version reflects feedback from Members. Please let me know this afternoon if you have any additional comments.
Valérie, let's have the secretariat ready to translate the statement and a s.64 decision tomorrow morning.
Thanks,
S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

This is **Exhibit "Y"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Scott Streiner
Sent: March 24, 2020 7:40 AM
To: Valérie Lagacé; Marcia Jones
Cc: Sébastien Bergeron
Subject: Statement
Attachments: Statement.docx

Bon matin. After sleeping on it, I've made one more single-word tweak to the statement – to talk about passenger "protection' rather than "concerns" (attached). Unless either of you has an issue with this, let's finalize the translation and prep of this version, so it's ready for release along with the two decisions later today.

Thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

The COVID-19 pandemic has caused major disruptions in domestic and international air travel.

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but typically have clauses that may relieve the airline of such obligations in *force majeure* situations.

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger ~~concerns~~ protection and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance and must find other ways of getting home should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time.

The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

This is **Exhibit "Z"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

Nadine Landry

From: Scott Streiner
Sent: Tuesday, March 24, 2020 8:40 AM
To: Marcia Jones; Valérie Lagacé
Cc: Sébastien Bergeron
Subject: RE: Statement
Attachments: Statement.docx

So the final version would be as attached.

For the sake of Patrice's sanity, this should be our last tweak unless we spot something egregious!

From: Scott Streiner
Sent: Tuesday, March 24, 2020 8:38 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement

Works for me, assuming the sentence continues with the words "in force majeure situations".

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 8:35 AM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement

Good morning,

Only one minor point - I would suggest striking out the word "typically" wrt tariffs and adjusting the sentence– so it would read "Some airlines' tariffs provide for refunds in certain cases, but may have clauses that relieve the airline of such obligations"

Thanks,
Marcia

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 7:40 AM
To: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: Statement

Bon matin. After sleeping on it, I've made one more single-word tweak to the statement – to talk about passenger "protection' rather than "concerns" (attached). Unless either of you has an issue with this, let's finalize the translation and prep of this version, so it's ready for release along with the two decisions later today.

Thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

This is **Exhibit "AA"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

Archivé: 13 décembre 2021 10:54:05
De:
À:
Cc:
Sujet: RE: message to carriers - signals check
Confidentialité: Normal

Hi, Marcia. Good (fast) work. A few tweaks, highlighted below.

We may also need to add something like, "Finally, the timeline for previously-announced special measures – exemptions from certain APPR requirements and a pause to all dispute resolution activities involving air carriers – has been extended from April 30, 2020 to …", depending on the outcome of the Members call this morning.

Thanks,

S

From: Marcia Jones
Sent: Tuesday, March 24, 2020 9:05 AM
To: Scott Streiner
Cc: Sébastien Bergeron ; Caitlin Hurcomb ; Allan Burnside ; Valérie Lagacé
Subject: message to carriers - signals check

Scott, normally I would not ask you to review this type of email, but wanted to be sure you had no issue with the draft message below that I will be sending out this afternoon. Thanks to Cait for preparing this quickly.

The plan is to send it out to carriers en masse, but given the outreach from PIAC/CAA, I could also do a separate send out to each of them.

Thanks

Marcia

> Good afternoon,
>
> I am writing to provide an update on the latest steps the Canadian Transportation Agency has taken related to the COVID-19 pandemic. Today, the CTA issued decisions:
>
> - Temporarily exempting all air carriers holding a domestic licence from the requirement in section 64 of the Canada Transportation Act to provide 120 days' notice and engage in consultations before temporarily suspending the operation of air services between points in Canada, while retaining that requirement for any permanent discontinuation of service. For more information, see Order X.
> - Temporarily exempting all air carriers from the *Air Passenger Protection Regulations* deadline for responding to passenger claims for compensation, while requiring that responses be provided within 120 days of the end of the exemption to certain APPR provisions. For more information, see Order Y.
>
> In addition, the CTA has released a statement providing guidance for addressing the mass flight cancellations taking place worldwide. In order to balance passenger protection and airline operating realities in these extraordinary and unprecedented circumstances, the CTA has indicated that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time. Of course, any situation brought forward to the CTA will be evaluated on its own merits. The full statement is available on the CTA's website (insert link).
>
> We will be sure to keep you informed of any further developments. Please don't hesitate to contact me with any questions.
>
> Sincerely,

Marcia Jones

Dirigeante principale, Stratégies/Chief Strategy Officer

Office des transports du Canada/Canadian Transportation Agency

15, rue Eddy/15 Eddy Street

Gatineau, QC, K1A 0N9

(819) 953-0327

marcia.jones@otc-cta.gc.ca

This is **Exhibit "AB"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Vincent Turgeon
Sent: March 24, 2020 5:13 PM
To: Marcia Jones; Sébastien Bergeron
Cc: Alysia Lau; Tim Hillier; Martine Maltais
Subject: FW: Question urgente de La Presse

Importance: High

Hi, the media request below is the 3rd such request about refunds and vouchers. The first was received mid-week last week and remains unanswered.

In light of the web revision that is about to be posted on this topic, can we send the link to the journalists, with a short message stating we regret late response, and refer them to the statement which addresses their question?

Just for the question below, are we in a position to provide her with the number of complaints received citing that regulatory issue?

Also, our Twitter account has received dozens of questions on that same topic. Can I use that strategy for direct responses on email (@Info inbox) and on Twitter?

Please advise.

Vincent

From: Grammond, Stéphanie [mailto:sgrammond@lapresse.ca]
Sent: Tuesday, March 24, 2020 4:17 PM
To: Media Relations / Relations Medias <media@tc.gc.ca>
Subject: Question urgente de La Presse

Bonjour,
Au lieu de rembourser les clients dont les vols sont annulés à cause de la COVID-19, plusieurs transporteurs leur offrent un crédit valide pour 12-24 mois. En ces temps difficiles, les consommateurs qui sont nombreux à avoir perdu leur emploi préfèreraient avoir l'argent dans leurs poches.
Avez-vous beaucoup de plaintes à cet égard?
Est-il légal de la part des transporteurs de refuser de rembourser les clients à qui ils n'ont pas fourni le vol prévu?
Merci de me revenir d'ici la fin de la journée,
SG

Stéphanie Grammond
Chroniqueuse
La Presse, Affaires

T 514 285-7000, poste 4905
750, boulevard Saint-Laurent, Montréal (Québec) H2Y 2Z4
sgrammon@lapresse.ca
LaPresse.ca | LaPressePlus.ca

This is **Exhibit "AC"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

From: Scott Streiner
Sent: March 24, 2020 7:34 PM
To: Marcia Jones; Sébastien Bergeron
Subject: Answer
Attachments: Answer.docx

Hi, Marcia and Seb. Attached is a draft answer to possible questions on why we issued the statement, whether it shortchanges passengers, whether it puts fragile airlines at greater risk of failure, etc. Feel free to tweak – and I'm happy to discuss -- but we need to be ready when the calls come. Thanks.

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

- The *Canada Transportation Act* and *Air Passenger Protection Regulations* do not require refunds where a flight cancellation is outside an airline's control, which would include cancellations resulting from the COVID-19 pandemic.
- Airline tariffs have a wide range of provisions, but it's often unclear which tariff terms would apply to this unprecedented situation and whether the *force majeure* clauses in most tariffs would exempt airlines from paying anything.
- As a result, many passengers affected by the cancellations have been facing significant confusion about what their rights were and the possibility that they will lose the entire cost of their flights.
- At the same time, airlines have had to deal with huge drops in passenger volumes and have little to no ability to issue cash refunds.
- In these extraordinary circumstances – which were never anticipated by the legislation, the regulations, or the tariffs – the CTA concluded that the best way of balancing passenger protection with airline's current operating realities was to suggest that airlines issue vouchers or travel credits for the value of cancelled tickets, as long as those vouchers or credits don't expire too soon.
- We believe that this is a fair, sensible approach in these very difficult circumstances and that greater clarity and consistency of approach will be of benefit to for both passengers and airlines.

This is **Exhibit “AD”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Marcia Jones
Sent: March 24, 2020 8:53 PM
To: Scott Streiner; Sébastien Bergeron
Subject: RE: Answer

Hi Scott, I was thinking of the same issue. I drafted up the following earlier today, for your consideration. I think with regard to the airlines, we are not trying to benefit them per se, but rather, ensure that Canadians can benefit from a variety of carriers, service offerings and routes in the future. The only reason we want to do this is for the benefit of Canadian passengers in the long term. It may be helpful to accentuate this.

Marcia

Q3. It does not seem fair to passengers who lost money that they would only get credits or vouchers. Can you explain?

The CTA believes that fair and robust air protection for passengers whose flights are cancelled in these circumstances is essential. That is why the CTA has issued a statement (insert link) indicating that providing vouchers or credits to passengers in these extraordinary circumstances may be appropriate. This measure goes beyond what is required for situations outside of the carrier's control under the *Air Passenger Protection Regulations* and, in some cases, goes beyond what carriers provide for in their tariffs.

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic.

The issuance of vouchers or credits strikes a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances. It is important that passengers not suffer out of pocket, and also that the air industry survive and can continue to provide diverse service offerings to Canadians once the crisis has abated.

From: Scott Streiner
Sent: Tuesday, March 24, 2020 7:34 PM
To: Marcia Jones ; Sébastien Bergeron
Subject: Answer

Hi, Marcia and Seb. Attached is a draft answer to possible questions on why we issued the statement, whether it shortchanges passengers, whether it puts fragile airlines at greater risk of failure, etc. Feel free to tweak – and I'm happy to discuss -- but we need to be ready when the calls come. Thanks.

S

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scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

This is **Exhibit "AE"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

From: Scott Streiner
Sent: March 25, 2020 8:47 AM
To: Liz Barker
Subject: FW: Answer

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The CTA believes that fair and robust air protection for passengers whose flights are cancelled in these circumstances is essential. That is why the CTA has issued a statement (insert link) indicating that providing vouchers or credits to passengers in these extraordinary circumstances may be appropriate. This measure goes beyond what is required for situations outside of the carrier's control under the *Air Passenger Protection Regulations* and, in some cases, goes beyond what carriers provide for in their tariffs.

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic.

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This is **Exhibit "AF"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Scott Streiner
Sent: March 25, 2020 9:32 AM
To: Liz Barker
Subject: FW: Statement
Attachments: Statement.docx

From: Scott Streiner
Sent: Tuesday, March 24, 2020 8:40 AM
To: Marcia Jones ; Valérie Lagacé
Cc: Sébastien Bergeron
Subject: RE: Statement

So the final version would be as attached.

For the sake of Patrice's sanity, this should be our last tweak unless we spot something egregious!

From: Scott Streiner
Sent: Tuesday, March 24, 2020 8:38 AM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement

Works for me, assuming the sentence continues with the words "in force majeure situations".

From: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 8:35 AM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Statement

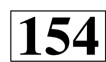
Good morning,

Only one minor point - I would suggest striking out the word "typically" wrt tariffs and adjusting the sentence– so it would read "Some airlines' tariffs provide for refunds in certain cases, but may have clauses that relieve the airline of such obligations"

Thanks,
Marcia

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 7:40 AM
To: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>

Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: Statement



Bon matin. After sleeping on it, I've made one more single-word tweak to the statement – to talk about passenger "protection' rather than "concerns" (attached). Unless either of you has an issue with this, let's finalize the translation and prep of this version, so it's ready for release along with the two decisions later today.

Thanks,

S

Scott Streiner
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scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

The COVID-19 pandemic has caused major disruptions in domestic and international air travel.

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but ~~typically~~ may have clauses that relieve the airline of such obligations in *force majeure* situations.

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger ~~concerns~~ protection and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance and must find other ways of getting home should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time.

The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

This is **Exhibit “AG”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

Nadine Landry

From: Scott Streiner
Sent: Wednesday, March 25, 2020 9:45 AM
To: Valérie Lagacé
Cc: Marcia Jones; Tom Oommen; Sébastien Bergeron; Lesley Robertson
Subject: Statement
Attachments: Statement.docx

Hi, all. After a lot of back-and-forth this morning, Liz and I have decided on a few additional tweaks to the statement. The final FINAL ***FINAL*** (!) version is attached.

No need for the call at 10.

Thanks,

S

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On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance ~~and must find other ways of getting home~~ should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time.

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This is **Exhibit “AH”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

From: Scott Streiner
Sent: March 25, 2020 9:53 AM
To: Marcia Jones; Sébastien Bergeron
Cc: Liz Barker
Subject: RE: Answer

Hi, Marcia. As part of Liz's and my discussion of the statement this morning, we concluded that vouchers may not, in fact, go beyond what the APPR require, since they could, arguably be deemed a necessary alternative to itinerary completion where completion isn't possible. That's the sort of interpretation the Agency might could conceivably in future adjudications.

Could you please adjust the answer accordingly, emphasizing not "going beyond" but rather, "bringing greater greater clarity and consistency in unprecedented and unanticipated circumstances"?

Thanks.

From: Marcia Jones
Sent: Tuesday, March 24, 2020 8:53 PM
To: Scott Streiner ; Sébastien Bergeron
Subject: RE: Answer

Hi Scott, I was thinking of the same issue. I drafted up the following earlier today, for your consideration. I think with regard to the airlines, we are not trying to benefit them per se, but rather, ensure that Canadians can benefit from a variety of carriers, service offerings and routes in the future. The only reason we want to do this is for the benefit of Canadian passengers in the long term. It may be helpful to accentuate this.

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industry survive and can continue to provide diverse service offerings to Canadians once the crisis has abated.

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 7:34 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: Answer

Hi, Marcia and Seb. Attached is a draft answer to possible questions on why we issued the statement, whether it shortchanges passengers, whether it puts fragile airlines at greater risk of failure, etc. Feel free to tweak – and I'm happy to discuss -- but we need to be ready when the calls come. Thanks.

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This is **Exhibit "AI"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Scott Streiner
Sent: March 25, 2020 12:00 PM
To: +_EC
Subject: Draft blog
Attachments: Dispatches from the living room.docx

…for feedback before, or discussion during, our daily call.

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

Dispatches from the living room

Hi, folks. We're approaching the end of our second week in work-at-home arrangements. As we all know, this may continue for some time to come.

It seems most of us are growing more accustomed to, and comfortable with, the technologies and work patterns needed to do our jobs effectively at a distance. I've certainly gotten better at calling into teleconferences (with a little help from Lesley)!

On the personal front, many of us are using various online platforms to stay connected with friends and family. Last Saturday, my wife and I used a combination of a game app and Hangouts to play a round of Monopoly with our sons (who live in Toronto and Calgary) and their partners. It was lots of fun – not quite the same as being together physically, but not too different – despite the fact that the parents were the first ones to go bankrupt. Seems a little unfair after everything we spent over the years providing our kids with lodging, food (a lot of food), and extracurricular activities, but when it comes to board games, our boys have a pronounced competitive spirit!

Some of you have told me that electronics and music are playing an increasing role in your currently hunkered-down lives. Indeed, during our daily calls, several members of EC may even have mentioned spousal drum kits or electric guitars with something less than total enthusiasm…

I hope everyone, and your loved ones, are healthy and holding up well. To the extent possible, we should all be trying to ensure – for ourselves and others -- that increased physical isolation doesn't result in too much social and psychological isolation.

On the work front, the Agency has taken additional temporary steps to address the impacts of COVID-19 on airlines and air passengers. This week, we issued three decisions: one exempting airlines from the normal 120-day notice period for the temporary suspension (but not permanent discontinuation) of certain domestic routes; another establishing longer timelines for airlines to respond to passengers' compensation claims and extending the modifications to a number of other APPR provisions to June 30; and a third extending the temporary stay of all dispute proceedings involving airlines to June 30.

We also released a statement indicating that in the extraordinary circumstances created by the pandemic, it could be appropriate for airlines give vouchers or credits to passengers who are unable to complete their itineraries. This guidance was aimed at bringing greater clarity and consistency of approach to an unprecedented situation, where there's a great deal of confusion around what, if anything, is owed to passengers, while airlines face severe financial challenges.

We're doing exceptionally well as an organization during these challenging days. EC and the broader management community will continue our efforts to keep communication flowing, respond quickly to questions and requests, and make sure that employees have meaningful work to do, even as some of our activities inevitably slow down.

Please don't hesitate to reach out to your supervisor, Branch Head, or me on any issue.

Stay safe, and stay in touch!

This is **Exhibit "AJ"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

From: Scott Streiner
Sent: March 25, 2020 1:35 PM
To: Marcia Jones
Cc: Sébastien Bergeron; Liz Barker
Subject: Statement
Attachments: Statement.docx

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

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While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

This is **Exhibit "AK"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

Nadine Landry

From: Marcia Jones
Sent: Wednesday, March 25, 2020 1:55 PM
To: Renée Langlois
Cc: Tim Hillier; Vincent Turgeon; Valérie Lagacé; Caitlin Hurcomb
Subject: FW: Statement
Attachments: Statement.docx

Over to you! ☺

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: Wednesday, March 25, 2020 1:35 PM
To: Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: Statement

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

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The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

This is **Exhibit “AL”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: George Petsikas <George.Petsikas@transat.com>
Sent: March 25, 2020 3:18 PM
To: Marcia Jones
Cc: Caitlin Hurcomb; Allan Burnside; Bernard Bussières; Howard Liebman
Subject: Re: Update: CTA measures/Mise à jour: mesures prises par l'OTC

Marcia

I confirm reception of your note hereunder on behalf of Transat.

Please accept our sincere thanks for turning this around and getting it out the door. We are mindful that Agency staff have been working very hard and diligently to assist both industry and consumers in this time of crisis so our appreciation is genuine.

Best regards and personal wishes to you, your family and colleagues for continued good health.

George

Get Outlook for Android

From: Marcia Jones
Sent: Wednesday, March 25, 2020, 2:34 PM
To: Marcia Jones
Cc: Caitlin Hurcomb; Allan Burnside
Subject: Update: CTA measures/Mise à jour: mesures prises par l'OTC

CYBERSÉCURITÉ ***Courriel d'une source externe:*** Ne cliquer sur aucun lien et aucune pièce jointe sauf si vous faites confiance à l'expéditeur et que le contenu est légitime.
CYBERSECURITY ***Email from an external source:*** Don't open links and attachments unless you trust the sender and know the content is safe.

Le français suit l'anglais.
Good afternoon,
I am writing to provide an update on the latest steps the Canadian Transportation Agency (CTA) has taken related to the COVID-19 pandemic. Today, the CTA issued decisions:

- Temporarily exempting all air carriers holding a domestic licence from the requirement in section 64 of the *Canada Transportation Act* to provide 120 days' notice and engage in consultations before temporarily suspending the operation of air services between points in Canada, while retaining that requirement for any permanent discontinuation of service. For more information, see Order 2020-A-36.
- Temporarily exempting all air carriers from the *Air Passenger Protection Regulations* deadline for responding to passenger claims for compensation, while requiring that responses be provided within 120 days of the end of the exemption to certain APPR provisions. For more information, see Determination A-2020-47.
- Extending the previously announced exemptions from certain APPR requirements related to compensation and alternate travel arrangements from April 30, 2020 to June 30, 2020. For more information, see Determination A-2020-47.

- Extending the stay of all dispute resolution activities involving air carriers from April 30, 2020 to June 30, 2020. For more information, see Order 2020-A-37.

In addition, the CTA has released a statement providing guidance for addressing the mass flight cancellations taking place worldwide. In order to balance passenger protection and airline operating realities in these extraordinary and unprecedented circumstances, the CTA has indicated that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time. A period of 24 months would be considered reasonable in most cases. Of course, any situation brought forward to the CTA will be evaluated on its own merits. The full statement is available on the CTA's website.

We will be sure to keep you informed of any further developments. Please don't hesitate to contact me with any questions.

_____

Bonjour,

Je vous écris pour faire le point sur les dernières mesures prises par l'Office des transports du Canada (OTC) dans le contexte de la pandémie de COVID-19. Aujourd'hui, l'OTC a rendu des décisions visant :

- à exempter temporairement tous les transporteurs aériens détenant une licence intérieure de l'obligation de donner un préavis de 120 jours, obligation prévue à l'article 64 de la *Loi sur les transports au Canada*, et de tenir des consultations avant de suspendre temporairement l'exploitation des services aériens entre des points situés au Canada; cette obligation est toutefois maintenue pour toute interruption de service permanente. Pour en savoir plus, consultez l'arrêté nº 2020-A-36;
- à exempter temporairement tous les transporteurs aériens de l'obligation de respecter le délai prévu dans le *Règlement sur la protection des passagers aériens* pour répondre aux demandes d'indemnité présentées par les passagers, en exigeant toutefois que les réponses soient fournies dans un délai de 120 jours à compter de la fin de la période d'exemption de l'application de certaines dispositions du RPPA. Pour en savoir plus, consultez la détermination n° A-2020-47;
- à prolonger du 30 avril au 30 juin 2020 les exemptions de l'application de certaines exigences du RPPA liées aux indemnités et aux arrangements de voyage alternatifs. Pour en savoir plus, consultez la détermination n° A-2020-47;
- à prolonger du 30 avril au 30 juin 2020 la suspension de toutes les activités liées au règlement des différends concernant les transporteurs aériens. Pour en savoir plus, consultez l'arrêté nº 2020-A-37.

De plus, l'OTC a publié une déclaration dans laquelle il donne des orientations pour faire face aux annulations massives de vols effectuées à l'échelle de la planète. Afin d'établir un équilibre entre la protection des passagers et les réalités opérationnelles des compagnies aériennes dans ces circonstances extraordinaires et sans précédent, l'OTC a indiqué que, de façon générale, une solution qui serait convenable dans le contexte actuel serait que les compagnies aériennes fournissent aux passagers touchés des bons ou des crédits pour des voyages futurs, à condition que ces bons ou ces crédits n'expirent pas dans un délai déraisonnablement court. Une période de 24 mois serait considérée comme raisonnable dans la plupart des cas. Bien entendu, toutes les situations présentées à l'OTC seront évaluées au cas par cas. La déclaration complète se trouve sur le site Web de l'OTC.

Nous ne manquerons pas de vous tenir informés de l'évolution de la situation. N'hésitez pas à communiquer avec moi si vous avez des questions.

Meilleures salutations,

Marcia Jones
Dirigeante principale, Stratégies/Chief Strategy Officer
Office des transports du Canada/Canadian Transportation Agency
15, rue Eddy/15 Eddy Street
Gatineau, QC, K1A 0N9
(613) 864-9918
marcia.jones@otc-cta.gc.ca

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This is **Exhibit “AM”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

From: Jason Kerr <jkerr@national.caa.ca>
Sent: March 25, 2020 4:11 PM
To: Marcia Jones
Cc: Allan Burnside; Caitlin Hurcomb; Sébastien Bergeron
Subject: RE: Update: CTA measures/Mise à jour: mesures prises par l'OTC

Thank you! This is just what I was looking for. I was just out a bit ahead.

CAA will review the CTA guidance on vouchers and may provide further comment.
We believe these government actions are reasonable and warranted for public health reasons. We believe Canadians should not be hit with large financial penalties for travel decisions out of their hands, especially at a time when unexpected economic stress has become a fact of life for most Canadians. Under these extraordinary circumstances it, CAA believes that, in our view, these extraordinary circumstances should permit an opportunity for passengers to access a cash refund, if not now then in the coming months, whether it is the airlines or government that make them whole.
To the extent that credits remain an option, they should not be allowed to expire as they would under normal circumstances. It may be more than 12-24 months before a Canadian's financial situation is good enough to contemplate another trip. As well, some seniors may not be in a position to still travel 18 months from now.

Jason

Jason Kerr
SENIOR DIRECTOR / DIRECTEUR PRINCIPAL
Government Relations / Relations gouvernementales
100 – 46 Elgin Street
Ottawa, ON
Tel/Tél 343-998-6679
jkerr@national.caa.ca

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From: Consultations aeriennes / Air Consultations (OTC/CTA)
Sent: March 25, 2020 4:01 PM
To: Marcia Jones
Cc: Allan Burnside ; Caitlin Hurcomb
Subject: Update: CTA measures/Mise à jour: mesures prises par l'OTC
Le français suit l'anglais.

Good afternoon,
I am writing to provide an update on the latest steps the Canadian Transportation Agency (CTA) has taken related to the COVID-19 pandemic. Today, the CTA issued decisions:

- Temporarily exempting all air carriers holding a domestic licence from the requirement in section 64 of the *Canada Transportation Act* to provide 120 days' notice and engage in consultations before temporarily suspending the operation of air services between points in Canada, while retaining that requirement for any permanent discontinuation of service. For more information, see Order 2020-A-36.
- Temporarily exempting all air carriers from the *Air Passenger Protection Regulations* deadline for responding to passenger claims for compensation, while requiring that responses be provided within 120 days of the end of the exemption to certain APPR provisions. For more information, see Determination A-2020-47.
- Extending the previously announced exemptions from certain APPR requirements related to compensation and alternate travel arrangements from April 30, 2020 to June 30, 2020. For more information, see Determination A-2020-47.
- Extending the stay of all dispute resolution activities involving air carriers from April 30, 2020 to June 30, 2020. For more information, see Order 2020-A-37.

In addition, the CTA has released a statement providing guidance for addressing the mass flight cancellations taking place worldwide. In order to balance passenger protection and airline operating realities in these extraordinary and unprecedented circumstances, the CTA has indicated that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time. A period of 24 months would be considered reasonable in most cases. Of course, any situation brought forward to the CTA will be evaluated on its own merits. The full statement is available on the CTA's website.
I also invite you to visit our webpage containing important information for travellers during COVID-19.
We will be sure to keep you informed of any further developments. Please don't hesitate to contact me with any questions.

Marcia Jones
Dirigeante principale, Stratégies/Chief Strategy Officer
Office des transports du Canada/Canadian Transportation Agency
15, rue Eddy/15 Eddy Street
Gatineau, QC, K1A 0N9
(613) 864-9918
marcia.jones@otc-cta.gc.ca

_____

Bonjour,
Je vous écris pour faire le point sur les dernières mesures prises par l'Office des transports du Canada (OTC) dans le contexte de la pandémie de COVID-19. Aujourd'hui, l'OTC a rendu des décisions visant :

- à exempter temporairement tous les transporteurs aériens détenant une licence intérieure de l'obligation de donner un préavis de 120 jours, obligation prévue à l'article 64 de la *Loi sur les transports au Canada*, et de tenir des consultations avant de suspendre temporairement l'exploitation des services aériens entre des points situés au Canada; cette obligation est toutefois maintenue pour toute interruption de service permanente. Pour en savoir plus, consultez l'arrêté n° 2020-A-36;
- à exempter temporairement tous les transporteurs aériens de l'obligation de respecter le délai prévu dans le *Règlement sur la protection des passagers aériens* pour répondre aux demandes d'indemnité présentées par les passagers, en exigeant toutefois que les réponses soient fournies dans un délai de 120 jours à compter de la fin de la période d'exemption de l'application de certaines dispositions du RPPA. Pour en savoir plus, consultez la détermination n° A-2020-47;
- à prolonger du 30 avril au 30 juin 2020 les exemptions de l'application de certaines exigences du RPPA liées aux indemnités et aux arrangements de voyage alternatifs. Pour en savoir plus, consultez la détermination n° A-2020-47;
- à prolonger du 30 avril au 30 juin 2020 la suspension de toutes les activités liées au règlement des différends concernant les transporteurs aériens. Pour en savoir plus, consultez l'arrêté n° 2020-A-37.

De plus, l'OTC a publié une déclaration dans laquelle il donne des orientations pour faire face aux annulations massives de vols effectuées à l'échelle de la planète. Afin d'établir un équilibre entre la protection des passagers et les réalités opérationnelles des compagnies aériennes dans ces circonstances extraordinaires et sans précédent, l'OTC a indiqué que, de façon générale, une solution qui serait convenable dans le contexte actuel serait que les compagnies aériennes fournissent aux passagers touchés des bons ou des crédits pour des voyages futurs, à condition que ces bons ou ces crédits n'expirent pas dans un délai déraisonnablement court. Une période de 24 mois serait considérée comme raisonnable dans la plupart des cas. Bien entendu, toutes les situations présentées à l'OTC seront évaluées au cas par cas. La déclaration complète se trouve sur le site Web de l'OTC.

Je vous invite également à visiter notre page web contenant des informations importantes pour les voyageurs pour la période de la COVID-19.

Nous ne manquerons pas de vous tenir informés de l'évolution de la situation. N'hésitez pas à communiquer avec moi si vous avez des questions.

Meilleures salutations,

Marcia Jones
Dirigeante principale, Stratégies/Chief Strategy Officer
Office des transports du Canada/Canadian Transportation Agency
15, rue Eddy/15 Eddy Street
Gatineau, QC, K1A 0N9
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marcia.jones@otc-cta.gc.ca

Spam
Phish/Fraud
Not spam
Forget previous vote

This is **Exhibit "AN"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

From: Liz Barker
Sent: March 25, 2020 4:11 PM
To: Scott Streiner
Cc: Sébastien Bergeron
Subject: RDIM-#2124145-v2-Web_FAQs_–_COVID-19.docx
Attachments: RDIM-#2124145-v2-Web_FAQs_–_COVID-19.docx

My comments in track changes.
Thanks
Liz

Web FAQs – COVID-19 Pandemic

Q1. I cancelled my flight reservation because of COVID-19 – does the airline have to refund my ticket?

The *Air Passenger Protection Regulations* (APPR) do not address situations where a passenger cancels their travel. In these cases, the airline must follow the policies set out in their tariff and fare rules. Contact your airline for more information.

Q2. The airline cancelled my flight because of COVID-19 – does the airline have to refund my ticket?

~~We~~ The CTA anticipates that most flight disruptions related to COVID-19 will be outside the airline's control. In these cases, the *Air Passenger Protection Regulations* only require that the airline ensure passengers complete their itineraries by rebooking them on the next available flight operated by them or a partner airline. However, an airline is not expected to rebook a passenger if they have completed their trip (including by a repatriation flight).

Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in *force majeure* situations.

The legislation, regulations and tariffs were not developed in anticipation of extraordinary circumstances such as these. While each case would need to be assessed on its merits, the CTA believes that refunds to passengers whose flights are cancelled in the form of vouchers or credits for future travel could be appropriate, as long as these vouchers or credits do not expire in an unreasonably short period of time.

This strikes a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.

Commented [SB1]: I would delete all of this and simply provide an hyperlink to the statement on our website.

Commented [LB2]: Agreed. Or set quote of statement out here, clearly identified as a quote.

Q3. It does not seem fair to passengers who lost money that they would only get credits or vouchers. Can you explain?

Commented [SB3]:

The CTA believes that fair and robust air protection for passengers whose flights are cancelled in these circumstances is essential. That is why the CTA has issued a statement (insert link) indicating that providing vouchers or credits to passengers in these extraordinary circumstances may be appropriate. This measure provides a clear signal on the carrier's obligations in ~~brings greater clarity and consistency in unprecedented and unanticipated circumstances in~~ situations outside of their ~~carrier's~~ control under the *Air Passenger Protection Regulations* – which simply require the

Commented [LB4]: Well robust air passenger protection would give them what they're entitled to, wouldn't it…? I think that this is the wrong word…

Commented [SB5]: guidance?

completion of the passenger's itinerary, when this may no longer be possible in today's environment – and, in some cases, goes beyond what carriers are to provide under their tariffs.

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic.

The issuance of vouchers or credits strikes a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances. It is important that passengers not suffer out of pocket, and also that the air industry survive and can continue to provide diverse service offerings to Canadians once the crisis has abated.

Commented [LB6]: Not sure we should say this. If obligation is on next available flight but there are no flights for a long time, then obligation moves to when they resume operations. Recognizing the extraordinary circumstances with a long term suspension of air services and ongoing government advisories and bans on travel to and from certain locations, this provision could be interpreted as requiring that vouchers be provided to permit completion of the itinerary at a point in the future, the timing of which is to be determined by the passenger based on the carrier's recovered schedules.

Commented [SB7]: Marcia's changes following your discussion with her re. guidance

Commented [LB8]: Would definitely not say this because I believe that if tariffs provide for nothing, they are out of compliance with the APPR.

Q4. I am a Canadian trying to return home from abroad. Can the Government of Canada help cover costs?

The Government of Canada has announced the creation of the COVID-19 Emergency Loan Program to provide financial help for Canadians outside Canada.

Commented [LB9]: Not sure this is enough. I think we should be directing people to the GAC resources that Seb gave me in response to the two situations I sought advice on earlier this week. (as an aside, the three women are still stuck in India because they are unable to travel from GOA to Delhi to catch a repatriation flight due to the Indian govt's shutdown. Not a good situation)

Q5. How do the *Air Passenger Protection Regulations* (APPR) apply to flight delays or cancellations during this pandemic?

Commented [SB10]: I would be tempted to only provide the 'For more information, visit…" line here

Commented [LB11]: I think there's value in providing this information as it incorporates both the reg and the subsequent orders related to COVID – 19.

In the event of a flight delay or cancellation, airlines must always keep passengers informed of their rights and the cause of a flight disruption.

We anticipate that most flight disruptions related to COVID-19 will be outside the airline's control. In these cases, airlines must make sure the passengers reach their destinations (re-booking them on other flights), but the regulations do not require that airlines provide standards of treatment or compensation.

Commented [LB12]: Not sure this is accurate. Would only apply in cases where travel had started. There's also the situation of people whose travel hasn't yet started and not sure this covers it that clearly.

Commented [LB13]: Or refunds

In the current circumstances, airlines do not have to follow APPR requirements to rebook passengers using an airline with which they have no commercial agreement.

For more information, visit Important Information for Travellers During COVID-19.

Refunds to passengers for cancelled flights, in the form of travel credits or vouchers, may also be appropriate. For more information, please see the CTA's statement insert link)

Commented [SB14]: guidance?

Commented [LB15]: I would prefer to not pull this sentence out of the statement like this. I would simply link to the statement now.

Q6. I've made a claim for compensation with an airline – don't they have to respond within 30 days?

In the context of the significant declines in passenger volumes and disruptions to airline operations caused by the COVID-19 pandemic and to allow airlines to continue focusing on immediate and urgent operational demands, including bringing Canadians home from abroad, the airlines are temporarily exempted from the obligation to respond to claims for compensation in 30-days. This will remain valid until June 30, 2020 or any further date that the CTA may order. After that, the airline will have 120 days to respond to the claims received during that time.

Q7. I filed an air travel complaint with the CTA. Will it still be processed during the pandemic period?

~~In light of the extraordinary circumstances resulting from the Covid-19 pandemic, the CTA is temporarily pausing all dispute resolution activities involving air carriers until June 30, 2020, to permit them to focus on immediate and urgent operational demands. All air passenger complaints, including by persons with disabilities, will be processed in due course.~~

~~On or before June 30, 2020, the CTA will determine if the pause should end on that date or be extended to a later date.~~

During these difficult times, the Canadian Transportation Agency (CTA) continues to maintain its normal operations while our employees practice social distancing. Our dedicated employees are working remotely and are available through electronic means to provide service. You can continue to request CTA services, file applications, and do normal business with us through our normal channels.

Please note, however, that the CTA has temporarily paused all dispute resolution activities involving air carriers until June 30, 2020, to permit them to focus on immediate and urgent operational demands. While ~~you~~ passengers can continue to file air ~~passenger~~ travel complaints with us and all complaints will be processed in due course, we may not be able to respond quickly. On or before June 30, 2020, the Agency will determine if the pause should end on that date or be extended to a later date.

Q8. An airline just suspended their services in my region. Don't airlines have to provide a notice of 120 days before eliminating a service?

The impact of the COVID-19 pandemic is significant and continues to evolve as air carriers try to adjust to travel restrictions and rapidly dropping passenger volumes and revenues. Given these circumstances, the CTA has exempted all airlines from the normal 120 day notice requirement when temporarily reducing or suspending~~discontinuing~~ domestic air services until June 30, 2020. Once the exemption ends, airlines will be required to immediately resume those services. Services cannot be reduced or discontinued on a permanent basis unless the normal requirements for notice and consultation are followed.

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Commented [SB16]: I would go with the messaging we agreed upon the other day that also signals that we continue to maintain our normal operations…

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Commented [LB17]: agreed

If the CTA finds that the suspension of service on a certain route has caused or is likely to cause a community to become so isolated that it does not have access to critical services and goods, the CTA may lift the exemption. In this case, service would have to resume and the carrier providing the service would have to follow the normal advance notice requirements before suspending it.

This is **Exhibit "AO"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, BC V5C 6C6

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info@evolinklaw.com
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December 17, 2021 **VIA EMAIL**

Attorney General of Canada
ATTN : Mr. Lorne Ptack and Sandy Graham
Civil Litigation Section
Department of Justice, Government of Canada
50 O'Connor Street, Suite 500, Room 526
Ottawa, ON K1A 0H8

Canadian Transportation Agency
ATTN : Ms. Barbara Cuber
Legal Services Directorate
15 Rue Eddy
Gatineau, Québec J8X 4B3

Dear Madam or Sir,

RE: Air Passenger Rights v. Attorney General of Canada and the Canadian Transportation Agency (A-102-20)

We write regarding the Court's Order dated October 15, 2021 (the "**Order**"), where at paragraph 3, the Court ordered the Canadian Transportation Agency to disclose three categories of documents. It has come to our attention that the Canadian Transportation Agency (the "**CTA**") may not have fully complied with the Order, specifically paragraph 3.

We set out the text of paragraph 3 of the Order below for ease of reference.

1. All non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020 (hereafter the "**CTA Member Correspondences**").

2. All non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020 (hereafter the "**Third-Party Correspondences**").

3. All non-privileged documents related to any meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the statement on vouchers posted on the CTA's website on March 25, 2020 was discussed (hereafter the "**Meeting Documents**").

[emphasis added]

At para. 23 of the Court's reasons for judgment, the Court provided the following clarity regarding the terms "meeting" and "third party":

[23] For clarity, meetings include telephone conversations, video conferences and internet meetings as well as in-person meetings and third parties include anyone other than a member or employee of the CTA.

CTA Member Correspondences

Under this first category, the Court ordered production of all non-privileged documents between March 9-25, 2020 concerning the Statement on Vouchers that were either: (1) sent to a member of the CTA; or (2) sent by a member of the CTA.

With reference to the package that the CTA provided on December 14, 2021 (the "**Dec. 14 Package**"), we note that there were at least the following deficiencies:

1. For page 15 of the Dec. 14 Package, there was an attachment titled "Statement.docx" which is a Microsoft Word Document that contains tracked-changes, and possibly comments. We note that a "document" is not limited to a paper print-out of an electronic document. A "document" also captures the original electronic document. We trust that the CTA will provide the original "Statement.docx" with the tracked-changes and comments.

2. For page 17 of the Dec. 14 Package, please refer to #1 above regarding a missing email attachment.

3. For page 31 of the Dec. 14 Package, that page appears to be incomplete. The email that enclosed the Microsoft Word Document titled "Rebooking and Refund Requirements.docx" (page 28 of the Dec. 14 Package) makes reference to jurisdictions, but page 31 only included a printout for one jurisdiction – the European Union. Furthermore, on its face, the table on page 31 should also have a row for "Method of refund" under the "Passenger cancellation" heading. But the printout did not have that row. We trust that the CTA will provide the original "Rebooking and Refund Requirements.docx" for the email on page 28 of the Dec. 14 Package, with the tracked-changes and comments.

Third-Party Correspondences

Under this second category, the Court ordered production of all non-privileged documents between March 9-25, 2020 concerning the Statement on Vouchers that were either: (1) sent to the CTA by third parties; or (2) sent by the CTA to third parties.

Of note, this category is not limited to documents sent/received by a Member of the CTA, but relates to the CTA as a whole.

We note that there are numerous documents missing from the Dec. 14 Package, including but not limited to the following:

1. Based on pages 130, 152, and 157 of the Dec. 14 Package, Ms. Marcia Jones (the CTA's

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former chief strategy officer) sent an email on March 25, 2020 at 2:34PM with the subject line "Update: CTA measures/Mise à jour: mesures prises par l'OTC". That email dealt with the Statement on Vouchers. The content of the email makes clear that it was intended for consumption by third-parties outside of the CTA. However, the versions of this email that were disclosed only revealed the "To:" and "Cc:" fields for the email, which only had names of the CTA employees. It appears that the CTA may have overlooked that they are to provide the **original** email sent by Ms. Jones,[1] which will contain the recipients list in the "Bcc:" field. We trust that the CTA would provide that original email forthwith.

2. The letter from Air Transat dated March 22, 2020 (pages 163-165 of the Dec. 14 Package) was sent to Mr. Streiner (the former chairperson of the CTA) and copied to Ms. Jones. The CTA had not produced the email that attached this letter from Air Transat, and all of the email responses and/or discussions flowing from this Air Transat letter.

3. At page 150 of the Dec. 14 Package, there was an email dated March 22, 2020 sent by ACTA to the CTA, and the email was labelled as "High" importance and marked for "Follow-up". The Dec. 14 Package did not include the follow-ups and/or responses sent by the CTA to ACTA regarding this March 22, 2020 email.

4. The discussion between Mr. Streiner, the Deputy Minister of Transport, and an unidentified individual on or before March 23, 2020. This discussion was mentioned in Exhibit B of the Affidavit of Vincent Millette affirmed on December 14, 2021.

5. The discussion(s) and correspondences between Ms. Jones and the Assistant Deputy Minister of Transport during the weekend of March 21-22, 2020. This discussion was also mentioned in Exhibit B of the Affidavit of Vincent Millette affirmed on December 14, 2021.

6. At page 136 of the Dec. 14 Package, there was reference to at least three inquiries from the media, and also numerous inquiries at the CTA's Info inbox and on Twitter on this issue. The Dec. 14 Package did not include copies of those inquiries, and responses.

Meeting Documents

We note that the Dec. 14 Package primarily consisted of emails and email attachments. The Dec. 14 Package did not include meeting minutes, CTA Members' meeting or discussion notes, or

[1] We note that Tab 9 of the Dec. 14 Package contains documents from Ms. Jones, but the original copy of this March 25, 2020 email was not included.

meeting agendas for numerous meetings[2] that a CTA Member participated in, including but not limited to the following meetings or discussions:

1. At page 34 of the Dec. 14 Package, Mr. Streiner confirmed that Air Transat's request to issue a statement regarding vouchers would be discussed at the EC call on March 19, 2020 (the "**March 19 EC Call**").

2. At Exhibit AJ of the Affidavit of Gabor Lukacs affirmed on January 3, 2021, there was a reference to a March 20, 2020 EC where there were decisions and follow-ups (the "**March 20 EC Call**").

3. At page 50 of the Dec. 14 Package, Mr. Streiner refers to a "Members' call tomorrow [March 24, 2020]" to discuss the draft Statement on Vouchers (the "**March 24 Members' Call**").

4. At page 67 of the Dec. 14 Package, Mr. Streiner refers to a meeting he had the morning of March 25, 2020 with Ms. Liz Barker, who is the CTA's Vice-Chair (the "**March 25 Discussion**").

5. At pages 69-70 of the Dec. 14 Package, Mr. Streiner confirmed that there were daily EC calls that he (and likely Ms. Barker) would participate in (the "**Daily EC Calls**").

6. At page 38 of the Dec. 14 Package, Mr. Streiner refers to having had discussions with "other federal players" before March 22, 2020 on the topic of issuing the Statement on Vouchers (the "**Other Federal Players Discussions**").

We note that the majority of the CTA Members are lawyers by trade, including Ms. Liz Barker (the CTA's Vice-Chair), Mr. MacKeigan, Ms. Oates, and Ms. Smith. It would be expected that those Members would have taken detailed notes on any discussions or meetings they participated in, including the March 19 EC Call, March 20 EC Call, March 24 Members' Call, the March 25 Discussion, and the Daily EC Calls.

We also understand that meeting minutes and/or notes are recorded for the CTA's EC calls[3] since Ms. Alysia Lau is tasked with notetaking, as evident from the email correspondences.[4]

[2] As the Court noted, meetings include telephone conversations, video conferences and internet meetings as well as in-person meetings.
[3] Including the March 19 EC Call, March 20 EC Call, and/or the Daily EC Calls.
[4] Exhibit AJ of the Affidavit of Gabor Lukacs affirmed on January 3, 2021.

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Furthermore, we understand the Government of Canada's teleconferencing system should have a record feature. Please advise if there are any voice recordings for any of the meetings identified above.

Conclusion

The above are the deficiencies we were able to identify on a cursory review. We will continue to review and will inform you should other deficiencies be identified.

Considering the 60-day time limit fixed by the Court having already expired on December 14, 2021, we would request that the aforementioned deficiencies be rectified by **no later than December 24, 2021**. The Applicant will bring a motion to seek the Court's assistance to enforce the Order thereafter without further notice.

Yours truly,
EVOLINK LAW GROUP

Simon Lin

SIMON LIN
Barrister & Solicitor

This is **Exhibit "AP"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

Evolink Law Group
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December 20, 2021

VIA EMAIL AND FAX (819-953-9269)

Canadian Transportation Agency
ATTN : Ms. Barbara Cuber
Legal Services Directorate
15 Rue Eddy
Gatineau, Québec J8X 4B3

Dear Ms. Cuber,

RE: Air Passenger Rights v. Attorney General of Canada and the Canadian Transportation Agency (A-102-20)

We write regarding the Court's Order dated October 15, 2021 (the "**Order**") and our letter dated December 17, 2021 regarding compliance with the Order. We kindly request that the Canadian Transportation Agency acknowledge receipt of our letter dated December 17, 2021.

Furthermore, please also confirm that the Order and our letter on December 17, 2021 were brought to the attention of the following individuals at the Canadian Transportation Agency, and that they are aware of their obligation to obey the Order.

1. Ms. France Pégeot, Chair and CEO
2. Ms. Elizabeth C. Barker, Vice-Chair
3. Ms. Valérie Lagacé, Senior General Counsel and Secretary

Yours truly,
EVOLINK LAW GROUP

Simon Lin

SIMON LIN
Barrister & Solicitor

Cc: Mr. Lorne Ptack and Sandy Graham, counsel for the Attorney General of Canada (email)

Encls: Order of Gleason J.A. dated October 15, 2021; Letter from Applicant's Counsel dated December 17, 2021.

Cour d'appel fédérale

Date: 20211015

Docket: A-102-20

Ottawa, Ontario, October 15, 2021

Present: GLEASON J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN TRANSPORTATION AGENCY

Intervener

ORDER

UPON informal motion of the applicant to file an additional affidavit in respect of its disclosure motion;

AND UPON motion of the applicant for an order under Rules 317 and 318 of the *Federal Courts Rules*, SOR 98/106, requiring the Canadian Transportation Agency (the CTA) to disclose the documents described in the applicant's Notice of Motion;

AND UPON motion of the CTA for leave to intervene in this application and other consequential orders;

AND UPON reading the materials filed;

THIS COURT ORDERS that:

1. The motions are granted on the terms set out below;

2. The additional affidavit from Dr. Gábor Lukács, sworn May 12, 2021, may be filed, effective the date it was received by the Court;

3. Within 60 days of the date of this Order, the CTA shall disclose to the applicant:

    a. all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020;

    b. all non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020; and

c. all non-privileged documents related to any meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the statement on vouchers posted on the CTA's website on March 25, 2020 was discussed;

4. The foregoing disclosure shall be made electronically;

5. Within 60 days of the date of this Order, the AGC shall submit to the Court for a ruling on privilege all documents over which privilege is asserted that would otherwise fall within paragraph 3 of this Order, the whole in accordance with the Reasons for this Order;

6. Within the same timeframe, the AGC shall serve and file a redacted version of its submissions, from which details of the contents of the documents are deleted;

7. The applicant shall have 30 days from receipt of the forgoing submissions to make responding submissions, if it wishes;

8. The materials related to claims for privilege shall then be submitted to the undersigned for a ruling on privilege;

9. Within 30 days of receipt of a ruling on the privilege claims, the applicant shall file any additional affidavit(s) it intends to rely on in support of its application;

10. The time for completion of all subsequent steps for perfection of this application shall be governed by the *Federal Courts Rules*;

11. The CTA is granted leave to intervene and to file an affidavit and a memorandum of fact and law of no more than 10 pages, the whole in accordance with the Reasons for this Order;

12. The style of cause is amended to add the CTA as an intervener and it shall be served with all materials the parties intend to file;

13. The issues of whether the CTA will be permitted to make oral submissions and of costs in respect of its intervention are remitted to the panel of this Court seized with hearing this application on its merits; and

14. No costs are awarded in respect of these motions.

"Mary J.L. Gleason"

J.A.

Evolink Law Group
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December 17, 2021 **VIA EMAIL**

Attorney General of Canada
ATTN : Mr. Lorne Ptack and Sandy Graham
Civil Litigation Section
Department of Justice, Government of Canada
50 O'Connor Street, Suite 500, Room 526
Ottawa, ON K1A 0H8

Canadian Transportation Agency
ATTN : Ms. Barbara Cuber
Legal Services Directorate
15 Rue Eddy
Gatineau, Québec J8X 4B3

Dear Madam or Sir,

RE: Air Passenger Rights v. Attorney General of Canada and the Canadian Transportation Agency (A-102-20)

We write regarding the Court's Order dated October 15, 2021 (the "**Order**"), where at paragraph 3, the Court ordered the Canadian Transportation Agency to disclose three categories of documents. It has come to our attention that the Canadian Transportation Agency (the "**CTA**") may not have fully complied with the Order, specifically paragraph 3.

We set out the text of paragraph 3 of the Order below for ease of reference.

1. All non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020 (hereafter the "**CTA Member Correspondences**").

2. All non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020 (hereafter the "**Third-Party Correspondences**").

3. All non-privileged documents related to any meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the statement on vouchers posted on the CTA's website on March 25, 2020 was discussed (hereafter the "**Meeting Documents**").

[emphasis added]

At para. 23 of the Court's reasons for judgment, the Court provided the following clarity regarding the terms "meeting" and "third party":

[23] For clarity, meetings include telephone conversations, video conferences and internet meetings as well as in-person meetings and third parties include anyone other than a member or employee of the CTA.

CTA Member Correspondences

Under this first category, the Court ordered production of all non-privileged documents between March 9-25, 2020 concerning the Statement on Vouchers that were either: (1) sent to a member of the CTA; or (2) sent by a member of the CTA.

With reference to the package that the CTA provided on December 14, 2021 (the "**Dec. 14 Package**"), we note that there were at least the following deficiencies:

1. For page 15 of the Dec. 14 Package, there was an attachment titled "Statement.docx" which is a Microsoft Word Document that contains tracked-changes, and possibly comments. We note that a "document" is not limited to a paper print-out of an electronic document. A "document" also captures the original electronic document. We trust that the CTA will provide the original "Statement.docx" with the tracked-changes and comments.

2. For page 17 of the Dec. 14 Package, please refer to #1 above regarding a missing email attachment.

3. For page 31 of the Dec. 14 Package, that page appears to be incomplete. The email that enclosed the Microsoft Word Document titled "Rebooking and Refund Requirements.docx" (page 28 of the Dec. 14 Package) makes reference to jurisdictions, but page 31 only included a printout for one jurisdiction – the European Union. Furthermore, on its face, the table on page 31 should also have a row for "Method of refund" under the "Passenger cancellation" heading. But the printout did not have that row. We trust that the CTA will provide the original "Rebooking and Refund Requirements.docx" for the email on page 28 of the Dec. 14 Package, with the tracked-changes and comments.

Third-Party Correspondences

Under this second category, the Court ordered production of all non-privileged documents between March 9-25, 2020 concerning the Statement on Vouchers that were either: (1) sent to the CTA by third parties; or (2) sent by the CTA to third parties.

Of note, this category is not limited to documents sent/received by a Member of the CTA, but relates to the CTA as a whole.

We note that there are numerous documents missing from the Dec. 14 Package, including but not limited to the following:

1. Based on pages 130, 152, and 157 of the Dec. 14 Package, Ms. Marcia Jones (the CTA's

former chief strategy officer) sent an email on March 25, 2020 at 2:34PM with the subject line "Update: CTA measures/Mise à jour: mesures prises par l'OTC". That email dealt with the Statement on Vouchers. The content of the email makes clear that it was intended for consumption by third-parties outside of the CTA. However, the versions of this email that were disclosed only revealed the "To:" and "Cc:" fields for the email, which only had names of the CTA employees. It appears that the CTA may have overlooked that they are to provide the **original** email sent by Ms. Jones,[1] which will contain the recipients list in the "Bcc:" field. We trust that the CTA would provide that original email forthwith.

2. The letter from Air Transat dated March 22, 2020 (pages 163-165 of the Dec. 14 Package) was sent to Mr. Streiner (the former chairperson of the CTA) and copied to Ms. Jones. The CTA had not produced the email that attached this letter from Air Transat, and all of the email responses and/or discussions flowing from this Air Transat letter.

3. At page 150 of the Dec. 14 Package, there was an email dated March 22, 2020 sent by ACTA to the CTA, and the email was labelled as "High" importance and marked for "Follow-up". The Dec. 14 Package did not include the follow-ups and/or responses sent by the CTA to ACTA regarding this March 22, 2020 email.

4. The discussion between Mr. Streiner, the Deputy Minister of Transport, and an unidentified individual on or before March 23, 2020. This discussion was mentioned in Exhibit B of the Affidavit of Vincent Millette affirmed on December 14, 2021.

5. The discussion(s) and correspondences between Ms. Jones and the Assistant Deputy Minister of Transport during the weekend of March 21-22, 2020. This discussion was also mentioned in Exhibit B of the Affidavit of Vincent Millette affirmed on December 14, 2021.

6. At page 136 of the Dec. 14 Package, there was reference to at least three inquiries from the media, and also numerous inquiries at the CTA's Info inbox and on Twitter on this issue. The Dec. 14 Package did not include copies of those inquiries, and responses.

Meeting Documents

We note that the Dec. 14 Package primarily consisted of emails and email attachments. The Dec. 14 Package did not include meeting minutes, CTA Members' meeting or discussion notes, or

[1] We note that Tab 9 of the Dec. 14 Package contains documents from Ms. Jones, but the original copy of this March 25, 2020 email was not included.

meeting agendas for numerous meetings[2] that a CTA Member participated in, including but not limited to the following meetings or discussions:

1. At page 34 of the Dec. 14 Package, Mr. Streiner confirmed that Air Transat's request to issue a statement regarding vouchers would be discussed at the EC call on March 19, 2020 (the "**March 19 EC Call**").

2. At Exhibit AJ of the Affidavit of Gabor Lukacs affirmed on January 3, 2021, there was a reference to a March 20, 2020 EC where there were decisions and follow-ups (the "**March 20 EC Call**").

3. At page 50 of the Dec. 14 Package, Mr. Streiner refers to a "Members' call tomorrow [March 24, 2020]" to discuss the draft Statement on Vouchers (the "**March 24 Members' Call**").

4. At page 67 of the Dec. 14 Package, Mr. Streiner refers to a meeting he had the morning of March 25, 2020 with Ms. Liz Barker, who is the CTA's Vice-Chair (the "**March 25 Discussion**").

5. At pages 69-70 of the Dec. 14 Package, Mr. Streiner confirmed that there were daily EC calls that he (and likely Ms. Barker) would participate in (the "**Daily EC Calls**").

6. At page 38 of the Dec. 14 Package, Mr. Streiner refers to having had discussions with "other federal players" before March 22, 2020 on the topic of issuing the Statement on Vouchers (the "**Other Federal Players Discussions**").

We note that the majority of the CTA Members are lawyers by trade, including Ms. Liz Barker (the CTA's Vice-Chair), Mr. MacKeigan, Ms. Oates, and Ms. Smith. It would be expected that those Members would have taken detailed notes on any discussions or meetings they participated in, including the March 19 EC Call, March 20 EC Call, March 24 Members' Call, the March 25 Discussion, and the Daily EC Calls.

We also understand that meeting minutes and/or notes are recorded for the CTA's EC calls[3] since Ms. Alysia Lau is tasked with notetaking, as evident from the email correspondences.[4]

---

[2] As the Court noted, meetings include telephone conversations, video conferences and internet meetings as well as in-person meetings.
[3] Including the March 19 EC Call, March 20 EC Call, and/or the Daily EC Calls.
[4] Exhibit AJ of the Affidavit of Gabor Lukacs affirmed on January 3, 2021.

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Furthermore, we understand the Government of Canada's teleconferencing system should have a record feature. Please advise if there are any voice recordings for any of the meetings identified above.

Conclusion

The above are the deficiencies we were able to identify on a cursory review. We will continue to review and will inform you should other deficiencies be identified.

Considering the 60-day time limit fixed by the Court having already expired on December 14, 2021, we would request that the aforementioned deficiencies be rectified by **no later than December 24, 2021**. The Applicant will bring a motion to seek the Court's assistance to enforce the Order thereafter without further notice.

Yours truly,
EVOLINK LAW GROUP

Simon Lin

SIMON LIN
Barrister & Solicitor

This is **Exhibit "AQ"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

VIA E-mail: simonlin@evolinklaw.com

December 24, 2021

Simon Lin
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, B.C.
V5C 6C6

Re: ***Air Passenger Rights v Attorney General of Canada and Canadian Transportation Agency***
Federal Court of Appeal Court File No.: A-102-20

Dear Mr. Lin,

This is in response to your letter of December 17, 2021 in the above-referenced matter. In that letter, you requested the disclosure of additional documents beyond those provided in the Agency's December 14, 2021 disclosure package. That package was sent in fulfillment of the Federal Court of Appeal's order dated October 15, 2021 (2021 FCA 201).

The Agency is providing the following responses and attachments. Where the Agency has not specifically addressed a document requested in your letter, it is because the Agency has not found such documents.

The Agency has taken all reasonable steps to comply with the Court's order. The disclosed material is the result of several searches, consultations with several persons within the Agency, and a review of thousands of pages of material.

CTA MEMBER CORRESPONDENCE

The Agency is providing the following attachments, noting that these are versions of documents already disclosed by the Agency in its December 14 disclosure package:

1. Regarding p. 15 of the package:

   Two versions more fully showing the changes made to the document are attached. There are no comments in this document.

2. Regarding p. 17 of the package:

   The attachment is on p. 66 of the December 14 package. Two versions more fully showing the changes made to the document are attached. There are no comments in this document.

3. Regarding p. 31 of the package:

   The document that was disclosed on December 14 is complete. There are no "Track Changes" or comments in the document. We are nevertheless providing the document to you anew.

THIRD PARTY CORRESPONDENCE
The Agency has provided the documents in its possession relating to third party correspondence, with the exception of the following:

Regarding p. 163-165 of the package:

On December 14, the Agency disclosed a letter from Air Transat to Scott Streiner dated March 22, 2020. However, the Agency has possession of an email string in connection with this letter that was not previously disclosed. This email string consists of a covering email from Air Transat, and a message dated March 22, 2020 showing that Scott Streiner forwarded this letter to the Executive Committee of the Agency. This document should have been included in the disclosure package, it was overlooked and is being provided now. The Agency requests that the parties treat this document as forming part of the disclosure package.

In relation to p. 136 of the package:

You have requested that the Agency disclose inquiries to the CTA's "info@" account and on Twitter, and responses to these inquiries.

The Agency did not include all messages between March 9 and 25, 2020 from its Twitter account or inquiries to or responses from its general email account, info@otc-cta.gc.ca, in the disclosure package.

There was a high volume of messages and inquiries from individuals concerning their personal air travel situations between March 9 and March 25 on these accounts. The Agency did not consider that such messages, inquiries or responses fell within the scope of the order insofar as that order targets documents relevant to the Applicant's bias claims concerning the Statement on Vouchers.

The Agency notes that in this proceeding, the President of Air Passenger Rights has filed an affidavit attaching excerpts of the Agency's Twitter feed, indicating that access to this material is already available. The Applicant's affiant has also provided messages from the "info@" account to support its claim that the Statement on Vouchers became widely disseminated after it was published.[i]

Please note that the absence of these documents from the disclosure package is not the result of a decision to hide these documents but is rather a question of interpretation as to the scope of the Court's order.

Please also note that in its December 14 package, the Agency provided responsive messages found in its searches involving journalists.

MEETING DOCUMENTS
The Agency has possession of the following meeting minutes, meeting and discussion notes, meeting agendas or voice recordings for relevant meetings held during this time period:

A redacted document associated with a March 20 EC meeting, which can be found in the Motion Record of the Attorney General of Canada: Informal motion to claim privilege over portions of two documents, at Exhibit B, which was served and filed with the Court on December 14.

I trust the foregoing is satisfactory.

Sincerely,

Barbara Cuber
Senior Counsel
Canadian Transportation Agency
Legal Services Directorate
15 Rue Eddy, 19th Floor
Gatineau, Québec J8X 4B3
Tel: 613-301-8322
Email: barbara.cuber@otc-cta.gc.ca
Email: Servicesjuridiques.LegalServices@otc-cta.gc.ca

c.c.: Air Passenger Rights, Applicant, via email: lukacs@airpassengerrights.ca

c.c.: Sandy Graham and Lorne Ptack, Counsel for the Attorney General of Canada, via email: sandy.graham@justice.gc.ca, Lorne.Ptack@justice.gc.ca

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[i] Motion Record of the Moving Party, Air Passenger Rights, Motion under Rules 41 and 318 of the *Federal Courts Rules,* vol. 1, Affidavit of Gabor Lukacs, affirmed on January 3, 2021, Exhibits N and O at pages 89-110 and Written Representations of the Moving Party at p. 396, para. 19.

The COVID-19 pandemic has caused major disruptions in domestic and international air travel.

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in *force majeure* situations.

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Deleted: airline

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.

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On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

Deleted: and must find other ways of getting home

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time.

The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

The COVID-19 pandemic has caused major disruptions in domestic and international air travel. ¶

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Scott Streiner
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Scott Streiner
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While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time.

The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

From: Marcia Jones
Sent: March 23, 2020 9:47 AM
To: Liz Barker; Sébastien Bergeron; Valérie Lagacé; Tom Oommen; Scott Streiner; +_EC
Subject: RE: Revised statement
Attachments: Rebooking and Refund Requirements.docx

Hi all, I wanted to share this info sheet prepared by my team on what the legal regimes are in the different jurisdictions (prior to COVID-19).

I believe this situation has accentuated what we already noted, that the APPR framework "should" provide for refund in situations outside the carrier's control, or reimbursement, however, it does not currently. Based on all my discussions to date, I would be concerned about the Agency attempting to layer on new requirements. I think we need to proceed with some caution here when doing what we can to signal that passengers should be treated fairly, which is of course very important.

Thanks,
Marcia

From: Liz Barker
Sent: Monday, March 23, 2020 9:38 AM
To: Sébastien Bergeron ; Valérie Lagacé ; Tom Oommen ; Scott Streiner ; +_EC
Subject: RE: Revised statement

I think the EU has landed on something different:
https://ec.europa.eu/commission/presscorner/detail/en/ip_20_485

From: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Sent: March-23-20 9:29 AM
To: Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>; Tom Oommen <Tom.Oommen@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

I agree with Valerie : my least favorite option is to say nothing and let air carriers issue useless vouchers.

Having said this, my preference would be to give these vouchers no expiration date or something like a 5 years expiration date. Allowing airlines to give vouchers instead of cash is already a big move. For reference, the EU, at the exception of Belgium, hasn’t gone that far yet. So, in the interest of striking a balance, I would be tempted to give passengers more time to use these vouchers.

Seb

Sébastien Bergeron
Chef de cabinet | Bureau du président et premier dirigeant
Office des transports du Canada | Gouvernement du Canada
sebastien.bergeron@otc-cta.gc.ca |Tél. 819-712-0827

Chief of Staff | Office of the Chair and Chief Executive Officer
Canadian Transportation Agency | Government of Canada
Sebastien.bergeron@otc-cta.gc.ca | Tél. 819-712-0827

De : Valérie Lagacé <Valerie.Lagace@otc-cta.gc.ca>
Envoyé : 23 mars 2020 09:23
À : Tom Oommen <Tom.Oommen@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Objet : RE: Revised statement

I agree with Tom on this. my least favorite option is to say nothing and let air carriers issue useless vouchers.

De : Tom Oommen <Tom.Oommen@otc-cta.gc.ca>
Envoyé : 23 mars 2020 09:21
À : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; +_EC <_EC@otc-cta.gc.ca>
Objet : RE: Revised statement

In my view, given the nature of the statement, suggesting that 24 months could be considered reasonable, is a good approach. Tom

Sent from my Bell Samsung device over Canada's largest network.

-------- Original message --------
From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Date: 2020-03-23 9:09 AM (GMT-05:00)
To: +_EC <_EC@otc-cta.gc.ca>
Subject: RE: Revised statement

Hi again, everyone. One issue that's been raised by a Member: should we retain language on expiry dates and if so, is the current text the best approach? While it comes across as balanced, it may be a bit vague and beg immediate questions on what we'd see as reasonable. Alternatives:

- Say vouchers/credits shouldn't have any expiry date. This would be consistent with the APPR and spread people travelling on vouchers over a longer period, but might be seen negatively by carriers who are trying to manage liabilities as losses pile up.
- Indicate more specifically what we think is reasonable – perhaps 24 months. This would provide clarity, but might seem a bit arbitrary in a highly fluid situation. Passengers might also object, given that the APPR prohibit expiry dates (albeit for different circumstances).
- Remain silent on the matter. This would avoid the complications noted above, but we know short expiry periods are being used by some carriers and that passengers find this frustrating and inconsistent with the spirit (if not the letter) of the APPR.

Please email any views on this question in the next hour or so.

Thanks,

S

From: Scott Streiner
Sent: Sunday, March 22, 2020 2:57 PM
To: +_EC <_EC@otc-cta.gc.ca>
Subject: Revised statement

Hi, all. The attached version reflects feedback from Members. Please let me know this afternoon if you have any additional comments.

Valérie, let's have the secretariat ready to translate the statement and a s.64 decision tomorrow morning.

Thanks,

S

Scott Streiner
Président et premier dirigeant, Office des transports du Canada
Chair and Chief Executive Officer, Canadian Transportation Agency
scott.streiner@otc-cta.gc.ca - Tél. : 819-997-9233 - ATS/TTY: 1-800-669-5575

Rebooking and Refund Requirements

<table>
<tr><th colspan="3">Airline cancellations</th></tr>
<tr><th></th><th>EC261 (EU)</th><th>APPR (with current exemptions)</th></tr>
<tr><td>Rebooking/ refund requirements</td><td>Regardless of the reason for a cancellation, the carrier must give the passenger the choice of:
• reimbursement (refund);
• re-routing at the earliest opportunity, or
• re-routing at a later date at the passenger's convenience.</td><td>Situations within carrier control (incl. required for safety):
• The carrier must rebook the passenger on the next available flight operated by them or a partner airline.
• If that rebooking does not meet the passenger's needs, the passenger must be given a refund.
Situations outside carrier control:
• The carrier must rebook the passenger on the next available flight operated by them or a partner airline
• No refund obligation (per legislative framework)
• Whether or not a passenger is reimbursed would depend on the airline's terms and conditions (tariff/fare rules)</td></tr>
<tr><td>Method of refund</td><td>By cash, electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

EU guidance: If the carrier proposes a voucher, this offer cannot affect the passenger’s right to opt for reimbursement instead.</td><td>Refunds required under the APPR (situations within carrier control) must be paid by the method used for the original payment and to the person who purchased the ticket or additional service.</td></tr>
<tr><th colspan="3">Passenger cancellation</th></tr>
<tr><td>Rebooking/ refund requirements</td><td>Not addressed in regulations.
Whether or not a passenger is reimbursed would depend on the airline's terms and conditions (tariff/fare rules)
Note: Certain jurisdictions (e.g., Italy) put in place their own requirements to provide a refund or voucher when a passenger cancels their own travel.</td><td>Not addressed in regulations.
Whether or not a passenger is reimbursed would depend on the airline's terms and conditions (tariff/fare rules)</td></tr>
</table>

From: Scott Streiner
Sent: March 22, 2020 1:59 PM
To: +_EC
Subject: FW: Letter from Jean-Marc Eustache
Attachments: 20-03-22 Scott Streiner.pdf.DRF

Importance: High

Hi, all. Some of these items were covered in our discussion on Friday or the call I have with several of you this morning. Others weren't. We'll talk about all of them tomorrow.

S

From: Jean-Marc Eustache <Jean-Marc.Eustache@transat.com>
Sent: Sunday, March 22, 2020 1:52 PM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Cc: mintc@tc.gc.ca; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; miled.hill@tc.gc.ca; lawrence.hanson@tc.gc.ca; colin.stacey@tc.gc.ca; George Petsikas <George.Petsikas@transat.com>; Jean-Marc Eustache <Jean-Marc.Eustache@transat.com>
Subject: Letter from Jean-Marc Eustache
Importance: High

Dear Mr. Streiner,

Please find enclosed a letter from Mr. Jean-Marc Eustache.

Best Regards,

Francine Giroux
Adjointe au président
Assistant to the President
T 514-987-1660, 4055

Transat A.T. inc.
300, rue Léo-Pariseau, bureau 600
Montréal (Québec) H2X 4C2

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March 22, 2020

Transmission by e-mail
scott.streiner@otc-cta.gc.ca

Mr. Scott Streiner
Chairman and Chief Executive Officer
Canadian Transportation Agency
15 Eddy Street, 17th Floor
Gatineau, Quebec J8X 4B3

RE: Request for further public clarification of air carrier obligations per the *Air Passenger Protection Regulations* ("APPR") in the context of the current extraordinary circumstances

Dear Mr. Streiner:

As you are aware, the global air transport and tourism industries are dealing with a wholly-unprecedented collapse in world travel demand, as well as with the resulting operational and financial calamity in terms of drastically cutting capacity and preserving liquidity in an attempt to prevent our businesses from failing and putting tens of thousands of Canadians out of work. Obviously, Transat A.T. and our subsidiary travel units, including Air Transat and Transat Holidays, have not been spared the brunt of this disaster.

Indeed, we have recently announced, as a result of borders closing, the suspension of all outbound travel sales on our flights and the imminent grounding of almost all of our fleet until April 30, 2020, except for the small remainder of our flights that are conducting emergency repatriation operations of Canadians abroad in coordination with the federal government. Furthermore, we are confronted to making extremely difficult decisions where an important number of employees will be put on leave until the situation stabilizes and until we can hopefully and eventually contemplate a return to some sense of normalcy in the future.

In the meantime, while our industry fights to survive, we urgently need the federal government and our oversight authorities such as the CTA to provide assistance, both in the form of financial support and relief in terms of the substantial easing of existing regulatory costs and burdens. I have already written to Ministers Garneau and Morneau with regards to the first objective, and I am now hereby addressing myself to you with respect to the second.

Please be assured that I appreciated the Agency's efforts on March 13, 2020 to provide much-needed clarification to both industry and consumers concerning the application and enforcement of certain provisions of the APPR in the context of the current extraordinary circumstances.

However, we need more to be done on an urgent basis in order to establish proper certainty and support the industry's impact mitigation efforts to date.

Specifically, I hereby request that the Agency publicly and unequivocally recognize the uncontrollable nature of the crisis and that all changes to schedules and capacity reductions are measures needed to manage the devastating losses this crisis is causing. Quite simply, these changes are not within the control of air carriers and our regulator should be clear to this end, as well as for the purposes of the application of the APPR.

Furthermore, the limited scope of the exemption on March 13, 2020 is problematic as our personnel have almost no ability to provide alternative travel arrangements at this time given the above-mentioned folding of flight schedules. Consequently, and as additional support and relief, I hereby request the following:

- Clearly recognize that all delays, cancellations, and denied boarding occurring at this time of crisis are outside of Air Transat's control;

- Clarify that the uncontrollable nature of the crisis means that no refunds to passengers are required under the APPR. This is essential to avoid unnecessary confusion among consumers and to pre-empt a spike in the increase of complaints and lawsuits;

- Recognize the offering of travel voucher options in lieu of cash refunds as an acceptable means to address consumer requests for refunds which, in turn, would allow credit card companies and their processors to deny customer chargeback claims and thereafter cease otherwise resulting and destructive financial guarantee demands on air carrier merchants;

- Exempt airlines from the obligation to respond to compensation claims within 30 days;

- Exempt airlines from all obligations to provide alternate travel arrangements; and

- Ensure that all exemptions ordered by the Agency, including those found in Determination No. A-2020-42, are in effect until such time as the industry has fully recovered, which is expected to take longer than April 30, 2020, and at the very least, 90 days.

I would also like to take this opportunity to request a minimum one-year suspension of enforcement action and the levying of fines for non-compliance per the APPR and ATPDR. Again, we are not trying to conveniently avoid our obligations *in normal circumstances,* but rather to ensure that our reduced levels of human resources going forward are able to focus on actively

managing the crisis and minimizing as much as possible disruptions to the system and our eventual efforts at recovery.

I wish to thank you in advance for your understanding and expeditious consideration of the present request. Also, please accept my best wishes for the continued health and well-being of yourself, your loved ones and your staff in these unimaginably difficult times.

Sincerely,

Jean-Marc Eustache
Chairman, President and
Chief Executive Officer

c.c. Hon. Marc Garneau, PC, MP – Minister of Transport
Marcia Jones, Chief Strategy Officer - CTA
Miled Hill, Office of the Hon. Marc Garneau, PC, MP
Lawrence Hanson, Assistant Deputy Minister of Transport (Policy)
Colin Stacey, Director General of Air Policy – Transport Canada
George Petsikas, Senior Director, Government and Industry Affairs – Transat A.T. Inc.

This is **Exhibit "AR"** to the Affidavit of Dr. Gábor Lukács

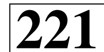
affirmed before me on January 16, 2022

____

Signature

Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, BC V5C 6C6

p. 604 620 2666
info@evolinklaw.com
www.evolinklaw.com



December 30, 2021 **VIA EMAIL**

Canadian Transportation Agency
ATTN : Ms. Barbara Cuber
Legal Services Directorate
15 Rue Eddy
Gatineau, Québec J8X 4B3

Dear Ms. Cuber,

RE: Air Passenger Rights v. Attorney General of Canada and the Canadian Transportation Agency (A-102-20)

We write to follow-up on our letter dated December 20, 2021 where we requested that you acknowledge that the Court's October 15, 2021 Order and our letter of December 17, 2021 were brought to the attention of three key personnel at the Canadian Transportation Agency.

In the correspondence to the Court on December 24, 2021, you acknowledged receiving our December 20, 2021 letter. However, we have not yet received any response from you indicating that the aforementioned documents were brought to the attention of the three key personnel.

We look forward to receiving your response to our professional correspondence by no later than **January 4, 2022 at 1:00PM EST**.

Yours truly,
EVOLINK LAW GROUP

SIMON LIN
Barrister & Solicitor

This is **Exhibit "AS"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

Office des transports du Canada | Canadian Transportation Agency

VIA E-mail: simonlin@evolinklaw.com

January 4, 2022

Simon Lin
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, B.C.
V5C 6C6

Re: ***Air Passenger Rights v Attorney General of Canada and Canadian Transportation Agency***
Federal Court of Appeal Court File No.: A-102-20

Dear Mr. Lin,

This is in response to your letter of December 30, 2021 in the above-referenced matter. In that letter, you repeated a previous request for confirmation that the Federal Court of Appeal's order of October 15, 2021 and correspondence from you were brought to the attention of specific persons at the Agency.

On December 17 and 20, you sent correspondence respecting the documents disclosed pursuant the Court's order. The Agency provided a response to you on December 24, which included explanations and documents.

You have not explained how your request for information about specific persons at the Agency is relevant to the documents disclosed or to the Court's order. You have also not justified why the Agency is required to provide this information.

The Agency will continue to provide responses as required in this proceeding.

Sincerely,

Barbara Cuber
Senior Counsel
Canadian Transportation Agency
Legal Services Directorate
15 Rue Eddy, 19th Floor
Gatineau, Québec J8X 4B3
Tel: 613-301-8322
Email: barbara.cuber@otc-cta.gc.ca
Email: Servicesjuridiques.LegalServices@otc-cta.gc.ca

This is **Exhibit "AT"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

Halifax, NS

lukacs@AirPassengerRights.ca

January 4, 2022

VIA EMAIL and FAX

Ms. France Pégeot, Chair and CEO
Canadian Transportation Agency
Email: *France.Pegeot@otc-cta.gc.ca*
Fax: (819) 997-6727 / (819) 953-5253

Ms. Elizabeth C. Barker, Vice-Chair
Canadian Transportation Agency
Email: *Liz.Barker@otc-cta.gc.ca*
Fax: (819) 997-6727 / (819) 953-5253

Ms. Valérie Lagacé, Senior General Counsel and Secretary
Canadian Transportation Agency
Email: *valerie.lagace@otc-cta.gc.ca*
Fax: (819) 953-9269

Dear Ms. Pégeot, Ms. Barker, and Me. Lagacé:

Re: Non-Compliance with the October 15, 2021 Order of Gleason, J.A. (A-102-20)

We are writing to you in your capacity as executive officers of the Canadian Transportation Agency [**Agency**] who supervise and control the Agency's members and staff and records pursuant to ss. 13-14 and 21-22 of the *Canada Transportation Act*, S.C. 1996, c. 10.

The Agency failed to comply and continues to fail to comply with paragraph 3 the Order of the Federal Court of Appeal rendered on October 15, 2021 by Gleason, J.A. in File No. A-102-20 [**Order**], a copy of which is attached for your review.

We request that you direct Agency members and staff under your supervision and control to fully cooperate and comply with paragraph 3 of the Order and have all documents produced forthwith and by no later than **Friday, January 7, 2022 at 17:00 Eastern Time**.

Please be advised that in the absence of full compliance by said deadline, we may be instructing counsel to bring contempt proceedings not only against the Agency but also against you personally pursuant to Rules 466-472 of the *Federal Courts Rules* and the principles laid out in *Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2021 FC 770 at para. 37.

A finding of contempt of court carries serious personal consequences. Your personal interests may not fully align with those of the Agency and/or the Government of Canada. We urge you to seek legal advice from counsel who is independent from the Agency and/or the Government of Canada.

I. Paragraph 3 of the Order Is Clear and Unambiguous

Paragraph 3 of the Order clearly and unambiguously directed the Agency to disclose to us, the applicant, Air Passenger Rights, within 60 days of the Order:

a. **all** non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 concerning the Statement on Vouchers posted on the CTA's website on March 25, 2020;

b. **all** non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the Statement on Vouchers posted on the CTA's website on March 25, 2020; and

c. **all** non-privileged documents related to any meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the Statement on Vouchers posted on the CTA's website on March 25, 2020 was discussed.

II. The Agency's Continued Failure to Comply with the Order

On December 14, 2021, the Agency produced certain documents [**Dec. 14 Package**] responding to paragraph 3 of the Order.

On December 17, 2021, our counsel advised the Agency that the production was incomplete and did not fully comply with the Order, and provided the Agency with a list of outstanding items.

On December 24, 2021, the Agency acknowledged that the original production was incomplete and produced further documents that were inadvertently omitted, but continues to disobey the Order.

At the time of writing this letter, the production of the following documents remain outstanding:

(b) Third-Party Correspondences

1. Based on pages 130, 152, and 157 of the Dec. 14 Package, Ms. Marcia Jones (former chief strategy officer) sent an email on March 25, 2020 at 2:34 p.m. with the subject "Update: CTA measures/Mise à jour: mesures prises par l'OTC." That email dealt with the Statement on Vouchers. The content of the email makes it clear that it was intended for consumption by third-parties outside of the Agency; however, the versions of this email that were disclosed only revealed the "To:" and "Cc: fields for the email, which only had names of the Agency employees.

   The Order required the Agency to provide the **original** email sent by Ms. Jones, which will contain the recipients list in the "Bcc:" field,[1] yet it was not produced.

[1] We note that Tab 9 of the Dec. 14 Package contains documents from Ms. Jones, but the original copy of this March 25, 2020 email was not included.

2. The letter from Air Transat dated March 22, 2020 (pages 163-165 of the Dec. 14 Package) was sent to Mr. Streiner (the former chairperson of the CTA) and copied to Ms. Jones.

   The Order required the Agency to produce **all** of the email responses and/or discussions flowing from this Air Transat letter, yet none were produced.

3. At page 150 of the Dec. 14 Package, there was an email dated March 22, 2020 sent by ACTA to the Agency. The email was labelled as "High" importance and marked for "Follow-up."

   The Order required the Agency to produce the follow-ups and/or responses sent by the Agency to ACTA regarding this March 22, 2020 email, yet none were produced.

4. The discussion between Mr. Streiner, the Deputy Minister of Transport, and an unidentified individual on or before March 23, 2020. This discussion was mentioned in Exhibit B to Vincent Millette's December 14, 2021 Affidavit.

   The Order required the Agency to produce all such discussions, yet none were produced.

5. The discussion(s) and correspondences between Ms. Jones and the Assistant Deputy Minister of Transport during the weekend of March 21-22, 2020. This discussion was also mentioned in Exhibit B of Vincent Millette's December 14, 2021 Affidavit.

   The Order required the Agency to produce all such discussions, yet none were produced.

6. At page 136 of the Dec. 14 Package, there was reference to at least three inquiries from the media, and also to numerous inquires at the Agency's Info inbox and on Twitter on this issue.

   The Order required the Agency to produce **all** these inquires and responses to same, yet none were produced.

(c) Meeting Documents

1. At page 34 of the Dec. 14 Package, Mr. Streiner confirmed that Air Transat's request to issue a statement regarding vouchers would be discussed at the EC call on March 19, 2020 [**March 19 EC Call**].

2. At page 50 of the Dec. 14 Package, Mr. Streiner refers to a "Members' call tomorrow [March 24, 2020]" to discuss the draft Statement on Vouchers [**March 24 Members' Call**].

3. At page 67 of the Dec. 14 Package, Mr. Streiner refers to a meeting he had the morning of March 25, 2020 with Ms. Liz Barker, the Agency's Vice-Chair [**March 25 Discussion**].

4. At pages 69-70 of the Dec. 14 Package, Mr. Streiner confirmed that there were daily EC calls that he (and likely Ms. Barker) would participate in [**Daily EC Calls**].

5. At page 38 of the Dec. 14 Package, Mr. Streiner refers to having had discussions with "other federal players" before March 22, 2020 on the topic of issuing the Statement on Vouchers [**Other Federal Players Discussions**].

The Order required the Agency to produce all documents related to the March 19 EC Call, the March 24 Members' Call, the March 25 Discussion, the Daily EC Calls, and the Other Federal Players Discussions, yet none were produced nor was any claim of privilege put forward, and the time to do so has expired.

III. The Contumacious Conduct is Unacceptable and Must Stop

While omission of documents in the Dec. 14 Package may have initially been inadvertent, this is clearly no longer the case. The Agency's continued refusal to comply with the Order amounts to contumacious conduct toward the Court's authority, which is unacceptable and must stop.

We request that as the Agency's top executive officers, you bring the Agency into compliance with the Order, and direct Agency members and staff under your supervision and/or control to fully cooperate and comply with paragraph 3 of the Order and have all documents produced forthwith by no later than **Friday, January 7, 2022 at 17:00 Eastern Time**.

Yours very truly,

Dr. Gábor Lukács
President

Enclosed: Order of Gleason, J.A., dated October 15, 2021

Cc: Mr. Sandy Graham, counsel for the Respondent, Attorney General of Canada (Sandy.Graham@justice.gc.ca)

Mr. Lorne Ptack, counsel for the Respondent, Attorney General of Canada (Lorne.Ptack@justice.gc.ca)

Ms. Barbara Cuber, counsel for the Intervener, Canadian Transportation Agency (Barbara.Cuber@otc-cta.gc.ca)

Mr. Simon Lin, counsel for the Applicant, Air Passenger Rights (simonlin@evolinklaw.com)

Date: 20211015

Docket: A-102-20

Ottawa, Ontario, October 15, 2021

Present: GLEASON J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN TRANSPORTATION AGENCY

Intervener

ORDER

UPON informal motion of the applicant to file an additional affidavit in respect of its disclosure motion;

AND UPON motion of the applicant for an order under Rules 317 and 318 of the *Federal Courts Rules*, SOR 98/106, requiring the Canadian Transportation Agency (the CTA) to disclose the documents described in the applicant's Notice of Motion;

AND UPON motion of the CTA for leave to intervene in this application and other consequential orders;

AND UPON reading the materials filed;

THIS COURT ORDERS that:

1. The motions are granted on the terms set out below;

2. The additional affidavit from Dr. Gábor Lukács, sworn May 12, 2021, may be filed, effective the date it was received by the Court;

3. Within 60 days of the date of this Order, the CTA shall disclose to the applicant:

    a. all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020;

    b. all non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020; and

c. all non-privileged documents related to any meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the statement on vouchers posted on the CTA's website on March 25, 2020 was discussed;

4. The foregoing disclosure shall be made electronically;

5. Within 60 days of the date of this Order, the AGC shall submit to the Court for a ruling on privilege all documents over which privilege is asserted that would otherwise fall within paragraph 3 of this Order, the whole in accordance with the Reasons for this Order;

6. Within the same timeframe, the AGC shall serve and file a redacted version of its submissions, from which details of the contents of the documents are deleted;

7. The applicant shall have 30 days from receipt of the forgoing submissions to make responding submissions, if it wishes;

8. The materials related to claims for privilege shall then be submitted to the undersigned for a ruling on privilege;

9. Within 30 days of receipt of a ruling on the privilege claims, the applicant shall file any additional affidavit(s) it intends to rely on in support of its application;

10. The time for completion of all subsequent steps for perfection of this application shall be governed by the *Federal Courts Rules*;

11. The CTA is granted leave to intervene and to file an affidavit and a memorandum of fact and law of no more than 10 pages, the whole in accordance with the Reasons for this Order;

12. The style of cause is amended to add the CTA as an intervener and it shall be served with all materials the parties intend to file;

13. The issues of whether the CTA will be permitted to make oral submissions and of costs in respect of its intervention are remitted to the panel of this Court seized with hearing this application on its merits; and

14. No costs are awarded in respect of these motions.

"Mary J.L. Gleason"
J.A.

This is **Exhibit "AU"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

Office des transports du Canada | Canadian Transportation Agency

VIA E-mail: simonlin@evolinklaw.com

January 7, 2022

Simon Lin
Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, B.C.
V5C 6C6

Re: ***Air Passenger Rights v Attorney General of Canada and Canadian Transportation Agency***
Federal Court of Appeal Court File No.: A-102-20

Dear Mr. Lin,

I am writing to you because I am in receipt of correspondence that your client has addressed directly to individuals at the Agency.

In that and your previous correspondence, questions have been raised as to the Agency's compliance with the October 15, 2021 order of the Federal Court of Appeal.

I refer you to the letter the Agency addressed to you on December 24, 2021. In that letter, the Agency described the extensive searches conducted to comply with the Court's order. The Agency has provided the documents in its possession that were found during these searches, and that come within the scope of the order.

However, the Agency has communicated its willingness to resolve any questions around compliance with the order and the fulfillment of its obligations under section 318 of the *Federal Courts Rules.*

The Agency agrees with the Attorney General of Canada's request for case management as an expeditious way to resolve any questions about compliance.

Sincerely,

Barbara Cuber
Senior Counsel
Canadian Transportation Agency
Legal Services Directorate
15 Rue Eddy, 19th Floor
Gatineau, Québec J8X 4B3
Tel: 613-301-8322
Email: barbara.cuber@otc-cta.gc.ca
Email: Servicesjuridiques.LegalServices@otc-cta.gc.ca

c.c.: Sandy Graham and Lorne Ptack, Counsel for the Attorney General of Canada,
via email: sandy.graham@justice.gc.ca, Lorne.Ptack@justice.gc.ca

This is **Exhibit “AV”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

Evolink Law Group
4388 Still Creek Drive, Suite 237
Burnaby, BC V5C 6C6

p. 604 620 2666
info@evolinklaw.com
www.evolinklaw.com

January 11, 2022 **VIA EMAIL**

Canadian Transportation Agency, Legal Services Directorate
ATTN : Ms. Barbara Cuber
15 Rue Eddy
Gatineau, Québec J8X 4B3

Dear Ms. Cuber,

RE: Air Passenger Rights v. ACG and the Canadian Transportation Agency (A-102-20)

We write in response to the Agency's letter of January 7, 2022 ("**January 7 Letter**"), which cited the Agency's letter of December 24, 2021 ("**December 24 Letter**"). The January 7 Letter claims that "the Agency has communicated its willingness to resolve any questions around compliance with the order…". Respectfully, that assertion is inaccurate. The Agency has for many weeks continuously refused to address the numerous issues of compliance with the Order.

We also enclose a particularized list of the missing documents (enclosed as **Schedule "A"**), which captures the 15 items in our December 17, 2021 letter, taking into account the December 24 Letter. Please provide **all** of the missing documents in Schedule "A" *forthwith*.

The Agency's Failure to Cooperate with the Applicant

The Applicant's letter of December 17, 2021 sets out fifteen (15) categories of missing documents. With reference to the December 17, 2021 letter, the Agency only provided a partial answer to item 1-3 in the "CTA Member Correspondences" category; item 2 and 6 under the "Third-Party Correspondences" category (i.e., item 1, 3, 4, and 5 of that category remains unanswered); item 2 under the "Meeting Documents" category only, leaving item 1, 3, 4, 5, and 6 from that category simply unanswered. Out of the six categories that the Agency provided a partial answer for, the Agency continued to refuse to provide the electronic files that containing metadata.

The Agency Acknowledged that it Improperly Excluded Numerous Documents

Notably, for item 6 under "Third-Party Correspondences", the Agency confirmed that the documents exist and the Agency acknowledged that it did not comply with the Court's October 15, 2021 Order. The Order was clear that the CTA must produce "**[a]ll** non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020". The Order **never** authorized the Agency to exclude any non-privileged documents.

<u>The Agency's December 24 Letter Regarding "Meeting Documents" is a Smokescreen</u>

In the Applicant's December 17, 2021 letter under the "Meeting Documents" category, the Applicant noted that the Agency's limited document production identified six (6) meetings relating to the Statement on Vouchers: (1) March 19 EC Call; (2) March 20 EC Call; (3) March 24 Members' Call; (4) March 25 Discussion; (5) Daily EC Calls; and (6) Other Federal Players Discussion.

However, the Agency's December 24 Letter <u>partially</u> addressed item 2 only, the March 20 EC call:

> *The Agency has possession of the following meeting minutes, meeting and discussion notes, meeting agendas or voice records for relevant meetings held during this time period:*
>
> *A redacted document associated with a March 20 EC meeting, which can be found in the Motion Record of the Attorney General of Canada: Informal motion to claim privilege over portions of two documents, at Exhibit B, which was served and filed with the Court on December 14.*

The Agency's silence is telling. The Agency only stated it has possession of a "decision and deliverable" from the March 20 EC meeting. In the December 24 Letter, the Agency did not deny that there would be other documents for the March 20 EC Meeting. Furthermore, the Agency did not deny that it was also in possession of documents relating to the five meetings described in items 1, 3, 4, 5, 6 above. The Agency simply avoided addressing those issues by silence.

The Agency's apparent "lack of documentation" for those meetings is implausible. The Treasury Board's Policy on Information Management applies to the Agency and requires, *inter alia*, that decisions and decision-making processes be documented.[1] It remains unclear how key CTA personnel could arrange meetings without first communicating with each other the date/time, dial-in information, and the discussion topics. Similarly, it is inexplicable why key personnel (particularly those who are lawyers by trade) would not have any notes regarding those important meetings.

<u>Conclusion</u>

We draw your attention to the list of items in **<u>Schedule "A"</u>** that are covered by the Court's Order and still missing. We urge the CTA to comply with the Court Order, without further delay.

Yours truly,
EVOLINK LAW GROUP
Simon Lin
SIMON LIN, Barrister & Solicitor

[1] Policy on Information Management - https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12742

SCHEDULE "A"
(the "Withheld Materials")

A. CTA Member Correspondences

A1. **The Microsoft Word Files for the Statement on Vouchers.** The original Microsoft Word files for the Statement on Vouchers, and drafts of the Statement on Vouchers, attached to e-mails that were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 9, 2020 and March 25, 2020.

A2. **Documents Regarding the Statement on Vouchers on March 23, 2020.** All documents regarding the Statement on Vouchers that were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) on or about March 23, 2020.

A3. **Documents Regarding the Statement on Vouchers on March 24, 2020.** All documents regarding the Statement on Vouchers that were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) on or about March 24, 2020 between 8:30AM and 7:00PM.

A4. **Documents Regarding the Announcement of the Statement on Vouchers to Third-Parties.** All documents regarding Ms. Jones's email on March 24, 2020 with the subject line "message to carriers - signals check" that was sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 24, 2020 and March 25, 2020.

A5. **Chairperson's Template Response to Media in MS Word Format.** The original Microsoft Word file(s) for the template media response in the March 24, 2020 at 7:34PM email sent by the Chairperson with subject line "Answer," which were sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 24, 2020 and March 25, 2020.

A6. **Ms. Jones's Draft FAQs about the Statement on Vouchers.** All documents in respect of Ms. Jones' draft FAQs first circulated on March 24, 2020 in response in the email with subject line "RE: Answer," which was sent to/from a CTA Member (including the Chairperson and Vice-Chairperson) between March 24, 2020 and March 25, 2020.

B. Third-Party Correspondences

B1. **Original E-mail Announcing the Statement on Vouchers.** Original version of the e-mail sent by Ms. Marcia Jones on March 25, 2020 with the subject line "Update: CTA measures/Mise à jour: mesures prises par l'OTC."

B2. **Original E-mail from Transport Canada on March 18, 2020.** Original version of the e-mail sent by Mr. Colin Stacey at Transport Canada to Ms. Marcia Jones on March 25, 2020 with the subject line "FW: From MinO:[Redacted]," including all attachments to that email.

B3. **Correspondences in respect of Ms. Jones's and the Assistant Deputy Minister's Meeting(s)**. All non-privileged correspondences in respect of the meeting(s) between Ms. Marcia Jones and the Assistant Deputy Minister of Transport on or about March 21-22, 2020.

B4. **CTA's Info Email and Twitter Messages.** All non-privileged documents sent to or from the CTA in respect of the Statement on Vouchers between March 9, 2020 and March 25, 2020 using:

(a) the CTA's Info email account (*info@otc-cta.gc.ca*); and

(b) the CTA's Twitter accounts in English (*CTA_gc*) and French (*OTC_gc*), including but not limited to Private Messages.

B5. **Correspondences to/from PIAC**. All non-privileged correspondences to/from PIAC between March 9, 2020 and March 25, 2020 regarding the Statement on Vouchers.

C. Meeting Documents

C1. **Documents for the March 19 EC Call.** All non-privileged documents in respect of the CTA's EC call on March 19, 2020, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meeting's decisions and deliverables.

C2. **Documents for the March 20 EC Call.** All non-privileged documents in respect of the CTA's EC call on March 20, 2020, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;

(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meeting's decisions and deliverables.

C3. **CTA Chairperson's March 21-22, 2020 Weekend Meeting(s)**. All non-privileged documents in respect of the meeting(s) between the CTA's Chairperson, the Deputy Minister of Transport, an unidentified individual, and/or some of them over the course of the weekend of March 21-22, 2020 about the Statement on Vouchers, including but not limited to:

(a) documents sent to/from those third-parties before or after the meeting(s), including draft(s) of the Statement on Vouchers;
(b) the meeting agenda;
(c) correspondences to schedule and/or set up the meeting;
(d) video or audio recordings of the meeting;
(e) meeting minutes;
(f) notes taken by or on behalf of any of the participants; and
(g) correspondences of the meeting's decisions and deliverables.

C4. **CTA Chairperson's March 21 and/or 22, 2020 Discussions with Vice-Chairperson**. All non-privileged documents in respect of the meeting(s) between the CTA's Chairperson and Vice-Chairperson over the course of the weekend of March 21-22, 2020 about the Statement on Vouchers, including but not limited to:

(a) documents circulated between them before or after their meeting(s), including draft(s) of the Statement on Vouchers;
(b) the meeting agenda;
(c) correspondences to schedule and/or set up the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences regarding the meeting(s).

C5. **Documents for the March 22 CTA Key Personnel Call.** All non-privileged documents in respect of the call on March 22, 2020 at or about 10:30AM, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meeting's decisions and deliverables.

C6. **Documents for the March 23 EC Call.** All non-privileged documents in respect of the CTA's EC call on March 23, 2020, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meeting's decisions and deliverables.

C7. **Documents for the March 24 CTA Members' Call.** All non-privileged documents in respect of the CTA Members' Call on March 24, 2020, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meeting's decisions and deliverables.

C8. **Documents for the March 25 Discussions Involving Chair and/or Vice-Chair.** All non-privileged documents in respect of the discussions involving the Chairperson or Vice-Chairperson, and/or other persons on March 25, 2020 regarding the Statement on Vouchers, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meetings' decisions and deliverables.

C9. **Documents for the Cancelled March 25 Call.** All non-privileged documents for the March 25, 2020 meeting originally scheduled for 10:00AM, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting; and
(c) draft documents circulated prior to the scheduled meeting.

C10. **The CTA Chairperson's Discussion(s) with "Other Federal Players".** All non-privileged documents in respect of the discussion(s) between the Chairperson and "other federal players" on or before March 23, 2020 regarding the Statement on Vouchers, including but not limited to:

(a) the meeting agenda;
(b) correspondences to schedule and/or set up the meeting;
(c) video or audio recordings of the meeting;
(d) meeting minutes;
(e) notes taken by or on behalf of any of the participants; and
(f) correspondences of the meeting's decisions and deliverables.

This is **Exhibit "AW"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

____

Signature

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Word Metadata and Electronic Evidence

Beware of Hidden MEtadata in electronic files

By **Ira Rothken**
Jun 18, 2015

Microsoft Word is currently the word processing software of choice for most individuals and companies. Many users are under the mistaken belief that the final version of the "visible" Word document is the only substantive content contained in the "saved file."

Beyond the visible document and hidden in Word files is data known as "metadata". Metadata can include things like revision history, authors, and "track changes" which reveals the evolution of a document and the various edits that led to the final Word file. According to Microsoft metadata found in Word files can include:

- Your name
- Your initials
- Your company or organization name
- The name of your computer
- The name of the network server or hard disk where you saved the document
- Other file properties and summary information
- Non-visible portions of embedded OLE objects
- Document revisions
- Document versions
- Template information
- Hidden text
- Comments

This leads to two important action items - First, if you are creating and saving Word documents get rid of the metadata prior to circulating Word files and saving them for posterity - you can use a free software tool like Microsoft's "rhdtool" or a more robust product like Workshare Protect to remove metadata from Word and other Microsoft Office files. Better yet convert the Word file to a PDF document (and make sure the metadata is removed from the PDF file as well).

Second, if you get Word files in electronic discovery or via investigations you may want to analyze the Word file metadata for hidden information which may reveal substantive evidence in your case - you can use a software tool like Workshare Protect to analyze the document files and provide summary reports of the metadata.

For example, in one high profile matter great care was taken to remove comments and edited text metadata from a Microsoft Word document but some metadata remained with serious consequences.

In 2003 a memo was prepared by British Prime Minister Tony Blair's office to support the notion that UN weapons inspections were not working in Iraq and that military action was justified. The memo was used by US Secretary of State Colin Powell in support of military action in Iraq. The memo was posted on the Prime Minister's web site in Microsoft Word "dot doc" format.

Two investigative events occurred related to the Iraq memo Word file. First, Glen Rangwala of Cambridge University compared the memo to an article published by a US graduate student in 2002 and found that large portions were cut and pasted or copied - grammatical errors and all - from the graduate student's article to the memo. None of the copied text was credited to the original author.

Second, Richard M. Smith a privacy and security expert in the US downloaded the Word document from the Prime Minister's web site and extracted revision history metadata - ten revisions in all. The revision history supported the view that the Prime Minister's press office was deeply involved in the Iraq memo's preparation. For example, those involved in editing the memo likely included, based on the metadata, Murtaza Khan who was a press officer, Alison Blackshaw who was a personal assistant to the Prime Minister, John Pratt who worked at 10 Downing Street, and Paul Hamill who was a foreign office official. Unfortunately for the Prime Minister, the metadata seemed to point to his staff as the cut and paste technicians who may have copied portions of the US graduate student's article.

I went ahead and performed a similar type of analysis on the UK-Iraq memo Word file using Workshare Protect's metadata analysis tool and here is a partial screenshot of what I found which is consistent with Richard M. Smith's metadata analysis.

The UK-Iraq memo metadata debacle is a powerful demonstration why attorneys and investigators must be sensitive to the metadata issue in everyday communications as well as in e-discovery and should acquire the appropriate tools for removing metadata and analyzing metadata in the appropriate context.

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An official website of the United States government Here's how you know

View Previous Tips

Security Tip (ST04-008)

Benefits of BCC

Original release date: August 12, 2009 | Last revised: September 27, 2019

Although in many situations it may be appropriate to list email recipients in the To: or CC: fields, sometimes using the BCC: field may be the most desirable option.

What is BCC?

BCC, which stands for blind carbon copy, allows you to hide recipients in email messages. Addresses in the **To:** field and the **CC:** (carbon copy) field appear in messages, but users cannot see addresses of anyone you included in the **BCC:** field.

Why would you want to use BCC?

There are a few main reasons for using BCC:

- **Privacy** - Sometimes it's beneficial, even necessary, for you to let recipients know who else is receiving your email message. However, there may be instances when you want to send the same message to multiple recipients without letting them know who else is receiving the message. If you are sending email on behalf of a business or organization, it may be especially important to keep lists of clients, members, or associates confidential. You may also want to avoid listing an internal email address on a message being sent to external recipients.
  Another point to remember is that if any of the recipients use the "reply to all" feature to reply to your messages, all of the recipients listed in the **To:** and **CC:** fields will receive the reply. If there is potential for a response that is not appropriate for all recipients, consider using BCC.
- **Tracking** - Maybe you want to access or archive the email message you are sending at another email account. Or maybe you want to make someone, such as a supervisor or team member, aware of the email without actually involving them in the exchange. BCC allows you to accomplish these goals without advertising that you are doing it.

- **Respect for your recipients** - People often forward email messages without removing the addresses of previous recipients. As a result, messages that are repeatedly sent to many recipients may contain long lists of email addresses. Spammers and email-borne viruses may collect and target those addresses.
  To reduce the risk, encourage people who forward messages to you to use BCC so that your email address is less likely to appear in other people's inboxes and be susceptible to being harvested. To avoid becoming part of the problem, in addition to using BCC if you forward messages, take time to remove all existing email addresses within the message. The additional benefit is that the people you're sending the message to will appreciate not having to scroll through large sections of irrelevant information to get to the actual message.

How do you BCC an email message?

Most email clients have the option to BCC listed a few lines below the **To:** field. However, sometimes it is a separate option that is not listed by default. If you cannot locate it, check the help menu or the software's documentation.

If you want to BCC all recipients and your email client will not send a message without something in the **To:** field, consider using your own email address in that field. In addition to hiding the identity of other recipients, this option will enable you to confirm that the message was sent successfully.

Authors

Mindi McDowell and Allen Householder

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This is **Exhibit "AY"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

Organization and mandate

Our organization and mandate

Members

Organizational chart

At the Heart of Transportation: A Moving History

The Canadian Transportation Agency (CTA) is an independent, quasi-judicial tribunal and regulator that has, with respect to all matters necessary for the exercise of its jurisdiction, all the powers of a superior court.

The CTA is made up of five full-time Members; up to three temporary Members may also be named. The Members, who are all based in the National Capital Region, are supported in their decision-making process by some 330 employees and administrative staff.

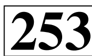
The CTA has three core mandates

- We help ensure that the national transportation system runs efficiently and smoothly in the interests of all Canadians: those who work and invest in it; the producers, shippers, travellers and businesses who rely on it; and the communities where it operates.
- We protect the human right of persons with disabilities to an accessible transportation network.
- We provide consumer protection for air passengers.

Our tools

To help advance these mandates, we have three tools at our disposal:

- **Rule-making:** We develop and enforce ground rules that establish the rights and responsibilities of transportation service providers and users and that level the playing field among competitors. These rules can take the form of binding regulations or less formal guidelines, codes of practice or interpretation notes.
- **Dispute resolution:** We resolve disputes that arise between transportation providers on



the one hand, and their clients and neighbours on the other, using a range of tools from facilitation and mediation to arbitration and adjudication.

- **Information provision:** We provide information on the transportation system, the rights and responsibilities of transportation providers and users, and the Agency's legislation and services.

Our values

Our Code of Values and Ethics outlines the core values and expected behaviours that guide us in all activities related to our professional duties. Our guiding values are:

Respect for democracy - We uphold Canadian parliamentary democracy and promote constructive and timely exchange of views and information.
Respect for people - We treat people with dignity and fairness and foster a cooperative, rewarding working environment. Integrity - We act with honesty, fairness, impartiality and transparency.
Stewardship - We use and manage our resources wisely and take full responsibility for our obligations and commitments.
Excellence - We provide the highest quality service through innovation, professionalism and responsiveness.

Members

- France Pégeot, Chair and CEO
- Elizabeth C. Barker, Vice-Chair
- Mark MacKeigan, Member
- Mary Tobin Oates, Member
- Heather Smith, Member
- Inge Green, temporary Member
- Toby Lennox, temporary Member

France Pégeot, Chair and CEO

France Pégeot was appointed Chair and CEO of the Canadian Transportation Agency (CTA) on June 1, 2021.

Before joining the CTA, Ms. Pégeot most recently served as Executive Vice-President of the Canadian Food Inspection Agency (2018-2021).

Prior to that, she has held consecutive Assistant Deputy Minister positions in policy, program and regulatory areas at Agriculture and Agri-Food Canada (2016-2017), Justice Canada (2013-2016), Fisheries and Oceans Canada (2011–2013), Industry Canada (2009–2011) and Canada Economic Development for the Quebec Regions (2006–2009).

Prior to becoming Assistant Deputy Minister, Ms. Pégeot participated in an Interchange assignment with Encana Corp. in Calgary (2005-2006) and worked in various departments, including Health Canada and the Privy Council Office. She started her career in the Quebec Ministry of Agriculture, Fisheries and Food.

She holds a Master of Policy Analysis and a Bachelor of Food Science and Technology, both from Laval University.

Elizabeth C. Barker, Vice-Chair

Liz Barker began a five-year term as Vice-Chair and Member of the Canadian Transportation Agency (CTA) on April 3, 2018.

Liz joined the CTA's predecessor, the National Transportation Agency, in 1991 as counsel. She has held several positions at the CTA, including, most recently, Chief Corporate Officer, Senior General Counsel and Secretary. She has worked in all areas of the Agency's mandate over the years, but has specialized in advising the tribunal in complex dispute adjudications and oral hearings on controversial subjects including rail level of service complaints, a wide range of complex accessible transportation disputes, and ministerial inquiries into marine pilotage and the accessibility of inter-city motor coach services. She has also worked extensively in the development of the Agency's approach to its human rights mandate, administrative monetary penalties regime, alternative dispute resolution, final offer arbitration, and rail level of service arbitration. She has appeared as counsel before all levels of court, including the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada, as co-counsel in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650.

Liz was a recipient of the Queen's Diamond Jubilee Medal in 2016 for her work at the Agency, in particular in accessible transportation, the administrative monetary penalties program, and for her leadership of the Legal Services Branch.

Liz received her law degree from Osgoode Hall Law School in 1987 and her B.A. (Honours in Law) from Carleton University in 1984. She has been a member of the Law Society of Ontario since 1989.

Mark MacKeigan, Member

Mark MacKeigan began a four-year term as a Member of the Canadian Transportation Agency on May 28, 2018.

He comes to the Agency from The St. Lawrence Seaway Management Corporation, the not-for-profit operator of the federal government's Seaway assets, where he was Chief Legal Officer and Corporate Secretary from 2014.

Mark is not entirely new to the Agency, having served previously as a Member from 2007 to 2014 and as legal counsel on specific files in a contract position during 1996.

His transportation law experience includes six years as senior legal counsel with the International Air Transport Association in Montréal from 2001 to 2007, focusing on competition law, cargo services, aviation regulatory and public international law matters. From 1996 to 2000, he was legal counsel with NAV CANADA, the country's provider of civil air navigation services.

Mark began his legal career in private practice in Toronto. After earning a Bachelor of Arts with highest honours in Political Science from Carleton University, Mark obtained his law degree from the University of Toronto and a Master of Laws from the Institute of Air and Space Law at McGill University. He also holds a postgraduate diploma in European Union Competition Law from King's College London.

He is a member of the Bars of Ontario and the State of New York and is admitted as a solicitor in England and Wales.

Mary Tobin Oates, Member

After 25 years of public service, Mary Tobin Oates joined the Canadian Transportation Agency on 9 July 2018. As a lawyer, Mary practised in different areas of law, largely in public and administrative law. She appeared before the Pension Appeals Board and the Federal Court of Appeal regarding disability benefits under the Canada Pension Plan and the Old Age Security Act. Mary served as a Board member of the Veterans Review and Appeal Board where she determined eligibility for disability benefits for members of the Canadian Forces and the Royal Canadian Mounted Police. Mary provided legal and policy advice on indigenous issues to the Department of Justice and to Indian and Northern Affairs Canada. She also served as Board member to Tungasuvvingat Inuit, a not-for-profit, charitable organization that provides services to and advocates on behalf of Inuit who live in southern Canada.

Before becoming a lawyer, Mary worked as a technical editor for the Canadian Transportation

Accident and Safety Board (now Transportation Safety Board).

Mary received her Bachelor of Arts from Memorial University of Newfoundland and graduated from Osgoode Hall Law School. She has been a member of the Law Society of Ontario (formerly the Law Society of Upper Canada) since February 1997.

Heather Smith, Member

Heather Smith became a full-time Member of the Canadian Transportation Agency on August 27, 2018. Heather was most recently Vice-President, Operations at the Canadian Environmental Assessment Agency. In previous positions, Heather was Executive Director in the Government Operations Sector of Treasury Board Secretariat, and Director General in the Strategic Policy Branch at Agriculture and Agri-Food Canada (AAFC). Heather held several management positions within Justice Canada, as General Counsel and Head of AAFC Legal Services, General Counsel and Head of Legal Services at the Canadian Environmental Assessment Agency, and General Counsel in the Legal Services Unit of Social Development Canada/Human Resources and Skills Development Canada.

Heather also served as legal counsel at Environment Canada Legal Services and Manager of the Canadian Environmental Protection Act Office at Environment Canada. Heather holds a B.A.(Hons.) from the University of King's College and an L.L.B. from the University of Toronto. She has also earned the Chartered Director (C.Dir.) designation from the McMaster/DeGroote Directors College.

Inge Green, temporary Member

Inge Green was appointed as a temporary Member of the Canadian Transportation Agency (CTA) effective March 31, 2021.

Inge was Senior Counsel with the CTA in its legal services unit. She started working at the National Transportation Agency, the predecessor of the CTA, in 1988 and worked for 32 years in the areas of transportation, administrative, constitutional, and human rights law.

During her time at the Agency, Inge worked in all areas of the Agency’s mandate. She worked on a wide range of domestic and international air matters. She also worked extensively in the development of regulations and acted as a mediator. She advised the Agency on a wide range of oral hearings, including rail level of

service complaints and complex accessible transportation disputes. She appeared as counsel before the Federal Court of Appeal, and the Supreme Court of Canada, as co-counsel in the case of *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*

Inge was the recipient of the Community of Federal Regulators' Regulatory Excellence Award (2019) as well as the Chair's Award of Excellence.

Inge obtained her law degree from the University of Ottawa in 1987 as well as a Bachelor of Arts (English Concentration) in 1984.

Toby Lennox, temporary Member

Toby Lennox was appointed as a temporary member of the Canadian Transportation Agency on March 31, 2021.

Toby is a lawyer and executive based in Toronto. He practiced corporate commercial law with Osler and then joined the Greater Toronto Airports Authority in 1995 to negotiate the transfer of Toronto-Pearson International Airport to the GTAA. He held the position of Senior Legal Counsel with the GTAA handling a variety of regulatory, administrative, corporate governance and commercial matters. In 2007, he joined the senior management team with the GTAA and held the position of Vice President, Strategy Development and Stakeholder Relations. In this role, among other duties, he had responsibility for overseeing all of the airport authority's interactions with regulatory bodies and agencies. Toby left the GTAA in 2014 and was asked to work on the creation of Toronto Global, the Toronto Region's investment attraction agency. He served as CEO of Toronto Global until February of 2021.

Toby holds a BA from Trent University, an MA in International Relations from Dalhousie University and law degrees from Oxford University and Dalhousie University. Toby received his ICD.D designation from the Canadian Institute of Corporate Directors in 2021.

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Date modified:
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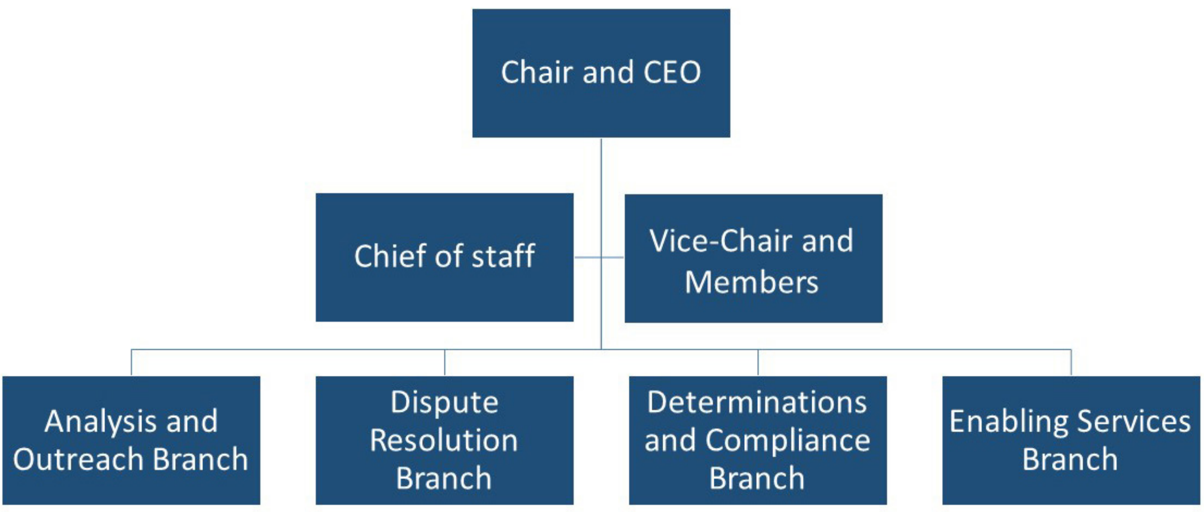
This is **Exhibit “AZ”** to the Affidavit of Dr. Gábor Lukács

affirmed before me on January 16, 2022

Signature

Organizational chart



Reporting to the Chair and Chief Executive Officer

- Vice-Chair and Members
- Chief of Staff
- Analysis and Outreach Branch
- Dispute Resolution Branch
- Determinations and Compliance Branch
- Enabling Services Branch

Agency branches

- Led by the Chief Strategy Officer, the **Analysis and Outreach Branch** comprises the following directorates:
  - Analysis and Regulatory Reform
  - Communications
  - Centre of Expertise on Accessible Transportation
- Led by the Chief Compliance Officer, the **Determinations and Compliance Branch** comprises the following directorates:
  - Air Determinations
  - Rail and Marine Determinations
  - Monitoring and Compliance
- Led by the Chief Dispute Resolution Officer, the **Dispute Resolution Branch** comprises:
  - Air and Accessibility Alternate Dispute Resolution
  - Rail and Marine ADR
  - Dispute Adjudication
- Led by the General Counsel and Secretary, the **Enabling Services Branch** comprises the following directorates:
  - Legal Services
  - Secretariat and Registrar Services
  - Financial Services and Asset Management
  - Workforce and Workplace Services
  - Information and Technology Management Services

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Date modified:
2016-04-01

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at the Federal Court of Appeal in **Vancouver, British Columbia**.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: April 3, 2020

Issued by: ______________________ JEAN-FRANÇOIS DUPORT REGISTRY OFFICER AGENT DU GREFFE

Address of local office: Federal Court of Appeal
90 Sparks Street, 5th floor
Ottawa, Ontario, K1A 0H9

TO: **CANADIAN TRANSPORTATION AGENCY**

APPLICATION

This is an application for judicial review pursuant to section 28 of the *Federal Courts Act* in respect of two public statements issued on or about March 25, 2020 by the Canadian Transportation Agency [**Agency**], entitled "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] that cites the Statement.

These public statements, individually or collectively, purport to provide an unsolicited advance ruling on how the Agency will treat and rule upon complaints of passengers about refunds from air carriers relating to the COVID-19 pandemic.

The Statement was issued without hearing the perspective of passengers whatsoever.

The Applicant makes application for:

1. a declaration that:

   (a) the Agency's Statement **is not** a decision, order, determination, or any other ruling of the Agency and has no force or effect of law;

   (b) the issuance of the Statement on or about March 25, 2020, referencing of the Statement within the COVID-19 Agency Page, and the subsequent distribution of those publications is contrary to the Agency's own *Code of Conduct* and/or gives rise to a reasonable apprehension of bias for:

      i. the Agency as a whole, or

      ii. alternatively, the appointed members of the Agency who supported the Statement;

   (c) further, the Agency, or alternatively the appointed members of the Agency who supported the Statement, exceeded and/or lost its (their) jurisdiction under the *Canada Transportation Act*, S.C. 1996, c. 10 to rule upon any complaints of passengers about refunds from carriers relating to the COVID-19 pandemic;

2. an interim order (*ex-parte*) that:

   (a) upon service of this Court's interim order, the Agency shall prominently post the interim clarification (below) at the top portion of both the French and English versions of the "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] (both defined in paragraphs 11-12 of the Notice of Application):

   > The Canadian Transportation Agency's "Statement on Vouchers" is not a decision, order, determination, or any legal ruling of the Canadian Transportation Agency. It does **not** have the force of law. The "Statement on Vouchers" is currently pending judicial review by the Federal Court of Appeal. This notice is posted by Order [insert URL link to PDF of order] of the Federal Court of Appeal.;

   (b) starting from the date of service of this Court's interim order, the Agency shall bring the above interim clarification to the attention of anyone that contacts the Agency with a formal complaint and/or informal inquiry regarding air carriers' refusal to refund arising from the COVID-19 pandemic;

   (c) the Agency shall not issue any decision, order, determination, or any other ruling with respect to refunds from air carriers in relation to the COVID-19 pandemic; and

   (d) this interim order is valid for fourteen days from the date of service of this Court's interim order on the Agency, and may be renewed by the Applicant under Rule 374(2);

3. an interlocutory order that:

   (a) the Agency shall forthwith completely remove the Statement from the Agency's website including any references to the Statement within the COVID-19 Agency Page and substitute it with this Court's interlocutory order, or alternatively the order renewing the interim clarification (subparagraph 2(a) above), until final disposition of the Application;

(b) the interim orders in subparagraphs 1(b)-(c) above are maintained until final disposition of the Application;

(c) the Agency shall forthwith communicate with persons that the Agency has previously communicated with regarding the Statement and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement; and

(d) the Agency shall forthwith communicate with air carriers under the Agency's jurisdiction, the Association of Canadian Travel Agencies, and Travel Pulse and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement;

4. a permanent order that:

(a) the Agency prominently post at the top portion of the COVID-19 Agency Page that the Agency's Statement has been ordered to be removed by this Court;

(b) the Agency remove the Statement, and references to the Statement within the COVID-19 Agency Page, from its website and replace the Statement with a copy of this Court's judgment;

(c) in the event the Agency receives any formal complaint or informal inquiry regarding air carriers' refusal to refund in respect of the COVID-19 pandemic, promptly and prominently inform the complainant of this Court's judgment; and

(d) the Agency, or alternatively the appointed members of the Agency who supported the Statement, be enjoined from dealing with any complaints involving air carriers' refusal to refund passengers in respect of the COVID-19 pandemic, and enjoined from issuing any decision, order, determination or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic;

5. costs and/or reasonable out-of-pocket expenses of this Application; and

6. such further and other relief or directions as the Applicant may request and this Honourable Court deems just.

The grounds for the application are as follows:

A. Overview

1. The present Application challenges the illegality of the Canadian Transportation Agency's Statement, which purports to provide an unsolicited advance ruling in favour of air carriers without having heard the perspective of passengers beforehand.

2. The Statement and the COVID-19 Agency Page preemptively suggest that the Agency is leaning heavily towards permitting the issuance of vouchers in lieu of refunds. They further suggest that the Agency will very likely dismiss passengers' complaints to the Agency for air carriers' failure to refund during the COVID-19 pandemic, irrespective of the reason for flight cancellation.

3. Despite the Agency having already determined in a number of binding legal decisions throughout the years that passengers have a fundamental right to a refund in cases where the passengers could not travel for events outside of their control, the Agency now purports to grant air carriers a blanket immunity from the law via the Statement, without even first hearing passengers' submissions or perspective as to why a refund is **mandated** by law. This is inappropriate.

4. The Agency, as a quasi-judicial tribunal, must at all times act with impartiality. That impartiality, unfortunately, has clearly been lost, as demonstrated by the Agency's issuance of the unsolicited Statement and usage thereof.

5. The fundamental precept of our justice system is that "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*" (*R. v. Yumnu*, 2012 SCC 73 at para. 39). This fundamental precept leaves no room for any exception, even during difficult times like the COVID-19 pandemic.

6. Impartiality is further emphasized in the Agency's own *Code of Conduct* stipulating that the appointed members of the Agency shall not express an opinion on potential cases.

B. The COVID-19 Pandemic

7. The coronavirus [**COVID-19**] is a highly contagious virus that originated from the province of Hubei in the Peoples Republic of China, and began spreading outside of the Peoples Republic of China on or around January 2020.

8. On or about March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.

9. On or about March 13, 2020, the Government of Canada issued a blanket travel advisory against non-essential travel outside of Canada until further notice and restricting entry of foreign nationals into Canada, akin to a "declaration of war" against COVID-19, and that those in Canada should remain at home unless absolutely necessary to be outside of their homes [**Declaration**].

10. COVID-19 has disrupted air travel to, from, and within Canada. The disruption was brought about by the COVID-19 pandemic and/or the Declaration, such as:

    (a) closure of borders by a number of countries, resulting in cancellation of flights by air carriers;

    (b) passengers adhering strictly to government travel advisories (such as the Declaration) and refraining from air travel (and other forms of travel) unless absolutely necessary; and

    (c) air carriers cancelling flights on their own initiative to save costs, in anticipation of a decrease in demand for air travel.

C. The Agency's Actions in Relation to COVID-19, Including the "Statement on Vouchers"

11. Since March 13, 2020 and up to the date of filing this Application, the Agency has taken a number of steps in relation to COVID-19. Those listed in the four sub-paragraphs below are **not** the subject of review in this Application.

    (a) **On March 13, 2020**, the Agency issued Determination No. A-2020-42 providing, *inter alia*, that various obligations under the *Air Passen-*

ger Protection Regulations, SOR/2019-150 [**APPR**] are suspended until April 30, 2020:

i. Compensation for Delays and Inconvenience for those that travel: compensation to passengers for inconvenience has been reduced and/or relaxed (an air carrier's obligation imposed under paragraphs 19(1)(a) and 19(1)(b) of the *APPR*);

ii. Compensation for Inconvenience to those that do not travel: the air carrier's obligation, under subsection 19(2) of the *APPR* to pay compensation for inconvenience to passengers who opted to obtain a refund instead of alternative travel arrangement, if the flight delay or the flight cancellation is communicated to passengers more than 72 hours before the departure time indicated on the passengers' original ticket; and

iii. Obligation to Rebook Passengers on Other Carriers: the air carrier's obligation, under paragraphs 17(1)(a)(ii), 17(1)(a)(iii), and 18(1)(a)(ii) of the *APPR*.

(b) **On or about March 25, 2020**, the Agency issued Determination No. A-2020-47 extending the exemptions under Decision No. A-2020-42 (above) to June 30, 2020. This Determination further exempted air carriers from responding to compensation requests within 30 days (s. 19(4) of *APPR*). Instead, air carriers would be permitted to respond to compensation requests 120 days *after* June 30, 2020 (e.g. October 28, 2020).

(c) **On or about March 18, 2020**, the Agency issued Order No. 2020-A-32, suspending **all** dispute proceedings until April 30, 2020.

(d) **On or about March 25, 2020**, the Agency issued Order No. 2020-A-37, extending the suspension (above) to June 30, 2020.

12. On or about March 25, 2020, almost concurrently with the Order and Determination on the same date (above), the Agency publicly posted the Statement on its website (**French**: https://otc-cta.gc.ca/fra/message-concernant-credits; **En-**

glish: https://otc-cta.gc.ca/eng/statement-vouchers) providing that:

> The COVID-19 pandemic has caused major disruptions in domestic and international air travel.
>
> For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.
>
> The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.
>
> On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.
>
> While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).
>
> The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

13. On or about March 25, 2020, concurrently with the Statement, the Agency posted an amendment to the COVID-19 Agency Page on its website, adding four references to the Statement (French: **Information importante pour les voyageurs pour la periode de la COVID-19** [https://otc-cta.gc.ca/fra/information-

importante-pour-voyageurs-pour-periode-covid-19]; English: **Important Information for Travellers During COVID-19** [https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19]).

14. The COVID-19 Agency Page cites and purports to apply the Statement in the context of an air carrier's legal obligation in three circumstances: (1) situations outside airline control (including COVID-19 situations); (2) situations within airline control; and (3) situations within airline control, but required for safety.

15. In effect, the COVID-19 Agency Page purports to have relieved air carriers from providing passengers with refunds in practically **every** imaginable scenario for cancellation of flight(s), contrary to the Agency's own jurisprudence and the minimum passenger protections under the *APPR*.

D. Jurisprudence on Refunds for Passengers

16. Since 2004, in a number of decisions, the Agency confirmed passengers' fundamental right to a refund when, for whatever reason, an air carrier is unable to provide the air transportation, including those outside of the air carrier's control:

   (a) *Re: Air Transat*, Decision No. 28-A-2004;
   (b) *Lukács v. Porter*, Decision No. 344-C-A-2013, para. 88;
   (c) *Lukács v. Sunwing*, Decision No. 313-C-A-2013, para. 15; and
   (d) *Lukács v. Porter*, Decision No. 31-C-A-2014, paras. 33 and 137.

17. The Agency's jurisprudence was entirely consistent with the common law doctrine of frustration, the civil law doctrine of *force majeure*, and, most importantly, common sense.

18. The *APPR*, which has been in force since 2019, merely provides **minimum** protection to passengers. The *APPR* does not negate or overrule the passengers' fundamental right to a refund for cancellations in situations outside of a carrier's control.

19. Furthermore, the COVID-19 Agency Page also suggests that the Statement *would* apply to cancellations that are within airline control, or within airline control but required for safety purposes, squarely contradicting the provisions

of subsection 17(7) of the *APPR*. Subsection 17(7) clearly mandates that any refund be in the original form of payment, leaving no room for the novel idea of issuing a voucher or credit.

20. Finally, whether an air carrier's flight cancellation could be characterized as outside their control, or within their control, remains to be seen. For example, if a cancellation was to save costs in light of shrinking demand, it may be considered a situation within an air carrier's control. However, the Statement and the COVID-19 Agency Page presuppose that **any and all** cancellations at this time should be considered outside an air carrier's control.

21. The combined effect of the Statement and the COVID-19 Agency Page purports to ignore decade old and firmly established jurisprudence of the Agency. This all occurred without any formal hearing, adjudication, determination, or otherwise, or even a single legal submission or input from the passengers.

22. As described further below, the Agency does not even outline its legal basis or provide any support for those public statements.

23. The Agency's public statements are tantamount to endorsing air carriers in illegally withholding the passengers' monies, all without having to provide the services that were contracted for. The air carriers all seek to then issue vouchers with varying expiry dates and usage conditions to every passenger, effectively depriving all the passengers of their fundamental right to a refund, which is a right the Agency itself firmly recognized.

E. The Agency's Conduct Gives Rise to a Reasonable Apprehension of Bias

24. The Agency is a quasi-judicial tribunal that is subject to the same rules of impartiality that apply to courts and judges of the courts.

25. Tribunals, like courts, speak through their legal judgments and not media postings or "statements."

26. The Statement and/or the COVID-19 Agency Page is not a legal judgment. They give an informed member of the public the perception that it would be more

likely than not that the Agency, or the members that supported the Statement, will not be able to fairly decide the issue of refunds relating to COVID-19.

27. The Agency has already stipulated a general rule, outside the context of a legal judgment, that refunds need not be provided. No support was provided for this radical departure from the fundamental rights of passengers. The Agency merely provided a bald assertion or conclusion that passengers are not entitled to any refund.

28. The Agency's own Code of Conduct expressly prohibits members of the Agency from expressing an opinion about potential cases or any other issue related to the Agency's work, or comments that may create a reasonable apprehension of bias:

> (40) Members **shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency**, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.
>
> [Emphasis added.]

29. Although neither the Statement, nor the COVID-19 Agency Page, contain the signature or names of any specific member of the Agency, given the circumstances and considering the Agency's own Code of Conduct providing that the professional civilian staff's role are to **fully** implement the appointed member(s)' directions, the Statement and the COVID-19 Agency Page ought to be attributed to the member(s) who supported the Statement either before or after its posting on the internet.

30. In these circumstances, the Court must proactively step in to protect the passengers, to ensure that "justice should not only be done, but should manifestly and undoubtedly be seen to be done," and to ensure that the administration of justice is not put to disrepute.

31. The Court ought to issue an interim, interlocutory, and/or permanent order restricting the Agency's involvement with passengers' COVID-19 related refunds against air carriers.

F. The Applicant

32. The Applicant is a non-profit corporation under the *Canada Not-for-profit Corporations Act*, SC 2009 that is an advocacy group representing the rights of air passengers.

33. Air Passenger Rights is led by a Canadian air passenger rights advocate, Dr. Gábor Lukács, whose work and public interest litigation has been recognized by this Honourable Court in a number of judgments:

(a) *International Air Transport Assn et al. v. AGC et al.* (Federal Court of Appeal File No. A-311-19, Order of Near J.A., dated March 3, 2020) that:

> [...] the Court is of the view that the case engages the public interest, that the proposed intervener [Dr. Gábor Lukács] would defend the interests of airline passengers in a way that the parties [the Agency, the Attorney General of Canada, and an airlines trade association] cannot, that the interests of justice favour allowing the proposed intervention in the appeal, and that the proposed intervention would be of assistance to the Court in deciding the appeal [...]

(b) *Lukács v. Canada (Transportation Agency)* 2016 FCA 174 at para. 6;

(c) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 269 at para. 43;

(d) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 at para. 1; and

(e) *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76 at para. 62.

G. Statutory provisions

34. The Applicant will also rely on the following statutory provisions:

(a) *Canada Transportation Act*, S.C. 1996, c. 10 and, in particular, sections

25, 37, and 85.1;

(b) *Federal Courts Act*, R.S.C. 1985, c. F-7, and in particular, sections 18.1, 18.2, 28, and 44; and

(c) *Federal Courts Rules*, S.O.R./98-106, and in particular, Rules 300, 369, and 372-374; and

35. Such further and other grounds as counsel may advise and this Honourable Court permits.

This application will be supported by the following material:

1. Affidavit of Dr. Gábor Lukács, to be served.

2. Such further and additional materials as the Applicant may advise and this Honourable Court may allow.

The Applicant requests the Canadian Transportation Agency to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Canadian Transportation Agency to the Registry and to the Applicant:

1. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents involving the appointed members of the Agency relating to the Statement and/or issuance of vouchers or credits in relation to the COVID-19 incident, including both before and after publication of the Statement;

2. The number of times the URLs for the Statements were accessed (**French**: https://otc-cta.gc.ca/fra/message-concernant-credits; **English**: https://otc-cta.gc.ca/eng/statement-vouchers) from March 24, 2020 onward;

3. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents between the Canadian Transportation Agency and the travel industry (including but not limited to any travel agencies, commercial airlines, industry groups, etc.) from February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected

by COVID-19; and

4. Complete and unredacted copies of all correspondences, e-mails, and/or complaints that the Agency received from passengers between February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected by COVID-19.

April 6, 2020

"Simon Lin"
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Counsel for the Applicant,
Air Passenger Rights

I HEREBY CERTIFY that the above document is a true copy of the original files in the Court./

JE CERTIFIE que le document ci-dessus est une copie conforme à l'original déposé au dossier de la Cour fédérale.

Filing date / Date de dépôt: April 9, 2020

Dated / Fait le: April 9, 2020

JEAN-FRANÇOIS DUPORT
REGISTRY OFFICER
AGENT DU GREFFE

Cour d'appel fédérale

Date: 20211015

Docket: A-102-20

Ottawa, Ontario, October 15, 2021

Present: GLEASON J.A.

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN TRANSPORTATION AGENCY

Intervener

ORDER

UPON informal motion of the applicant to file an additional affidavit in respect of its disclosure motion;

AND UPON motion of the applicant for an order under Rules 317 and 318 of the *Federal Courts Rules*, SOR 98/106, requiring the Canadian Transportation Agency (the CTA) to disclose the documents described in the applicant's Notice of Motion;

AND UPON motion of the CTA for leave to intervene in this application and other consequential orders;

AND UPON reading the materials filed;

THIS COURT ORDERS that:

1. The motions are granted on the terms set out below;

2. The additional affidavit from Dr. Gábor Lukács, sworn May 12, 2021, may be filed, effective the date it was received by the Court;

3. Within 60 days of the date of this Order, the CTA shall disclose to the applicant:

    a. all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020;

    b. all non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020; and

c. all non-privileged documents related to any meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the statement on vouchers posted on the CTA's website on March 25, 2020 was discussed;

4. The foregoing disclosure shall be made electronically;

5. Within 60 days of the date of this Order, the AGC shall submit to the Court for a ruling on privilege all documents over which privilege is asserted that would otherwise fall within paragraph 3 of this Order, the whole in accordance with the Reasons for this Order;

6. Within the same timeframe, the AGC shall serve and file a redacted version of its submissions, from which details of the contents of the documents are deleted;

7. The applicant shall have 30 days from receipt of the forgoing submissions to make responding submissions, if it wishes;

8. The materials related to claims for privilege shall then be submitted to the undersigned for a ruling on privilege;

9. Within 30 days of receipt of a ruling on the privilege claims, the applicant shall file any additional affidavit(s) it intends to rely on in support of its application;

10. The time for completion of all subsequent steps for perfection of this application shall be governed by the *Federal Courts Rules*;

11. The CTA is granted leave to intervene and to file an affidavit and a memorandum of fact and law of no more than 10 pages, the whole in accordance with the Reasons for this Order;

12. The style of cause is amended to add the CTA as an intervener and it shall be served with all materials the parties intend to file;

13. The issues of whether the CTA will be permitted to make oral submissions and of costs in respect of its intervention are remitted to the panel of this Court seized with hearing this application on its merits; and

14. No costs are awarded in respect of these motions.

"Mary J.L. Gleason"

J.A.

Cour d'appel fédérale

Date: 20211015

Docket: A-102-20

Citation: 2021 FCA 201

Present: **GLEASON J.A.**

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN TRANSPORTATION AGENCY

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 15, 2021.

REASONS FOR ORDER BY: GLEASON J.A.

Date: 20211015

Docket: A-102-20

Citation: 2021 FCA 201

Present: **GLEASON J.A.**

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN TRANSPORTATION AGENCY

Intervener

REASONS FOR ORDER

GLEASON J.A.

[1] I have before me three motions: a motion from the applicant seeking disclosure of documents from the Canadian Transportation Agency (the CTA) under Rules 317 and 318 of the

Federal Courts Rules, SOR/98-106, or alternatively, that a subpoena be issued for their disclosure; an informal motion from the applicant made by way of letter seeking to put additional materials before the Court on the disclosure motion; and a motion from the CTA seeking leave to intervene in this application.

[2] Before turning to each of the motions, a little background is useful.

[3] The underlying judicial review application in this file challenges a statement on vouchers posted on the CTA's website on March 25, 2020, shortly after the onset of the COVID-19 pandemic. The CTA opined in the statement that airlines could issue vouchers to passengers for cancellations caused by the pandemic as opposed to reimbursements for cancelled flights. The statement provided:

> The COVID-19 pandemic has caused major disruptions in domestic and international air travel.
>
> For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.
>
> The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.
>
> On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

> While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).
>
> The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

[4] In its judicial review application, the applicant seeks the following declarations: (1) that the foregoing statement does not constitute a decision of the CTA and has no force or effect at law; (2) that the issuance of the statement violates the CTA’s Code of Conduct and gives rise to a reasonable apprehension of bias, either for the CTA, as a whole, or for any member who supported the statement; and (3) that the CTA as a whole or any member who supported the statement exceeded or lost its or their jurisdiction to rule on passenger complaints seeking reimbursements for cancelled flights. The applicant also seeks injunctive relief requiring, among other things, removal of the statement from the CTA’s website and an order enjoining the CTA as a whole or, alternatively, any member who supported the statement, from hearing passenger complaints requesting reimbursement for flights cancelled because of the pandemic.

[5] The applicant sought an interlocutory injunction for much the same relief on an interim basis. Justice Mactavish dismissed the request for interim relief, but in so doing accepted, without specifically ruling on the point, that the applicant’s judicial review application raised a serious issue (*Air Passenger Rights v. Canada (Transportation Agency)*, 2020 FCA 92, [2020] F.C.J. No. 630 at para. 17).

[6] The CTA then brought a motion to strike the application, which was dismissed by Justice Webb (*Air Passenger Rights v. Canada (Transportation Agency)*, 2020 FCA 155). In so ruling, Justice Webb held that the bias issues raised by the applicant were ones that merit a hearing before a full panel of this Court (at para. 33).

[7] After being seized with the applicant's disclosure motion, I issued a direction requesting submissions on the proper respondent in this matter because the applicant had named the CTA and not the Attorney General of Canada (the AGC). After receipt of submissions from the parties and the AGC, I ruled that the AGC was the proper respondent in light of the nature of the application, the requirements of the *Federal Courts Rules* and the nature of the allegations made in the application. However, I left open the possibility of the CTA's bringing a motion to intervene (*Air Passenger Rights v. The Attorney General of Canada*, 2021 FCA 112).

[8] The AGC subsequently advised that he relied on the CTA's submissions in response to the applicant's motion for disclosure and made brief submissions opposing the applicant's informal motion to file additional materials on the disclosure motion.

[9] Thereafter, the CTA made a motion to intervene in the application, seeking the ability to make submissions related to its jurisdiction and mandate. The applicant opposes the intervention motion, and the AGC takes no position in respect of it.

I. The Motion for Disclosure and the Informal Motion to add an Affidavit on the Disclosure Motion

[10] In its motion for disclosure, the applicant seeks an order requiring disclosure of unredacted copies of all CTA records from March 9 to April 8, 2020 in respect of the impugned statement, including, without restriction, emails, meeting agendas, meeting minutes, notes, draft documents, and memos.

[11] In support of its disclosure motion, the applicant filed an affidavit from its President, Dr. Gábor Lukács, in which he attached excerpts from the transcript of the evidence given by the CTA's Chairperson before the House of Commons Standing Committee on Transport, Infrastructure and Communities on December 1, 2020. Dr. Lukács also appended an email exchange between an official at the Transport Canada and a Member of Parliament and documents obtained from the CTA through an access to information request that sought documents similar to those sought by the applicant in the present motion for disclosure. Several of the documents disclosed by the CTA in response to the access request were heavily redacted. In addition, the documents disclosed are but a few of the several thousand pages that the CTA indicated were responsive to the access request.

[12] The materials appended to Dr. Lukács' affidavit indicate that there were email communications between representatives from two airlines and the CTA regarding the subject matter of the impugned statement before it was issued and that there were likewise similar communications between representatives of the CTA and Transport Canada about the statement

before the statement was issued. Given the redactions to these documents, it is difficult to discern the nature of what was said about the statement in them. Other documents attached as exhibits to Dr. Lukács' affidavit indicate that the Chairperson and Vice-Chairperson of the CTA received drafts of the impugned statement before it was posted on the CTA's website. The fact that the Chairperson of the CTA was involved in approving the statement was confirmed in his testimony to the House of Commons Standing Committee on Transport, Infrastructure and Communities on December 1, 2020 and the email exchange between officials at the Transport Canada and a Member of Parliament. The latter email exchange also suggests that other CTA members endorsed the impugned statement.

[13] In the informal motion, the applicant seeks to add an additional affidavit from Dr. Lukács that appends three additional documents he obtained after he swore his first affidavit in support of the disclosure motion. These documents indicate that there are additional documents concerning the impugned statement that were exchanged between the CTA and Transport Canada prior to the issuance of the statement. One of the appended documents is a less redacted version of one of the emails appended to Dr. Lukács' original affidavit.

[14] I will deal with the informal motion first.

[15] The AGC objects to the filing of Dr. Lukács' additional affidavit because he says that the applicant did not follow the *Federal Courts Rules* in proceeding by way of informal motion and because the additional documents the applicant seeks to add to the record in respect of the disclosure motion are not relevant.

[16] With respect, I disagree. Given the current circumstances associated with the COVID-19 pandemic, as well as the fact that the informal motion contained an affidavit that appended the additional documents that the applicant seeks to put before the Court, there was no need for the applicant to have proceeded via way of formal motion. The AGC has suffered no prejudice due to the way the motion was brought and the Court has before it all that is necessary for disposition of the motion, including the arguments of the parties.

[17] As for relevance, the additional documents are of the same nature as those appended to Dr. Lukács' original affidavit and are relevant to the applicant's bias arguments, which are two-fold in nature. On one hand, the applicant asserts that the posting of the statement, itself, gives rise to a reasonable apprehension of bias because it indicates that the CTA pre-judged the merits of any complaint that might be filed in which a passenger seeks compensation for a cancelled flight. On the other hand, the applicant asserts that there was inappropriate third party interference in the CTA's adoption of the policy reflected in the impugned statement, which the applicant says provides an additional basis for a reasonable apprehension of bias. The documents the applicant wishes to add are relevant to the second prong of its bias argument.

[18] The second affidavit of Dr. Lukács is therefore relevant and I will consider it in support of the applicant's disclosure request.

[19] Turning to that request, adopting the submissions that were previously filed by the CTA, the AGC opposes the requested disclosure for several reasons. First, he says that Rule 317 of the *Federal Courts Rules* does not permit or require the requested disclosure because the Rule only

applies to material in the possession of a tribunal whose order is the subject of an application for judicial review. According to the AGC, there is no basis for disclosure under Rule 317 or 318 because the applicant contends that the impugned statements do not have the force of an order and no order has been made. In the alternative, the AGC submits that the request for disclosure should be denied because it is overly-broad, constitutes a fishing expedition and the materials sought are irrelevant to the issues raised in the application, which the AGC says have been impermissibly expanded by the applicant to include alleged third-party interference in the adoption of the impugned statement.

[20] I disagree in large part with each of these assertions.

[21] Turning to the first of the foregoing assertions, as the applicant rightly notes, the breadth of materials that are subject to disclosure under Rules 317 and 318 of the *Federal Courts Rules* is broader where bias or breach of procedural fairness is alleged, particularly where, as here, relief in the nature of prohibition is sought. In such circumstances, disclosure is not limited to the materials that were before the tribunal when an order was made. Rather, where such arguments are raised, documents in the possession, control or power of a tribunal that are relevant to the allegations of bias or breach of procedural fairness are subject to disclosure. Indeed, were it otherwise, this Court would be deprived of evidence necessary for the disposition of an applicant's claims of bias or breach of procedural fairness and the availability of relief in the nature of prohibition would be largely illusory: see, e.g., *Humane Society of Canada Foundation v. Canada (National Revenue)*, 2018 FCA 66, 289 A.C.W.S. (3d) 875 at paras. 5-6; *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program & Advertising Activities)*, 2006

FC 720, 293 F.T.R. 108 at para. 50, aff'd 2007 FCA 131; *Majeed v. Canada (Minister of Employment & Immigration)*, 1997 CarswellNat 1693, [1993] F.C.J. No. 908 (F.C.T.D.) at para. 3, aff'd [1994] F.C.J. No. 1401 (F.C.A.). Thus, the first assertion advanced by the AGC as to the scope of permitted disclosure under Rules 317 and 318 is without merit.

[22] As concerns the subsidiary arguments advanced by the AGC to resist disclosure, I do not agree that all the documents sought by the applicant are irrelevant or fall outside the scope of the claims made in the applicant's Notice of Application. However, the requested disclosure is broader than necessary and goes beyond that which is relevant to the bias issues raised by the applicant. Disclosure should instead be limited to documents sent to or from a member of the CTA (including its Chairperson and Vice-Chairperson), related to a meeting attended by CTA members or sent to or from a third party concerning the impugned statement between March 9 and March 25, 2020, the date the statement was posted on the CTA website. In addition, privileged documents should be exempt from disclosure.

[23] For clarity, meetings include telephone conversations, video conferences and internet meetings as well as in-person meetings and third parties include anyone other than a member or employee of the CTA.

[24] As noted, the applicant's allegations related to bias are two-fold and concern, first, the alleged pre-judgement by the CTA as an institution or, in the alternative, by its constituent members of passengers' entitlement to reimbursement for flights cancelled due to the COVID-19 pandemic and, second, alleged third-party influence in the development of the impugned

statement on vouchers. The Notice of Application and affidavits of Dr. Lukács are broad enough to encompass both aspects of the bias argument. I therefore do not accept that the bias argument has been impermissibly widened by the applicant.

[25] Documents received by and sent from CTA members or sent to or by anyone at the CTA from third parties about the subject matter of the statement that were sent or received prior to the date the statement was posted are relevant to the applicant's bias allegations because they are relevant to the involvement of decision-makers and third parties in the adoption of the impugned statement. Such involvement is central to the applicant's bias allegations. Likewise, documents related to meetings attended by CTA members during which the impugned statement was discussed before its adoption are similarly relevant.

[26] The evidence filed to date by Dr. Lukács shows that there were communications between third parties and the CTA about the subject matter of the impugned statement, prior to its adoption. Such evidence also suggests that the CTA's Chair, and possibly other CTA members, were involved in the decision to adopt and post the impugned statement. There is therefore a factual grounding for the requested disclosure, which cannot be said to constitute an impermissible fishing expedition.

[27] However, the applicant has provided no evidence to substantiate disclosure of documents post-dating the date the impugned statement was posted. Similarly, the applicant has failed to establish that documents that were purely internal to the CTA and which were not shared with its members are relevant. In short, there is no basis to suggest that such documents would contain

information about whether CTA members or third parties were involved in making the decision to post the impugned statement, which is the essence of the applicant's bias allegations. Thus, these additional documents need not be disclosed.

[28] The AGC, in adopting the submissions of the CTA, has requested that if disclosure is ordered, privileged documents be exempt from disclosure and that a process be established for ruling on privilege claims. I agree that this is necessary, and believe that the most expeditious process for advancing any claims of privilege would be for the CTA to submit any documents over which it claims privilege to the Court on a confidential basis for a ruling.

[29] I would accordingly order that, within 60 days from the date of the Order in these matters, all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 or sent to a third party by the CTA or received from a third party by the CTA between the same dates concerning the impugned statement or related to a meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the impugned statement was discussed shall be provided electronically to the applicant. I would also order that, within the same period, the AGC shall provide the Court, on a confidential basis, copies of any document over which the CTA claims privilege, that would otherwise be subject to disclosure, along with submissions outlining the basis for the privilege claim. Such filing may be made via way of informal motion and should be supported by an affidavit attaching copies of the documents over which privilege is claimed. A redacted version of the AGC's submissions, from which all details regarding the contents of the documents are deleted, shall be served and filed.

The applicant shall have 30 days from receipt to make responding submissions, if it wishes. These materials shall then be forwarded to the undersigned for a ruling on privilege.

[30] Should a 60-day period be too short to accomplish the foregoing, the AGC may apply for an extension, via way of informal motion supported by affidavit evidence, if the time provided is inadequate by reason of complexities flowing from the COVID-19 pandemic or the number of documents involved.

[31] The applicant will have 30 days from receipt of this Court's ruling on the privilege claims to serve any additional affidavits it intends to rely on in support of its application. Subsequent time limits for completion of the remaining steps to perfect the application will thereafter be governed by the *Federal Courts Rules*.

II. The Motion for Intervention

[32] I turn now to the CTA's motion for intervention. It seeks leave to intervene to provide a brief affidavit, a memorandum of fact and law and oral submissions on its jurisdiction and, more specifically, on the scope of its regulatory and adjudicative functions. The CTA proposes that such affidavit would be limited to attaching a sample of six resource, informational and guidance tools it says it has issued and posted on its website and the submissions limited to explaining the scope of the CTA's jurisdiction and practice of publishing guidance materials on its website.

[33] The applicant objects to the intervention, arguing that it is an impermissible attempt by the CTA to indirectly argue the merits of the bias issue. The applicant further submits that the AGC is the only party who should be heard and says that the AGC is able to adequately defend against the bias claims. The applicant in the alternative submits that, if it is allowed to intervene, the CTA should not be allowed to file additional evidence as an intervener is bound by the record the parties put before the Court and may not file new evidence or raise new arguments. The applicant also says that two of the six examples the CTA wishes to submit are bootstrapping as they were issued by the CTA after this application was commenced.

[34] The test for intervention applied by this Court involves the consideration of several factors such as whether: (1) the intervener is directly affected by the outcome; (2) there is a justiciable issue and a public interest raised by the intervention; (3) there is another efficient means to put the issue before the Court; (4) the position of the proposed intervener is adequately defended by one of the parties; (5) the interests of justice are better served by the intervention; and (6) the Court can effectively decide the case without the participation of the intervener: *Rothmans Benson & Hedges Inc. v. Canada (Attorney General)*, [1989] F.C.J. No. 446, 1989 CarswellNat 594, at para. 12; *Sport Maska v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3 at para. 37-39[*Sport Maska*]. However, as noted at paragraph 42 of *Sport Maska*, the test is a flexible one as each case is different and, ultimately, the most important question for the Court is whether the interests of justice are best served by granting the intervention.

[35] Here, I believe the interests of justice would be best served by granting the CTA the right to intervene as the Court may well benefit from some of the background information the CTA

seeks to put before the Court, which will set out the relevant context. The CTA is uniquely placed to provide such information to the Court, and such information might be important for the Court to understand in order to appreciate the relevant backdrop and scope of the CTA's jurisdiction in regulatory and adjudicative matters. Administrative tribunals have often been granted leave to intervene to explain their jurisdiction as was noted by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation*, 2015 SCC 44, [2015] 3 S.C.R. 147 at paras. 42 and 48.

[36] That said, it is vital that the CTA's intervention not impair its ability to function as an independent administrative tribunal. Its submissions must therefore be factual and go no further than explaining its role and setting out the examples the CTA wishes to put before the Court that pre-date March 25, 2020. I do not believe it appropriate that the CTA refer to more recent examples because they are not directly relevant to what transpired in this application and may be perceived as an attempt to bootstrap the approach taken by the CTA in issuing the impugned statement. It is not the role of the CTA in intervening to act as an advocate or in any way defend the propriety of issuing the impugned statement. The CTA should rather behave as an *amicus*, who is allowed to intervene solely to ensure the Court possesses relevant background information.

[37] The examples the CTA will be allowed to put before the Court are not the sort of evidence that it is impermissible for an intervener to add to the record, if they indeed even constitute evidence as opposed to something more akin to a decision that may simply be filed or referred to in submissions. They do not expand the factual record or points in issue.

[38] I would accordingly allow the CTA to submit an affidavit that attaches the four examples appended as exhibits to the affidavit of Meredith Desnoyers, sworn July 14, 2021, which pre-date March 25, 2020. The applicant may submit such affidavit at the same time as the AGC submits its affidavits in response to those of the applicant. I would also allow the CTA to file a memorandum of fact and law of no more than 10 pages, explaining its jurisdiction and practice of publishing guidance materials on its website, as exemplified by the examples attached to the affidavit it will file. I would further grant the CTA's request that the style of cause be amended to add it as an intervener and that the other parties be ordered to serve the CTA with all further materials filed in this application.

[39] I would leave the issue of whether the CTA will be allowed to make oral submissions during the hearing to the panel seized with the application on the merits and would remit to such panel the issue of whether costs should be awarded in respect of the intervention.

[40] These three motions will therefore be granted on the foregoing terms. I make no order as to costs as none were sought in respect of the motion for intervention and success was divided on the motion for disclosure.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-102-20
STYLE OF CAUSE:	AIR PASSENGER RIGHTS v. THE ATTORNEY GENERAL OF CANADA and THE CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	GLEASON J.A.
DATED:	OCTOBER 15, 2021

WRITTEN REPRESENTATIONS BY:

Simon Lin	FOR THE APPLICANT
J. Sanderson Graham	FOR THE RESPONDENT
Barbara Cuber	COUNSEL FOR THE CANADIAN TRANSPORTATION AGENCY

SOLICITORS OF RECORD:

Evolink Law Group Burnaby, British Columbia	FOR THE APPLICANT
A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT
Legal Services Directorate Canadian Transportation Agency Gatineau, Quebec	FOR THE CANADIAN TRANSPORTATION AGENCY

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

WRITTEN REPRESENTATIONS OF THE MOVING PARTY

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Applicant is seeking the Court's assistance in the progressive enforcement of the Order of Gleason, J.A., dated October 15, 2021, compelling the Canadian Transportation Agency [**CTA**] to disclose documents in its possession [**Disclosure Order**].[1]

2. The CTA has failed and continues to fail to comply with the Disclosure Order despite multiple written requests from the Applicant. The CTA has failed to disclose the Withheld Materials set out in Schedule "A".

3. The Applicant is seeking a specific Order compelling the CTA to disclose the Withheld Materials within five (5) calendar days, thereby affording the CTA and its key personnel a final opportunity to comply with their legal obligations under the Disclosure Order. If the CTA continues to disobey this Court's Order(s), then an order for a contempt of court hearing ought to be issued under Rule 467 without further delay.

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[1] Order of Gleason, J.A. (October 15, 2021), paras. 3-4 [Tab 4, pp. 276-277].

4. Regrettably, the CTA's counsel has also been shielding the CTA's three executive officers from provable knowledge of the Disclosure Order, and has consistently refused to confirm that the order was brought to the attention of CTA's three executives.

5. To foster compliance with the Disclosure Order and to ensure that the CTA's executive officers are fully aware of the CTA's obligations and their own obligations as executives of the CTA, the Applicant is asking that the Court direct the CTA's solicitor of record to bring the Disclosure Order and the order made on this motion to the attention of the CTA's Chairperson, Vice-Chairperson, and Secretary within one (1) day of the order, and to confirm to the Court having done so within two (2) days of the order.

6. The Applicant is also asking for an order under Rule 147 to validate the service of this motion that has already been delivered to the three CTA executives' work email addresses. The Applicant seeks a further order under Rule 467(4) that service of the Rule 467 "show cause" Order be served using alternative methods that would bring the Court's Orders to those recipients' attention.

The Underlying Application for Judicial Review

7. The underlying Application relates to the widely disseminated "Statement on Vouchers" that the CTA published on its website on March 25, 2020 [**Statement on Vouchers**], purporting to guide the public on their right to refunds of unused airfares.

8. The Applicant is a non-profit organization seeking judicial review on behalf of and for the benefit of the travelling public based on two distinct grounds of review:

(a) **Reasonable Apprehension of Bias Ground** [**RAB Ground**] — the CTA's issuing of the Statement on Vouchers is contrary to the CTA's own *Code of Conduct*, **and** gives rise to a reasonable apprehension of bias with respect to the CTA as a whole, or alternatively, the CTA's members who supported and/or endorsed the Statement on Vouchers; and

(b) **Misinformation Ground** — the content of the Statement on Vouchers contains misinformation and omissions about passengers' legal rights vis-à-vis the airlines, and infuses confusion for the travelling public.

9. The RAB Ground is two-fold and concerns: (i) the pre-judgement by the CTA as an institution, or in the alternative, by its constituent members, of passengers' entitlement to reimbursement for flights cancelled due to the COVID-19 pandemic; and (ii) third-party influence on the development of the impugned Statement on Vouchers.[2]

10. Prior to Gleason, J.A.'s Disclosure Order, two justices of this Court had already confirmed that this RAB Ground presents a *serious issue to be tried* on its merits.[3]

B. The October 15, 2021 Disclosure Order of Gleason, J.A.

11. The Notice of Application, issued on April 9, 2020, contained a request that the CTA transmit four categories of relevant materials in its possession to the Registry and the Applicant.[4] Since the CTA objected to the request to transmit materials, the Court directed the Applicant to assert its request by way of a formal motion.

12. On January 3, 2021, the Applicant brought a motion for disclosure of unredacted copies of all CTA records from March 9, 2020 to April 8, 2020 in respect of the Statement on Vouchers, including, without restriction, emails, meeting agendas, meeting minutes, notes, draft documents, and memos.[5] In the interest of a swift resolution of the disclosure motion and the Application, the Applicant pursued only one of the four categories of the materials in the Notice of Application, and with a narrower date range.

13. The Applicant's disclosure motion as well as numerous other procedural matters that arose since then were heard and decided by Gleason, J.A.

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[2] Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 24 [Tab 5, p. 288].
[3] Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at paras. 5-6 [Tab 5, pp. 282-283].
[4] Notice of Application (Apr. 9, 2020), request to transmit [Tab 3, p. 273].
[5] Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 10 [Tab 5, p. 284].

14. On October 15, 2021, Gleason, J.A. issued the Disclosure Order and compelled the CTA to disclose, within sixty (60) days, three clearly and carefully circumscribed subcategories of documents within a narrowed date range:

(a) all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020 [**CTA Member Correspondences**];

(b) all non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020 [**Third-Party Correspondences**]; and

(c) all non-privileged documents related to any meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the statement on vouchers posted on the CTA's website on March 25, 2020 was discussed [**Meeting Documents**].[6]

15. The reasons for the Disclosure Order state that "meetings include telephone conversations, video conferences and internet meetings as well as in-person meetings and third parties include anyone other than a member or employee of the CTA."[7]

16. The Disclosure Order is unambiguous that the disclosure be electronic.[8]

17. Gleason, J.A. also carefully crafted informal procedures for extensions of time or for claiming privilege, and Her Ladyship remained seized with these matters.[9]

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6 Order of Gleason, J.A. (Oct. 15, 2021), para. 3 [Tab 4, pp. 276-277].
7 Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 23 [Tab 5, p. 288].
8 Order of Gleason, J.A. (Oct. 15, 2021), para. 4 [Tab 4, p. 277].
9 Order of Gleason, J.A. (Oct. 15, 2021), paras. 5-8 [Tab 4, p. 277]; and Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 30 [Tab 5, p. 291].

C. Statement on Vouchers: Chronology and the Withheld Materials

18. On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic, followed by the Government of Canada's travel advisories around March 13, 2020 and restricting entry of foreign nationals. Air travel changed significantly, with airlines cancelling flights and passengers no longer travelling for non-essential reasons, leading to legal disputes over entitlement to refunds between airlines and passengers.

19. On March 25, 2020, the Agency published on its website the Statement on Vouchers, which the CTA used as template replies to passengers' inquiries and was also further disseminated by air carriers in order to deny refunds.[10] For the past 21 months, the CTA has been tight-lipped on what led up to the CTA issuing the unattributed Statement on Vouchers, or even who drafted or approved the Statement on Vouchers.[11]

20. On December 14, 2021, the CTA disclosed a limited number of documents [**Dec. 14 Docs**],[12] partially revealing the behind-the-scenes third-party dealings leading to the Statement on Vouchers, as detailed below. On December 17, 2021, the Applicant informed the CTA that the Dec. 14 Docs failed to disclose at least fifteen (15) sets of documents that are covered by the Disclosure Order.[13] On December 24, 2021, the CTA provided a limited response and a very small number of the missing documents.[14]

21. Those limited number of documents the CTA has provided thus far reveal that many documents within the Disclosure Order's scope were not disclosed, as described in Schedule "A" [**Withheld Materials**]. The fifteen items identified by the Applicant on December 17, 2021 are particularized in the list of Withheld Materials, and include six additional items that the Applicant subsequently discovered were missing.

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[10] Lukács Affidavit, para. 9 and Exhibits "B" [Tabs 2 and 2B, pp. 20 and 39].
[11] Lukács Affidavit, para. 10 [Tab 2, p. 20].
[12] Lukács Affidavit, para. 16(a).
[13] Lukács Affidavit, Exhibit "AO" [Tab 2AO, p. 186].
[14] Lukács Affidavit, Exhibit "AQ" [Tab 2AQ, p. 203].

i. March 18, 2020, Transport Canada's Encrypted Email to the CTA

22. On March 18, 2020, Mr. Colin Stacey, the Director General of Air Policy at Transport Canada, forwarded an encrypted email to Ms. Marcia Jones, the CTA's former Chief Strategy Officer.[15] Although the substance of their email exchanges are presently heavily redacted, the Respondent's motion for extension of time on December 14, 2021 *ipso facto* confirms that the emails are within the Disclosure Order's scope.

23. In the Dec. 14 Docs, the CTA did not disclose the original email Mr. Stacey forwarded to Ms. Jones, which would have included the forwarded content and the attachments. The missing documents are described in the Withheld Materials as B2.

ii. March 18, 2020, Request from Transat to Recognize Vouchers

24. On March 18, 2020, George Petsikas, Transat's Senior Director of Government and Industry Affairs, spoke to Ms. Jones, as per the email with subject line "Request for recognition and acceptance of travel voucher solutions."[16] Mr. Petsikas requested the CTA to urgently issue a statement to recognize vouchers instead of refunds, for Transat to fend off passengers' credit card chargebacks when services were not rendered and protect its cash flow. Mr. Scott Streiner, the CTA's former Chairperson, stated internally that this "seems to boil down to a commercial dispute between the carrier and the credit card companies," and he was "not sure [the CTA has] a clear role here," but marked this for discussion at the March 19, 2020 Executive Committee [**EC**] meeting.[17]

25. In the Dec. 14 Docs, the CTA did not produce any documents for the March 19, 2020 EC meeting. The CTA also, subsequently, failed to address this omission.[18] The missing documents are described in the Withheld Materials as C1.

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[15] Lukács Affidavit, Exhibit "G" [Tab 2G, p. 72].
[16] Lukács Affidavit, Exhibit "H" [Tab 2H, p. 74].
[17] Lukács Affidavit, Exhibit "I" [Tab 2I, p. 77].
[18] Lukács Affidavit, Ex. "AO", "AQ", and "AV" [Tabs 2AO, 2AQ, 2AV; pp. 186, 203, 236].

iii. March 19, 2020, Ms. Jones Acknowledges Transat's Urgent Request

26. On the afternoon of March 19, 2020, in response to Mr. Petsikas's further follow-up of Transat's urgent request, Ms. Jones responded saying "[p]lease rest assured we are looking into this..." and "I will definitely keep you posted of any updates."[19]

iv. March 20, 2020, Ms. Jones is to Draft a Statement on Vouchers

27. At the Friday March 20, 2020 EC meeting, Ms. Jones was assigned to "[p]repare and circulate draft statement with respect to air passenger refunds and vouchers during COVID-19" by next week.[20] However, near the close of business on that same day, Mr. Streiner then specifically instructed her to "remove the 'refunds and vouchers' item, since we're not quite sure yet what will be done on this front or how."[21]

28. The Respondent's motion for claim to privilege contains a single "decisions and deliverables" email for the March 20, 2020 EC meeting, and the Dec. 14 Docs contained nothing else about this meeting.[22] The CTA has not disclosed any meeting agenda, meeting minutes, meeting notes, nor any further correspondences on the "decisions and deliverables." The missing documents are described in the Withheld Materials as C2.

v. Relevant Dealings Over the Weekend of March 21 and 22, 2020

29. Although drafting of a statement on vouchers was no longer on the to-do list, a slew of activity ensued that weekend, including meetings with Transport Canada and unidentified third-parties. Early morning on Sunday March 22, 2020, Mr. Streiner circulated a draft of the Statement on Vouchers. The Dec. 14 Docs do not reveal what caused Mr. Streiner to change his mind, nor who authored the statement's first draft.

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[19] Lukács Affidavit, Exhibit "J" [Tab 2J, p. 80].
[20] Lukács Affidavit, Exhibit "K" [Tab 2K, p. 84].
[21] *Ibid.*
[22] *Ibid*, Lukács Affidavit, Exhibit "AQ" [Tab 2AQ, p. 203].

(1) Meetings with Transport Canada and Unidentified Third-Parties

30. During that weekend, Mr. Streiner spoke with a Transport Canada Deputy Minister and an unidentified third-party about issuing the Statement on Vouchers,[23] contrary to the CTA's *Code of Conduct*.[24] On March 22, 2020, Mr. Streiner also indicated that he spoke with "other federal players," but did not identify who those would be.[25]

31. During the same weekend, Ms. Jones spoke with a Transport Canada Assistant Deputy Minister named "Lawrence" about the Statement on Vouchers.[26] Mr. Streiner also emailed Ms. Jones in the afternoon of March 22, 2020, enclosing the draft Statement on Vouchers and a draft CTA decision regarding Air Canada, with a message to Ms. Jones that it is "[a]s background for your call," without specifying what call that was. This call likely involved third-parties since the CTA's internal call was at 10:30AM (see paragraph 33 below) and Mr. Streiner's email came in the afternoon.

32. In the Dec. 14 Docs, the CTA did not produce any documents relating to these third-party meetings during the weekend of March 21-22, 2020, except the lone email in the Respondent's motion for extension of time confirming that these meetings occurred.[27] These missing documents involving Transport Canada and/or other third-parties are described in the Withheld Materials as C3, C10, and B3.

(2) First Draft of the Statement on Vouchers and Discussion(s) Thereof

33. In the early morning on Sunday March 22, 2020, Mr. Streiner emailed five key personnel at the CTA, revealing a prepared draft of the Statement on Vouchers and indicating it would be "one item for discussion on our 10:30 call. Talk soon."[28] The

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23 Lukács Affidavit, Exhibit "T" [Tab 2T, p. 116].
24 *Code of Conduct*, section 39 – Lukács Affidavit, Exhibit "D" [Tab 2D, p. 55].
25 Lukács Affidavit, Exhibit "M" [Tab 2M, p. 90].
26 Lukács Affidavit, Exhibit "T" [Tab 2T, p. 116].
27 *Ibid.*
28 Lukács Affidavit, Exhibit "L" [Tab 2L, p. 87].

recipients of the email are Ms. Elizabeth Barker (Vice-Chairperson), Ms. Marcia Jones, Ms. Valerie Lagace (Secretary of the CTA), Mr. Tom Oommen (Chief Compliance and Enforcement Officer), and Mr. Sebastien Bergeron (Chief of Staff).[29]

34. In the Dec. 14 Docs, the CTA did not produce the Microsoft Word files of the Statement on Vouchers and its drafts. These electronic Microsoft Word files contain metadata, including data on its authorship.[30] Although this omission was brought to the CTA's attention, the CTA has refused to produce these files.[31] These missing Microsoft Word files with metadata are described in the Withheld Materials as A1.

35. In the Dec. 14 Docs, the CTA also did not produce any documents for the 10:30AM call on Sunday March 22, 2020, where the Statement on Vouchers was discussed. The missing documents are detailed in the Withheld Materials as C5.

(3) Mr. Streiner's Discussions with Vice-Chairperson

36. Later in the morning on Sunday March 22, 2020, Mr. Streiner emailed five of the CTA's Members,[32] copying Ms. Barker in Cc, and provided a draft of the Statement on Vouchers for those Members to provide feedback by 2:00PM the same day.[33] All of the Members endorsed or approved the issuance of the Statement on Vouchers.[34]

37. Mr. Streiner's email stated that "Liz and I wanted to share [the draft Statement on Vouchers] with all Members...," confirming that Mr. Streiner and Ms. Barker already had some discussion(s) about this topic. However, in the Dec. 14 Docs, the CTA did not disclose any documents relating to the discussion(s) between Mr. Streiner and Ms. Barker. The missing documents are described in the Withheld Materials as C4.

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29 Lukács Affidavit, paras. 20 and 41 [Tab 2, pp. 22 and 26].
30 Lukács Affidavit, Exhibit "AW" [Tab 2AW, p. 244].
31 Lukács Affidavit, Ex. "AO", "AQ", and "AV" [Tabs 2AO, 2AQ, 2AV; pp. 186, 203, 236].
32 "Organization and mandate", p.2 – Lukács Affidavit, Exhibit "C" [Tab 2C, p. 43].
33 Lukács Affidavit, Exhibit "M" [Tab 2M, p. 90].
34 Lukács Affidavit, Exhibits "N"-"Q" [Tabs 2N-2Q, pp. 93-103].

(4) Transat's Reiterated Request to Recognize Vouchers in Lieu of Refunds

38. On the afternoon of Sunday March 22, 2020, Mr. Jean-Marc Estache, Transat's President, sent a letter to Mr. Streiner, and copied to officials at Transport Canada, reiterating Mr. Petsikas's request that the CTA recognize vouchers in lieu of refunds.[35]

39. The CTA's Dec. 14 Docs only included the letter from Transat's President, but excluded the email enclosing the letter.[36] Upon follow-up, the CTA stated that the omission was inadvertent and provided an email chain dated March 22, 2020.[37] In that email, Mr. Streiner forwarded Transat's letter to the EC with a note that "[s]ome of these items were covered in our discussion on Friday [March 20, 2020] or the call I have with several of you this morning [March 22, 2020]. Others weren't. We'll talk about all of them tomorrow [Monday March 23, 2020]."[38]

40. The above email confirms that Transat's request would have been discussed on March 23, 2020. However, in the Dec. 14 Docs, the CTA did not disclose any documents in respect of the March 23, 2020 discussions. The missing documents are described in the Withheld Materials as C6.

vi. March 23, 2020

41. From the time Mr. Streiner circulated a first draft of the Statement on Vouchers on March 22, 2020, he repeatedly reiterated the urgency of having the statement posted on March 23, 2020.[39] The Statement on Vouchers' text was finalized at 12:00PM on March 23, 2020 and Mr. Streiner directed the CTA's Secretary, Ms. Lagacé, to "finalize and post the statement as provided yesterday" without further changes.[40]

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[35] Lukács Affidavit, Exhibit "R" [Tab 2R, p. 106].
[36] *Ibid.*
[37] Lukács Affidavit, Exhibit "AQ" [Tab 2AQ, p. 203].
[38] Lukács Affidavit, Exhibit "S" [Tab 2S, p. 110].
[39] Lukács Affidavit, Exhibits "M" and "U" [Tabs 2M and 2U, pp. 90 and 119].
[40] Lukács Affidavit, Exhibit "W" [Tab 2W, p. 126].

42. The Statement on Vouchers was not published by the CTA until the afternoon of March 25, 2020.[41] Mr. Streiner's email from the morning of March 24, 2020 suggests he was aware the Statement on Vouchers had not yet been posted on March 23, 2020 as he directed, and proposed further changes to be incorporated "so it's ready for release along with the two decisions later today [March 24, 2020]."[42]

43. The Dec. 14 Docs did not contain any documents on March 23, 2020 about the Statement on Vouchers after Mr. Streiner's clarification for Ms. Lagacé at 12:09PM on March 23, 2020,[43] and is wholly unclear how Mr. Streiner could learn of the statement's status without corresponding, since CTA personnel were all working from home at the time.[44] These missing documents are described in the Withheld Materials as A2.

vii. March 24, 2020

44. On March 24, 2020, the CTA was preparing other materials that accompanied the Statement on Vouchers, including an announcement to air carriers and other third-parties, and a template media response. The CTA's Members also had a meeting on March 24, 2020 where the Statement on Vouchers was an item for discussion.

(1) Draft Announcement to Carriers of the Statement on Vouchers

45. At 9:05AM on March 24, 2020, Ms. Jones sent Mr. Streiner a draft email she planned to send to carriers and other third-parties, to announce the Statement on Vouchers amongst other things.[45] The final version was disseminated on March 25, 2020.[46]

[41] Lukács Affidavit, Exhibit "AK" [Tab 2AK, p. 169].
[42] Lukács Affidavit, Exhibit "Y" [Tab 2Y, p. 133].
[43] Lukács Affidavit, Exhibit "X" [Tab 2X, p. 130].
[44] Lukács Affidavit, Exhibit "AI" [Tab 2AI, p. 162].
[45] Lukács Affidavit, Exhibit "AA" [Tab 2AA, p. 139].
[46] Lukács Affidavit, Exhibits "AL" and "AM" [Tabs 2AL and 2AM, pp. 172 and 176].

46. The email in the Dec. 14 Docs suggests Mr. Streiner responded to Ms. Jones before the Members' call the morning of March 24, 2020.[47] However, that email appears to have been tampered with, and the sender and recipient information was completely removed. The missing documents are described in the Withheld Materials as A4.

(2) No Documentation for the Members' Call on the Statement on Vouchers

47. On March 24, 2020, there was a meeting scheduled for the CTA's Members where the Statement on Vouchers would be dealt with.[48] The meetings of the CTA's Members are typically recorded with formal meeting minutes.[49] However, the Dec. 14 Docs did not contain any document from the CTA Members' meeting on March 24, 2020. The missing documents are described in the Withheld Materials as C7.

(3) Correspondences to/from Third-Parties on Refunds and Vouchers

48. On the afternoon of March 24, 2020, a CTA employee said the CTA had received correspondences from third parties about refunds and vouchers, including media requests, dozens of questions on Twitter, and some inquiries on the CTA's Info email, and sought guidance on whether to simply respond using the Statement on Vouchers.[50]

49. In the Dec. 14 Docs, the CTA did not disclose these correspondences from third-parties although they are Third-Party Correspondences covered by the Disclosure Order. On December 24, 2021, the CTA confirmed the existence of these missing documents, but refused to disclose them.[51] The missing documents are described in the Withheld Materials as B4.

[47] Lukács Affidavit, Exhibit "AA" [Tab 2AA, p. 139].
[48] Lukács Affidavit, Exhibit "V" [Tab 2V, p. 122].
[49] Lukács Affidavit, para. 14 and Exhibit "E" [Tabs 2 and 2E, pp. 21 and 57].
[50] Lukács Affidavit, Exhibit "AB" [Tab 2AB, p. 141].
[51] Lukács Affidavit, Exhibit "AQ" [Tab 2AQ, p. 203].

(4) Mr. Streiner's Draft Media Response for the Statement on Vouchers

50. On the evening of March 24, 2020, Mr. Streiner circulated an "Answer" to possible questions from the media on why the CTA issued the Statement on Vouchers and stressed the importance that the CTA will "need to be ready when the call comes."[52]

51. In the Dec. 14 Docs, the CTA did not disclose the MS Word file(s) of Mr. Streiner's document, nor its further drafts. The electronic files contain metadata, including data on its authorship[53] and are described in the Withheld Materials as A5.

(5) Missing Emails During Regular Business Hours on March 24, 2020

52. The Statement on Vouchers was not published by the CTA until the afternoon of March 25, 2020.[54] Mr. Streiner's email from the early morning of March 24, 2020 directed that the Statement on Vouchers be posted "later today."[55]

53. The Dec. 14 Docs did not contain any further documents on March 24, 2020 regarding the Statement on Vouchers after Mr. Streiner's directions that morning. Similar to March 23, 2020, it is wholly unclear how Mr. Streiner could learn of the statement's status without corresponding, since CTA personnel were all working from home at the time.[56] The missing documents are described in the Withheld Materials as A3.

viii. March 25, 2020 - The Day the Statement on Vouchers is Published

54. On March 25, 2020, the CTA published the Statement on Vouchers in the afternoon. Before the publication, the Chairperson and Vice-Chairperson had "a lot of back-and-forth."[57] Shortly after publication, Ms. Jones sent an announcement to all air

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52 Lukács Affidavit, Exhibit "AC" [Tab 2AC, p. 144].
53 Lukács Affidavit, Exhibit "AW" [Tab 2AW, p. 244].
54 Lukács Affidavit, Exhibit "AK" [Tab 2AK, p. 169].
55 Lukács Affidavit, Exhibits "Y" and "Z" [Tabs 2Y and 2Z, pp. 133 and 136].
56 Lukács Affidavit, Exhibit "AI" [Tab 2AI, p. 162].
57 Lukács Affidavit, Exhibit "AG" [Tab 2AG, p. 156].

carriers, and other stakeholders of the Statement on Vouchers. The identities of all the stakeholders remain unknown, except two that the CTA chose to disclose to the Court.

(1) Mr. Streiner's Numerous Back-and-forth with Vice-Chairperson

55. On the morning of March 25, 2020, Mr. Streiner had numerous back-and-forth with the Vice-Chairperson regarding the Statement on Vouchers, and then proceeded to cancel the scheduled meeting at 10AM with other EC personnel.[58] Similarly, Mr. Streiner's blank email in the afternoon to Ms. Jones, Mr. Bergeron, and Ms. Barker attaching the Statement on Vouchers confirms some discussion(s) had occurred.[59]

56. However, in the Dec. 14 Docs, the CTA did not produce the documents about the back-and-forth between Mr. Streiner and Ms. Barker on March 25, 2020, or Mr. Streiner's discussions with Ms. Jones and/or Mr. Bergeron. The missing documents are described in the Withheld Materials as C8.

57. Furthermore, in the Dec. 14 Docs, the CTA did not produce documents about when and how the March 25, 2020 call at 10:00AM was initially scheduled. The missing documents are described in the Withheld Materials as C9.

(2) Ms. Jones' Draft FAQs for the Statement on Vouchers

58. In the late evening of March 24, 2020, Ms. Jones first circulated an FAQ explaining why the Statement on Vouchers was issued.[60] A Microsoft Word file of Ms. Jones's draft FAQs ultimately ended up in Ms. Barker's hands, and Ms. Barker sent a further revision of that draft FAQ to Mr. Streiner in the afternoon of March 25, 2020.[61]

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[58] Lukács Affidavit, Exhibits "AE"-"AH" [Tabs 2AE-2AH, pp. 150-159].
[59] Lukács Affidavit, Exhibit "AJ" [Tab 2AJ, p. 166].
[60] Lukács Affidavit, Exhibit "AD" [Tab 2AD, p. 147].
[61] Lukács Affidavit, Exhibits "AH" and "AN" [Tabs 2AH and 2AN, pp. 159 and 180].

59. However, in the Dec. 14 Docs, the CTA did not produce documents on how Ms. Jones's draft FAQs suddenly ended up in Ms. Barker's hands, without discussions beforehand. The missing documents are described in the Withheld Materials as A6.

(3) Ms. Jones Announces the Statement on Vouchers to Third-Parties

60. On March 25, 2020 at 2:34PM, Ms. Jones disseminated the final version of the email described in the Withheld Materials as A4.[62] In the Dec. 14 Docs, the CTA only produced the email responses from two third-parties (Transat and the Canadian Automobile Association),[63] and no responses from any other third-parties were provided. Ms. Jones's email was destined to be sent *en masse* to all carriers and also to "PIAC".[64]

61. Although Ms. Jones indicated that "PIAC" reached out to the CTA, the Dec. 14 Docs do not contain these third-party correspondences. The missing documents are described in the Withheld Materials as B5.

62. **Most importantly,** in the Dec. 14 Docs, the CTA did not disclose Ms. Jones's original sent email. That original sent email contains the Bcc (Blind carbon copy) field that reveals all the third-parties that Ms. Jones had disseminated that announcement to.[65] This omission was specifically brought to the CTA's attention, but it was left unanswered.[66] The missing documents are described in the Withheld Materials as B1.

D. The CTA's Continued Failure to Comply with the Disclosure Order

63. Upon receiving the Dec. 14 Docs, the Applicant discovered that at least fifteen (15) sets of documents were missing and wrote to the CTA on December 17, 2021 to request the CTA to comply with the Disclosure Order within one week.[67]

[62] Lukács Affidavit, Exhibits "AL" and "AM" [Tabs 2AL and 2AM, pp. 172 and 176].
[63] *Ibid.*
[64] Lukács Affidavit, Exhibit "AA" [Tab 2AA, p. 139].
[65] Lukács Affidavit, Exhibit "AX" [Tab 2AX, p. 248].
[66] Lukács Affidavit, Exhibits "AO" and "AQ" [Tabs 2AO and 2AQ, pp. 186 and 203].
[67] Lukács Affidavit, Exhibit "AO" [Tab 2AO, p. 186].

64. To foster compliance with the Disclosure Order, on December 20, 2021, the Applicant requested that counsel for the CTA ensure that the Disclosure Order and the Applicant's December 17, 2021 letter were brought to the attention of the CTA's executive officers: (1) the Chairperson; (2) the Vice-Chairperson; and (3) the Secretary.[68]

i. CTA Declined the Applicant's Attempts to Seek Compliance

65. On December 24, 2021, the CTA responded to the Applicant's letter of December 17, 2021 and provided a limited response to six of the fifteen missing items:

(a) The CTA provided only three (3) out of the fifteen (15) sets of the missing documents in an alternative scanned paper format, rather than the missing electronic Microsoft Word format that contained metadata;

(b) The CTA also provided a partial response to another three (3) of the fifteen (15) sets of the missing documents; and

(c) The CTA did not deny that the remaining nine (9) sets of missing documents exist, but the CTA failed to provide a legal justification for why the CTA would be excused from providing those documents.

66. The fifteen (15) missing items identified in the Applicant's December 17, 2021 letter are subsumed within the twenty-one (21) missing items of Withheld Materials in Schedule "A", taking into account the CTA's further response on December 24, 2021 and further missing items subsequently discovered.

67. Prior to this motion, the Withheld Materials were specifically brought to the CTA's attention and their compliance with the Disclosure Order was again requested;[69] however, regrettably, the CTA has yet to respond.[70]

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68 Lukács Affidavit, Exhibit "AP" [Tab 2AP, p. 192].
69 Lukács Affidavit, Exhibit "AV" [Tab 2AV, p. 236].
70 Lukács Affidavit, para. 57 [Tab 2, p. 28].

ii. Key Personnel Shielded from Knowledge of the Disclosure Order

68. Other than the partial response on December 24, 2021, almost simultaneously, the CTA wrote to the Court and confirmed receipt of the Applicant's December 20, 2021 letter. Since the CTA had not answered the Applicant's December 20, 2021 letter, the Applicant followed up on December 30, 2021 requesting a response to that letter.[71]

69. On January 4, 2022, counsel for the CTA continued to refuse to acknowledge whether the Disclosure Order and the Applicant's December 17, 2021 letter were brought to the attention of the three key CTA personnel.[72] The CTA's counsel requested further information from the Applicant on why this acknowledgment was requested, when the CTA was already aware that the Applicant's request clearly related to the CTA's (non)compliance with the Disclosure Order, as recognized in the CTA's own letter sent to the Court on December 24, 2021.

70. Thereafter, the Applicant, while acting *in propria persona*, sent a letter directly via both fax and email to (1) the CTA's Chairperson; (2) the CTA's Vice-Chairperson; and (3) the CTA's Secretary and Senior General Counsel, copied to all counsel, stressing the importance of complying with the Disclosure Order.[73] Counsel for the CTA acknowledged receipt of this further letter, but continues to refuse to confirm that the CTA's executive officers have knowledge of the Disclosure Order.[74]

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[71] Lukács Affidavit, Exhibit "AR" [Tab 2AR, p. 220].
[72] Lukács Affidavit, Exhibit "AS" [Tab 2AS, p. 222].
[73] Lukács Affidavit, Exhibit "AT" [Tab 2AT, p. 224].
[74] Lukács Affidavit, Exhibit "AU" [Tab 2AU, p. 234].

PART II – STATEMENT OF THE POINTS IN ISSUE

71. The issues to be decided on this motion are:

(a) Do the Withheld Materials fall within the Disclosure Order's scope?

(b) If so, whether the Court should order, or direct, that:

i. the CTA disclose the Withheld Materials within five (5) calendar days;

ii. the CTA's counsel inform three executive officers at the CTA about the Court's orders, and confirm to the Court having done so; and

iii. upon affidavit proof that the CTA failed to disclose the Withheld Materials within five (5) calendar days, a Rule 467 Order be issued forthwith.

(c) Should the Court validate the service of this motion on the three CTA executives, and order alternative methods of service for the Rule 467 Order?

PART III – STATEMENT OF SUBMISSIONS

72. The Applicant submits that the Withheld Materials fall squarely within the scope of the Disclosure Order, and that progressive enforcement, as outlined in *Hyundai Auto Canada v. Cross Canada Auto Body Supply (West) Ltd.*, 2007 FC 120 [***Hyundai***][75] by Dawson, J. (as she then was), is the most effective, efficient, and least expensive way to bring the CTA into compliance with the Disclosure Order.

73. As explained below in greater detail, progressive enforcement consists of an order to deliver specific documents within a short delay and a conditional show cause order, with the latter being issued upon affidavit evidence of further non-compliance.

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[75] *Hyundai Auto Canada v. Cross Canada Auto Body Supply (West) Ltd.*, 2007 FC 120 [Tab 19, p. 417].

A. The Withheld Materials Fall within the Disclosure Order's Scope

74. The Applicant submits that the twenty-one (21) sets of Withheld Materials each fall within the three categories in the Disclosure Order, as particularized in Schedule "A": (1) CTA Member Correspondences; (2) Third-Party Correspondences; and (3) Meeting Documents. These twenty-one sets of Withheld Materials shed light on the full extent and nature of third-party influence(s) on the preparation of the Statement on Vouchers, which the CTA has been concealing.

75. The circumstances behind the decision over the weekend of March 21-22, 2020 to publish the Statement on Vouchers remain in suspense, despite the CTA's Chairperson having specifically withdrawn the drafting of such a statement at the close of business on March 20, 2020. The breadth and extent of third-party influences on the Statement on Vouchers remains a mystery. The Dec. 14 Docs do not reveal how, why, or what may have prompted Mr. Streiner to reverse course within about one day.

i. CTA Member Correspondences

76. The CTA Member Correspondences category is all-encompassing and captures: "all non-privileged documents sent to or by a member of the CTA (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020."[76]

77. All six of the Withheld Materials in the CTA Member Correspondences category (i.e., A1 to A6), by definition, concern the Statement on Vouchers and are within the stated time period. As summarized in the table below, the Applicant has also specifically pinpointed to the CTA's Dec. 14 Docs that further confirm that those missing items concern the Statement on Vouchers and that they do, in fact, exist.

[76] Order of Gleason, J.A. (October 15, 2021), para. 3(a) [Tab 4, p. 276].

Withheld Material Identification	Evidence Pinpoint
A1 (Statement on Vouchers MS Word Files)	Direct evidence at paras. 33-34
A2 and A3 (Statement on Vouchers Documents on March 23 to 24, 2020)	Circumstantial evidence at paras. 41-43 and 52-53, resp.
A4 (Draft Announcements of the Statement on Vouchers)	Direct evidence at paras. 45-46 and 60
A5 (Chairpersons' Draft Media Response(s))	Direct evidence at paras. 50-51
A6 (Draft FAQs for the Statement on Vouchers)	Circumstantial evidence at paras. 58-59 of discussions during that time period

ii. Third-Party Correspondences

78. The Third-Party Correspondences category covers all correspondences involving **anyone** at the CTA with third-parties concerning the Statement on Vouchers between March 9-25, 2020: "all non-privileged documents sent to a third party by the CTA or received from a third party by the CTA between March 9 and March 25, 2020 concerning the statement on vouchers posted on the CTA's website on March 25, 2020."[77]

79. Unlike the CTA Member Correspondences and the Meeting Documents categories, the Third-Party Correspondences category **is not** tied to the participation of a CTA Member. The Third-Party Correspondences category encompasses **anyone** at the CTA,[78] and the Court further specified that "third-parties" refers to anyone other than a member or employee of the CTA.[79]

80. All five of the Withheld Materials in the Third-Party Correspondences category (i.e., B1 to B5), by definition, concern the Statement on Vouchers and are within the stated time period. As summarized in the table below, the Applicant has specifically pinpointed to the CTA's Dec. 14 Docs, or documents filed by the Respondent, that further confirm that those missing items concern the Statement on Vouchers and they in fact exist.

77 Order of Gleason, J.A. (October 15, 2021), para. 3(b) [Tab 4, p. 276].
78 Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 25 [Tab 5, p. 289].
79 Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 23 [Tab 5, p. 288].

Withheld Material Identification	Evidence Pinpoint
B1 (Statement on Vouchers Announcement to Third-Parties)	Direct evidence at paras. 60-62
B2 (Encrypted Email from Transport Canada)	Direct evidence at paras. 22-23
B3 (Ms. Jones's Correspondences with Transport Canada)	Direct evidence at paras. 31-32
B4 (Third-Party Inquiries on Twitter and Email)	Direct evidence at paras. 48-49
B5 (PIAC's Correspondences with the CTA)	Direct evidence at paras. 60-61

iii. Meeting Documents

81. The Meeting Documents category covers any meetings attended by a CTA Member concerning the Statement on Vouchers: "all non-privileged documents related to any meeting attended by a CTA member (including its Chairperson or Vice-Chairperson) between March 9 and March 25, 2020 where the statement on vouchers posted on the CTA's website on March 25, 2020 was discussed."[80]

82. To avoid doubt, the Court specified that "meetings include telephone conversations, video conferences and internet meetings as well as in-person meetings."[81]

83. Most of the missing Meeting Documents were brought to the CTA's attention on December 17, 2021.[82] However, the CTA's response on December 24, 2021 avoided the issue and directed the Applicant to a lone email about "decisions and deliverables" for a March 20 meeting only.[83] The CTA did not deny that those meetings identified in the December 17, 2021 letter occurred, and that documents existed for those meetings. The CTA simply remained tight-lipped on what documents were in their possession.

84. A lack of documentation for the series of meetings between March 19-25, 2020 is implausible. The participants must have, at least, corresponded in some way to schedule the meetings and organize the discussion items. This cannot occur telepathically.

[80] Order of Gleason, J.A. (Oct. 15, 2021), para. 3(c) [Tab 4, p. 277].
[81] Reasons for Order of Gleason, J.A. (Oct. 15, 2021) at para. 23 [Tab 5, p. 288].
[82] Lukács Affidavit, Exhibit "AO" [Tab 2AO, p. 186].
[83] Lukács Affidavit, Exhibits "AQ" and "AV" [Tabs 2AQ and 2AV, pp. 203 and 236].

85. It defies common sense for the CTA to lack documentation for discussions about the Statement on Vouchers, which was an important publication that had the effect of protecting air carriers' cash flows and affecting passengers' perception of their entitlement to refunds. These important policy decisions must be documented, according to the Treasury Board's policy on record keeping,[84] which applies to the CTA.[85]

86. All ten (10) of the Withheld Materials in the Meeting Documents category (i.e., C1 to C10) concern discussions of the Statement on Vouchers between March 19-25, 2020 and are within the stated time period. As summarized in the table below, the Applicant has specifically identified clear references to those meetings in the CTA's own documents, and that the meetings involved discussion on the Statement on Vouchers.

Withheld Material Identification	**Evidence Pinpoint**
C1 (March 19 EC Meeting)	Direct evidence in paras. 24-25
C2 (March 20 EC Meeting)	Direct evidence in paras. 27-28
C3 (Chair's Weekend Meeting(s) with Transport Canada and Unidentified Individual(s))	Direct evidence in paras. 30-32
C4 (Weekend Meetings between Chairperson and Vice-Chairperson)	Direct evidence in paras. 36-37
C5 (Sunday March 22 Meeting of Key Personnel)	Direct evidence in paras. 33-35
C6 (March 23 EC Meeting)	Direct evidence in paras. 38-40
C7 (March 24 CTA Members' Call)	Direct evidence in para. 47
C8 (March 25 Meetings Involving Chair and Vice-Chair)	Direct evidence in paras. 55-56
C9 (March 25 Cancelled Meeting)	Direct evidence in paras. 55-57
C10 (Chair's Meeting(s) with "Other Federal Players")	Direct evidence in paras. 30-32

84 Lukács Affidavit, Exhibit "F" [Tab 2F, p. 61].

85 *Financial Administration Act*, s. 2 (meaning of "department" at (a.1)) and Schedule I.1 [Tab 10, pp. 351 and 354].

B. Progressive Enforcement of Orders

87. The rule of law is directly dependent on courts' ability to enforce their process and maintain their dignity and respect.[86] The Federal Court of Appeal is no exception. This Court is a superior court with civil and criminal jurisdiction,[87] with the inherent power to enforce its orders and, as a last resort, conduct contempt of court hearings.[88]

88. A person who "disobeys a process or order of the court" is guilty of civil contempt of court.[89] The constituent elements of disobedience of an order of the court are:

(a) existence of an order that states clearly and unequivocally what should and should not be done;

(b) contemnor's actual knowledge of the order, which may be inferred from the circumstances or on the basis of the willful blindness doctrine; and

(c) the contemnor has intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.[90]

89. Notably, intent to interfere with the orderly administration of justice or to impair the authority or dignity of the Court **is not** a requisite element for civil contempt; rather, it suffices for the court to find that the order was clear and that the alleged contemnor knowingly committed the prohibited act or failed to do the act that the order compels.[91]

90. Where a legal person is found in contempt, the responsible officers of that legal person who have aided and abetted the legal person in acting contrary to the Court's Orders may also be found in contempt.[92]

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[86] *Carey v. Laiken*, 2015 SCC 17 at para. 31 [Tab 15, p. 393].
[87] *Federal Courts Act*, s. 3 [Tab 8, p. 335].
[88] *Steward v. Canada (MEI)*, [1988] 3 F.C. 452 at para. 13 [Tab 25, p. 503].
[89] *Federal Courts Rules*, Rule 466(b) [Tab 9, p. 346].
[90] *Carey v. Laiken*, 2015 SCC 17 at paras. 32-35 [Tab 15, pp. 393-394]; see also: *Wachsberg v. Canada (PSEP)*, 2020 FC 675 at para. 29 [Tab 27, p. 526].
[91] *Merck & Co. v. Apotex Inc.*, 2003 FCA 234 at para. 60 [Tab 22, p. 464].
[92] *Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2021 FC 770 [Tab 14, p. 378].

91. Rule 467 provides a two-step process for contempt hearings.[93]

(1) First, the moving party must seek a “show cause” order requiring the alleged contemnor to appear before a judge at a stipulated time and place, and be prepared to hear proof of the act or acts with which they are charged.

(2) If the “show cause” order is granted, then the alleged contemnor must appear before a judge, and must also be prepared to present any defence that they may have.[94]

92. On a motion for a show cause order, the court is tasked with determining whether the affidavit evidence establishes, *prima facie*, a breach of the order. It is not the time or place to argue the merits of the contempt proceeding or what may be valid defences.[95]

> If the evidence established a *prima facie* breach of the injunction, the Judge had to issue the show cause order sought unless the evidence showed clearly that the violation of the injunction was so unimportant or had taken place in such circumstances that it be absolutely certain that it did not deserve to be punished.[96]

93. The Court’s contempt powers should not be engaged prematurely, though.[97] The primary purpose of civil contempt of court, where there is no element of public defiance, is coercive rather than punitive.[98]

94. In *Hyndai*, Dawson, J. (as she then was) applied a progressive approach as an expeditious and cost-effective way to secure compliance with a disclosure order. She issued a second order specifying the documents to disclose, with a short time for com-

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[93] *Federal Courts Rules*, Rule 467(1) [Tab 9, p. 347].
[94] *Association des Employeurs Maritimes c. Racette*, 2019 FC 1384 at para. 26 [Tab 12, p. 362]; and *Warman v. Tremaine*, 2010 FC 1198 at para. 14 [Tab 28, p. 533].
[95] *Direct Source Special Products Inc. v. Sony Music Canada Inc.*, 2005 FC 1362 at para. 4 [Tab 16, p. 404].
[96] *Canada v. Perry*, 1982 CanLII 2885 (FCA) at para. 12 [Tab 13, p. 368].
[97] *Hyundai*, 2007 FC 120 at para. 15 [Tab 19, p. 420].
[98] *Carey v. Laiken*, 2015 SCC 17 at para. 31 [Tab 15, p. 393].

pliance, and simultaneously made a conditional show cause order that read: "on proof by affidavit evidence of such a failure to comply, an order will issue under Rule 467(1) in respect of non-compliance with both the order of Mr. Justice Phelan and this order."[99]

C. Application of Progressive Enforcement in this Case

95. Although the CTA is *prima facie* in violation of the order to produce documents, it is in the interest of justice to rectify the CTA's breach with a progressive approach.

i. A Specific Order for Production of the Withheld Materials

96. The Applicant's objective is not to punish the CTA for breach of a court order. Rather, the Applicant's goal is to ensure that the Withheld Materials will be before the Court on the judicial review. A full evidentiary record enables the Court to carry out its constitutional function, adjudicate all grounds of judicial review, and ensures that the CTA will not be immunized from scrutiny for any of its improper conduct or actions.[100]

97. The more direct, expeditious, and cost-effective way of ensuring the Withheld Materials will be before the Court is to issue a specific order for production of those Withheld Materials [**Specific Order**], with a significant costs award.[101] Nearly all of the CTA's current Members are lawyers.[102] As officers of this Court, it is expected they will cause the CTA to respect and fully comply with the Specific Order once it is issued.

98. Issuing the Specific Order first, before issuing a show cause order for contempt, will serve the goal of efficiency applicable to judicial review matters. This will also avoid unnecessarily expending judicial resources for invoking the full machinery of a contempt of court trial should the CTA promptly comply after this motion.[103]

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[99] *Hyundai*, 2007 FC 120 at paras. 13, 22, and Order [Tab 19, pp. 419 and 421].
[100] *Lukács v. Canadian Transportation Agency*, 2016 FCA 103 at para. 7 [Tab 21, p. 436].
[101] *Hyundai*, 2007 FC 120 at para. 13 [Tab 19, p. 419].
[102] Lukács Affidavit, Exhibit "AY" [Tab 2AY, p. 251].
[103] *Hyundai*, 2007 FC 120 at para. 14 [Tab 19, p. 419].

ii. Issuing a Direction to the CTA's Solicitor of Record

99. The Applicant submits that it is appropriate here to issue a Court direction that the CTA's counsel is to bring this Court's Orders to the attention of the CTA's three executives: the Chairperson, Vice-Chairperson, and Secretary [**Notification Direction**].

100. The CTA is legally composed of its Members, including a Chairperson and Vice-Chairperson.[104] The executive arm of the CTA is led by the Chairperson, as chief executive officer, and in that person's absence the Vice-Chairperson[105] assumes those duties. The CTA's Secretary has a statutory obligation to hold some of the CTA's records,[106] and is also head of the CTA's information technology department.[107]

101. The Notification Direction will ensure that the CTA's three key executives have notice of this Court's Disclosure Order, and the Specific Order. This will foster compliance, and ensure that the CTA will be attentive to its obligations and will dedicate sufficient resources and effort to comply with the Court's orders without further delay.

iii. Issuing the Show Cause Order upon Proof of Further Non-Compliance

102. Should the CTA not comply with the Disclosure Order or the Specific Order, the Applicant submits that a Rule 467(1) "show cause" order should then be issued, upon filing an affidavit from the Applicant showing the CTA's non-compliance.[108]

103. Holding another motion hearing solely to issue a "show cause" order will be inefficient use of judicial resources and invites a repeat of the same arguments the CTA may already raise on the present motion,[109] which already afforded the CTA an opportunity to be heard. A "show cause" motion is not a forum to decide any defenses.

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[104] *Canada Transportation Act*, s. 7 [Tab 7, p. 329].
[105] *Canada Transportation Act*, ss. 13-14 [Tab 7, pp. 330-331].
[106] *Canada Transportation Act*, s. 21 [Tab 7, p. 332].
[107] Lukács Affidavit, Exhibit "AZ" [Tab 2AZ, p. 258].
[108] *Hyundai*, 2007 FC 120 at Order, para. 2 [Tab 19, p. 421].
[109] *Hyundai*, 2007 FC 120 at para. 22 [Tab 19, p. 421].

104. If the CTA continues to fail to produce the Withheld Materials, the "show cause" order should be issued to four persons: (1) the CTA; (2) the CTA's Chairperson; (3) the CTA's Vice-Chairperson; and (4) the CTA's Secretary. There is a *prima facie* case that these persons are currently, and will still be, in contempt of this Court's order(s). The three requisite elements for issuing the "show cause order" are clearly met.

105. The Disclosure Order is clear that the CTA must produce the Withheld Materials. The Specific Order also removes any residual doubt about the CTA's obligations.

106. The CTA, its Vice-Chairperson, and its Secretary have actual knowledge of the Disclosure Order, since they disclosed a limited number of documents in response to the Disclosure Order. The Secretary has even signed a certificate to that effect. In the case of the Chairperson, the surrounding circumstances reveal that she also has actual knowledge of the Disclosure Order. She has the legal obligation to supervise the work of the CTA and all its staff,[110] and the Disclosure Order was specifically brought to her attention in a letter.[111] The Notification Direction will further afford the CTA's executives, particularly the Chairperson, the necessary notice and procedural fairness.

107. The CTA was reminded multiple times that their failure to produce some documents violates the Disclosure Order. The CTA acknowledged those reminders, but continued to withhold the documents. The CTA's conduct can no longer be considered inadvertent or negligent, and it must be intentional. The Specific Order will have the added benefit of clearing up any residual concern on whether the CTA's conduct was intentional, or not. The Notification Direction will also ensure the CTA's executives are made aware of the Specific Order and Disclosure Order and appreciate their seriousness. These steps will foster compliance with the Court's orders and give the CTA a final opportunity to provide the documents as specifically ordered months ago.[112]

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[110] *Canada Transportation Act*, s. 13 [Tab 7, p. 330].
[111] Lukács Affidavit, Exhibit "AT" [Tab 2AT, p. 224].
[112] *Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2021 FC 770 [Tab 14, p. 378].

D. Validating Service of this Motion on the Chair, Vice-Chair, and Secretary

108. Although Rule 467(2) permits *ex parte* "show cause" motions, it is recommended that notice be given.[113] Courts commend parties that proactively give notice of such motions.[114] This motion is being served on the named parties, the AGC and CTA, and also delivered to the CTA's Chairperson, Vice-Chairperson, and Secretary.

109. This motion is not an originating document and does not require personal service on the CTA's Chairperson, Vice-Chairperson, and Secretary, although they are non-parties personally affected by this motion.[115] The Applicant is delivering this motion record via email to these CTA executives at their official government email addresses.

110. The Applicant seeks an Order under Rule 147 to validate the service of the motion materials delivered by email to the CTA's Chairperson, Vice-Chairperson, and Secretary. The email addresses are their government work email addresses and they would have notice of the motion materials.[116] These CTA executives are not completely foreign to this Application, since they are the executive officers of the intervener.

E. Service Methods for the Rule 467(1) "Show Cause" Order

111. A "show cause" Order must be served personally, or in another manner authorized by the Court.[117] The Applicant seeks an Order authorizing alternative manners of service for the CTA and its three executives that will similarly ensure they have notice.

112. **For the CTA**, the Applicant requests that service be effected by email to the CTA's counsel of record. All parties to the Application have been serving their motions by email, consistent with the Practice Direction for the COVID-19 Suspension Period.

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[113] *Goodman Yachts LLC v. Gertrude Oldendorff (Ship)*, 2003 FCT 752 (CanLII) at para. 13 [Tab 18, p. 414].
[114] *Telus Mobility v. T.W.U.*, 2002 FCT 656 at para. 8 [Tab 26, p. 509].
[115] *Federal Courts Rules*, Rules 63, 127, 138, 139 [Tab 9, pp. 343, 344, and 345].
[116] *Figueroa v. Canada (PSEP)*, 2020 FCA 7 at para. 11 [Tab 17, p. 409].
[117] *Federal Courts Rules*, Rule 467(4) [Tab 9, p. 347].

113. **For the three CTA executives**, the Applicant requests that service of the "show cause" Order be effected by three separate manners to ensure that they have notice: (1) a Notification Direction for the "show cause" order; (2) the Applicant electronically delivering to their work email addresses; and (3) the Registry delivering by regular postal mail to each individual at the CTA's official address and also by email.

114. The CTA's Vice-Chairperson and Secretary are lawyers, and service of documents on officers of the court typically do not require the same level of formalities. For the CTA's Chairperson, there is no feasible way to effect personal service during the pandemic since most individuals are working remotely. The Applicant also does not have the Chairperson's residential address to effect service despite a diligent search.[118]

F. The Applicant Seeks Costs in Any Event and Payable Forthwith

115. It is well-established practice that a party bringing a contempt motion to ensure compliance of the Court's Order should not be required to bear the costs of doing so.[119] It is customary to require that persons found guilty of contempt pay costs on a solicitor-and-client basis to the party who has brought the matter before the Court.[120]

116. The Applicant submits that the long-standing practice for costs on a contempt motion should similarly guide the awarding of costs for this motion to progressively enforce the Disclosure Order.[121] The CTA knew from the filing of this Application that Applicant's counsel is acting on a *pro bono* basis.[122] The facts clearly reveal that the CTA has withheld records covered by the Disclosure Order. The CTA's conduct caused the Applicant to unnecessarily expend resources to bring the CTA into compliance.

[118] Lukács Affidavit, para. 63 [Tab 2, p. 29].
[119] *Apotex Inc. v. Merck & Co. Inc.*, 2003 FCA 234 at paras. 93-94 [Tab 22, pp. 476-477].
[120] *Lari v. Canadian Copyright Licensing Agency*, 2007 FCA 127 at para. 38 [Tab 20, p. 432].
[121] *Hyundai*, 2007 FC 120 at para. 13 [Tab 19, p. 419].
[122] Lukács Affidavit, para. 8 [Tab 2, p. 19].

117. While some courts defer costs until the contempt of court trial, that approach may not be appropriate in this case of progressive enforcement. The Applicant expects that the CTA will comply with the Disclosure Order once the Court issues the Specific Order to produce the Withheld Materials. The Applicant should not be deprived of costs for following the court's guidance to pursue a progressive enforcement of orders.

118. Exempting the CTA from paying costs would not foster the CTA's compliance with future court orders. It may also send a wrong message to other potential contemnors that they have one complimentary "get out of jail free" card for each court order.

119. For this motion to progressively enforce the Disclosure Order, the Applicant seeks costs on a solicitor-and-client basis, or alternatively a lump sum award of $5,000 plus disbursements, payable forthwith in any event. The Applicant and its counsel has an agreement for costs,[123] and any cost awards should be paid to counsel in trust.[124]

PART IV – ORDER SOUGHT

120. The Moving Party, Air Passenger Rights, is seeking orders and directions as set out in the Notice of Motion **[Tab 1, pp. 1-2]**.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 16, 2022

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

[123] Lukács Affidavit, para. 7 [Tab 2, p. 19].

[124] *Roby v. Canada*, 2013 FCA 251 at paras. 23-29 [Tab 24, pp. 495-497]; and *Northcott v. Canada*, 2021 FC 289 at paras. 51-53 [Tab 23, p. 488].

PART V – LIST OF AUTHORITIES

Statutes and Regulations

Canada Transportation Act, S.C. 1996, c. 10,
ss. 7, 13-14, and 21

Federal Courts Act, R.S.C. 1985, c. F-7,
ss. 3, 18.1, 28, and 44

Federal Courts Rules, S.O.R./98-106,
Rules 63, 127, 138, 139, 365, 369.2, and 466-472

Financial Administration Act, R.S.C., 1985, c. F-11,
s. 2 and Schedule I.1

Rules Amending the Federal Courts Rules, SOR/201-244,
ss. 16 and 17

Case Law

Association des Employeurs Maritimes c. Racette, 2019 FC 1384

Canada v. Perry, 1982 CanLII 2885 (FCA)

Canadian Standards Association v. P.S. Knight Co. Ltd., 2021 FC 770

Carey v. Laiken, 2015 SCC 17

Direct Source Special Products Inc. v. Sony Music Canada Inc., 2005 FC 1362

Figueroa v. Canada (Public Safety and Emergency Preparedness), 2020 FCA 7

Goodman Yachts LLC v. Penguin Boat International Ltd., 2003 FCT 752

Hyundai Auto Canada v. Cross Canada Auto Body Supply (West) Ltd., 2007 FC 120

Lari v. Canadian Copyright Licensing Agency, 2007 FCA 127

Lukács v. Canadian Transportation Agency, 2016 FCA 103

Merck & Co. v. Apotex Inc., 2003 FCA 234

Northcott v. Canada (Attorney General), 2021 FC 289

Roby v. Canada (Attorney General), 2013 FCA 251

Steward v. Canada (Minister of Employment & Immigration), [1988] 3 F.C. 452

Telus Mobility v. T.W.U., 2002 FCT 656

Wachsberg v. Canada (Public Safety and Emergency Preparedness), 2020 FC 675

Warman v. Tremaine, 2010 FC 1198

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to December 23, 2021

Last amended on June 10, 2020

À jour au 23 décembre 2021

Dernière modification le 10 juin 2020

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Cost recovery

6.8 The Minister may recover any costs associated with the processing and assessing of an application under section 6.6 and may refuse to make the order requested until those costs are recovered from the applicant.

2019, c. 29, s. 215.

Recouvrement

6.8 Le ministre peut recouvrer les coûts afférents au traitement et à l'évaluation d'une demande visée à l'article 6.6 et peut refuser de prendre l'arrêté demandé jusqu'à ce que les coûts soient recouvrés.

2019, ch. 29, art. 215.

PART I

Administration

Canadian Transportation Agency

Continuation and Organization

Agency continued

7 (1) The agency known as the National Transportation Agency is continued as the Canadian Transportation Agency.

Composition of Agency

(2) The Agency shall consist of not more than five members appointed by the Governor in Council, and such temporary members as are appointed under subsection 9(1), each of whom must, on appointment or reappointment and while serving as a member, be a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

Chairperson and Vice-Chairperson

(3) The Governor in Council shall designate one of the members appointed under subsection (2) to be the Chairperson of the Agency and one of the other members appointed under that subsection to be the Vice-Chairperson of the Agency.

1996, c. 10, s. 7; 2001, c. 27, s. 221; 2007, c. 19, s. 3; 2015, c. 3, s. 30(E).

Term of members

8 (1) Each member appointed under subsection 7(2) shall hold office during good behaviour for a term of not more than five years and may be removed for cause by the Governor in Council.

Reappointment

(2) A member appointed under subsection 7(2) is eligible to be reappointed on the expiration of a first or subsequent term of office.

PARTIE I

Administration

Office des transports du Canada

Maintien et composition

Maintien de l'Office

7 (1) L'Office national des transports est maintenu sous le nom d'Office des transports du Canada.

Composition

(2) L'Office est composé, d'une part, d'au plus cinq membres nommés par le gouverneur en conseil et, d'autre part, des membres temporaires nommés en vertu du paragraphe 9(1). Tout membre doit, du moment de sa nomination, être et demeurer un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.

Président et vice-président

(3) Le gouverneur en conseil choisit le président et le vice-président de l'Office parmi les membres nommés en vertu du paragraphe (2).

1996, ch. 10, art. 7; 2001, ch. 27, art. 221; 2007, ch. 19, art. 3; 2015, ch. 3, art. 30(A).

Durée du mandat

8 (1) Les membres nommés en vertu du paragraphe 7(2) le sont à titre inamovible pour un mandat d'au plus cinq ans, sous réserve de révocation motivée par le gouverneur en conseil.

Renouvellement du mandat

(2) Les mandats sont renouvelables.

Temporary members may not hold other office

(2) During the term of office of a temporary member, the member shall not accept or hold any office or employment that is inconsistent with the member's duties under this Act.

Disposal of conflict of interest

(3) If an interest referred to in subsection (1) vests in a member appointed under subsection 7(2) for the benefit of the member by will or succession, the member shall, within three months after the vesting, absolutely dispose of the interest.

1996, c. 10, s. 10; 2015, c. 3, s. 32(E).

Conflits d'intérêts : membres temporaires

(2) Les membres temporaires ne peuvent accepter ni occuper une charge ou un emploi incompatible avec les attributions que leur confère la présente loi.

Cession d'intérêts

(3) Le membre nommé en vertu du paragraphe 7(2) qui est investi d'intérêts visés au paragraphe (1) par l'ouverture d'une succession doit les céder entièrement dans les trois mois suivant la saisine.

1996, ch. 10, art. 10; 2015, ch. 3, art. 32(A).

Remuneration

Remuneration

11 (1) A member shall be paid such remuneration and allowances as may be fixed by the Governor in Council.

Expenses

(2) Each member is entitled to be paid reasonable travel and living expenses incurred by the member in carrying out duties under this Act or any other Act of Parliament while absent from the member's ordinary place of work.

Members — retirement pensions

12 (1) A member appointed under subsection 7(2) is deemed to be employed in the public service for the purposes of the *Public Service Superannuation Act*.

Temporary members not included

(2) A temporary member is deemed not to be employed in the public service for the purposes of the *Public Service Superannuation Act* unless the Governor in Council, by order, deems the member to be so employed for those purposes.

Accident compensation

(3) For the purposes of the *Government Employees Compensation Act* and any regulation made pursuant to section 9 of the *Aeronautics Act*, a member is deemed to be an employee in the federal public administration.

1996, c. 10, s. 12; 2003, c. 22, ss. 224(E), 225(E); 2015, c. 3, s. 33(E).

Rémunération

Rémunération et indemnités

11 (1) Les membres reçoivent la rémunération et touchent les indemnités que peut fixer le gouverneur en conseil.

Frais de déplacement

(2) Les membres ont droit aux frais de déplacement et de séjour entraînés par l'exercice, hors de leur lieu de travail habituel, des fonctions qui leur sont confiées en application de la présente loi ou de toute autre loi fédérale.

Pensions de retraite des membres

12 (1) Les membres nommés en vertu du paragraphe 7(2) sont réputés appartenir à la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*.

Membres temporaires

(2) Sauf décret prévoyant le contraire, les membres temporaires sont réputés ne pas appartenir à la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*.

Indemnisation

(3) Pour l'application de la *Loi sur l'indemnisation des agents de l'État* et des règlements pris en vertu de l'article 9 de la *Loi sur l'aéronautique*, les membres sont réputés appartenir à l'administration publique fédérale.

1996, ch. 10, art. 12; 2003, ch. 22, art. 224(A) et 225(A); 2015, ch. 3, art. 33(A).

Chairperson

Duties of Chairperson

13 The Chairperson is the chief executive officer of the Agency and has the supervision over and direction of the

Président

Pouvoirs et fonctions

13 Le président est le premier dirigeant de l'Office; à ce titre, il assure la direction et le contrôle de ses travaux et

work of the members and its staff, including the apportionment of work among the members and the assignment of members to deal with any matter before the Agency.

la gestion de son personnel et procède notamment à la répartition des tâches entre les membres et à la désignation de ceux qui traitent des questions dont est saisi l'Office.

Absence of Chairperson

14 In the event of the absence or incapacity of the Chairperson or if the office of Chairperson is vacant, the Vice-Chairperson has all the powers and shall perform all the duties and functions of the Chairperson.

Intérim du président

14 En cas d'absence ou d'empêchement du président ou de vacance de son poste, la présidence est assumée par le vice-président.

Absence of both Chairperson and Vice-Chairperson

15 The Chairperson may authorize one or more of the members to act as Chairperson for the time being if both the Chairperson and Vice-Chairperson are absent or unable to act.

Choix d'un autre intérimaire

15 Le président peut habiliter un ou plusieurs membres à assumer la présidence en prévision de son absence ou de son empêchement, et de ceux du vice-président.

Quorum

Quorum

16 (1) Subject to the Agency's rules, two members constitute a quorum.

Quorum lost because of incapacity of member

(2) Where a member who is conducting a hearing in respect of a matter becomes incapacitated or dies during the hearing or after the conclusion of the hearing but before rendering a decision and quorum is lost as a result, the Chairperson may, with the consent of all the parties to the hearing,

- **(a)** if the incapacity or death occurs during the hearing, authorize another member to continue the hearing and render a decision, or

- **(b)** if the incapacity or death occurs after the conclusion of the hearing, authorize another member to examine the evidence presented at the hearing and render a decision,

and in either case, the quorum in respect of the matter is deemed never to have been lost.

Quorum not lost because of incapacity of member

(3) Where a member who is conducting a hearing in respect of a matter becomes incapacitated or dies during the hearing and quorum is not lost as a result, another member may be assigned by the Chairperson to participate in the hearing and in the rendering of a decision.

Quorum

Quorum

16 (1) Sous réserve des règles de l'Office, le quorum est constitué de deux membres.

Perte de quorum due à un décès ou un empêchement

(2) En cas de décès ou d'empêchement d'un membre chargé d'une audience, pendant celle-ci ou entre la fin de l'audience et le prononcé de la décision, et de perte de quorum résultant de ce fait, le président peut, avec le consentement des parties à l'audience, si le fait survient :

- **a)** pendant l'audience, habiliter un autre membre à continuer l'audience et à rendre la décision;

- **b)** après la fin de l'audience, habiliter un autre membre à examiner la preuve présentée à l'audience et à rendre la décision.

Dans l'une ou l'autre de ces éventualités, le quorum est réputé avoir toujours existé.

Décès ou empêchement sans perte de quorum

(3) En cas de décès ou d'empêchement, pendant une audience, du membre qui en est chargé, sans perte de quorum résultant de ce fait, le président peut habiliter un autre membre à participer à l'audience et au prononcé de la décision.

Rules

Rules

17 The Agency may make rules respecting

Règles

Règles

17 L'Office peut établir des règles concernant :

(a) the sittings of the Agency and the carrying on of its work;

(b) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and

(c) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament.

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

Head Office

Head office

18 (1) The head office of the Agency shall be in the National Capital Region described in the schedule to the *National Capital Act*.

Residence of members

(2) The members appointed under subsection 7(2) shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within any distance of it that the Governor in Council determines.

1996, c. 10, s. 18; 2007, c. 19, s. 5; 2008, c. 21, s. 61.

Siège de l'Office

Siège

18 (1) Le siège de l'Office est fixé dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale*.

Lieu de résidence des membres

(2) Les membres nommés au titre du paragraphe 7(2) résident dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale* ou dans la périphérie de cette région définie par le gouverneur en conseil.

1996, ch. 10, art. 18; 2007, ch. 19, art. 5; 2008, ch. 21, art. 61.

Staff

Secretary, officers and employees

19 The Secretary of the Agency and the other officers and employees that are necessary for the proper conduct of the business of the Agency shall be appointed in accordance with the *Public Service Employment Act*.

Technical experts

20 The Agency may appoint and, subject to any applicable Treasury Board directive, fix the remuneration of experts or persons who have technical or special knowledge to assist the Agency in an advisory capacity in respect of any matter before the Agency.

Personnel

Secrétaire et personnel

19 Le secrétaire de l'Office et le personnel nécessaire à l'exécution des travaux de celui-ci sont nommés conformément à la *Loi sur l'emploi dans la fonction publique*.

Experts

20 L'Office peut nommer des experts ou autres spécialistes compétents pour le conseiller sur des questions dont il est saisi, et, sous réserve des instructions du Conseil du Trésor, fixer leur rémunération.

Records

Duties of Secretary

21 (1) The Secretary of the Agency shall

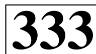
(a) maintain a record in which shall be entered a true copy of every rule, order, decision and regulation of the Agency and any other documents that the Agency requires to be entered in it; and

Registre

Attributions du secrétaire

21 (1) Le secrétaire est chargé :

a) de la tenue du registre du texte authentique des règles, arrêtés, règlements et décisions de l'Office et des autres documents dont celui-ci exige l'enregistrement;



(b) keep at the Agency's office a copy of all rules, orders, decisions and regulations of the Agency and the records of proceedings of the Agency.

Entries in record

(2) The entry of a document in the record referred to in paragraph (1)(a) shall constitute the original record of the document.

Copies of documents obtainable

22 On the application of any person, and on payment of a fee fixed by the Agency, the Secretary of the Agency or, in the absence of the Secretary, the person assigned by the Chairperson to act in the absence shall issue under the seal of the Agency to the applicant a certified copy of any rule, order, regulation or any other document that has been issued by the Agency.

Judicial notice of documents

23 (1) Judicial notice shall be taken of a document issued by the Agency under its seal without proof of the signature or official character of the person appearing to have signed it.

Evidence of deposited documents

(2) A document purporting to be certified by the Secretary of the Agency as being a true copy of a document deposited or filed with or approved by the Agency, or any portion of such a document, is evidence that the document is so deposited, filed or approved and, if stated in the certificate, of the time when the document was deposited, filed or approved.

Powers of Agency

Policy governs Agency

24 The powers, duties and functions of the Agency respecting any matter that comes within its jurisdiction under an Act of Parliament shall be exercised and performed in conformity with any policy direction issued to the Agency under section 43.

Agency powers in general

25 The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

b) de la conservation, dans les bureaux de l'Office, d'un exemplaire des règles, arrêtés, règlements, décisions et procès-verbaux de celui-ci.

Original

(2) Le document enregistré en application de l'alinéa (1)a) en constitue l'original.

Copies conformes

22 Le secrétaire de l'Office, ou la personne chargée par le président d'assurer son intérim, délivre sous le sceau de l'Office, sur demande et contre paiement des droits fixés par celui-ci, des copies certifiées conformes des règles, arrêtés, règlements ou autres documents de l'Office.

Admission d'office

23 (1) Les documents délivrés par l'Office sous son sceau sont admis d'office en justice sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

Preuve

(2) Le document censé être en tout ou en partie la copie certifiée conforme, par le secrétaire de l'Office, d'un document déposé auprès de celui-ci, ou approuvé par celui-ci, fait foi du dépôt ou de l'approbation ainsi que de la date, si elle est indiquée sur la copie, de ce dépôt ou de cette approbation.

Attributions de l'Office

Directives

24 Les attributions de l'Office relatives à une affaire dont il est saisi en application d'une loi fédérale sont exercées en conformité avec les directives générales qui lui sont données en vertu de l'article 43.

Pouvoirs généraux

25 L'Office a, à toute fin liée à l'exercice de sa compétence, la comparution et l'interrogatoire des témoins, la production et l'examen des pièces, l'exécution de ses arrêtés ou règlements et la visite d'un lieu, les attributions d'une cour supérieure.

CANADA

CONSOLIDATION

Federal Courts Act

R.S.C., 1985, c. F-7

CODIFICATION

Loi sur les Cours fédérales

L.R.C. (1985), ch. F-7

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Senate and House of Commons

(2) For greater certainty, the expression *federal board, commission or other tribunal*, as defined in subsection (1), does not include the Senate, the House of Commons, any committee or member of either House, the Senate Ethics Officer, the Conflict of Interest and Ethics Commissioner with respect to the exercise of the jurisdiction or powers referred to in sections 41.1 to 41.5 and 86 of the *Parliament of Canada Act*, the Parliamentary Protective Service or the Parliamentary Budget Officer.

Sénat et Chambre des communes

(2) Il est entendu que sont également exclus de la définition de *office fédéral* le Sénat, la Chambre des communes, tout comité de l'une ou l'autre chambre, tout sénateur ou député, le conseiller sénatorial en éthique, le commissaire aux conflits d'intérêts et à l'éthique à l'égard de l'exercice de sa compétence et de ses attributions visées aux articles 41.1 à 41.5 et 86 de la *Loi sur le Parlement du Canada*, le Service de protection parlementaire et le directeur parlementaire du budget.

Deeming

(3) Despite subsection (2), the Parliamentary Budget Officer is deemed to be a federal board, commission or other tribunal for the purpose of subsection 18.3(1).

R.S., 1985, c. F-7, s. 2; 1990, c. 8, s. 1; 2001, c. 6, s. 115; 2002, c. 8, s. 15; 2004, c. 7, ss. 7, 38; 2006, c. 9, ss. 5, 38; 2015, c. 36, s. 124; 2017, c. 20, s. 159.

Présomption

(3) Malgré le paragraphe (2), le directeur parlementaire du budget est réputé avoir le statut d'office fédéral pour l'application du paragraphe 18.3(1).

L.R. (1985), ch. F-7, art. 2; 1990, ch. 8, art. 1; 2001, ch. 6, art. 115; 2002, ch. 8, art. 15; 2004, ch. 7, art. 7 et 38; 2006, ch. 9, art. 5 et 38; 2015, ch. 36, art. 124; 2017, ch. 20, art. 159.

The Courts

Federal Court — Appeal Division continued

3 The division of the Federal Court of Canada called the Federal Court — Appeal Division is continued under the name "Federal Court of Appeal" in English and "Cour d'appel fédérale" in French. It is continued as an additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and as a superior court of record having civil and criminal jurisdiction.

R.S., 1985, c. F-7, s. 3; 1993, c. 34, s. 68(F); 2002, c. 8, s. 16.

Federal Court — Trial Division continued

4 The division of the Federal Court of Canada called the Federal Court — Trial Division is continued under the name "Federal Court" in English and "Cour fédérale" in French. It is continued as an additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and as a superior court of record having civil and criminal jurisdiction.

R.S., 1985, c. F-7, s. 4; 2002, c. 8, s. 16.

Les cours

Maintien : section d'appel

3 La Section d'appel, aussi appelée la Cour d'appel ou la Cour d'appel fédérale, est maintenue et dénommée « Cour d'appel fédérale » en français et « Federal Court of Appeal » en anglais. Elle est maintenue à titre de tribunal additionnel de droit, d'equity et d'amirauté du Canada, propre à améliorer l'application du droit canadien, et continue d'être une cour supérieure d'archives ayant compétence en matière civile et pénale.

L.R. (1985), ch. F-7, art. 3; 1993, ch. 34, art. 68(F); 2002, ch. 8, art. 16.

Maintien : Section de première instance

4 La section de la Cour fédérale du Canada, appelée la Section de première instance de la Cour fédérale, est maintenue et dénommée « Cour fédérale » en français et « Federal Court » en anglais. Elle est maintenue à titre de tribunal additionnel de droit, d'equity et d'amirauté du Canada, propre à améliorer l'application du droit canadien, et continue d'être une cour supérieure d'archives ayant compétence en matière civile et pénale.

L.R. (1985), ch. F-7, art. 4; 2002, ch. 8, art. 16.

The Judges

Constitution of Federal Court of Appeal

5 (1) The Federal Court of Appeal consists of a chief justice called the Chief Justice of the Federal Court of Appeal, who is the president of the Federal Court of Appeal, and 13 other judges.

Les juges

Composition de la Cour d'appel fédérale

5 (1) La Cour d'appel fédérale se compose du juge en chef, appelé juge en chef de la Cour d'appel fédérale, qui en est le président, et de treize autres juges.

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

Recours extraordinaires : Forces canadiennes

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

R.S., 1985, c. F-7, s. 18; 1990, c. 8, s. 4; 2002, c. 8, s. 26.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

L.R. (1985), ch. F-7, art. 18; 1990, ch. 8, art. 4; 2002, ch. 8, art. 26.

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

1990, c. 8, s. 5; 2002, c. 8, s. 27.

Interim orders

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

1990, ch. 8, art. 5; 2002, ch. 8, art. 27.

Mesures provisoires

18.2 La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

Hearing in summary way

(1.4) An appeal under subsection (1.2) shall be heard and determined without delay and in a summary way.

Notice of appeal

(2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal

(a) in the case of an interlocutory judgment, within 10 days after the pronouncement of the judgment or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 10 days; and

(b) in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.

Service

(3) All parties directly affected by an appeal under this section shall be served without delay with a true copy of the notice of appeal, and evidence of the service shall be filed in the Registry of the Federal Court of Appeal.

Final judgment

(4) For the purposes of this section, a final judgment includes a judgment that determines a substantive right except as to any question to be determined by a referee pursuant to the judgment.

R.S., 1985, c. F-7, s. 27; R.S., 1985, c. 51 (4th Supp.), s. 11; 1990, c. 8, ss. 7, 78(E); 1993, c. 27, s. 214; 2002, c. 8, s. 34.

Judicial review

28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

(a) [Repealed, 2012, c. 24, s. 86]

(b) the Review Tribunal continued by subsection 27(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*;

e) elle a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) elle a agi de toute autre façon contraire à la loi.

Procédure sommaire

(1.4) L'appel interjeté en vertu du paragraphe (1.2) est entendu et tranché immédiatement et selon une procédure sommaire.

Avis d'appel

(2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour d'appel fédérale, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire qu'un juge de la Cour d'appel fédérale peut, soit avant soit après l'expiration de celui-ci, accorder. Le délai imparti est de :

a) dix jours, dans le cas d'un jugement interlocutoire;

b) trente jours, compte non tenu de juillet et août, dans le cas des autres jugements.

Signification

(3) L'appel est signifié sans délai à toutes les parties directement concernées par une copie certifiée conforme de l'avis. La preuve de la signification doit être déposée au greffe de la Cour d'appel fédérale.

Jugement définitif

(4) Pour l'application du présent article, est assimilé au jugement définitif le jugement qui statue au fond sur un droit, à l'exception des questions renvoyées à l'arbitrage par le jugement.

L.R. (1985), ch. F-7, art. 27; L.R. (1985), ch. 51 (4e suppl.), art. 11; 1990, ch. 8, art. 7 et 78(A); 1993, ch. 27, art. 214; 2002, ch. 8, art. 34.

Contrôle judiciaire

28 (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

a) [Abrogé, 2012, ch. 24, art. 86]

b) la commission de révision prorogée par le paragraphe 27(1) de la *Loi sur les sanctions administratives pécuniaires en matière d'agriculture et d'agroalimentaire*;

(b.1) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*;

(c) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

(d) [Repealed, 2012, c. 19, s. 272]

(e) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

(f) the Canadian Energy Regulator established by the *Canadian Energy Regulator Act*;

(g) the Governor in Council, when the Governor in Council makes an order under subsection 186(1) of the *Canadian Energy Regulator Act*;

(g) the Appeal Division of the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, unless the decision is made under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the *Canada Pension Plan*, section 27.1 of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;

(h) the Canada Industrial Relations Board established by the *Canada Labour Code*;

(i) the Federal Public Sector Labour Relations and Employment Board referred to in subsection 4(1) of the *Federal Public Sector Labour Relations and Employment Board Act*;

(i.1) adjudicators as defined in subsection 2(1) of the *Federal Public Sector Labour Relations Act*;

(j) the Copyright Board established by the *Copyright Act*;

(k) the Canadian Transportation Agency established by the *Canada Transportation Act*;

(l) [Repealed, 2002, c. 8, s. 35]

(m) [Repealed, 2012, c. 19, s. 272]

(n) the Competition Tribunal established by the *Competition Tribunal Act*;

b.1) le commissaire aux conflits d’intérêts et à l’éthique nommé en vertu de l’article 81 de la *Loi sur le Parlement du Canada*;

c) le Conseil de la radiodiffusion et des télécommunications canadiennes constitué par la *Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes*;

d) [Abrogé, 2012, ch. 19, art. 272]

e) le Tribunal canadien du commerce extérieur constitué par la *Loi sur le Tribunal canadien du commerce extérieur*;

f) la Régie canadienne de l’énergie constituée par la *Loi sur la Régie canadienne de l’énergie*;

g) le gouverneur en conseil, quand il prend un décret en vertu du paragraphe 186(1) de la *Loi sur la Régie canadienne de l’énergie*;

g) la division d’appel du Tribunal de la sécurité sociale, constitué par l’article 44 de la *Loi sur le ministère de l’Emploi et du Développement social*, sauf dans le cas d’une décision qui est rendue au titre du paragraphe 57(2) ou de l’article 58 de cette loi ou qui vise soit un appel interjeté au titre du paragraphe 53(3) de cette loi, soit un appel concernant une décision relative au délai supplémentaire visée au paragraphe 52(2) de cette loi, à l’article 81 du *Régime de pensions du Canada*, à l’article 27.1 de la *Loi sur la sécurité de la vieillesse* ou à l’article 112 de la *Loi sur l’assurance-emploi*;

h) le Conseil canadien des relations industrielles au sens du *Code canadien du travail*;

i) la Commission des relations de travail et de l’emploi dans le secteur public fédéral visée par le paragraphe 4(1) de la *Loi sur la Commission des relations de travail et de l’emploi dans le secteur public fédéral*;

i.1) les arbitres de grief, au sens du paragraphe 2(1) de la *Loi sur les relations de travail dans le secteur public fédéral*;

j) la Commission du droit d’auteur constituée par la *Loi sur le droit d’auteur*;

k) l’Office des transports du Canada constitué par la *Loi sur les transports au Canada*;

l) [Abrogé, 2002, ch. 8, art. 35]

m) [Abrogé, 2012, ch. 19, art. 272]

(o) assessors appointed under the *Canada Deposit Insurance Corporation Act*;

(p) [Repealed, 2012, c. 19, s. 572]

(q) the Public Servants Disclosure Protection Tribunal established by the *Public Servants Disclosure Protection Act*; and

(r) the Specific Claims Tribunal established by the *Specific Claims Tribunal Act*.

n) le Tribunal de la concurrence constitué par la *Loi sur le Tribunal de la concurrence*;

o) les évaluateurs nommés en application de la *Loi sur la Société d'assurance-dépôts du Canada*;

p) [Abrogé, 2012, ch. 19, art. 572]

q) le Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles constitué par la *Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles*;

r) le Tribunal des revendications particulières constitué par la *Loi sur le Tribunal des revendications particulières*.

Sections apply

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

Dispositions applicables

(2) Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

Federal Court deprived of jurisdiction

(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

R.S., 1985, c. F-7, s. 28; R.S., 1985, c. 30 (2nd Supp.), s. 61; 1990, c. 8, s. 8; 1992, c. 26, s. 17, c. 33, s. 69, c. 49, s. 128; 1993, c. 34, s. 70; 1996, c. 10, s. 229, c. 23, s. 187; 1998, c. 26, s. 73; 1999, c. 31, s. 92(E); 2002, c. 8, s. 35; 2003, c. 22, ss. 167(E), 262; 2005, c. 46, s. 56.1; 2006, c. 9, ss. 6, 222; 2008, c. 22, s. 46; 2012, c. 19, ss. 110, 272, 572, c. 24, s. 86; 2013, c. 40, ss. 236, 439; 2014, c. 20, s. 236; 2017, c. 9, ss. 43, 55; 2019, c. 28, s. 102.

Incompétence de la Cour fédérale

(3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

L.R. (1985), ch. F-7, art. 28; L.R. (1985), ch. 30 (2e suppl.), art. 61; 1990, ch. 8, art. 8; 1992, ch. 26, art. 17, ch. 33, art. 69, ch. 49, art. 128; 1993, ch. 34, art. 70; 1996, ch. 10, art. 229, ch. 23, art. 187; 1998, ch. 26, art. 73; 1999, ch. 31, art. 92(A); 2002, ch. 8, art. 35; 2003, ch. 22, art. 167(A) et 262; 2005, ch. 46, art. 56.1; 2006, ch. 9, art. 6 et 222; 2008, ch. 22, art. 46; 2012, ch. 19, art. 110, 272 et 572, ch. 24, art. 86; 2013, ch. 40, art. 236 et 439; 2014, ch. 20, art. 236; 2017, ch. 9, art. 43 et 55; 2019, ch. 28, art. 102.

29 to 35 [Repealed, 1990, c. 8, s. 8]

29 à 35 [Abrogés, 1990, ch. 8, art. 8]

Substantive Provisions

Dispositions de fond

Prejudgment interest — cause of action within province

36 (1) Except as otherwise provided in any other Act of Parliament, and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

Intérêt avant jugement — Fait survenu dans une province

36 (1) Sauf disposition contraire de toute autre loi fédérale, et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt avant jugement qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province.

Prejudgment interest — cause of action outside province

(2) A person who is entitled to an order for the payment of money in respect of a cause of action arising outside a province or in respect of causes of action arising in more than one province is entitled to claim and have included

Intérêt avant jugement — Fait non survenu dans une seule province

(2) Dans toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur n'est pas survenu dans une province ou dont les faits générateurs sont survenus dans plusieurs provinces, les intérêts avant

exclusivement une mission non commerciale au moment où a été formulée la demande ou intentée l’action les concernant.

Arrest

(8) The jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action.

Saisie de navire

(8) La compétence de la Cour fédérale peut, aux termes de l’article 22, être exercée en matière réelle à l’égard de tout navire qui, au moment où l’action est intentée, appartient au véritable propriétaire du navire en cause dans l’action.

Reciprocal security

(9) In an action for a collision in which a ship, an aircraft or other property of a defendant has been arrested, or security has been given to answer judgment against the defendant, and in which the defendant has instituted a cross-action or counter-claim in which a ship, an aircraft or other property of the plaintiff is liable to arrest but cannot be arrested, the Federal Court may stay the proceedings in the principal action until security has been given to answer judgment in the cross-action or counterclaim.

R.S., 1985, c. F-7, s. 43; 1990, c. 8, s. 12; 1996, c. 31, s. 83; 2002, c. 8, s. 40; 2009, c. 21, s. 18(E).

Garantie réciproque

(9) Dans une action pour collision où un navire, aéronef ou autre bien du défendeur est saisi, ou un cautionnement est fourni, et où le défendeur présente une demande reconventionnelle en vertu de laquelle un navire, aéronef ou autre bien du demandeur est saisissable, la Cour fédérale peut, s’il ne peut être procédé à la saisie de ces derniers biens, suspendre l’action principale jusqu’au dépôt d’un cautionnement par le demandeur.

L.R. (1985), ch. F-7, art. 43; 1990, ch. 8, art. 12; 1996, ch. 31, art. 83; 2002, ch. 8, art. 40; 2009, ch. 21, art. 18(A).

Mandamus, injunction, specific performance or appointment of receiver

44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.

R.S., 1985, c. F-7, s. 44; 2002, c. 8, s. 41.

Mandamus, injonction, exécution intégrale ou nomination d’un séquestre

44 Indépendamment de toute autre forme de réparation qu’elle peut accorder, la Cour d’appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction ou une ordonnance d’exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu’elle juge équitables.

L.R. (1985), ch. F-7, art. 44; 2002, ch. 8, art. 41.

Procedure

Giving of judgment after judge ceases to hold office

45 (1) A judge of the Federal Court of Appeal or the Federal Court who resigns or is appointed to another court or otherwise ceases to hold office may, at the request of the Chief Justice of that court, at any time within eight weeks after that event, give judgment in any cause, action or matter previously tried by or heard before the judge as if he or she had continued in office.

Taking part in giving of judgment after judge of Federal Court of Appeal ceases to hold office

(2) If a judge of the Federal Court of Appeal who resigns or is appointed to another court or otherwise ceases to hold office has heard a cause, an action or a matter in the Federal Court of Appeal jointly with other judges of that

Procédure

Jugement rendu après cessation de fonctions

45 (1) Le juge de la Cour d’appel fédérale ou de la Cour fédérale qui a cessé d’occuper sa charge, notamment par suite de démission ou de nomination à un autre poste, peut, dans les huit semaines qui suivent et à la demande du juge en chef du tribunal concerné, rendre son jugement dans toute affaire qu’il a instruite.

Participation au jugement après cessation de fonctions

(2) À la demande du juge en chef de la Cour d’appel fédérale, le juge de celle-ci qui se trouve dans la situation visée au paragraphe (1) après y avoir instruit une affaire conjointement avec d’autres juges peut, dans le délai fixé

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

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rule 169 or 300 as either an action or an application, the person may commence the proceeding as an action or as an application.

d'application de celle-ci qui en permet l'introduction par voie d'action ou de demande, le demandeur peut l'introduire de l'une ou l'autre de ces façons.

Originating documents

Commencement of proceedings

62 (1) Subject to subsection (2), all actions, applications or appeals shall be commenced by the issuance of an originating document.

Exception

(2) A counterclaim or third party claim in an action brought only against persons who are already parties to the action shall be commenced by the service and filing of the counterclaim or third party claim.

Types of originating documents

63 (1) Unless otherwise provided by or under an Act of Parliament, the originating document for the commencement of

(a) an action, including an appeal by way of an action, is a statement of claim;

(b) a counterclaim against a person who is not yet a party to the action is a statement of defence and counterclaim;

(c) a third party claim against a person who is not yet a party to the action is a third party claim;

(d) an application is a notice of application; and

(e) an appeal is a notice of appeal.

Other originating documents

(2) Where by or under an Act of Parliament a proceeding is to be commenced by way of a document different from the originating document required under these Rules, the rules applicable to the originating document apply in respect of that document.

Declaratory relief available

64 No proceeding is subject to challenge on the ground that only a declaratory order is sought, and the Court may make a binding declaration of right in a proceeding whether or not any consequential relief is or can be claimed.

Acte introductif d'instance

Introduction de l'instance

62 (1) Sous réserve du paragraphe (2), les actions, les demandes et les appels sont introduits par la délivrance d'un acte introductif d'instance.

Exception

(2) Dans une action, la demande reconventionnelle ou la mise en cause qui vise uniquement des personnes qui sont déjà parties à l'action est introduite par sa signification à celles-ci et son dépôt.

Types d'actes introductifs

63 (1) Sauf disposition contraire d'une loi fédérale ou de ses textes d'application, l'acte introductif d'instance est :

a) une déclaration, dans le cas d'une action, notamment d'un appel par voie d'action;

b) une défense et demande reconventionnelle, dans le cas d'une demande reconventionnelle contre une personne qui n'est pas partie à l'action;

c) une mise en cause, dans le cas de la mise en cause d'une personne qui n'est pas partie à l'action;

d) un avis de demande, dans le cas d'une demande;

e) un avis d'appel, dans le cas d'un appel.

Autre document introductif

(2) Lorsqu'une loi fédérale ou un texte d'application de celle-ci prévoit l'introduction d'une instance au moyen d'un document autre que l'acte introductif d'instance visé au paragraphe (1), les règles applicables à ce dernier s'appliquent à ce document.

Jugement déclaratoire

64 Il ne peut être fait opposition à une instance au motif qu'elle ne vise que l'obtention d'un jugement déclaratoire, et la Cour peut faire des déclarations de droit qui lient les parties à l'instance, qu'une réparation soit ou puisse être demandée ou non en conséquence.

Order to be served

(3) An order made under subsection (1) removing a solicitor of record of a party shall be served on the party in the manner set out in subsection (2) and on all other parties to the proceeding.

Signification de l'ordonnance

(3) Si la Cour rend l'ordonnance de cessation d'occuper, l'avocat la signifie à la partie qu'il représentait, de la façon prévue au paragraphe (2), ainsi qu'aux autres parties à l'instance.

Proof of service

(4) An order under subsection (1) does not take effect until proof of its service has been filed.

Prise d'effet de l'ordonnance

(4) L'ordonnance de cessation d'occuper ne prend effet qu'à compter du dépôt de la preuve de sa signification.

Solicitor of record ceasing to act

126 A party is deemed not to be represented by a solicitor if the party does not appoint a new solicitor after its solicitor of record

- **(a)** dies; or
- **(b)** ceases to act for the party because of
  - **(i)** appointment to a public office incompatible with the solicitor's profession,
  - **(ii)** suspension or disbarment as a solicitor, or
  - **(iii)** an order made under rule 125.

Cessation de la représentation

126 Est réputée ne pas être représentée par un avocat la partie qui ne remplace pas son avocat inscrit au dossier lorsque celui-ci, selon le cas :

- **a)** décède;
- **b)** cesse de la représenter pour l'une des raisons suivantes :
  - **(i)** il a été nommé à une charge publique incompatible avec sa profession,
  - **(ii)** il a été suspendu ou radié en tant qu'avocat,
  - **(iii)** une ordonnance a été rendue en vertu de la règle 125.

Service of Documents

Personal Service

Service of originating documents

127 (1) An originating document that has been issued, other than in an appeal from the Federal Court to the Federal Court of Appeal or an *ex parte* application under rule 327, shall be served personally.

Exception

(2) A party who has already participated in the proceeding need not be personally served.

Service of notice of appeal on the Crown

(3) Despite subsections (1) and (2), in the case of an appeal from Federal Court to the Federal Court of Appeal, if the Crown, the Attorney General of Canada or any other minister of the Crown is a respondent, the notice of appeal shall be served personally on them in accordance with rule 133.

SOR/2004-283, s. 13; SOR/2010-177, s. 1.

Signification des documents

Signification à personne

Signification de l'acte introductif d'instance

127 (1) L'acte introductif d'instance qui a été délivré est signifié à personne sauf dans le cas de l'appel d'une décision de la Cour fédérale devant la Cour d'appel fédérale et dans le cas d'une demande visée à la règle 327 et présentée *ex parte*.

Exception

(2) Il n'est pas nécessaire de signifier ainsi l'acte introductif d'instance à une partie qui a déjà participé à l'instance.

Signification de l'avis d'appel à la Couronne

(3) Malgré les paragraphes (1) et (2), dans le cadre de l'appel d'une décision de la Cour fédérale devant la Cour d'appel fédérale, lorsque la Couronne, le procureur général du Canada ou tout autre ministre de la Couronne est l'intimé, l'avis d'appel est signifié à personne conformément à la règle 133.

DORS/2004-283, art. 13; DORS/2010-177, art. 1.

Substituted service or dispensing with service

136 (1) Where service of a document that is required to be served personally cannot practicably be effected, the Court may order substitutional service or dispense with service.

Ordonnance de signification substitutive

136 (1) Si la signification à personne d'un document est en pratique impossible, la Cour peut rendre une ordonnance autorisant la signification substitutive ou dispensant de la signification.

Motion may be made *ex parte*

(2) A motion for an order under subsection (1) may be made *ex parte*.

Requête *ex parte*

(2) L'ordonnance visée au paragraphe (1) peut être demandée par voie de requête *ex parte*.

Order to be served

(3) A document served by substitutional service shall make reference to the order that authorized the substitutional service.

Signification de l'ordonnance

(3) Un document signifié selon un mode substitutif fait mention de l'ordonnance autorisant ce mode de signification.

Service outside Canada

Signification à l'étranger

Service outside Canada

137 (1) Subject to subsection (2), a document to be personally served outside Canada may be served in the manner set out in rules 127 to 136 or in the manner prescribed by the law of the jurisdiction in which service is to be effected.

Signification à l'étranger

137 (1) Sous réserve du paragraphe (2), le document devant être signifié à personne à l'étranger peut l'être soit de la manière prévue aux règles 127 à 136, soit de la manière prévue par les règles de droit en vigueur dans les limites territoriales où s'effectue la signification.

Hague Convention

(2) Where service is to be effected in a contracting state to the Hague Convention, service shall be as provided by the Convention.

Convention de La Haye

(2) La signification dans un État signataire de la Convention de La Haye s'effectue de la manière prévue par celle-ci.

Proof of service

(3) Service of documents outside Canada may be proven

(a) in the manner set out in rule 146;

(b) in the manner provided by the law of the jurisdiction in which service was effected; or

(c) in accordance with the Hague Convention, if service is effected in a contracting state.

Preuve de signification

(3) La preuve de la signification de documents à l'étranger peut être établie :

a) de la manière prévue à la règle 146;

b) de la manière prévue par les règles de droit en vigueur dans les limites territoriales où la signification a été effectuée;

c) conformément à la Convention de La Haye, dans le cas où la signification a été effectuée dans un État signataire.

Other Forms of Service

Autres modes de signification

Personal service of originating documents

138 Unless otherwise provided in these Rules, personal service is required only for originating documents.

SOR/2015-21, s. 15.

Signification à personne — acte introductif d'instance

138 Sauf disposition contraire des présentes règles, seul l'acte introductif d'instance est signifié à personne.

DORS/2015-21, art. 15.

Application of rules re other charging orders

(2) Subsection 458(1) and rules 460 and 462 apply, with such modifications as are necessary, to an order made under this rule.

Ancillary or incidental injunction

464 On motion, a judge may grant an injunction ancillary or incidental to a charging order under rule 458 or appoint a receiver to enforce a charge imposed by such an order.

Order prohibiting dealing with funds

465 (1) The Court, on the motion of a person

(a) who has a mortgage or charge on the interest of another person in money paid into court,

(b) to whom such an interest has been assigned, or

(c) who is a judgment creditor of a person entitled to such an interest,

may make an order prohibiting the transfer, delivery, payment or other dealing with all or any part of the money, or any income thereon, without prior notice to the moving party.

Service of notice of motion

(2) Notice of a motion under subsection (1) shall be served on every person whose interest may be affected by the order sought.

Costs

(3) On a motion under subsection (1), the Court may order the moving party to pay the costs of any party or of any other person interested in the money in question.

Contempt Orders

Contempt

466 Subject to rule 467, a person is guilty of contempt of Court who

(a) at a hearing fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding;

(b) disobeys a process or order of the Court;

Application d’autres règles

(2) Le paragraphe 458(1) et les règles 460 et 462 s’appliquent, avec les adaptations nécessaires, à l’ordonnance rendue en vertu de la présente règle.

Ordonnance accessoire

464 Un juge peut, sur requête, accorder une injonction corollaire ou accessoire à une ordonnance de constitution de charge rendue en vertu de la règle 458 ou nommer un séquestre judiciaire chargé de veiller au respect de la charge constituée par l’ordonnance.

Opérations interdites

465 (1) La Cour peut, sur requête de l’une des personnes suivantes, rendre une ordonnance interdisant que soit effectué, sans préavis à cette personne, tout transfert, livraison, paiement ou autre opération mettant en cause la totalité ou une partie d’une somme consignée à la Cour ou des revenus y afférents :

a) une personne qui possède une hypothèque ou une charge sur le droit que possède une autre personne sur cette somme;

b) une personne à laquelle un droit sur cette somme a été cédé;

c) une personne qui est créancière judiciaire de la personne qui possède un droit sur cette somme.

Signification de l’avis de requête

(2) L’avis de la requête présentée aux termes du paragraphe (1) est signifié à chaque personne dont le droit sur la somme d’argent peut être touché par l’ordonnance demandée.

Frais

(3) Par suite de la requête présentée aux termes du paragraphe (1), la Cour peut ordonner au requérant de payer les frais engagés par toute partie ou toute autre personne ayant un intérêt dans la somme d’argent en cause.

Ordonnances pour outrage

Outrage

466 Sous réserve de la règle 467, est coupable d’outrage au tribunal quiconque :

a) étant présent à une audience de la Cour, ne se comporte pas avec respect, ne garde pas le silence ou manifeste son approbation ou sa désapprobation du déroulement de l’instance;

(c) acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court;

(d) is an officer of the Court and fails to perform his or her duty; or

(e) is a sheriff or bailiff and does not execute a writ forthwith or does not make a return thereof or, in executing it, infringes a rule the contravention of which renders the sheriff or bailiff liable to a penalty.

b) désobéit à un moyen de contrainte ou à une ordonnance de la Cour;

c) agit de façon à entraver la bonne administration de la justice ou à porter atteinte à l'autorité ou à la dignité de la Cour;

d) étant un fonctionnaire de la Cour, n'accomplit pas ses fonctions;

e) étant un shérif ou un huissier, n'exécute pas immédiatement un bref ou ne dresse pas le procès-verbal d'exécution, ou enfreint une règle dont la violation le rend passible d'une peine.

Right to a hearing

467 (1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt

(a) to appear before a judge at a time and place stipulated in the order;

(b) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and

(c) to be prepared to present any defence that the person may have.

Droit à une audience

467 (1) Sous réserve de la règle 468, avant qu'une personne puisse être reconnue coupable d'outrage au tribunal, une ordonnance, rendue sur requête d'une personne ayant un intérêt dans l'instance ou sur l'initiative de la Cour, doit lui être signifiée. Cette ordonnance lui enjoint :

a) de comparaître devant un juge aux date, heure et lieu précisés;

b) d'être prête à entendre la preuve de l'acte qui lui est reproché, dont une description suffisamment détaillée est donnée pour lui permettre de connaître la nature des accusations portées contre elle;

c) d'être prête à présenter une défense.

Ex parte motion

(2) A motion for an order under subsection (1) may be made *ex parte*.

Requête *ex parte*

(2) Une requête peut être présentée *ex parte* pour obtenir l'ordonnance visée au paragraphe (1).

Burden of proof

(3) An order may be made under subsection (1) if the Court is satisfied that there is a *prima facie* case that contempt has been committed.

Fardeau de preuve

(3) La Cour peut rendre l'ordonnance visée au paragraphe (1) si elle est d'avis qu'il existe une preuve *prima facie* de l'outrage reproché.

Service of contempt order

(4) An order under subsection (1) shall be personally served, together with any supporting documents, unless otherwise ordered by the Court.

Signification de l'ordonnance

(4) Sauf ordonnance contraire de la Cour, l'ordonnance visée au paragraphe (1) et les documents à l'appui sont signifiés à personne.

Contempt in presence of a judge

468 In a case of urgency, a person may be found in contempt of Court for an act committed in the presence of a judge and condemned at once, if the person has been called on to justify his or her behaviour.

Outrage en présence d'un juge

468 En cas d'urgence, une personne peut être reconnue coupable d'outrage au tribunal pour un acte commis en présence d'un juge et condamnée sur-le-champ, pourvu qu'on lui ait demandé de justifier son comportement.

Burden of proof

469 A finding of contempt shall be based on proof beyond a reasonable doubt.

Fardeau de preuve

469 La déclaration de culpabilité dans le cas d'outrage au tribunal est fondée sur une preuve hors de tout doute raisonnable.

Evidence to be oral

470 (1) Unless the Court directs otherwise, evidence on a motion for a contempt order, other than an order under subsection 467(1), shall be oral.

Témoignages oraux

470 (1) Sauf directives contraires de la Cour, les témoignages dans le cadre d'une requête pour une ordonnance d'outrage au tribunal, sauf celle visée au paragraphe 467(1), sont donnés oralement.

Testimony not compellable

(2) A person alleged to be in contempt may not be compelled to testify.

Témoignage facultatif

(2) La personne à qui l'outrage au tribunal est reproché ne peut être contrainte à témoigner.

Assistance of Attorney General

471 Where the Court considers it necessary, it may request the assistance of the Attorney General of Canada in relation to any proceedings for contempt.

Assistance du procureur général

471 La Cour peut, si elle l'estime nécessaire, demander l'assistance du procureur général du Canada dans les instances pour outrage au tribunal.

Penalty

472 Where a person is found to be in contempt, a judge may order that

(a) the person be imprisoned for a period of less than five years or until the person complies with the order;

(b) the person be imprisoned for a period of less than five years if the person fails to comply with the order;

(c) the person pay a fine;

(d) the person do or refrain from doing any act;

(e) in respect of a person referred to in rule 429, the person's property be sequestered; and

(f) the person pay costs.

Peine

472 Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :

a) qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance;

b) qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à l'ordonnance;

c) qu'elle paie une amende;

d) qu'elle accomplisse un acte ou s'abstienne de l'accomplir;

e) que les biens de la personne soient mis sous séquestre, dans le cas visé à la règle 429;

f) qu'elle soit condamnée aux dépens.

Process of the Court

To whom process may be issued

473 (1) Where there is no sheriff or a sheriff is unable or unwilling to act, a process, including a warrant for arrest of property under rule 481, may be issued to any person to whom a process of a superior court of the province in which the process is to be executed could be issued.

Moyens de contrainte

Personnes autres que le shérif

473 (1) En cas d'absence du shérif ou d'empêchement ou de refus d'agir de sa part, tout bref d'exécution ou autre moyen de contrainte, y compris le mandat de saisie de biens délivré en vertu de la règle 481, peut être adressé à une personne à qui pourrait être adressé un acte d'exécution émanant d'une cour supérieure de la province où l'exécution doit s'effectuer.

CONSOLIDATION

CODIFICATION

Financial Administration Act

Loi sur la gestion des finances publiques

R.S.C., 1985, c. F-11

L.R.C. (1985), ch. F-11

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R.S.C., 1985, c. F-11

L.R.C., 1985, ch. F-11

An Act to provide for the financial administration of the Government of Canada, the establishment and maintenance of the accounts of Canada and the control of Crown corporations

Loi relative à la gestion des finances publiques, à la création et à la tenue des comptes du Canada et au contrôle des sociétés d'État

Short Title

Short title

1 This Act may be cited as the *Financial Administration Act*.

R.S., c. F-10, s. 1.

Titre abrégé

Titre abrégé

1 *Loi sur la gestion des finances publiques*.

S.R., ch. F-10, art. 1.

Interpretation

Definitions

2 In this Act,

appropriate Minister means,

(a) with respect to a department named in Schedule I, the Minister presiding over the department,

(a.1) with respect to a division or branch of the federal public administration set out in column I of Schedule I.1, the Minister set out in column II of that Schedule,

(b) with respect to a commission under the *Inquiries Act*, the Minister designated by order of the Governor in Council as the appropriate Minister,

(c) with respect to the Senate and the office of the Senate Ethics Officer, the Speaker of the Senate, with respect to the House of Commons, the Board of Internal Economy, with respect to the office of the Conflict of Interest and Ethics Commissioner, the Speaker of the House of Commons, and with respect to the Library of Parliament, the Parliamentary Protective Service and the office of the Parliamentary Budget Officer, the Speakers of the Senate and the House of Commons,

Définitions

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

agent agréé Personne autorisée par le ministre à placer des valeurs auprès de souscripteurs ou d'acquéreurs. (*authorized agent*)

agent comptable Outre les agents comptables nommés en vertu de la partie IV, la Banque du Canada. (*registrar*)

agent financier Outre les agents financiers nommés en vertu de la partie IV, la Banque du Canada. (*fiscal agent*)

biens publics Biens de toute nature, à l'exception de fonds, appartenant à Sa Majesté du chef du Canada. (*public property*)

billet du Trésor Billet, avec ou sans certificat, émis par Sa Majesté ou en son nom, constatant le droit du bénéficiaire inscrit ou du porteur de toucher, à une date située dans les douze mois suivant celle de son émission, la somme qui y est spécifiée à titre de principal. (*treasury note*)

(c.1) with respect to a departmental corporation, the Minister designated by order of the Governor in Council as the appropriate Minister, and

(d) with respect to a Crown corporation, the appropriate Minister as defined in subsection 83(1); (*ministre compétent*)

appropriation means any authority of Parliament to pay money out of the Consolidated Revenue Fund; (*crédit*)

Auditor General of Canada means the officer appointed pursuant to subsection 3(1) of the *Auditor General Act*; (*vérificateur général*)

authorized agent means any person authorized by the Minister to accept subscriptions for or make sales of securities; (*agent agréé*)

Consolidated Revenue Fund means the aggregate of all public moneys that are on deposit at the credit of the Receiver General; (*Trésor*)

Crown corporation has the meaning assigned by subsection 83(1); (*société d'État*)

department means

(a) any of the departments named in Schedule I,

(a.1) any of the divisions or branches of the federal public administration set out in column I of Schedule I.1,

(b) a commission under the *Inquiries Act* that is designated by order of the Governor in Council as a department for the purposes of this Act,

(c) the staffs of the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service and office of the Parliamentary Budget Officer, and

(d) any departmental corporation; (*ministère*)

departmental corporation means a corporation named in Schedule II; (*établissement public*)

fiscal agent means a fiscal agent appointed under Part IV and includes the Bank of Canada; (*agent financier*)

fiscal year means the period beginning on April 1 in one year and ending on March 31 in the next year; (*exercice*)

Minister means the Minister of Finance; (*ministre*)

bon du Trésor Bon, avec ou sans certificat, émis par Sa Majesté ou en son nom, constatant le droit du bénéficiaire inscrit ou du porteur de toucher, à une date située dans les douze mois suivant celle de son émission, la somme qui y est spécifiée à titre de principal. (*treasury bill*)

certificat de valeur Certificat émis par Sa Majesté ou en son nom qui représente une partie de la dette publique du Canada. (*security certificate*)

crédit Autorisation donnée par le Parlement d'effectuer des paiements sur le Trésor. (*appropriation*)

effet de commerce Titre négociable, notamment chèque, chèque de voyage, traite, lettre de change ou titre de versement postal. (*negotiable instrument*)

établissement public Personne morale mentionnée à l'annexe II. (*departmental corporation*)

exercice La période commençant le 1er avril d'une année et se terminant le 31 mars de l'année suivante. (*fiscal year*)

fonctionnaire public Ministre ou toute autre personne employée dans l'administration publique fédérale. (*public officer*)

fonds Sommes d'argent; y sont assimilés les effets de commerce. (*money*)

fonds publics Fonds appartenant au Canada, perçus ou reçus par le receveur général ou un autre fonctionnaire public agissant en sa qualité officielle ou toute autre personne autorisée à en percevoir ou recevoir. La présente définition vise notamment :

a) les recettes de l'État;

b) les emprunts effectués par le Canada ou les produits de l'émission ou de la vente de titres;

c) les fonds perçus ou reçus pour le compte du Canada ou en son nom;

d) les fonds perçus ou reçus par un fonctionnaire public sous le régime d'un traité, d'une loi, d'une fiducie, d'un contrat ou d'un engagement et affectés à une fin particulière précisée dans l'acte en question ou conformément à celui-ci. (*public money*)

ministère

a) L'un des ministères mentionnés à l'annexe I;

money includes negotiable instruments; (*fonds*)

negotiable instrument includes any cheque, draft, traveller's cheque, bill of exchange, postal note, money order, postal remittance and any other similar instrument; (*effet de commerce*)

non-certificated security includes a security for which no certificate is issued and a certificated security held within a security clearing and settlement system in the custody of a custodian or nominee; (*valeur sans certificat*)

parent Crown corporation has the meaning assigned by subsection 83(1); (*société d'État mère*)

public money means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes

(a) duties and revenues of Canada,

(b) money borrowed by Canada or received through the issue or sale of securities,

(c) money received or collected for or on behalf of Canada, and

(d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract; (*fonds publics*)

public officer includes a minister of the Crown and any person employed in the federal public administration; (*fonctionnaire public*)

public property means all property, other than money, belonging to Her Majesty in right of Canada; (*biens publics*)

registrar means a registrar appointed under Part IV and includes the Bank of Canada; (*agent comptable*)

securities means securities of Canada in certificated form or non-certificated securities of Canada, and includes bonds, notes, deposit certificates, non-interest bearing certificates, debentures, treasury bills, treasury notes and any other security representing part of the public debt of Canada; (*valeurs* ou *titres*)

security certificate means a tangible certificate issued by or on behalf of Her Majesty representing part of the public debt of Canada; (*certificat de valeur*)

a.1) l'un des secteurs de l'administration publique fédérale mentionnés à la colonne I de l'annexe I.1;

b) toute commission nommée sous le régime de la *Loi sur les enquêtes* désignée comme tel, pour l'application de la présente loi, par décret du gouverneur en conseil;

c) le personnel du Sénat, celui de la Chambre des communes, celui de la bibliothèque du Parlement, celui du bureau du conseiller sénatorial en éthique, celui du bureau du commissaire aux conflits d'intérêts et à l'éthique, celui du Service de protection parlementaire et celui du bureau du directeur parlementaire du budget;

d) tout établissement public. (*department*)

ministre Le ministre des Finances. (*Minister*)

ministre compétent

a) Dans le cas d'un ministère mentionné à l'annexe I, le ministre chargé de son administration;

a.1) dans le cas d'un secteur de l'administration publique fédérale mentionné à la colonne I de l'annexe I.1, le ministre mentionné à la colonne II de cette annexe;

b) dans le cas d'une commission visée par la *Loi sur les enquêtes*, le ministre chargé de son administration par décret du gouverneur en conseil;

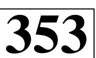
c) dans le cas du Sénat et du bureau du conseiller sénatorial en éthique, le président du Sénat, dans celui de la Chambre des communes, le bureau de régie interne, dans celui du bureau du commissaire aux conflits d'intérêts et à l'éthique, le président de la Chambre des communes et dans celui de la bibliothèque du Parlement, du Service de protection parlementaire et du bureau du directeur parlementaire du budget, le président de chaque chambre;

c.1) dans le cas d'un établissement public, le ministre que le gouverneur en conseil charge, par décret, de son administration;

d) dans le cas d'une société d'État, le ministre de tutelle au sens du paragraphe 83(1). (*appropriate Minister*)

société d'État S'entend au sens du paragraphe 83(1). (*Crown corporation*)

société d'État mère S'entend au sens du paragraphe 83(1). (*parent Crown corporation*)



treasury bill means a bill in certificated form, or a non-certificated security, issued by or on behalf of Her Majesty for the payment of a principal sum specified in the bill to a named recipient or to a bearer at a date not later than twelve months after the date of issue of the bill; (*bon du Trésor*)

treasury note means a note in certificated form, or a non-certificated security, issued by or on behalf of Her Majesty for the payment of a principal sum specified in the note to a named recipient or to a bearer at a date not later than twelve months after the date of issue of the note. (*billet du Trésor*)

R.S., 1985, c. F-11, s. 2; R.S., 1985, c. 1 (4th Supp.), s. 25; 1991, c. 24, s. 50(F); 1992, c. 1, ss. 69, 143(E); 1995, c. 17, s. 57; 1999, c. 31, s. 98(F); 2003, c. 22, s. 224(E); 2004, c. 7, s. 8; 2006, c. 9, s. 7; 2015, c. 36, s. 125; 2017, c. 20, s. 160.

Trésor Le total des fonds publics en dépôt au crédit du receveur général. (*Consolidated Revenue Fund*)

valeur sans certificat Outre la valeur mobilière qui n'est pas constatée par un certificat, y est assimilé le certificat de valeur confié à un dépositaire ou un intermédiaire pour des services de compensation et de règlement. (*non-certificated security*)

valeurs ou ***titres*** Valeurs du Canada, avec ou sans certificat, qui représentent une partie de la dette publique. La présente définition vise notamment les obligations, les billets, les certificats de dépôt, les certificats ne portant pas intérêt, les débentures, les bons du Trésor et les billets du Trésor. (*securities*)

vérificateur général Personne nommée conformément au paragraphe 3(1) de la *Loi sur le vérificateur général*. (*Auditor General of Canada*)

L.R. (1985), ch. F-11, art. 2; L.R. (1985), ch. 1 (4e suppl.), art. 25; 1991, ch. 24, art. 50(F); 1992, ch. 1, art. 69 et 143(A); 1995, ch. 17, art. 57; 1999, ch. 31, art. 98(F); 2003, ch. 22, art. 224(A); 2004, ch. 7, art. 8; 2006, ch. 9, art. 7; 2015, ch. 36, art. 125; 2017, ch. 20, art. 160.

Alteration of Schedules

Addition to Schedule I.1, II or III

3 (1) The Governor in Council may, by order,

(a) add to Schedule I.1 in column I thereof the name of any division or branch of the federal public administration and in column II thereof opposite that name a reference to the appropriate Minister;

(a.1) add to Schedule II the name of any corporation established by an Act of Parliament that performs administrative, research, supervisory, advisory or regulatory functions of a governmental nature; and

(b) add to Part I or II of Schedule III the name of any parent Crown corporation.

Alteration of Schedule I.1

(1.1) The Governor in Council may, by order, amend Schedule I.1 by striking out the reference in column II thereof opposite the name of a division or branch of the federal public administration in column I thereof and by substituting therefor another reference in column II thereof opposite that name.

Idem

(1.2) The Governor in Council may, by order, delete from Schedule I.1 the name of any division or branch of the federal public administration that has been changed and shall thereupon add the new name of the division or branch to that Schedule.

Annexes

Inscription aux ann. I.1, II ou III

3 (1) Le gouverneur en conseil peut, par décret :

a) inscrire à l'annexe I.1 tout secteur de l'administration publique fédérale ainsi que le ministre compétent;

a.1) inscrire à l'annexe II toute personne morale constituée par une loi fédérale et chargée de fonctions étatiques d'administration, de recherche, de contrôle, de conseil ou de réglementation;

b) inscrire aux parties I ou II de l'annexe III toute société d'État mère.

Modification de l'ann. I.1

(1.1) Le gouverneur en conseil peut, par décret, modifier à l'annexe I.1 toute mention de la colonne II figurant en regard d'une mention de la colonne I.

Idem

(1.2) Le gouverneur en conseil peut, par décret, remplacer à l'annexe I.1 l'ancienne dénomination d'un secteur de l'administration publique fédérale par la nouvelle.

SCHEDULE I.1

(Sections 2 and 3)

Column I Division or Branch of the Federal Public Administration	Column II Appropriate Minister
Administrative Tribunals Support Service of Canada *Service canadien d'appui aux tribunaux administratifs*	Minister of Justice
Atlantic Canada Opportunities Agency *Agence de promotion économique du Canada atlantique*	Member of the Queen's Privy Council for Canada appointed by Commission under the Great Seal to be the Minister for the purposes of the *Atlantic Canada Opportunities Agency Act*
Canadian Grain Commission *Commission canadienne des grains*	Minister of Agriculture and Agri-Food
Canadian Human Rights Commission *Commission canadienne des droits de la personne*	Minister of Justice
Canadian Intergovernmental Conference Secretariat *Secrétariat des conférences intergouvernementales canadiennes*	Minister of Infrastructure and Communities
Canadian Northern Economic Development Agency *Agence canadienne de développement économique du Nord*	Minister of the Canadian Northern Economic Development Agency
Canadian Radio-television and Telecommunications Commission *Conseil de la radiodiffusion et des télécommunications canadiennes*	Minister of Canadian Heritage
Canadian Security Intelligence Service *Service canadien du renseignement de sécurité*	Minister of Public Safety and Emergency Preparedness
Canadian Space Agency *Agence spatiale canadienne*	Minister of Industry
Canadian Transportation Agency *Office des transports du Canada*	Minister of Transport
Civilian Review and Complaints Commission for the Royal Canadian Mounted Police *Commission civile d'examen et de traitement des plaintes relatives à la Gendarmerie royale du Canada*	Minister of Public Safety and Emergency Preparedness
Communications Security Establishment *Centre de la sécurité des télécommunications*	Minister of National Defence
Copyright Board *Commission du droit d'auteur*	Minister of Industry
Correctional Service of Canada *Service correctionnel du Canada*	Minister of Public Safety and Emergency Preparedness

ANNEXE I.1

(articles 2 et 3)

Colonne I Secteur de l'administration publique fédérale	Colonne II Ministre compétent
Administration du pipe-line du Nord *Northern Pipeline Agency*	Le ministre des Ressources naturelles
Agence canadienne de développement économique du Nord *Canadian Northern Economic Development Agency*	Le ministre de l'Agence canadienne de développement économique du Nord
Agence canadienne d'évaluation d'impact *Impact Assessment Agency of Canada*	Le ministre de l'Environnement
Agence de développement économique du Canada pour les régions du Québec *Economic Development Agency of Canada for the Regions of Quebec*	Le ministre de l'Agence de développement économique du Canada pour les régions du Québec
Agence de développement économique du Pacifique Canada *Pacific Economic Development Agency of Canada*	Le ministre du Développement international
Agence de la consommation en matière financière du Canada *Financial Consumer Agency of Canada*	Le ministre des Finances
Agence de la santé publique du Canada *Public Health Agency of Canada*	Le ministre de la Santé
Agence de promotion économique du Canada atlantique *Atlantic Canada Opportunities Agency*	Le membre du Conseil privé de la Reine pour le Canada chargé, par commission sous le grand sceau, de l'application de la *Loi sur l'Agence de promotion économique du Canada atlantique*
Agence fédérale de développement économique pour le Nord de l'Ontario *Federal Economic Development Agency for Northern Ontario*	Le ministre des Services aux Autochtones
Agence fédérale de développement économique pour le Sud de l'Ontario *Federal Economic Development Agency for Southern Ontario*	Le ministre d'État (Agence fédérale de développement économique pour le Sud de l'Ontario)
Agence spatiale canadienne *Canadian Space Agency*	Le ministre de l'Industrie
Bibliothèque et Archives du Canada *Library and Archives of Canada*	Le ministre du Patrimoine canadien
Bureau de l'enquêteur correctionnel du Canada *Office of the Correctional Investigator of Canada*	Le ministre de la Sécurité publique et de la Protection civile
Bureau de l'infrastructure du Canada *Office of Infrastructure of Canada*	Le ministre de l'Infrastructure et des Collectivités

Registration
SOR/2021-244 December 13, 2021

FEDERAL COURTS ACT

P.C. 2021-1002 December 9, 2021

The rules committee of the Federal Court of Appeal and the Federal Court, pursuant to section 46[a] of the *Federal Courts Act*[b], makes the annexed *Rules Amending the Federal Courts Rules*.

Ottawa, November 3, 2021

Donald J. Rennie
Chair
Rules committee of the Federal Court of Appeal and the Federal Court

Whereas, pursuant to paragraph 46(4)(a)[c] of the *Federal Courts Act*[b], a copy of the proposed *Rules Amending the Federal Courts Rules*, substantially in the annexed form, was published in the *Canada Gazette*, Part I, on April 10, 2021 and interested persons were invited to make representations concerning the proposed Rules;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to section 46[a] of the *Federal Courts Act*[b], approves the annexed *Rules Amending the Federal Courts Rules*, made by the rules committee of the Federal Court of Appeal and the Federal Court.

Rules Amending the Federal Courts Rules

Amendments

1 (1) The definition *Christmas recess* in Rule 2 of the *Federal Courts Rules*[1] is repealed.

(2) The definition *holiday* in Rule 2 of the Rules is replaced by the following:

holiday means

(a) a Saturday;

(b) a *holiday* as defined in subsection 35(1) of the *Interpretation Act*;

Enregistrement
DORS/2021-244 Le 13 décembre 2021

LOI SUR LES COURS FÉDÉRALES

C.P. 2021-1002 Le 9 décembre 2021

En vertu de l'article 46[a] de la *Loi sur les Cours fédérales*[b], le comité des règles de la Cour d'appel fédérale et de la Cour fédérale établit les *Règles modifiant les Règles des Cours fédérales*, ci-après.

Ottawa, le 3 novembre 2021

Le président du comité des règles de la Cour d'appel fédérale et de la Cour fédérale
Donald J. Rennie

Attendu que, conformément à l'alinéa 46(4)a)[c] de la *Loi sur les Cours fédérales*[b], le projet de règles intitulé *Règles modifiant les Règles des Cours fédérales*, conforme en substance au texte ci-après, a été publié dans la Partie I de la *Gazette du Canada* le 10 avril 2021 et que les intéressés ont ainsi eu la possibilité de présenter leurs observations à cet égard,

À ces causes, sur recommandation du ministre de la Justice et en vertu de l'article 46[a] de la *Loi sur les Cours fédérales*[b], Son Excellence la Gouverneure générale en conseil approuve les *Règles modifiant les Règles des Cours fédérales*, ci-après, établies par le comité des règles de la Cour d'appel fédérale et de la Cour fédérale.

Règles modifiant les Règles des Cours fédérales

Modifications

1 (1) La définition de *vacances judiciaires de Noël*, à la règle 2 des *Règles des Cours fédérales*[1], est abrogée.

(2) La définition de *jour férié*, à la règle 2 des mêmes règles, est remplacée par ce qui suit :

jour férié S'entend :

a) du samedi;

b) de tout *jour férié* au sens du paragraphe 35(1) de la *Loi d'interprétation*;

[a] S.C. 2002, c. 8, s. 44
[b] R.S., c. F-7; S.C. 2002, c. 8, s. 14
[c] S.C. 1990, c. 8, s. 14(4)
[1] SOR/98-106; SOR/2004-283, s. 2

[a] L.C. 2002, ch. 8, art. 44
[b] L.R., ch. F-7; L.C. 2002, ch. 8, art. 14
[c] L.C. 1990, ch. 8, par. 14(4)
[1] DORS/98-106; DORS/2004-283, art. 2

16 (1) Subsection 365(1) of the Rules is replaced by the following:

Respondent's motion record

365 (1) A respondent to a motion shall serve a respondent's motion record and file one electronic copy or, subject to Rule 72.4, three paper copies of the record no later than

(a) in the case of a motion brought in the Federal Court, and subject to subsections 213(4) and 369(2), 2:00 p.m. on the day that is two days before the day fixed for the hearing of the motion; and

(b) in the case of a motion brought in the Federal Court of Appeal, 10 days after the day on which they are served with the moving party's motion record.

(2) Paragraph 365(2)(e) of the Rules is replaced by the following:

(e) any other filed material not contained in the moving party's motion record that is necessary for the purposes of the motion.

17 The Rules are amended by adding the following after rule 369:

Motions in the Federal Court of Appeal

369.1 Rule 362, subsection 364(3) and rules 366 to 369 do not apply to a motion that is brought in the Federal Court of Appeal.

Written representations only — Federal Court of Appeal

369.2 (1) Unless otherwise ordered by the Court and subject to subsection (2), all motions brought in the Federal Court of Appeal shall be decided on the basis of written representations.

Request for oral hearing

(2) A party to a motion may make a written request that the motion be heard orally. The request, together with the reasons why the motion should be heard orally, shall be attached as a separate page at the end of the party's motion record.

Reply by moving party

(3) Unless the motion is to be heard orally, the moving party may serve and file written representations in reply within four days after the day on which they are served with the respondent's motion record.

16 (1) Le paragraphe 365(1) des mêmes règles est remplacé par ce qui suit :

Dossier de l'intimé

365 (1) L'intimé signifie un dossier de réponse et en dépose une copie électronique ou, sous réserve de la règle 72.4, trois copies papier au plus tard :

a) dans le cas d'une requête présentée à la Cour fédérale et sous réserve des paragraphes 213(4) et 369(2), à 14 heures deux jours avant la date prévue pour l'audition de la requête;

b) dans le cas d'une requête présentée à la Cour d'appel fédérale, dix jours suivant la date où il a reçu signification du dossier de requête.

(2) L'alinéa 365(2)e) des mêmes règles est remplacé par ce qui suit :

e) les autres documents et éléments matériels déposés qui sont nécessaires dans le cadre de la requête et qui ne figurent pas dans le dossier de requête.

17 Les mêmes règles sont modifiées par adjonction, après la règle 369, de ce qui suit :

Requêtes à la Cour d'appel fédérale

369.1 La règle 362, le paragraphe 364(3) et les règles 366 à 369 ne s'appliquent pas aux requêtes présentées à la Cour d'appel fédérale.

Prétentions écrites uniquement — Cour d'appel fédérale

369.2 (1) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (2), la décision à l'égard d'une requête présentée à la Cour d'appel fédérale est prise sur la base de prétentions écrites.

Demande d'audience

(2) Une partie peut présenter une demande écrite d'audition de la requête. La demande, accompagnée des raisons justifiant l'audition, est jointe sous forme de page séparée à la fin du dossier de requête de la partie.

Réponse du requérant

(3) Sauf si une audition est tenue, le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse de l'intimé dans les quatre jours suivant la date à laquelle il en a reçu signification.

Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

– and –

CANADIAN TRANSPORTATION AGENCY

Intervener

MOTION RECORD OF THE APPLICANT, AIR PASSENGER RIGHTS

Show Cause Motion for Contempt of Court
(pursuant to Rules 467(1) and 369.2 of the *Federal Courts Rules*)

VOLUME 2 of 2

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IN THE MATTER OF THE CANADA LABOUR CODE, RSC 1985, c L-2 AS AMENDED

IN THE MATTER OF AN AGREEMENT BETWEEN THE MARITIME EMPLOYERS ASSOCIATION ("MEA") AND THE SYNDICAT DES DÉBARDEURS CUPE, LOCAL 375 ("UNION") RATIFIED BY ARBITRATOR JEAN-PIERRE LUSSIER ON APRIL 5, 2016, EMPLOYER GRIEVANCE FILE 2016-0001

IN THE MATTER OF THE FEDERAL COURT FILING OF THE AFOREMENTIONED ARBITRAL AWARD PURSUANT TO SECTION 66 OF THE CANADA LABOUR CODE

THE MARITIME EMPLOYERS ASSOCIATION (Applicant) and ANDRÉ JR RACETTE (Respondent) and THE SYNDICAT DES DÉBARDEURS, LOCAL 375 OF THE CANADIAN UNION OF PUBLIC EMPLOYEES (Impleaded Party)

Sylvie E. Roussel J.

Heard: May 21, 2019
Judgment: November 5, 2019
Docket: T-1247-18

Counsel: Mélanie Sauriol, for the Applicant
Jacques Lamoureux, for the Respondent and Impleaded Party

***Sylvie E. Roussel J.*:**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

I. Introduction

1 This is an appeal filed by the applicant, the Maritime Employers Association [MEA], pursuant to Rule 51 of the *Federal Courts Rules*, SORS/98-106 [Rules], against a decision dated March 18, 2019, by Madam Prothonotary Alexandra Steele. In the decision, Prothonotary Steele

dismissed the MEA's motion for a show cause order pursuant to rule 467 of the Rules, requiring the respondent, André Jr Racette, to appear and answer allegations of contempt of court.

2 For the reasons that follow, the Court finds that the motion to appeal must be dismissed.

II. Background

3 The MEA is an employers association recognized by order of the Canada Industrial Relations Board as representing maritime stakeholders from the ports of Montréal, Trois-Rivières, Bécancour, Hamilton and Toronto. It negotiates and administers the collective agreements of its members, which include ship owners, operators and agents as well as stevedoring companies.

4 Mr. Racette is a union representative of the impleaded party, the Syndicat des débardeurs, Local 375 of the Canadian Union of Public Employees [Union]. He represents employees engaged in the loading and unloading of vessels, and in other related work, in the territory of the Port of Montréal.

5 On February 5, 2016, the MEA filed an employer's grievance against Mr. Racette in relation to certain comments he made about one of the MEA's employees. The parties agreed to settle the employer's grievance and, under an agreement signed by all of the parties on March 29, 2019, Mr. Racette undertook to send the MEA a letter, the terms of which are reproduced in Appendix 1 to the agreement. That letter reads as follows:

> [TRANSLATION]
>
> I, André Jr Racette, union representative of the CUPE, acknowledge that the comments I made about [Mr. X] on January 22 and 28, 2016, were wrong and inappropriate.
>
> I recognize that such comments have no place in an employer/union relationship, especially in an arbitration.
>
> I hereby pledge to managers and employees of [the MEA], and more specifically to [Mr. X], to no longer engage in such personal attacks. I agree that a grievance arbitrator order me to comply with this commitment not to engage in personal attacks against any manager or employee of [the MEA].

6 The agreement further provides that the parties agree to ask the arbitrator to acknowledge the agreement between the parties, which comes into effect from the date of signature, and to order Mr. Racette to comply with the undertakings contained in the letter.

7 On April 5, 2016, the arbitrator issued his arbitral award in which the agreement and Mr. Racette's letter are reproduced. The arbitrator concluded as follows in the arbitral award:

> [TRANSLATION]

> [9] ***THE ARBITRATOR ACKNOWLEDGES*** the agreement between the parties — which constitutes the settlement of employer grievance number 2016-0001 that was before him — and ***ORDERS*** Mr. Racette "*to comply with the undertakings he made in the letter, the content of which is reproduced in Appendix 1*".
>
> [Bold font and italics in original.]

8 Two years later, that is to say, on June 26, 2018, the MEA sent Mr. Racette a demand letter in which he was accused of making derogatory, abusive, intimidating and harassing comments about the MEA and its representatives on June 13 and 18, 2018. The MEA requested that he provide a sworn statement confirming that he would cease any form of intimidation of MEA employees, that he would not raise his voice when speaking to them and that he would fully comply with his previous undertakings.

9 On June 27, 2018, a certificate of filing of the arbitral award was issued by this Court pursuant to section 66 of the *Canada Labour Code*, RSC 1985, c L-2, which allows the MEA to avail itself of the enforcement measures set out in Part 12 of the Rules, once the certificate has been issued. This part includes provisions that cover contempt of court.

10 In a response dated July 3, 2018, Mr. Racette indicated that some context was needed with respect to the incidents of June 13 and 18, 2018, and reiterated the undertakings he had previously agreed to comply with.

11 On October 12, 2018, the MEA filed a motion for a show cause order for contempt pursuant to rule 467 of the Rules, in order to require Mr. Racette to appear and respond to allegations made against him. In that motion, the MEA accused Mr. Racette of having deliberately contravened the arbitral award [TRANSLATION] "as a result of his aggressive, offensive and inappropriate behaviour when he personally attacked [Mr. X], industrial relations counsellor with [the MEA]".

12 On March 18, 2019, Prothonotary Steele dismissed the MEA's motion. She concluded that the MEA had not discharged its burden of showing *prima facie* evidence that it was entitled to the contempt of court order.

13 After reviewing the two stages and three constituent elements of contempt of civil court, Prothonotary Steele concluded that the MEA had established the first element, namely the existence of a compliance order at the time of the alleged facts on June 13 and 18, 2018. Relying on judgments issued in *Professional Institute of Public Service of Canada v Bremsak*, 2012 FCA 147, and *Canada (Human Rights Commission) v Warman*, 2011 FCA 297, she dismissed Mr. Racette's argument that the arbitral award could not apply to him prior to its filing in Federal Court. She determined that the arbitral award was binding from the moment it was issued on April 5, 2016.

14 Prothonotary Steele concluded that the second constituent element was not met. She found that the case, as presented by the MEA, did not support a *prima facie* conclusion that Mr. Racette had real or constructive knowledge of the arbitral award. She therefore dismissed the MEA's argument that Mr. Racette would have known about the arbitral award based on the fact that he had consented in the agreement to the arbitrator ordering him to comply with his contractual undertakings. Despite this finding, which was fatal in her view, Prothonotary Steele nonetheless proceeded with an analysis of the third element of contempt, namely a deliberate violation of the order, from a hypothetical perspective wherein her finding with regard to the second element was flawed.

15 After having noted the parties' arguments, Prothonotary Steele found that the MEA's evidence was sufficient to establish that interactions between Mr. Racette and the MEA's representatives took place on June 13 and 18, 2018, and that the comments reported by the MEA had been made by Mr. Racette. However, in her view, she was not satisfied that the MEA had proven that a deliberate *prima facie* violation of the order had occurred, for two reasons.

16 First, she was of the view that the arbitral award was not clear and unequivocal, noting that the parties did not agree on the scope of the expression [TRANSLATION] "personal attacks". Mr. Racette argued that the expression was ambiguous and open to interpretation, and that, at any rate, that interpretation should be limited to a prohibition on insulting the MEA and its representatives, as had been the case earlier, for example, when Mr. Racette used the term [TRANSLATION] "poodle" in reference to an individual. For its part, the MEA submits that the arbitral award, which obviously cannot foresee every potential prohibited word or comment, is sufficiently precise for one to understand what is prohibited. Prothonotary Steele pointed out that if an order can, depending on the context, be interpreted narrowly, as Mr. Racette suggests it should be, or more broadly, as the MEA suggests, then it is ambiguous. Accordingly, in the absence of a clear and unambiguous order, there can be no deliberate violation of an order. She added that where there is ambiguity, the Court tends to prefer an interpretation that is more favorable to the accused and that in this case, the more favorable interpretation is that which is the most restrictive, namely the one proposed by Mr. Racette.

17 She finished her analysis by stating the following:

> [TRANSLATION]
>
> In the circumstances of this case, even though the comments attributed to [M]ister Racette may be deemed to be highly inappropriate, particularly in the context of employer and employee relations, they are not, on their face, personal attacks in that they do not directly attack the person and/or the reputation of the MEA or of [Mr. X]. Even the coarsest of the expressions reported in this case ([TRANSLATION] "You can go and fuck off, go fuck yourself") does not strike me as being a personal attack, but is rather more of an expression

drawn from Québécois slang used, among other things, to tell someone where to go. In the absence of comments that constitute "personal attacks", there cannot be a deliberate violation of the arbitral award.

18 As was the case with the second constituent element of contempt of civil court, she concluded that the lack of *prima facie* evidence of a deliberate violation of the arbitral award was fatal to the MEA's motion.

19 The MEA is now requesting that this Court set aside the decision rendered by Prothonotary Steele and to issue a show cause order for contempt pursuant to rule 467 of the Rules, requiring Mr. Racette to appear before a judge at specified date, time and place, to be prepared to hear proof of the act alleged against him, and to be prepared to mount a defence.

20 The MEA argues that Prothonotary Steele erred in finding that there was no *prima facie* evidence of knowledge and violation of the order.

21 First, the MEA submits that the arbitral award dated April 5, 2016, had been sent to the union's counsel. In the MEA's view, Mr. Racette showed wilful blindness when he stated he did not receive or read the arbitral award when in fact, in the agreement he signed on March 29, 2016, it is indicated that the parties agree to ask the arbitrator to acknowledge the agreement and order him to comply with the undertakings set out in the letter that was signed that same day. In that letter, he undertakes [TRANSLATION] "to no longer engage in such personal attacks" against MEA employees or managers. The MEA maintains that Mr. Racette could not have been unaware of the contents of the order included in the arbitral award without having shown wilful blindness.

22 Second, the MEA submits that Prothonotary Steele's reasoning is flawed with respect to the words used by Mr. Racette. In the MEA's view, it is inconceivable that a reasonable person who was singled out by someone who was yelling the words used by Mr. Racette would not feel personally targeted. In this regard, the MEA criticizes Prothonotary Steele in particular for having applied the beyond a reasonable doubt burden of proof, on which a contempt of court finding is based, rather than that of a *prima facie* case that contempt has been committed as set out in subsection 467(3) of the Rules. The MEA further complains that she failed to address all of Mr. Racette's personal attacks.

III. Standard of review

23 The applicable standard of review for appeals of discretionary prothonotary orders is the one set out by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*]: (1) the standard of correctness applicable to questions of law and to questions of mixed fact and law, where an extricable legal principle is at stake; and (2) the "palpable and overriding error" standard applicable to findings of fact and to questions of mixed fact and law (*Housen* at paras. 19-37;

Hospira Healthcare Corporation v Kennedy Institute of Rheumatology, 2016 FCA 215 at paras. 28, 79; *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para. 74).

IV. Analysis

24 It is well established that power in matters of contempt is discretionary. Its purpose is to ensure the smooth functioning of the judicial process and to uphold the Court's dignity (*Carey v Laiken*, 2015 SCC 17 at paras. 30, 36 [*Carey*]; *Canada (National Revenue) v Chi*, 2018 FC 897 at para 12; *Joly v Gadwa*, 2018 FC 746 at para 31).

25 In *Carey*, the Supreme Court of Canada reiterated that there are two forms of contempt of court: criminal contempt and civil contempt. Civil contempt has three elements which must be established beyond a reasonable doubt. The first element is that the order alleged to have been breached must state clearly and unequivocally what should and should not be done. The second element is that the party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge of the order on the basis of the wilful blindness doctrine. Finally, for the third element, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels (*Carey* at paras 32-35).

26 Before a party can be found to be in contempt of court, a show cause order pursuant to rule 467 of the Rules must be issued by the Court against the party that is allegedly in contempt. According to subsection 467(3) of the Rules, the Court must be satisfied that there is *prima facie* proof of the alleged contempt.

27 After reviewing the matter, the Court is of the view that Prothonotary Steele committed no error that would warrant the intervention of this Court. First, she set out the proper legal principles that are applicable to contempt of court. Moreover, even if it were possible to conclude that Prothonotary Steele committed an error in interpreting the facts in this matter, the Court is of the view that it would not be an "overriding" error, given that the Court concurs with her conclusion that the arbitral award was not clear and unequivocal.

28 In *Carey*, the Supreme Court of Canada pointed out that the purpose of the requirement of clarity is to ensure that a party will not be found in contempt where an order is unclear. An order may be deemed to be unclear if, *inter alia*, it incorporates overly broad language (*Carey* at para 33).

29 That is the case here. First, the arbitral award ordered Mr. Racette [TRANSLATION] "to comply with the undertakings he made in the letter, the content of which is reproduced in Appendix 1". One must therefore refer to the content of the letter, even if it is reproduced elsewhere in the arbitral award. Furthermore, the expression [TRANSLATION] "personal attacks" found in the letter signed by Mr. Racette can be used to describe various types of behaviour. Were the attacks comments that directly attacked the person, their characteristics, their personal qualities or their

reputation? Was the expression accompanied by body gestures or a raised voice? Must it include an added element of threat? Did the expression include coarse or offensive language that was not aimed at a specific person?

30 Considering that the expression [TRANSLATION] "personal attacks" lacks clarity and that the parties themselves were unable to agree on their scope, the Court finds that it was open to Prothonotary Steele to conclude, even in applying the *prima facie* burden of proof, that there was an absence of a clear and ambiguous order that would warrant a show cause order in this case.

31 Given that this finding is fatal to the MEA's motion, the Court does not intend to dispose of the arguments raised by the MEA.

V. Conclusion

32 In summary, the Court finds that the MEA has not persuaded it that Prothonotary Steele committed an error of law or a palpable and overriding error that would warrant the intervention of the Court. The motion to appeal the decision of Prothonotary Steele, dated March 18, 2019, is therefore dismissed.

ORDER in Docket T-1247-18

THIS COURT ORDERS that:

1. The motion to appeal the decision of Prothonotary Steele, dated March 18, 2019, is dismissed;

2. Costs in the amount of $2,000 are awarded in favour of the respondent, André Jr Racette.

Appeal dismissed.

Federal Court of Appeal

Citation: Canada v. Perry
Date: 1982-03-18

Pratte, Heald and Urie JJ.

Counsel:
W. L. Nisbet, Q.C., for appellants.
John P. Nelligan, Q.C., for respondents.

The judgment of the Court was delivered by

[1] PRATTE J.:—This is an appeal from a decision of the Trial Division dismissing an application made under Rule 355(4) for an order that a group of air controllers employed by the federal Government appear before the Court and show cause why they should not be found guilty of contempt of Court for having breached an interlocutory injunction granted by Mr. Justice Walsh on October 9, 1980 [[1981] 2 F.C. 12].

[2] The respondents, as well as the other persons that the appellants wish to cite for contempt, are employed as air controllers by the Government of Canada. They are part of a bargaining unit known as the Air Traffic Controllers Group for which the Canadian Air Traffic Controllers Association is the certified bargaining agent.

[3] On October 7, 1980, the appellants sued the respondents in their personal capacities as well as the representatives of all the other employees in the Air Traffic Controllers Group bargaining unit. The appellants alleged that, commencing on September 1, 1980, the respondents and other members of the bargaining unit had participated in illegal strikes at various locations across Canada; they claimed the issuance of a permanent injunction restraining the respondents from participating in unlawful strikes.

[4] Immediately after having commenced their action, the appellants applied for an interlocutory injunction. At that time, all the air controllers were back at work but as all the issues and grievances that had occasioned the strikes had not yet been entirely resolved, it was feared that there might be other strikes which could seriously disrupt air traffic in the country. Mr. Justice Walsh granted the interlocutory injunction applied for by the appellants. The operative part of his order read as follows:

> THIS COURT DOTH GRANT an interlocutory injunction restraining defendants and all the Air Traffic Controllers employed by the Government of Canada who are included in the Air Traffic Controllers Group Bargaining Unit and who are employees for the purposes of the *Public Service Staff Relations Act* until the trial of this action from engaging in a strike in concert with other members of the Air Traffic Controllers Group Bargaining Unit by ceasing to work or refusing to work or to continue to work or by restricting or limiting their output in contravention of clause 101(2)(a) of the *Public Service Staff Relations Act,* R.S.C. 1970, c. P-35. This Order is subject to the undertaking on behalf of Her Majesty The Queen and the Attorney-General of Canada that the Deputy Attorney-General of

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Canada will take all necessary steps to facilitate the enforcement of this injunction Order.

[5] The respondents appealed from that order. Their appeal was dismissed by a judgment of this Court pronounced on July 16, 1981 [41 N.R. 91 *sub nom. Government of Canada v. Perry et al.*].

[6] The appellants' action has not yet been tried. The interlocutory injunction pronounced by Mr. Justice Walsh was, therefore, still in force when, on August 11, 1981, the appellants made the application which was rejected by the decision under appeal [128 D.L.R. (3d) 347]. By that application, made pursuant to Rule 355(4), the appellants sought an order requiring some 150 air controllers named in a schedule attached to the notice of motion to appear before the Court and show cause why they should not be found guilty of contempt of Court for having breached the interlocutory injunction granted by Mr. Justice Walsh on October 9, 1980. That application was supported by affidavits establishing that at least certain of the air controllers mentioned in the schedule had refused to perform part of their normal duties when, following directives given by the executive of their association on August 9, 1981, they had refused to provide normal air traffic control services to flights bound for or coming from the United States. Those affidavits also established that the air controllers had acted in that fashion notwithstanding that they had previously received a written warning from their employer that they would violate the injunction pronounced by Mr. Justice Walsh if they complied with the instructions of their association. The affidavits showed, in addition, that the executive of the Canadian Air Traffic Controllers Association justified its position by its concern for the safety of air traffic in Canada which was allegedly imperilled by the poor quality of the services then provided in the United States by the American air controllers who had been hired to replace the regular air controllers who were on strike since the beginning of August.

[7] The first question to be resolved is whether the Court has jurisdiction to entertain this appeal. Counsel for the respondents argued that no appeal lies from the dismissal of an application for a show cause order under Rule 355. He referred to s-s. 27(1) of the *Federal Court Act,* R.S.C. 1970, c. 10 (2n Supp.), a provision which determines the limits of the appellate jurisdiction of this Court, and to the definition of the phrase "final judgment" contained in s. 2:

27(1) An appeal lies to the Federal Court of Appeal from any

(*a*) final judgment,

(*b*) judgment on a question of law determined before trial, or

(*c*) interlocutory judgment,

of the Trial Division.

• • • • •

2. In this Act

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• • • • •

"final judgment" means any judgment or other decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;

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[8] Counsel for the respondents said that the decision not to issue a show cause order is neither an interlocutory nor a final judgment. It is a decision, said he, which does not make an adjudication on any point and which is of the same nature as a ruling on evidence and a show cause order which have both been held not to be appealable (*Saint John Shipbuilding & Dry Dock Co. Ltd. v. Kingsland Maritime Corp. et al.* (1978), 93 D.L.R. (3d) 91, [1979] 1 F.C. 523, 8 C.P.C. 251; *R. v. United Fishermen & Allied Workers' Union et al.* (1967), 63 D.L.R. (2d) 356, [1968] 1 C.C.C. 194, 60 W.W.R. 370).

[9] This argument must, in my view, be rejected. The refusal to issue a show cause order under Rule 355(4) cannot be compared to the granting of such an order or to a ruling on evidence. Those orders or rulings do not adjudicate on anything. The same thing cannot be said of an order such as the one under attack which finally determines either that the respondents were not in contempt or, in any event, that they do not deserve to be punished for what they have done. An order of that kind is, in my opinion, a judgment which is appealable under s-s. 27(1) of the *Federal Court Act.* As the appellants have commenced their appeal within the time-limit prescribed for interlocutory judgments, it is not necessary to determine whether the decision that they are attacking is an interlocutory or final judgment.

[10] The Judge of first instance refused to issue the show cause order sought by the appellants because, as I understand his reasons, he was of opinion, on the basis of the affidavit evidence before him, that if the show cause order were issued, the Court would not be likely to find the air controllers guilty of contempt. That opinion of the learned Judge was based on the following considerations:

A. The injunction pronounced by Mr. Justice Walsh, while expressed in general terms, must be read in the light of his reasons for judgment. These reasons show that he granted the injunction because he feared that the air traffic controllers might refuse to work in the future in order to press their grievances against their employer. The circumstances which prompted the appellants to seek a show cause order were entirely different: the air controllers had not refused to work, they had merely refused to perform certain of their duties; they had done so, not by reason of any grievance against their employer, but, rather, according to what they had said, by reason of their concern for safety. Those differences between the two situations led the Judge to formulate the following question [at p. 352]:

On what basis, then, could this Court be reasonably expected to conclude that these events are related to the earlier order of Walsh J. in such a direct way as to constitute, not just technical disobedience, but in addition, that attitude of defiance and public disrespect which has consistently been found to be an element of contempt of Court?

B. From the evidence before him, the learned Judge inferred that the refusal of the air

controllers to perform part of their duties had been dictated solely by their concern for safety rather by their intention to support the strike of the American controllers.

C. The learned Judge conceded that the action of the air controllers might have constituted a strike within the meaning of s. 2 [am. 1973-74, c. 15, s. 1; 1974-75-76, c. 67, s. 1] of the *Public Service Staff Relations Act,* R.S.C. 1970, c. P-35,[1] which was prohibited by the injunction of Mr. Justice Walsh. He added, however, that these actions constituted a mere technical violation of the injunction.

[11] From those considerations, the learned Judge concluded that there was no likelihood that the Court, in the event a show cause order were issued, would find that in acting as they did the air controllers had "displayed an attitude of contempt toward the order of Walsh J." He accordingly declined to issue the show cause order and dismissed the application.

[12] This decision is, in my view, ill-founded. The Judge below did not have to determine whether the air controllers had displayed "an attitude of defiance and public disrespect" towards the injunction previously pronounced by Mr. Justice Walsh. He did not have, either, to try and anticipate what would be the ultimate judgment of the Court if the show cause order were issued. His duty was to determine whether the affidavit evidence filed in support of the application for a show cause order established, *prima facie,* that the persons or some of the persons mentioned in sch. A to the notice of motion had breached the injunction pronounced by Mr. Justice Walsh. If the evidence established a *prima facie* breach of the injunction, the Judge had to issue the show cause order sought unless the evidence showed clearly that the violation of the injunction was so unimportant or had taken place in such circumstances that it be absolutely certain that it did not deserve to be punished.

[13] Here, there is not the slightest doubt that the evidence discloses a *prima facie* case of contempt of Court. The injunction pronounced by Mr. Justice Walsh restrained the air controllers "from engaging in a strike in concert with other members of the Air Traffic Controllers Group Bargaining Unit by ceasing to work ... or by restricting or limiting their output". This injunction was expressed in general terms and cannot be considered as referring only to the strikes that would take place in circumstances similar to those which existed when the injunction was pronounced. The affidavit evidence filed in support of the application shows clearly that at least some of the persons mentioned in sch. A to the notice of motion, on the advice of the executive of their association, engaged in a strike by limiting their output. This, they did advisedly, after having been warned that their proposed course of conduct would constitute a violation of the injunction. In those circumstances, I do not see how their conduct can be said to constitute a mere technical breach of the injunction. True, the evidence discloses that the air controllers explained their conduct by their concern for the safety of the public. However, that explanation may or may not be true; it is impossible to say at this preliminary stage of the proceedings. Moreover, assuming it to be true, it would be relevant if the Court were called to assess the penalty to be imposed on those found guilty of contempt; it

[1] That definition reads as follows:
"'strike' includes a cessation of work or a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;"

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is entirely irrelevant at this stage of the proceedings since the controllers' concern for safety certainly did not excuse them from obeying the injunction.

[14] For those reasons, I would allow the appeal with costs in this Court and in the Trial Division, I would set aside the decision of first instance dismissing the appellants' application and refer the matter back to the Trial Division in order that it be decided on the basis that show cause orders must issue against all the persons mentioned in sch. A to the appellants' notice of motion who, according to the affidavit evidence filed in support of the motion, either refused to normally perform their functions as air controllers or incited air controllers to refuse to perform all their functions.

[15] Appeal allowed; order accordingly.

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2021 FC 770
Federal Court

Canadian Standards Association v. P.S. Knight Co. Ltd.

2021 CarswellNat 2681, 2021 FC 770, 175 W.C.B. (2d) 124, 186 C.P.R. (4th) 102, 336 A.C.W.S. (3d) 455

CANADIAN STANDARDS ASSOCIATION (Applicant) and P.S. KNIGHT CO. LTD. AND GORDON KNIGHT (Respondents)

Christine M. Pallotta J.

Heard: March 17, 2021
Judgment: July 20, 2021
Docket: T-646-15

Counsel: Kevin Sartorio, James Green, Harvey Lim, for Applicant
Gordon Knight, for Respondents and P.S. Knight Americas Inc.

***Christine M. Pallotta J.*:**

I. Introduction

1 Canadian Standards Association (*CSA*) seeks an order finding the respondents, P.S. Knight Co. Ltd. (*Knight Co*.) and Mr. Gordon Knight, as well as a related company, PS Knight Americas Inc. (*Knight Americas*), in contempt of court. The alleged contemnors will be referred to as the *Knight Parties*.

2 CSA alleges that each of the Knight Parties has breached, or alternatively has aided and abetted another Knight Party to breach, the terms of an Amended Judgment (Canadian Standards Association v P.S. Knight Co Ltd, 2016 FC 294) and a Supplemental Judgment (Canadian Standards Association v P.S. Knight Co Ltd., 2016 FC 387) issued by Justice Manson of this Court in 2016 (collectively referred to as the *Judgment*). The Federal Court of Appeal affirmed the Judgment (P.S. Knight Co Ltd v Canadian Standards Association, 2018 FCA 222) and the Supreme Court of Canada dismissed the respondents' application for leave to appeal (P.S. Knight Co Ltd et al v Canadian Standards Association, 2019 CarswellNat 2072).

3 The Judgment was issued in a copyright infringement proceeding, and declared that Knight Co. had infringed CSA's copyright in a 2015 edition of the Canadian Electrical Code, Part I (2015 CSA Code). Knight Co. was ordered to deliver up to CSA all copies of its infringing publication

(*Knight Code*). Knight Co., its officers, directors, employees, and any related companies under its control were permanently enjoined from reproducing, distributing, or selling the Knight Code, or otherwise doing any act to contravene CSA's copyright in the 2015 CSA Code, without CSA's express written permission. The Knight Parties are charged with three counts of contempt for disobeying these terms.

4 In addition, Knight Co. was ordered to pay to CSA statutory damages in the amount of $5,000 in respect of past acts of infringement and costs of the proceeding in the amount of $96,336.

5 CSA alleges that since October 2020, the respondents have resumed reproduction, distribution and sales of infringing Knight Code publications through a newly incorporated entity, Knight Americas, contrary to the terms of the Judgment. CSA alleges that the Knight Parties have deliberately disobeyed the injunction, and that they have engaged in a bad faith pattern of behaviour to evade their obligations under the Judgment, including attempting to avoid the jurisdiction of this Court by carrying on infringing activities through Knight Americas.

6 The Knight Parties raise four points in defence:

(i) the injunction is restricted to the 2015 edition of the Knight Code and does not enjoin later editions of the Knight Code;

(ii) only Knight Co. was found liable for copyright infringement; therefore, Mr. Knight and Knight Americas cannot be held in contempt of the Judgment;

(iii) the Knight Parties have not contravened CSA's copyright in the 2015 CSA Code without CSA's permission because: (a) the CSA Code has been incorporated into law and may be freely reproduced without infringing copyright; and (b) a written agreement between the respondents and CSA permits the Knight Parties to reproduce and sell copies of the CSA Code, or at least the 2018 edition of the CSA Code; and

(iv) the Knight Code is now published by Knight Americas in the United States, which is beyond the jurisdiction of this Court and the Judgment.

7 I find that the evidence establishes beyond a reasonable doubt that each of the Knight Parties knowingly breached the terms of the Judgment. The defences raised by the Knight Parties do not excuse the breach. For the reasons below, I find each of the Knight Parties guilty of contempt of court on all counts with which they are charged.

II. Background

A. The parties

8 CSA is a not-for-profit organization that develops standards in various fields, including standards for the installation and maintenance of electrical equipment in Canada (*CSA Code*). The first edition of the CSA Code was published around 1927. New editions are published every three years.

9 Knight Co. is a book publisher. Mr. Knight is the sole officer and director of Knight Co. and Knight Americas.

10 Although the respondents were represented by counsel in the underlying copyright infringement proceeding (including the appeal), Mr. Knight represented himself in the contempt proceeding. Prior to the contempt hearing, Mr. Knight sought and was granted leave to represent Knight Co. and Knight Americas. At the hearing, Mr. Knight confirmed that he still wished to represent the corporate Knight Parties.

B. Selected history of this proceeding and related proceedings

11 In 2012, CSA commenced an action for copyright infringement against the respondents, seeking to enjoin the sale of an annotated guide book to CSA's Code (Court file no. T-1178-12). During the course of the 2012 action, CSA learned that Knight Co. planned to publish a complete copy of CSA's 2015 edition of the CSA Code and offer it for sale to the public at a third of the price of CSA's publication. CSA then commenced this proceeding (Court File No. T-646-15), which resulted in the Judgment that is the subject of the contempt charges.

12 As noted above, one of the Knight Parties' defences to the charges of contempt is that the CSA Code may be freely reproduced without infringing copyright because it has been incorporated into law. In the underlying proceeding the respondents had argued that because CSA is a government organization and the CSA Code is incorporated by reference into provincial laws, the Crown owns the copyright. The respondents had also argued that the CSA Code is in the public domain and cannot be the subject of copyright because it has been incorporated by reference into provincial laws. The Court did not accept the respondents' arguments.

13 The respondents appealed the Judgment. The monetary terms of the Judgment were stayed pending disposition of the appeal; however, the injunction was not stayed.

14 In March 2018, while the appeal was pending, CSA learned that Knight Co. had announced to the public that it would begin selling a complete copy of CSA's 2018 edition of the CSA Code. CSA commenced a third proceeding for copyright infringement (Court file no. T-577-18) and brought a motion for an interlocutory injunction in that proceeding. The motion in Court file no. T-577-18 was resolved through Minutes of Settlement (Exhibit A27), which effected a "stand still" agreement that permitted the respondents to sell the 2018 edition of the Knight Code pending the Federal Court of Appeal's decision, with all proceeds of sale to be held by the respondents in

trust (*2018 Agreement*). The 2018 Agreement is raised as one of the Knight Parties' defences in this contempt proceeding. They argue that the 2018 Agreement allows them to reproduce and sell copies of the CSA Code, or at least the 2018 edition of the CSA Code.

15 After the Federal Court of Appeal dismissed the respondents' appeal in December 2018, CSA requested confirmation that the respondents would cease all sales of the Knight Code and abide by the injunction as set out in the Judgment. When CSA did not receive confirmation, it brought a motion for a show cause order in this proceeding (Court file no. T-646-15) against Knight Co. and Gordon Knight. A show cause order issued on May 1, 2019 (Prior Show Cause Order).

16 On May 23, 2019, the Supreme Court of Canada dismissed the respondents' application for leave to appeal the Federal Court of Appeal's decision. The respondents acknowledged the negative decision on their website and indicated they would abide by the Judgment. According to CSA, since the respondents had published the acknowledgement and since it appeared they had stopped selling the Knight Code, CSA discontinued Court file no. T-577-18 and took no steps in respect of the Prior Show Cause Order.

17 Turning to the events that led to this contempt proceeding, CSA alleges that in October 2020 it learned that the respondents had resumed reproducing, offering to sell, selling, and distributing copies of the 2018 edition of the Knight Code through a newly-incorporated U.S. entity (Knight Americas). Mr. Knight published an online announcement that the Knight Code, "which the [Federal] Court ruled against, is happily available once again" and re-released through Knight Americas, which was said to be "outside the direct jurisdiction of the Federal Court." The announcement noted that CSA "forgot to register copyright over this document...so we did. As you read this, the Canadian Electrical Code is the private property of [Knight Americas] in the U.S." As a result, CSA commenced legal proceedings in the United States to invalidate the U.S. copyright registration and enjoin the Knight Parties' activities in the U.S., and sought a show cause order in this proceeding, which was granted on January 8, 2021 (Show Cause Order).

III. Issue

18 The issue in this contempt proceeding is whether one or more of the Knight Parties is in contempt of court for failing to abide by the terms of the Judgment. The three charges of contempt set out in the Show Cause Order are:

> 1. THAT Knight Co., Knight Americas, and Gordon Knight have reproduced, distributed to a prejudicial extent, sold and offered for sale their Knight Code publication, entitled "Knight's Canadian Electrical Code, Part One, 2018-2021, 24th Edition", or authorized others to do so, contrary to the Judgment and the rights of CSA in its 2015 Electrical Code under the *Copyright Act*.

2. THAT Knight Co., Knight Americas, and Gordon Knight have failed to deliver-up to CSA all copies of their Knight Code publication entitled "Knight's Canadian Electrical Code, Part One, 2018-2021, 24th Edition", produced since the date of the Judgment, and any plates or electronic files related thereto, contrary to the Judgment.

3. THAT Knight Americas has aided and abetted Knight Co. and Gordon Knight in carrying out the acts described in (1) and (2) above, contrary to the Judgment.

19 Following the contempt hearing on liability, Mr. Knight filed a letter asking the Court generally, and the judges on this file specifically, to recuse themselves from the case. I issued a direction stating that a request for recusal must be made by way of motion, in accordance with the Federal Courts Rules, SOR/98-106 [FC Rules]. No motion was filed.

IV. Analysis

A. General principles

20 A person who disobeys a process or order of the Court, or who acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court, is guilty of contempt of Court: Rules 466(b) and (c) of the FC Rules.

21 A finding of civil contempt requires that three elements be established: the order alleged to have been breached must state clearly and unequivocally what should and should not be done; the alleged contemnor must have had knowledge of the order; and the alleged contemnor must have intentionally carried out the act that the order prohibits or failed to carry out the act that the order requires: Carey v Laiken, 2015 SCC 17 at paras 33-35 [.

22 It is not necessary to show that the alleged contemnor intended, by doing the act, to "interfere with the orderly administration of justice or to impair the authority or dignity of the Court". It is sufficient to find that the order was "clear and that the alleged contemnor knowingly committed the prohibited act": Apotex Inc v Merck & Co Inc, 2003 FCA 234 at para 60.

23 Contempt of court is criminal or quasi-criminal in nature. Therefore, the elements of contempt must be established to the criminal standard of proof, beyond a reasonable doubt: Rule 469 of the FC Rules. The alleged contemnor is presumed to be innocent, and the burden of proving contempt rests with the accuser and never shifts to the accused: R v Lifchus, [1997] 3 SCR 320 at para 36 [; Sweda Farms Ltd v Ontario Egg Producers, 2011 ONSC 3650 at paras 24-25 [(aff'd 2012 ONCA 337).

24 The approach to credibility findings in respect of disputed evidence, on the elements of contempt and any defences raised, requires that I acquit if I believe the accused parties' exculpatory evidence, or if I do not believe the exculpatory evidence but it leaves me with a reasonable doubt

about where the truth of the matter lies, or if the evidence that I accept does not convince me, beyond a reasonable doubt, that the accused parties are in contempt: *Sweda Farms* at para 25. A reasonable doubt must be based upon reason and common sense, and must be logically connected to the evidence or the absence of evidence. It does not involve proof to an absolute certainty: *Lifchus* at para 36. An alleged contemnor is not compelled to testify "but, if he chooses to testify his evidence is subject to full scrutiny, and the court may draw adverse inferences from his evidence": *Sweda Farms* at para 24.

25 The Court's contempt powers are discretionary and should be exercised as a measure of last resort and only where necessary to safeguard the administration of justice: Carey at para 36; Morasse v Nadeau-Dubois, 2016 SCC 44 at para 21.

B. Evidence and Findings

26 The evidence in this contempt proceeding was delivered orally: Rule 470(1) of the FC Rules.

27 CSA called two witnesses, George Douglas (Doug) Morton and Junior Williams. Mr. Morton is employed by CSA. He was involved in the underlying copyright infringement proceeding against the respondents (he was CSA's principal affiant) and in other proceedings against the respondents. Mr. Morton gave evidence about the history of the proceedings between the parties and the Knight Parties' activities in resuming sales of the Knight Code. He was cross-examined. Mr. Williams is a private investigator who purchased the Knight Code from within Canada, and he gave evidence about the online store, his purchase, and related events. He was not cross-examined.

28 Mr. Knight chose to testify, but limited his testimony in chief to introducing documentary exhibits and explaining their relevance, some of which were ruled inadmissible. He was cross-examined.

(1) Clear and unequivocal order

29 As noted above, the first element required to support a finding of contempt is that the order alleged to have been breached — in the present case, the Judgment — must clearly and unequivocally state what a party is to do or to refrain from doing: Carey at para 33; Canada (Human Rights Commission) v Warman, 2011 FCA 297 at paras 88-89.

30 The Court can find that an order is unclear if, for example, it is missing an essential detail about where, when, or to whom it applies; if it incorporates overly broad language; if external circumstances have obscured its meaning; or if the order is merely declaratory: Carey at para 33; Telecommunications Workers Union v Telus Mobility, 2004 FCA 59 at para 4.

31 Justice Manson found the corporate respondent, Knight Co., had infringed copyright in the 2015 CSA Code. The terms of the Judgment that are at issue in this contempt proceeding read as follows:

> 2. [Knight Co.], its officers, directors, employees and any related companies under its control, are hereby enjoined from any reproduction, distribution, sale of the Knight Code, or any other act that contravenes the CSA's copyright in the 2015 CSA Code, without the express written permission of the CSA;
>
> 3. [Knight Co.] shall deliver up to CSA all copies of the Knight Code produced to the date of this judgment or hereafter, and any plates or electronic files of the Knight Code;

32 There is no question that the Judgment was in force at the time of the alleged acts of contempt in 2020. The Judgment was final, had been upheld on appeal to the Federal Court of Appeal, and the Supreme Court of Canada had denied leave to appeal in May 2019 (Exhibits A9 and A12).

33 The Knight Parties, however, assert that their activities do not fall within the scope of the Judgment. They advance two arguments in this regard: (i) since only Knight Co. was found liable for copyright infringement, Mr. Knight and Knight Americas cannot be held in contempt for breaching the terms of Judgment; and (ii) the Judgment is restricted to the 2015 edition of the Knight Code, and does not enjoin the reproduction, distribution, or sale of later editions of the Knight Code. Therefore, under this first element of the test for contempt, I have considered whether I am left with a reasonable doubt as to whether the Judgment is insufficiently clear about whether it applies to parties other than Knight Co. and to editions other than the 2015 Knight Code.

34 CSA submits that paragraphs 2 and 3 of the Judgment are clear and do not suffer from the kind of defect or problem that would raise a reasonable doubt about whether the Knight Parties' activities fall within the scope of the Judgment.

35 First, CSA submits that the Judgment expressly binds not only Knight Co. but also its officers, directors, employees, and any related companies under its control. CSA introduced Government of Alberta corporate profile reports obtained in September 2020 and March 2021, listing Mr. Knight as the director of Knight Co. (Exhibit A2). No other officers or directors are listed. CSA also introduced State of Texas corporate records for Knight Americas (Exhibit A15) listing one director, Mr. Knight. CSA points out that Justice Manson found that Mr. Knight was the sole directing mind of Knight Co. At the contempt hearing, Mr. Knight testified that he has operated a business through Knight Co. since about 2009 or 2010, and he incorporated Knight Americas. Mr. Knight also testified that he is responsible for writing the content on the website at <www.restorecsa.com> (*Restore CSA Website*). CSA introduced a printout of an October 18, 2020 announcement published on the Restore CSA Website, titled "Knight's Code is Back!" (Exhibit A14), and stating:

So how can we re-release Knight's Code now?

Well, first "we," (that's me), incorporated a new entity in the US and transferred assets to that new entity. Knight's Code is re-released by PS Knight Americas Inc, from the US, and outside the direct jurisdiction of the Federal Court and Manson's Law.

36 I find that the evidence establishes beyond a reasonable doubt that Mr. Knight is a director of Knight Co. and Knight Americas is a related company. In addition to Knight Co., which is specifically named, the Judgment expressly applies to officers, directors, employees, and any related companies of Knight Co. I am satisfied beyond a reasonable doubt that the Judgment clearly applies to all three Knight Parties.

37 Furthermore, even a party who is not specifically bound according to the terms of the injunction can be found guilty of contempt where that party, knowing of the injunction, contravenes its terms: Baxter Travenol Laboratories of Canada Ltd v Cutter (Canada) Ltd, [1983] 2 SCR 388 at paras 10-12. Where a corporation is found in contempt, responsible officers who have aided and abetted the breach may be found in contempt: Manufacturers Life Insurance Co. v Guaranteed Estate Bond Corp (2000), 85 ACWS (3d) 352 (FCTD) at para 15 [MLI v GEB]; Telus Mobility v TWU, 2002 FCT 656 at para 16 [; Setanta Sports Canada Ltd v 1053007 Ontario Inc, 2011 FC 99 at para 14 [. These principles provide additional justification for my finding that the Judgment applies to all three Knight Parties.

38 Second, CSA submits that the Judgment is clearly not limited to the 2015 edition of the Knight Code and prohibits any act that contravenes CSA's copyright in the 2015 CSA Code. CSA points out that Mr. Knight and Knight Co. did not argue on appeal that the terms of the injunction are unclear in any way (Exhibit A8 — Notices of Appeal, Federal Court of Appeal File Nos. A-90-16, A-121-16) and the Knight Parties did not bring a motion for clarification of the terms. CSA submits the Knight Parties' conduct demonstrates that they have always understood the terms of Judgment. For example, Mr. Knight testified that he stopped selling a 2018 edition of the Knight Code after the Supreme Court of Canada denied leave to appeal. Also, Mr. Knight published statements on the Restore CSA Website that are inconsistent with a belief that the Judgment is limited to the 2015 edition of the Knight Code, including (with my notes in square brackets):

(a) *Exhibit A7 (March 10, 2016 post)*: If this verdict [the Judgment] is affirmed on appeal then it will be illegal for us to refer to privately owned electrical laws in our publications and that, of course, would be the end of our fifty-year old family business.

(b) *Exhibit A13 (May 26, 2019 post) [Knight Co. was selling the 2018 edition of the Knight Code at this time]*: ...[T]he Supreme Court issued a Decision to dismiss our appeal of Manson's law [the Judgment]. We lost this one. Bigly. The Supreme Court was the last chance to overturn Manson's law...So here's where we stand: First, PS

Knight's authorized reproduction of electrical law, known as Knight's Code, is no longer authorized. Knight's Code will be unavailable until Manson's Law has been legislatively corrected.

(c) *Exhibit A14 (October 18, 2020 post)*: Knight's Code is back. That's right folks, our release of the 2018-2021 Canadian Electrical Code, which the Court Ruled against, is happily available once again.

39 The Knight Parties' written submissions in this proceeding are also inconsistent with a belief that the Judgment only enjoined the reproduction and sale of the 2015 edition of the Knight Code, for example (with my notes in square brackets):

> In January 2018, the Civil Service [CSA] released the 2018 - 2021 iteration of electrical law.
>
> The Defendants accepted that Manson's Law applied to all legislation but were of the view that the Federal Court of Appeal would surely correct what was considered an aberrant and compromised Ruling...

40 At one point during his oral submissions at the contempt hearing, Mr. Knight conceded that "Manson's law ruling" — that is, the Judgment — applies to all editions of the Canadian electrical code.

41 I find that the terms of the Judgment are clearly not limited to the 2015 edition of the Knight Code. The Judgment does not define the term Knight Code in a way that limits it to the 2015 edition specifically. The order to deliver up and the injunction are not limited to the 2015 edition of the Knight Code, and the terms of Judgment cover other editions or versions of the Knight Code that would violate CSA's copyright in the 2015 CSA Code. Indeed, the injunction generally prohibits "any other act that contravenes the CSA's copyright in the 2015 CSA Code", meaning it enjoins any act that would be prohibited under the Copyright Act, RSC 1985, c C-42 [Copyright Act], whether in respect of the Knight Code or some other publication that infringes the 2015 CSA Code.

42 The Knight Parties are charged with contempt in respect of "Knight's Canadian Electrical Code, Part One, 2018-2021, 24th Edition." I am satisfied beyond a reasonable doubt that the Judgment clearly applies to this publication.

(2) Knowledge of the order

43 A party alleging contempt must prove actual knowledge of the order allegedly breached. Knowledge may be inferred from conduct, for example, an appeal of the order that could only have been taken on the alleged contemnor's instructions: Apple Computer Inc v Minitronics of Canada Ltd, [1988] 2 FC 265.

44 The Knight Parties do not contest that they had actual knowledge of the Judgment at all material times. Of course, Knight Co. and Mr. Knight were directly involved in the underlying copyright infringement proceeding and appeals. Mr. Knight published multiple posts about the Judgment on the Restore CSA Website and he was clearly aware of its terms. Mr. Knight is the sole directing mind of Knight Co. and Knight Americas, which he incorporated in June 2020 for the purpose of attempting to evade the Judgment. I am satisfied beyond a reasonable doubt that all three Knight Parties had knowledge of the Judgment at all material times, including at the time they engaged in acts that contravened its terms.

45 Mr. Knight asserts that Knight Americas was not properly served with the Show Cause Order. I disagree. The Show Cause Order dispensed with a requirement for personal service, and stated that service on all three alleged contemnors was to be effected by sending a copy of the Show Cause Order by email (to sales@psknight.com) and courier (to a Calgary address). The Show Cause Order was served in this manner, and there is no question that it came to Mr. Knight's attention.

(3) Intentionally carried out the prohibited act or failed to carry out compelled act

46 The third element requires proof that an alleged contemnor has intentionally done the act that the order prohibits or failed to do the act that the order compels: Careyat paras 32-35. It is not necessary to establish that an alleged contemnor intended to disobey the order — a lack of intent to interfere with the orderly administration of justice or to act with contempt is not a defence to a finding of contempt: Burberry Ltd v Ramjaun (Laguna Trading), 2016 FC 1188 at paras 17-19.

47 CSA alleges that the Knight Parties have sold 2018 and 2021 editions of the Knight Code to Canadian customers, contrary to the terms of the Judgment. While I agree with CSA that the 2021 Knight Code reproduces a substantial part of the 2015 CSA Code, the 2021 publication post-dates the Show Cause Order. The charges of contempt relate to the 2018 edition of the Knight Code, and my findings of contempt are based on the 2018 edition of the Knight Code referred to in the Show Cause Order.

48 On the facts of this case, proof beyond a reasonable doubt that the Knight Parties intentionally committed the acts of contempt with which they are charged requires proof that: (i) the Knight Parties have reproduced, distributed and/or sold the 2018 edition of the Knight Code and/or failed to deliver up to CSA all copies of that edition, and (ii) the 2018 edition of the Knight Code violates CSA's copyright in the 2015 CSA Code.

49 Turning first to whether the evidence establishes beyond a reasonable doubt that the 2018 Knight Code violates CSA's copyright in the 2015 CSA Code, the Judgment, affirmed on appeal, includes findings that copyright subsists in the 2015 CSA Code and that CSA is the copyright owner. CSA introduced a copy of the 2015 CSA Code into evidence (Exhibit A1). Mr. Morton

testified that CSA releases updates to the CSA Code every three years when a new edition is published.

50 CSA also introduced the copy of the 2018 edition of the Knight Code purchased by Mr. Williams (Exhibit A18) and a printout from an online store at www.psknight.com (*Knight Website*) stating the following about the 2018 edition of the Knight Code (Exhibit A17):

> Knight's Canadian Electrical Code contains the full Code, plus minor annotations to highlight changes from previous Code editions. As an authorized reprinting of electrical law, all illustrations, explanations and descriptions therein are presented entirely and exactly as enacted by Governments.

51 Since each edition of the CSA Code and the Knight Code is hundreds of pages long, CSA introduced demonstrative exhibits to show the similarities between the 2015 CSA Code and the 2018 Knight Code (Exhibit A23) and between the 2015 CSA Code and the 2021 Knight Code (Exhibit A24). Mr. Morton testified that he compared the passages to confirm their accuracy. I reviewed Exhibits A23 and A24 and I also compared the full versions of these publications directly.

52 The Knight Parties state that the 2018 and 2021 Knight Code publications are not an "exact copy or colourable imitation" of the 2015 CSA Code. They submit that the formatting of the Knight Code is very different. Also, the Knight Parties rely on the fact that CSA took the position on a motion (decision marked as Exhibit A26) that there are 180 errors in the Knight Code (I note that the motions judge found the errors to be minor differences).

53 It is trite law that copyright infringement does not require that the infringing publication be an exact copy or colourable imitation of a copyright-protected work. Liability for copyright infringement is established where "the work or any substantial part thereof in any material form" is reproduced: sections 3 and 27 of the Copyright Act.

54 As I understand the Knight Parties' arguments, they do not seriously contest that the 2018 and 2021 editions of the Knight Code reproduce a substantial part of the 2015 CSA Code—they did not provide evidence or explain in their written or oral submissions why the Knight Code publications are not substantially similar to the 2015 CSA Code. Indeed, the Knight Parties state in their written argument that, "The actual text of electrical law of course, cannot be legally amended by the Defendants." Instead, the Knight Parties' defence in respect of this element of the test for contempt is that they have not contravened CSA's copyright in the 2015 CSA Code without CSA's permission because: (a) the CSA Code has been incorporated into law, and may be freely reproduced without infringing copyright; and (b) the 2018 Agreement permits the Knight Parties to reproduce and sell copies of the CSA Code, or at least the 2018 edition of the CSA Code.

55 As noted above, the argument that the CSA Code may be freely reproduced because it has been incorporated into law was raised and rejected in the underlying copyright infringement

proceeding. The Court found that "it would be contrary to a purposive construction of the *Copyright Act* to strip the CSA of its rights in the 2015 CSA Code simply because certain provinces have incorporated it into law." The "incorporated into law" argument was also a key issue on appeal. The Federal Court of Appeal dismissed the respondents' appeal, finding that laws and regulations may be the subject of copyright in Canada. The Knight Parties' "incorporated into law" argument constitutes an impermissible, collateral attack on the Judgment in the context of a contempt hearing. As a valid order, a violation of the terms of Judgment constitutes contempt: Canada (Human Rights Commission) v Canadian Liberty Net, [1998] SCR 626 at para 51 [.

56 Similarly, the defence that the Knight Parties' actions are permitted by the 2018 Agreement signed after the date of the Judgment must fail. The 2018 Agreement settled CSA's motion for an interlocutory injunction. When they engaged in the activities in question in 2020, the Knight Parties understood that the 2018 Agreement did not apply. The Knight Parties' written representations in the contempt proceeding describe the 2018 Agreement as an agreement that "upheld the status-quo, *pending the Federal Court of Appeal Ruling* on Defendant's appeal of Manson's Law" (my emphasis). Also, the respondents ceased sales of the 2018 Knight Code in 2019, acknowledging in an online post that "reproduction of electrical law, known as Knight's Code, is no longer authorized." Indeed, Mr. Knight incorporated Knight Americas to sell the 2018 Knights Code because he believed the Judgment "ruled against" selling or offering the 2018 edition in Canada.

57 Based on the foregoing, I am satisfied beyond a reasonable doubt that the 2018 Knight Code reproduces a substantial part of the 2015 CSA Code, contrary to sections 3 and 27 of the Copyright Act. Such reproduction was not permitted or authorized as a result of the CSA Code having been incorporated into law, or a grant of permission under the 2018 Agreement.

58 Furthermore, I am satisfied beyond a reasonable doubt that the Knight Parties reproduced the 2018 edition of the Knight Code and sold and distributed it in Canada, and that they did not deliver up all copies, electronic or otherwise, of the 2018 Knight Code. Mr. Williams' testimony and the documentary exhibits that he introduced establish the following:

- in October 2020, the 2018 edition of the Knight Code was offered for sale through the Knight Website; Mr. Williams accessed the Knight Website from a computer in Canada;

- on October 20, 2020, Mr. Williams (using an alias) purchased the 2018 Knight Code in Canada, from the Knight Website;

- Mr. Williams received an order confirmation email from sales@psknight.com, attaching an invoice issued by Knight Americas with an address in Martinsville, Indiana; the invoice reflects the price for the publication and shipping fees in Canadian dollars, indicates "bill to" and "ship to" addresses in Canada, references a "GST No." and charges GST at 5%;

• on October 30, 2020 Mr. Williams received a courier package containing a copy of the 2018 Knight Code, which had been delivered to an address in Toronto, Ontario;

• the shipping label affixed to the courier package indicates a ship date of October 22, 2020, and identifies the sender as "GEK, P.S. Knight Americas Inc." with a Calgary, Alberta address;

• a pre-printed return address label affixed to the courier package indicates "PS Knight Americas Inc." with a second Calgary, Alberta address; and

• the inside cover of the 2018 Knight Code publication indicates that it was published in Canada in 2018 by Knight Co., shows the same address for Knight Co. as shown on Knight Americas' return address label (i.e., the second Calgary address), and the same Knight Website at www.psknight.com.

59 The Knight Parties did not introduce evidence that raises a reasonable doubt about whether one or more of them carried out the acts described above. Based on the evidence, I am satisfied beyond a reasonable doubt that each of the Knight Parties carried out at least one of the acts of "reproducing, distributing and/or selling" the 2018 Knight Code, contrary to the terms of the Judgment. I also am satisfied beyond a reasonable doubt that each of the Knight Parties failed to deliver up all copies of the 2018 Knight Code, as the Judgment required.

60 The Knight Parties have not avoided the terms of the Judgment or the jurisdiction of this Court by their attempts to shield their activities through Knight Americas.

61 Mr. Knight admitted on cross examination that sales of the Knight Code publication through the Knight Website are not geographically restricted, and the publications offered through the site can be purchased from and shipped to Canada. He also admitted that in October 2020, Knight Americas began taking reservations for a 2021 edition of the Knight Code. As with sales of the 2018 edition of the Knight Code, reservations for the 2021 edition were not geographically restricted. Mr. Williams testified that he reserved, and later purchased and received, a copy of the 2021 edition of the Knight Code. He purchased the 2021 edition from within Canada and received it at an address in Toronto, Ontario.

62 On cross-examination, Mr. Knight refused to answer questions about the shipper's addresses displayed on the courier package delivered to Mr. Williams, including a question asking whether one of the Calgary addresses on the package is Mr. Knight's home address. I draw a negative inference from Mr. Knight's refusal to testify about the Calgary addresses. As CSA points out, Mr. Knight's initials are "GEK" and Mr. Knight is the only director listed for both Knight Co. and Knight Americas. I am satisfied that the online order for the 2018 Knight Code was completed in Canada and the product was shipped from Alberta to Ontario at Mr. Knight's direction. Both the shipping label and the return address label affixed to the courier package indicate that the U.S. company, Knight Americas, runs at least part of its operations from Calgary. As noted above, the

copy of the 2018 Knight Code delivered to Mr. Williams indicates that it was published by Knight Co. and that the volume was printed in Canada.

63 I find these words of Justice Bastarache from the Supreme Court of Canada's decision in *Liberty Net* (at paras 52-53) to be applicable to the matter before me:

> 52 The appellants' second ground of attack is that the contempt order is inapplicable because it seeks to restrain conduct taking place outside of Canada, and, therefore, beyond the territorial jurisdiction of the Federal Court of Canada. This argument is misguided...As long as at least part of an offence has taken place in Canada, Canadian courts are competent to exert jurisdiction. As La Forest J. articulates the principle in *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.), at pp. 212-13:
>
> > As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well-known in public and private international law...
>
> This case does not even test the outer limits of that principle. There was here an advertisement for a message which violated the terms of the order, and that advertisement was made in Canada, on the very phone line where the offending messages had formerly been available, and this advertisement was done with knowledge of the content of those messages and with knowledge that that content violated the terms of the order of Muldoon J.
>
> 53 The defendants knowingly violated the order of Muldoon J. and were properly found to be in contempt of court by Teitelbaum J.

64 The decision to resume sales of the 2018 edition of the Knight Code in October 2020, and the failure to deliver up all copies of that publication, were clearly deliberate acts. While there is no requirement to establish "contumacious" intent, that is to say, an intention to disobey in the sense of desiring or knowingly choosing to disobey the order or judgment in question (ASICS Corporation v 9153-2267 Québec Inc, 2017 FC 5 at para 33, citing Carey at paras 39-42, 47), in my view, the Knight Parties have chosen to disobey the Judgment. It is clear from the content of Mr. Knight's online posts that were introduced into evidence, and Mr. Knight's behaviour toward CSA and the Court at the contempt hearing, that Mr. Knight's strong disagreement with the Judgment has crossed a line, and demonstrates disrespect.

65 In summary, the Knight Parties have intentionally carried out acts prohibited by the Judgment, and they have intentionally failed to carry out acts compelled by the Judgment. Their activities are caught by the terms of the Judgment, and it is within the jurisdiction of this Court to find them in contempt. The evidence establishes, beyond a reasonable doubt, that each of the Knight Parties

is in contempt of court and the Knight Parties have led no evidence that would raise a reasonable doubt in this regard.

66 The evidence establishes that both Knight Co. and Knight Americas are essentially extensions of Mr. Knight himself, and he is the sole directing mind. In addition to contravening the Judgment directly, I find Mr. Knight to be in contempt as the responsible officer who aided and abetted a breach of the Judgment by Knight Co. and Knight Americas: *MLI v GEB* at para 15; *Telus Mobility* at para 16; *Setanta Sports* at para 14.

67 While I find that Knight Americas has contravened the Judgment directly, and this is sufficient to find Knight Americas in contempt, I also find that Knight Americas has aided and abetted Knight Co. and Mr. Knight in acting contrary to the Judgment.

V. Conclusion

68 For the foregoing reasons, I find that the Knight Parties are guilty of contempt as charged. Knight Americas is guilty of contempt on all three counts. Knight Co. is guilty of contempt on counts 1 and 2. Mr. Knight is guilty of contempt on all three counts, both in his personal capacity (counts 1 and 2) and as the directing mind of Knight Co. and Knight Americas (all counts).

69 Having found the Knight Parties in contempt, this proceeding will advance to the next stage, the hearing regarding penalty: Winniki v Canada (Human Rights Commission), 2007 FCA 52 at paras 12-16.

70 The hearing may be set down on one of the following dates: September 3, 13, 15, 16, October 4-7, October 18-21. Within five days, CSA shall file a letter with the Court, copying Mr. Knight by email, indicating the proposed hearing dates when CSA is not available and setting out a proposed schedule for filing deadlines and any procedural matters in advance of the hearing, expressed in days before the hearing. Within five days of CSA's letter, Mr. Knight shall file a letter with the Court, copying CSA's counsel by email, indicating the proposed hearing dates when he is not available and providing any response to CSA's proposed schedule. After considering the parties' availability and their positions on a proposed schedule, the Court will issue a direction setting the hearing date and schedule.

71 A party may request directions or a case management conference in the event they wish to propose an alternative procedure for the next stage.

72 Costs of both stages of this contempt proceeding as well as the motion for the Show Cause Order will be determined as part of the penalty stage.

JUDGMENT IN T-646-15

THIS COURT'S JUDGMENT is that:

1. P.S. Knight Co. Ltd., Mr. Gordon Knight, and PS Knight Americas Inc. are guilty of contempt for disobeying the terms of the Judgment.

2. This contempt proceeding will advance to the next stage, the hearing regarding penalty.

3. Within five days, CSA shall file a letter with the Court, copying Mr. Knight by email, indicating the proposed hearing dates when CSA is not available and setting out a proposed schedule for filing deadlines and any procedural matters in advance of the hearing, expressed in days before the hearing.

4. Within five days of CSA's letter, Mr. Knight shall file a letter with the Court, copying CSA's counsel by email, indicating the proposed hearing dates when he is not available and providing any response to CSA's proposed schedule.

5. After considering the parties' availability and their positions on a proposed schedule, the Court will issue a direction setting the hearing date and schedule.

6. Costs of the liability and penalty stages of the contempt proceeding and costs of the motion for the Show Cause Order are reserved, and will be addressed at the penalty stage.

Application granted.

2015 SCC 17, 2015 CSC 17
Supreme Court of Canada

Carey v. Laiken

2015 CarswellOnt 5237, 2015 CarswellOnt 5238, 2015 SCC 17, 2015 CSC 17, [2015] 2 S.C.R. 79, [2015] A.C.S. No. 17, [2015] S.C.J. No. 17, 133 O.R. (3d) 80 (note), 251 A.C.W.S. (3d) 242, 332 O.A.C. 142, 382 D.L.R. (4th) 577, 470 N.R. 89, 66 C.P.C. (7th) 1, J.E. 2015-660

Peter W. G. Carey, Appellant and Judith Laiken, Respondent

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: December 10, 2014
Judgment: April 16, 2015
Docket: 35597

Proceedings: affirming *Laiken v. Carey* (2013), 116 O.R. (3d) 641, 52 C.P.C. (7th) 144, 367 D.L.R. (4th) 415, 310 O.A.C. 209, 2013 CarswellOnt 11824, 2013 ONCA 530, E.E. Gillese J.A., M. Rosenberg J.A., Robert J. Sharpe J.A. (Ont. C.A.); reversing *Laiken v. Carey* (2012), [2012] O.J. No. 6596, 2012 CarswellOnt 17537, 2012 ONSC 7252, L.B. Roberts J. (Ont. S.C.J.)

Counsel: Patricia D.S. Jackson, Rachael Saab, for Appellant
Kevin Toyne, John Philpott, for Respondent

Cromwell J. **(McLachlin C.J.C. and Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. concurring):**

I. Introduction

1 Contempt of court proceedings against lawyers are rare; so are situations in which judges reverse their own previous findings. But this case, which gives the Court the opportunity to clarify some aspects of the common law of civil contempt of court, has both of these unusual elements.

2 The appellant, Peter Carey, is a lawyer who was the object of contempt proceedings for allegedly breaching the terms of an injunction. He was initially found in contempt by a judge of the Ontario Superior Court of Justice, but the judge revisited that finding and reversed it when the matter came back before her for consideration of the appropriate penalty. The Court of Appeal set the judge's second decision aside and found Mr. Carey in contempt. He now appeals to this Court, raising three questions:

1. To have committed contempt, did Mr. Carey have to intend to interfere with the administration of justice?

2. Was Mr. Carey in contempt?

3. Was it open to the judge to set aside her initial finding of contempt?

3 I conclude that the Court of Appeal for Ontario was correct to answer the first and third questions in the negative and the second in the affirmative: to be in contempt, Mr. Carey did not need to intend to interfere with the administration of justice; Mr. Carey was in contempt and his obligations to his client did not justify or excuse his breaching the injunction; and it was not open to the judge to set aside her initial finding of contempt. I would therefore dismiss the appeal with costs.

4 The factual and procedural context in which these issues arise is complicated and I will turn to that before getting into the legal analysis that has led me to these conclusions.

II. Background

A. Overview

5 The appeal arises out of Mr. Carey's alleged breach of a so-called *Mareva* injunction that enjoined any person with knowledge of the order from "disposing of, or otherwise dealing with" any assets of various parties, including Peter Sabourin for whom Mr. Carey acted. The injunction was issued in the course of litigation between the respondent, Judith Laiken, and Mr. Sabourin and related parties. Ultimately, Ms. Laiken obtained a judgment against Mr. Sabourin and his companies for roughly $1 million and costs.

6 Following the conclusion of this litigation, Ms. Laiken brought contempt proceedings against Mr. Carey, who unquestionably had knowledge of the injunction. She alleged he had breached its terms by returning to Mr. Sabourin over $400,000 that Mr. Carey was holding in trust for him. These contempt proceedings have led to the appeal before this Court.

B. The Litigation Leading to the Injunction

7 Ms. Laiken retained Mr. Sabourin and his group of companies to conduct off-shore security trades on her behalf. To this end, she transferred approximately $885,000 to various bank accounts he and his businesses held. Ultimately, these funds were lost and, unsurprisingly, the business relationship between Ms. Laiken and Mr. Sabourin soured. In 2000, he sued her for $364,000, alleging a deficit in her margin account. She counterclaimed for over $800,000, alleging that he had defrauded her. Mr. Carey represented Mr. Sabourin and his business entities in these proceedings.

8 Ms. Laiken obtained an *ex parte Mareva* injunction from the Ontario Superior Court of Justice freezing the assets of the defendants to her counterclaim, including Mr. Sabourin. The injunction had broad terms. It prohibited, among other things, Mr. Sabourin and any person with knowledge of the order from "disposing of, or otherwise dealing with" any of Mr. Sabourin's assets: Order of May 4, 2006, by Campbell J. (see A.R., vol. I, at p. 2). The injunction also directed any person with knowledge of it to "take immediate steps to prevent the ... transfer" of the assets, including those held in "trust accounts" in that person's power, possession or control (*ibid.*). The Superior Court of Justice continued the injunction on multiple occasions with the understanding that the parties needed to work out between themselves variations to it to allow for payment of legal fees and living expenses. However, the injunction was never formally amended.

9 A few months after the initial order had been made Mr. Sabourin sent Mr. Carey a cheque for $500,000. No instructions accompanied the cheque and Mr. Carey could not reach Mr. Sabourin to obtain instructions. Pursuant to Law Society of Upper Canada by-law requirements, Mr. Carey deposited the cheque in his trust account, applying some of the money towards Mr. Sabourin's outstanding legal fees, since the parties had agreed that the injunction did not prohibit the payment of reasonable legal fees.

10 Mr. Sabourin later called Mr. Carey and told him to use the rest of the funds to settle the claims of creditors represented by Bill Brown, who had invested in the Sabourin entities. Mr. Carey advised Mr. Sabourin that he could not do that because making a payment to a third-party creditor would breach the injunction. Mr. Sabourin then instructed Mr. Carey to attempt to negotiate a settlement with Ms. Laiken.

11 A few days later, during a conference call with Messrs. Brown and Carey, Mr. Sabourin advised that Mr. Carey was holding some $500,000 in trust. The money, he said, was intended for Mr. Brown, but the injunction prohibited Mr. Carey from paying it to him.

12 Mr. Carey could not reach a settlement with Ms. Laiken's lawyers. At no point did he reveal to them the existence of the trust money. After the failed settlement negotiations, Mr. Sabourin instructed Mr. Carey to return the balance of the funds to him, which Mr. Carey did after deducting an amount to cover future legal fees. Mr. Carey transferred a total of $440,000 back to Mr. Sabourin in October and November 2006.

13 Early in 2007, Mr. Sabourin called Mr. Carey and terminated his retainer and instructed him to take no further steps until he had retained new counsel. Shortly after this call, Mr. Sabourin went out of business and vanished. Mr. Carey never received a notice of change of lawyers and remained counsel of record in the Laiken-Sabourin litigation.

14 Later that year, Mr. Brown obtained judgment against Mr. Sabourin and receivership over his assets and those of his companies. Advised of the trust funds that Mr. Carey had held for Mr.

Sabourin, the receiver demanded that Mr. Carey provide a full accounting of these funds. Mr. Carey replied that he had received $500,000 from Mr. Sabourin, returned $440,000 and that just over $6,000 remained in the trust account. Mr. Carey indicated that he felt he could provide this information without violating any solicitor-client privilege, but he refused to provide additional information or documents that he thought might be privileged. A further court order required Mr. Carey to give a "full accounting of all funds" from Mr. Sabourin, which he provided.

15 In November 2007, Ms. Laiken obtained summary judgment dismissing Mr. Sabourin's claim against her and granting her over $1 million in damages and costs on her counterclaim for fraud.

C. The Contempt Proceedings

16 Ms. Laiken applied to have Mr. Carey found in contempt. She alleged that he breached the *Mareva* injunction by returning the $440,000 in his trust account to Mr. Sabourin. The series of decisions related to this motion led ultimately to the appeal before us.

17 In Ontario, civil contempt proceedings are governed by rule 60.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Under this rule, a party may move to obtain a contempt order: Rule 60.11(1). A judge, in dealing with such a motion, can "make such order as is just" and, following "a finding" of contempt, he or she may order the contemnor to be imprisoned, pay a fine, do or refrain from doing an act, pay just costs, and comply with any other order the judge considers necessary: rule 60.11(5). Upon motion, "a judge may discharge, set aside, vary or give directions in respect of an order under subrule (5) ... and may grant such other relief and make such other order as is just": rule 60.11(8).

18 The *Rules* do not prescribe the form of contempt proceedings. However, as a general rule, proceedings are bifurcated into a liability phase — where the case on liability proceeds and a defence is offered — and, if liability is established, a penalty phase. In contempt proceedings, liability and penalty are discrete issues: *College of Optometrists (Ontario) v. SHS Optical Ltd.*, 2008 ONCA 685, 241 O.A.C. 225 (Ont. C.A.), at paras. 72-75.

19 It is within this procedural framework that the Ontario courts considered Ms. Laiken's motion to find Mr. Carey in contempt of the *Mareva* injunction.

(1) The First Contempt Decision: Ontario Superior Court of Justice (Roberts J., 2011 ONSC 5892 (Ont. S.C.J.)

20 The motions judge found Mr. Carey in contempt and issued an order to that effect. She was satisfied beyond a reasonable doubt that the *Mareva* order was clear and that Mr. Carey "knowingly and deliberately breached" it by transferring the funds from his trust account to Mr. Sabourin (para. 42 (CanLII)). The motions judge ordered the parties to appear before her at a later date for another

hearing. She stated she would take into account any further evidence and testimony the parties submitted in making any order under Rules 60.11(5) and 60.11(8).

(2) The Stay Application Decision: Court of Appeal for Ontario (Sharpe J.A., 2011 ONCA 757, 286 O.A.C. 273 (Ont. C.A. [In Chambers])

21 A judge of the Court of Appeal dismissed Mr. Carey's motion for a stay of the motions judge's order and any further proceedings pending appeal of that order. The court held that the contempt proceedings were not yet completed and that until they were, the Court of Appeal would not know relevant information, including whether the judge considered the contempt to be trivial or serious.

(3) The Second Contempt Decision: Ontario Superior Court of Justice (Roberts J., 2012 ONSC 7252, [2012] O.J. No. 6596 (Ont. S.C.J.)

22 When the matter resumed before the motions judge, Mr. Carey moved to reopen the contempt hearing. He filed new evidence, including an affidavit sworn by Alan Lenczner, Q.C., stating that by returning the money in excess of that required to cover legal fees, Mr. Carey had acted in a manner consistent with the practice of counsel generally. Mr. Carey also proffered his own testimony about what he perceived to be his professional obligations and his motivations in dealing with the trust funds.

23 The motions judge set aside her previous finding of contempt. Based on the new evidence, she doubted whether the terms of the order were clear and whether Mr. Carey's interpretation of it was deliberately and wilfully blind.

(4) The Appeal Decision: Court of Appeal (Sharpe J.A. (Rosenberg and Gillese JJ.A. concurring), 2013 ONCA 530, 367 D.L.R. (4th) 415 (Ont. C.A.)

24 The Court of Appeal unanimously allowed the appeal and restored the initial contempt finding. The motions judge had erred, the Court of Appeal found, in setting it aside. Mr. Carey had inappropriately used the second stage of the contempt proceedings to attack the motions judge's earlier findings and based this attack on evidence he ought to have filed at the first hearing. While the appeal could have been resolved on these procedural grounds, the court went on to hold that the motions judge erred in finding Mr. Carey was not in contempt.

25 The Court of Appeal accepted that Mr. Carey did not desire or knowingly choose to disobey the order, but found that it is unnecessary to establish this in order to find him liable for civil contempt. Mr. Carey knew of a clear court order and he committed an act that violated it. This was sufficient to constitute civil contempt.

III. Analysis

A. First Issue: To Have Committed Contempt, Did Mr. Carey Have to Intend to Interfere With the Administration of Justice?

(1) Overview

26 At the initial contempt hearing, Roberts J. stated, in my view correctly, that "civil contempt consists of the intentional doing of an act which is in fact prohibited by the order": 2011 ONSC 5892 (Ont. S.C.J.), at para. 24 (CanLII). However, she subsequently set aside her earlier finding of contempt. She held:

> Based on Mr. Carey's oral evidence, because of the protracted history between Mr. Carey's clients and the plaintiff and the way that Mr. Carey viewed the merits of the plaintiffs [sic] claim, the unusual form of the May 4, 2006 Mareva Order, and the variations discussed and agreed upon between counsel, which were not set out in one document by formal amendment, I have a reasonable doubt as to whether the terms of the May 4, 2006 Mareva Order were completely clear to Mr. Carey, and I am not satisfied beyond a reasonable doubt that Mr. Carey's interpretation of the May 4, 2006 Mareva Order was deliberately and willfully blind.
>
> [Emphasis added; 2012 ONSC 7252 (Ont. S.C.J.), at para. 36.]

27 The Court of Appeal, however, held that it was an error of law to conclude that Mr. Carey could not be found in contempt because he did not deliberately breach the order. Ms. Laiken did not have to prove that Mr. Carey had "deliberately" breached the order or, as the court put it elsewhere in its reasons, to establish "contumacious intent": 2013 ONCA 530 (Ont. C.A.), at paras. 65 nd 62. The order clearly prohibited dealing in trust funds belonging to Mr. Sabourin, yet Mr. Carey knew of the order and he intentionally transferred the funds, an act that was contrary to the order. This is all that is required to establish the elements of civil contempt.

28 Before this Court, the parties devoted a substantial portion of their written submissions to the mental element of civil contempt. Mr. Carey's position is that in various circumstances — namely, where the alleged contemnor cannot "purge" his contempt, is a lawyer or is a third party to an order — proof of an intention to interfere with the administration of justice is required. In other words, in these circumstances contumacy or intent to breach the order is an element of the offence. Ms. Laiken frames the issue slightly differently. Rather than viewing the question as one turning on the elements of civil contempt, she submits that lack of contumacious intent is not a defence in civil contempt proceedings, regardless of the alleged contemnor's circumstances.

29 However framed, the issue boils down to the required intent for a finding of civil contempt. Canadian jurisprudence clearly sets out the requirements for establishing civil contempt, of which I provide an overview below. Contumacy — the intent to interfere with the administration of justice — is not an element of civil contempt and lack of contumacy is therefore not a defence. I do not

accept Mr. Carey's position that a different rule should apply to individuals who cannot purge their contempt, to lawyers and to third parties.

(2) The Canadian Common Law of Civil Contempt

30 Contempt of court "rest[s] on the power of the court to uphold its dignity and process .... The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect": *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.), at p. 931. It is well established that the purpose of a contempt order is "first and foremost a declaration that a party has acted in defiance of a court order": *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612 (S.C.C.), at para. 35, cited in *Bell ExpressVu Ltd. Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614 (Ont. C.A.), at para. 20.

31 The common law has developed to recognize two forms of contempt of court: criminal contempt and civil contempt. The distinction, which the parties to this appeal accept, rests on the element of public defiance accompanying criminal contempt: see, e.g., *United Nurses*, at p. 931; *Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 S.C.R. 516 (S.C.C.), at p. 522. With civil contempt, where there is no element of public defiance, the matter is generally seen "primarily as coercive rather than punitive": R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at ¶6.100. However, one purpose of sentencing for civil contempt is punishment for breaching a court order: *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, 305 D.L.R. (4th) 655 (Ont. C.A.), at para. 117. Courts sometimes impose substantial fines to match the gravity of the contempt, to deter the contemnor's continuing conduct and to deter others from comparable conduct: Sharpe, at ¶6.100.

32 Civil contempt has three elements which must be established beyond a reasonable doubt: *G. (N.) c. Services aux enfants & adultes de Prescott-Russell* (2006), 82 O.R. (3d) 686 (Ont. C.A.), at para. 27; *College of Optometrists*, at para. 71; *Bhatnager v. Canada (Minister of Employment & Immigration)*, [1990] 2 S.C.R. 217 (S.C.C.), at pp. 224-25; *Jackson v. Honey*, 2009 BCCA 112, 267 B.C.A.C. 210 (B.C. C.A.), at paras. 12-13; *TG Industries Ltd. v. Williams*, 2001 NSCA 105, 196 N.S.R. (2d) 35 (N.S. C.A.), at paras. 17 and 32; *Godin v. Godin*, 2012 NSCA 54, 317 N.S.R. (2d) 204 (N.S. C.A.), at para. 47; *Gaudet v. Soper*, 2011 NSCA 11, 298 N.S.R. (2d) 303 (N.S. C.A.), at para. 23. These three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases: *Bell ExpressVu*, at para. 22; *Chiang*, at paras. 10-11.

33 The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done": *Prescott-Russell*, at para. 27; *Bell ExpressVu*, at para. 28, citing with approval *Jaskhs Enterprises Inc. v. Indus Corp.* [2004 CarswellOnt 4036 (Ont. S.C.J.)] 2004 CanLII 32262, at para. 40. This requirement of clarity ensures that a party will not be found in contempt where an order is unclear: *Pro Swing*, at para. 24; *Bell ExpressVu*, at

para. 22. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning: *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463 (Sask. C.A.), at para. 21.

34 The second element is that the party alleged to have breached the order must have had actual knowledge of it: *Bhatnager*, at p. 226; *College of Optometrists*, at para. 71. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine (*ibid.*).

35 Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: *Sheppard, Re* (1976), 12 O.R. (2d) 4 (Ont. C.A.). at p. 8. The meaning of this element is one of the main points in contention on appeal and I will turn to consider it in more detail momentarily.

36 The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders: see, e.g., *Hefkey v. Hefkey*, 2013 ONCA 44, 30 R.F.L. (7th) 65 (Ont. C.A.), at para. 3. If contempt is found too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect": *Centre commercial Les Rivières ltée c. Jean Bleu inc.*, 2012 QCCA 1663 (C.A. Que.), at para. 7. As this Court has affirmed, "contempt of court cannot be reduced to a mere means of enforcing judgments": *Vidéotron ltée c. Industries Microlec produits électroniques inc.*, [1992] 2 S.C.R. 1065 (S.C.C.), at p. 1078, citing *Daigle c. St-Gabriel de Brandon (Paroisse)*[1991] R.D.J. 249 (C.A. Que.). Rather, it should be used "cautiously and with great restraint": *TG Industries*, at para. 32. It is an enforcement power of last rather than first resort: *Hefkey*, at para. 3; *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 89 O.R. (3d) 81 (Ont. C.A.), at paras. 41-43; *Centre commercial Les Rivières ltée*, at para. 64.

37 For example, where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt: see, e.g., *Morrow, Power v. Newfoundland Telephone Co.* (1994), 121 Nfld. & P.E.I.R. 334 (Nfld. C.A.), at para. 20; *TG Industries*, at para. 31. While I prefer not to delineate the full scope of this discretion, given that the issue was not argued before us, I wish to leave open the possibility that a judge may properly exercise his or her discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case.

(3) The Required "Intent"

38 It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice: *Prescott-Russell*, at para. 27; *College of Optometrists*, at para. 71; *Sheppard*, at p. 8; *TG Industries*, at paras. 17 and 32; *Bhatnager*,

at pp. 224-25; Sharpe, at ¶ 6.190. The Court of Appeal followed this approach. As it noted, to require a contemnor to have intended to disobey the order would put the test "too high" and result in "mistakes of law [becoming] a defence to an allegation of civil contempt but not to a murder charge" (2013 ONCA 530 (Ont. C.A.)(para. 59). Instead, contumacy or lack thereof goes to the penalty to be imposed following a finding of contempt: para. 62; see also *Sheppard*; and Sharpe, at ¶6.200.

39 The appellant submits, however, that in situations in which the alleged contemnor cannot "purge" the contempt, is a lawyer or is a third party to the order, the intent to interfere with the administration of justice must be proved. I understand this to mean that "the intention to disobey, in the sense of desiring or knowingly choosing to disobey the order" must be established: *TG Industries*, at para. 17. This is sometimes also referred to as "contumacious" intent.

40 The appellant submits that the mental element of civil contempt must address at least one of the two goals of civil contempt: securing compliance with court orders or protecting the integrity of the administration of justice. Finding a party in contempt where he or she cannot purge (either because the act that constituted the contempt cannot be undone or because a conflicting legal duty prevents compliance with the order) furthers neither of these goals absent some heightened mental element for contempt. Only if the person is shown to have had the intent to interfere with the administration of justice would one of these purposes — protecting the integrity of the administration of justice — be served.

41 I cannot accept this position. There is no principled reason to depart from the established elements of civil contempt in situations in which compliance has become impossible for either of the reasons referred to by the appellant. Where, as here, the person's own actions contrary to the terms of a court order make future compliance impossible, I fail to see the logic or justice of requiring proof of some higher degree of fault in order to establish contempt. The appellant's submission also overlooks the point that one of the purposes of the contempt power is to deter violations of court orders, thereby encouraging respect for the administration of justice. It undermines that purpose to treat with special charity people whose acts in violation of an order make subsequent compliance impossible. It seems to me that the existing discretion not to enter a contempt finding and the defence of impossibility of compliance provide better answers than a heightened degree of fault where a party is unable to purge his or her contempt for the reasons the appellant outlines: *Jackson* at para. 14; *Sussex Group Ltd. v. Fangeat* (2003), 42 C.P.C. (5th) 274 (Ont. S.C.J.), at para. 56.

42 The appellant correctly notes that civil contempt is quasi-criminal in nature, which he says justifies a higher fault element where contempt cannot be purged. But civil contempt is always quasi-criminal, so this provides no justification for carving out a distinct mental element for particular types of civil contempt cases. As I have already discussed, requiring contumacious intent would open the door to mistakes of law providing a defence to an allegation of civil contempt. It

could also permit an alleged contemnor to rely on a misinterpretation of a clear order to avoid a contempt finding, which would significantly undermine the authority of court orders.

43 Further, adopting the appellant's proposal would in effect make the required mental element dependent on the nature of the order alleged to have been breached. Those who breach a prohibitory order would benefit from this heightened mental element disproportionately, due to subsequent impossibility of compliance, as compared to those who breach a mandatory order, with which the alleged contemnor will be able to subsequently comply absent a conflicting legal duty. I see no principled basis for creating this distinction.

44 The appellant also submits that lawyers should benefit from a heightened fault requirement, but I do not agree. As the Court of Appeal recognized, reliance on legal advice does not shield a party from a finding of contempt: para. 61, citing *Mileage Conference Group of the Tyre Manufacturers' Conference, Re*, [1966] 2 All E.R. 849 (Eng. Restrictive Practices Ct.), at p. 862; *Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1974), 48 D.L.R. (3d) 641 (Ont. H.C.), at p. 661, aff'd (1975), 65 D.L.R. (3d) 231 (Ont. C.A.). Still less should the law permit lawyers to escape a finding of contempt because they have, in effect, relied on their own legal advice.

45 As for third parties, the appellant points to some authority in the United Kingdom and Australia to the effect that intent to interfere with the administration of justice is a prerequisite for finding a third party in contempt: see, e.g., *Customs & Excise Commissioners v. Barclays Bank Plc*, [2006] UKHL 28, [2007] 1 A.C. 181 (Eng. H.L.), at para. 29; *Attorney General v. Punch Ltd.*, [2002] UKHL 50, [2003] 1 A.C. 1046 (U.K. H.L.), at para. 87; *Z Ltd. v. A.*, [1982] 2 W.L.R. 288 (Eng. C.A.), at p. 305; *Baker v. Paul*, [2013] NSWCA 426 (New South Wales S.C.), at para. 19. It has also been noted that "[i]t would appear that a higher degree of intention is required to make a non-party liable for contempt": Sharpe, at ¶6.210.

46 The short answer to this point is that, even accepting this line of authority, Mr. Carey is not in the same category as the third parties discussed in this line of authority. I would respectfully adopt as my own the following excerpt on this point from the reasons of Sharpe J.A. in the Court of Appeal:

> The solicitor-client bond creates a community of interest between Carey and Sabourin that is plainly distinguishable from the situation of a stranger to the litigation who is apprised of the court order. As an officer of the court, a solicitor of record is duty-bound to take scrupulous care to ensure respect for court orders. ... [A]s the solicitor of record in the case, Carey should be held to the same standard of compliance as his client who was a party. [para. 64]

(4) Conclusion

47 I conclude that "contumacious" intent was not required in this case, and to the extent that the judge at first instance found otherwise in overturning her earlier finding of contempt, she erred in law.

B. Second Issue: Was Mr. Carey in Contempt?

48 Mr. Carey submits that he was not in contempt, making two main points. He submits first that the payment of funds from his trust account to Mr. Sabourin was not a "transfer" within the meaning of the order, either because beneficial ownership of the funds did not change or because it amounted to a permissible return of an overpayment of legal fees that informal variations to the order permitted. Second, he also says that his conduct complied with his solicitor-client obligations and that such compliance cannot be considered to have been in breach of the *Mareva* injunction. The existence of Mr. Sabourin's funds in his trust account attracted solicitor-client privilege and, as such, Mr. Carey was bound not to disclose that the funds were in his account. But, he submits, leaving the funds where they were and maintaining the privilege would have sheltered them from execution. He maintains that his only option that was consistent with both his professional obligations to his client and to the court was to return the funds to Mr. Sabourin as he did. The privileged nature of the funds precluded him from seeking advice about the proper course of action from the court.

49 Respectfully, neither of these points withstands careful scrutiny.

(1) The "Transfer"

50 Mr. Carey contends that there was no transfer of funds within the meaning of the order because there was no change in beneficial ownership when he returned them to Mr. Sabourin. As the Court of Appeal pointed out, the purpose of the order was to prevent dealings with Mr. Sabourin's assets that would defeat the court's process (para. 50). Mr. Carey's position, if accepted, would mean the order actually permitted trustees of assets held for Mr. Sabourin's benefit to freely transfer those assets between accounts and even between jurisdictions, putting those assets beyond the reach of the court in the event of execution, so long as Mr. Sabourin retained beneficial ownership of the assets. An interpretation of the order that permitted this would be illogical: it would clearly defeat the purpose of the order and would also run counter to the plain language of the order specifically prohibiting those with knowledge of it from "dealing with" Mr. Sabourin's assets. For these reasons, I cannot accept Mr. Carey's position.

51 Mr. Carey also submits that the return of the funds to Mr. Sabourin did not constitute a "transfer" within the meaning of the injunction because it amounted simply to returning an overpayment of reasonable legal fees, the payment of which was permitted by the informal variations to the order agreed to by counsel. Mr. Carey also contends that returning the overpayment was consistent with the standard of practice of the profession at the time. Moreover,

if moving funds from the trust account to Mr. Sabourin did constitute a "transfer", then it actually corrected a violation of the order that would have occurred when Mr. Sabourin originally transferred funds to Mr. Carey and he deposited them in his trust account.

52 Mr. Carey's characterization of the $500,000 in his trust account as an "overpayment" of "reasonable legal fees" in the circumstances of this case is artificial in the extreme. Moreover, even if I were to accept that characterization (and I do not), the clear terms of this order still prohibited any transfer of those "excess" funds. Further, while the question of whether Mr. Sabourin's initial transfer of the funds to Mr. Carey breached the order is not before us, I reject Mr. Carey's submission that if it were a breach, this justifies a subsequent violation of the order by returning the money to Mr. Sabourin.

53 In my view, Mr. Carey's submissions on this issue rely on alleged uncertainty where none in fact exists. The order clearly prohibited, as the Court of Appeal held, at para. 49, dealing with money held in trust. Mr. Carey's other conduct showed that he understood that, even taking into account the variations informally agreed to by counsel to permit payment of legal and ordinary living expenses, the order was in full force and was binding on him. He unsuccessfully tried to vary the order to permit payments to third party creditors and he rightly declined, on the basis of the order, to carry out Mr. Sabourin's instructions to use the trust money to settle the Brown claims.

(2) Solicitor-Client Privilege

54 I am not persuaded by Mr. Carey's arguments before this Court that there was a true conflict between the order and his professional duties such that he had no option but to transfer the trust funds back to Mr. Sabourin.

55 I will assume, but not decide, that the existence of the funds was privileged at the time of the transfer. There are certainly arguments to be considered that the privilege never attached in the first place, or that it was waived by Mr. Sabourin's disclosure of the funds' existence to a third party adverse in interest, as Ms. Laiken submits was the case. Moreover, Mr. Carey's claim in this litigation that the funds' existence was privileged is undermined by his disclosure of that fact in response to a request from the receiver in the unrelated litigation for a full accounting of trust funds, a disclosure which he indicated he believed could be made without even any danger of violating any privilege. Mr. Carey wrote:

> ... I believe I can provide you with the following information <u>without danger of violating any privilege:</u> on September 21, 2006 our firm was provided with a cheque for $500,000.00 from Peter Sabourin. Subsequently, on October 25, 2006, at the request of Mr. Sabourin, we returned $400,000.00, by way of four (4) Bank Drafts, payable to Peter Sabourin. On November 30, 2006 we returned another $40,000.00 to Peter Sabourin. The balance of the monies were kept in the Trust account and used to pay legal fees resulting in the balance that

is currently in our account. [Emphasis added; Letter from Mr. Carey to receiver, November 1, 2007; A.R., vol. IV, at p. 145.]

56 Be that as it may, Mr. Carey's assumed duty to guard solicitor-client privilege did not conflict with his duty to comply with the order. To fulfill both, he needed only to leave the funds in his trust account once they had been deposited there. In doing so, he would have respected any obligations arising from solicitor-client privilege to maintain the confidentiality of the funds and he would have abided by the terms of the *Mareva* order not to transfer funds held in trust for Mr. Sabourin.

57 In my view, leaving the funds in his trust account would not have conflicted with other asserted professional obligations. Mr. Carey expressed concern that if he left the funds where they were, he would be assisting in shielding them from execution in the event that Ms. Laiken succeeded in her action against Mr. Sabourin. This position is not only illogical, but ironic in view of the fact that returning them certainly had that effect. It is true that had Mr. Carey retained the funds, a conflict might have developed at the point when Ms. Laiken obtained judgment against Mr. Sabourin. Then Mr. Carey might have had an ethical dilemma on his hands: how would he comply with any solicitor-client privilege obligations (assuming the existence of the funds in trust was privileged), with the *Mareva* order and with any duty to avoid assisting his client in evading execution arising from the judgment? But it is not an answer for Mr. Carey to say that he breached the order so that he would avoid the possibility of a future ethical dilemma.

58 Accepting that Mr. Carey believed — albeit mistakenly — that there was a true conflict, there were appropriate avenues open to him other than making a unilateral decision to breach the order. The unilateral approach that he adopted gave no weight to the important principle that "a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed": *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599. See also *Paul Magder Furs Ltd. v. Ontario (Attorney General)* (1991), 6 O.R. (3d) 188 (Ont. C.A.), at p. 192: "It is elementary that so long as ... an order of the court remains in force it must be obeyed."

59 For one thing, Mr. Carey could have obtained a determination about whether the existence of the funds in trust was covered by solicitor-client privilege. Only if it was would a true conflict potentially exist. He himself at one point thought that information about the funds' existence could be released without any danger of violating solicitor-client privilege. He could have asked his client to waive any privilege over the existence of the funds. Had his client agreed, that would have put an end to any potential future conflict. Mr. Carey also could have sought a variation of the order or direction from the court on an *ex parte* and *in camera* basis. But there is no evidence that Mr. Carey took or even considered taking any of these steps.

60 In any event, we do not need to make any final pronouncements on what Mr. Carey should have done instead of unilaterally deciding to give the money back. One thing is crystal clear: there

was no legal or ethical duty that compelled Mr. Carey to breach the injunction by transferring the trust funds back to Mr. Sabourin or that conflicted with obeying the order. Although I accept that Mr. Carey did not breach the order maliciously or with the intent to interfere with the administration of justice, the law does not require that he have done so in order to satisfy the elements of civil contempt.

C. Third Issue: Was It Open to the Motions Judge to Set Aside Her Initial Contempt Finding?

61 The Court of Appeal held that the motions judge erred in setting aside her initial contempt finding. Neither the *Rules* nor the case law contemplates the procedure the motions judge followed. The interests of justice are best served when the principle of finality is respected. Mr. Carey used the second stage of the proceedings to attack the motions judge's findings and declaration of contempt. This was inappropriate (paras. 30-32).

62 The court identified two qualifications to the general rule that a contempt finding at the first hearing is final. First, rule 60.11 contemplates that a judge may set aside a finding of contempt if the contemnor purges the contempt, since the contempt proceedings have secured compliance with the court order. Second, contempt proceedings are subject to the standard principles that allow parties to reopen findings in exceptional circumstances to permit consideration of fresh evidence or new facts that were not before the court at the first hearing.

63 The appellant submits that the Court of Appeal was wrong for two principal reasons: rule 60.11(8) grants the court discretion to set aside a contempt finding and the quasi-criminal nature of civil contempt proceedings demands that judges retain discretion to set aside a finding on the basis of new material evidence. The appellant submits that the motions judge properly exercised her discretion to set aside the contempt finding in this case.

64 I do not accept these submissions and I agree with the Court of Appeal, for substantially the reasons it gave.

65 The starting point is that, in civil contempt proceedings, once a finding of contempt has been made at the first stage of a bifurcated proceeding, that finding is usually final. As the Court of Appeal stated, "[a] party faced with a contempt motion is not entitled to present a partial defence [at the liability stage] and then, if the initial gambit fails, have a second 'bite at the cherry'" at the penalty stage (para. 32). This would defeat the purpose of the first hearing. This is what the judge at first instance erroneously permitted Mr. Carey to do.

66 Without exhaustively outlining the circumstances in which a judge may properly revisit an initial contempt finding, I agree with the Court of Appeal that he or she may do so where the contemnor subsequently complies with the order or otherwise purges his or her contempt or, in exceptional circumstances, where new facts or evidence have come to light after the contempt finding was made.

67 Although the motions judge was concerned that refusing to consider the new evidence would lead to a miscarriage of justice, I agree that neither Rule 60.11 nor the case law permitted her to revisit her earlier finding in the circumstances of this case. Rule 60.11(8) allows a judge, on motion, to "discharge, set aside, vary or give directions in respect of an order under subrule (5) or (6) and ... grant such other relief and make such other order as is just". Relying on the Court of Appeal's comments in its stay decision, the motions judge thought that there was no need to "reopen" Ms. Laiken's motion for contempt, as it was not yet completed: 2012 ONSC 7252 (Ont. S.C.J.), at para. 8. I agree with the Court of Appeal that the motions judge misinterpreted this aspect of the stay decision. The Court of Appeal correctly held that in these circumstances, the motions judge erred in exercising her discretion to permit Mr. Carey to relitigate the initial contempt finding and erred in setting that finding aside.

IV. Disposition

68 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

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2005 FC 1362
Federal Court

Direct Source Special Products Inc. v. Sony Music Canada Inc.

2005 CarswellNat 3175, 2005 FC 1362, [2005] F.C.J. No. 1666,
143 A.C.W.S. (3d) 280, 45 C.P.R. (4th) 50, 67 W.C.B. (2d) 409

Direct Source Special Products Inc., Plaintiff and Sony Music Canada Inc. and Sony Music Entertainment (Canada) Inc., Defendants

Milczynski Prothonotary

Heard: October 3, 2005
Judgment: October 5, 2005
Docket: T-1483-99

Counsel: Ian Blue, Andrew Brodkin, for Plaintiff
Miles Hastie, for Defendants

***Milczynski Prothonotary*:**

1 The Defendant/Plaintiff by Counterclaim Sony Music Entertainment (Canada) Inc., now SM Music (Canada) Corp. (the "Defendant"), brought this motion, heard October 3, 2005, for:

1. A Show Cause Order that the Plaintiff and Arnold B. Schwisberg appear before this Court at a date and time to be fixed to hear proof of the acts with which they are charged and to urge any grounds of defence that they may have regarding information provided by the Defendant that the Plaintiff and Arnold B. Schwisberg acted in contempt of this Court by virtue of the following acts:

a. In violation of the implied undertakings given by them that documents produced by the Defendant in this action and information therein would only be used for the purposes of this action, by letter dated February 3, 2005, the Plaintiff and its solicitor, Arnold B. Schwisberg:

(i) caused documents and information produced by the Defendant in this action to be disclosed to CHUM Limited, a non-party to the action; and

(ii) relied on the documents and information therein for the purpose of threatening litigation against CHUM Limited.

2 This is an action for infringement of the trade-mark "DANCE MIX". The Plaintiff alleges that the Defendants have used the mark on its product labels and have thereby infringed the Plaintiff's trade-mark rights. The contempt alleged by the Defendant that is the subject of this motion, relates to a breach of the implied undertaking governing the disclosure and use of documents and information obtained through the discovery process.

3 Rule 467 of the *Federal Courts Rules* provides for a two step process before any person may be found in contempt of Court. First, the person alleged to be in contempt must be served with an order (a "show cause" order), made on the motion of a person who has an interest in the proceeding or on the Court's own initiative. Secondly, the show cause order, if granted, will require the person that is alleged to be in contempt, to appear before a judge at a stipulated time and place, and be prepared to hear proof of the act or acts with which he or she is charged. The person alleged to be in contempt must also, at that time, be prepared to present any defence that they may have.

4 A motion for a show cause order has been brought in this case by the Defendant against the Plaintiff and against Plaintiff's counsel. On such motion, in order to grant the show cause order sought, the Court must determine only the threshold issue of whether the evidence establishes a *prima facie* case that the actions of the alleged contemnor have been committed and that they constitute contempt deserving of sanction of this Court. A motion for a show cause order is not the time or place to argue the merits of the contempt proceeding or what may be valid defences. The exception is in those cases where it is clear from the record that the alleged violation is such that it does not deserve to be punished. This is not the case here. I am satisfied that a *prima facie* case of contempt has been established, and that the show cause order should issue.

5 On December 22, 2004, Mr. Schwisberg, counsel for the Plaintiff, wrote to then counsel for the Defendants for the purposes of this action, reminding counsel for the Defendants of the Defendants' ongoing disclosure obligations under the Rules, and for the production of certain documents within their "possession, power or control". Mr. Schwisberg made a demand that was fairly specific and well-defined in terms of what documents or information he was seeking through the production and discovery process.

6 On January 19, 2005, counsel for the Defendants responded and set out the additional productions at Appendix A and Appendix B of their correspondence for the purposes of the Affidavit of Documents, and provided copies of the described documents, which were sent to Mr. Schwisberg by fax and by courier.

7 On February 3, 2005, Mr. Schwisberg sent a letter to CHUM Limited ("CHUM"). CHUM is not a party to this action. In his correspondence, Mr. Schwisberg described generally the nature of the litigation between his client and the Defendants - trade-mark infringement with respect to the mark "DANCE MIX", and proceeded to make allegations that CHUM owed his client a fiduciary duty and had conspired with the Defendants to deliberately appropriate the goodwill

associated with the trade-mark. Mr. Schwisberg stated that he was making these allegations on the basis of additional documents that were produced by the Defendants on January 19, 2005, noting that "as a result" of these additional documents produced, his client "now knows" of CHUM's wrongdoing. He enclosed some of the documents that were provided to him in the January 19, 2005 correspondence and concludes by essentially noting that there were no other means for his client to have uncovered the conspiracy between CHUM and the Defendants - it only came to light on January 19, 2005. On the basis of the allegations, Mr. Schwisberg advised that his client was prepared to join CHUM to this action or commence a separate action against CHUM, but, to the extent that he might have suggestions for a more productive solution, Mr. Schwisberg invited CHUM to call him.

8 Documents and information produced on discovery are protected by an implied undertaking by the party receiving the documents and their solicitors that the documents and information will not be used for purposes collateral to the action without seeking the consent of the party making the production, or leave of the Court. A party and its solicitor who use such documents and information for purposes outside the action for which they were produced without consent or leave may be in breach of the implied undertaking and may be liable to be held in contempt of court.

9 On the basis of the above facts, I am satisfied that there is a *prima facie* case that there has been a breach of the implied undertaking rule relating to the use of documents and information obtained on discovery. The Plaintiff, through its solicitor, Mr. Schwisberg, appears to have disclosed and used documents obtained from the Defendants in this action without consent and without leave, to correspond to and threaten legal action against a non-party, asserting claims of conspiracy and breach of fiduciary duty against the non-party on the basis of the information disclosed. The allegations of conspiracy involving CHUM Limited to injure the trade-mark are not related to this action for trade-mark infringement. They are, however, made on the basis of documents and information disclosed in this action and are therefore made for collateral and improper purposes. Accordingly, I find that there is an arguable case that the Plaintiff and its solicitor breached the implied undertakings and that there is a prima facie case of contempt of court.

10 As for costs of this motion, counsel for the Defendants submitted that costs ought to be fixed in the amount of $10,000.00 and made payable forthwith. Counsel for the Plaintiff and Mr. Schwisberg did not oppose that amount to be fixed but submitted that it ought to be payable to the Defendants in the event of the cause.

Order

THIS COURT ORDERS that

1. A representative of the Plaintiff and Arnold B. Schwisberg appear before this Court at a date and time to be fixed by the Judicial Administrator to hear proof of the acts with which they are charged and to urge any grounds of defence that they may have regarding information

provided by the Defendant that the Plaintiff and Arnold B. Schwisberg acted in contempt of this Court by virtue of the following acts:

a. In violation of the implied undertakings given by them that documents produced by the Defendant in this action and information therein would only be used for the purposes of this action, by letter dated February 3, 2005, the Plaintiff and its solicitor, Arnold B. Schwisberg:

(i) caused documents and information produced by the Defendant in this action to be disclosed to CHUM Limited, a non-party to the action; and

(ii) relied on the documents and information therein for the purpose of threatening litigation against CHUM Limited.

2. Counsel for the Defendants shall serve the Plaintiff and Arnold B. Schwisberg with a list of documents to be adduced and witnesses that the Defendants propose to call no later than 20 days before the Contempt Hearing:

3. Costs of this motion are fixed at $10,000.00, to be paid by the Plaintiff and Arnold B. Schwisberg to the Defendant in the event of the cause at the contempt of court hearing.

2020 CAF 7, 2020 FCA 7
Federal Court of Appeal

Figueroa v. Canada (Public Safety and Emergency Preparedness)

2020 CarswellNat 151, 2020 CarswellNat 4542,
2020 CAF 7, 2020 FCA 7, 315 A.C.W.S. (3d) 228

JOSE LUIS FIGUEROA (Appellant) and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS (Respondent)

Richard Boivin J.A., Mary J.L. Gleason J.A., Marianne Rivoalen J.A.

Heard: January 14, 2020
Judgment: January 15, 2020
Docket: A-99-19

Counsel: Jose Luis Figueroa, Appellant, for himself
Brett J. Nash, for Respondent

***Richard Boivin J.A.*:**

1 This is an appeal from the Federal Court's Order (*per* Lafrenière J.) dated February 18, 2019 (*Figueroa v. Canada (Public Safety and Emergency Preparedness)* (February 18, 2019), Doc. T-427-15 (F.C.)), dismissing the appellant's application for judicial review for his failure to pay security for costs on a redetermination after a successful appeal to the Federal Court of Appeal. The underlying file concerns the respondent's refusal to issue a certificate under section 83.07 of the *Criminal Code*, R.S.C. 1985, c. C-46.

2 The procedural history of this file is as follows. On April 25, 2017, Prothonotary Lafrenière (as he then was) ordered the appellant to pay security for costs and granted leave to the respondent to apply informally to have the appellant's application dismissed if he failed to post security for costs within 30 days (*Figueroa v. Canada (Public Safety and Emergency Preparedness)* (April 25, 2017), Doc. T-427-15 (F.C.)). Lafrenière J. dismissed the application for judicial review on June 29, 2017, seven days after the respondent filed its informal request (by letter) for the Court to dismiss the appellant's application because he did not post security. The appellant successfully appealed this June 29, 2017 Order. The Federal Court of Appeal found that the Federal Court had ruled on the matter prematurely, given that under Rule 369(2) of the *Federal Courts Rules*, S.O.R./98-106, the appellant should have had 10 days, instead of 7 days, to respond to the request for dismissal (*Figueroa v. Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 12,

301 A.C.W.S. (3d) 230 (F.C.A.) [*Figueroa FCA*]). The Federal Court of Appeal thus remitted the matter to the Federal Court so that it could receive the appellant's response and any reply from the respondent before determining the matter.

3 In the Order dated February 18, 2019, dismissing the appellant's application for judicial review for the second time, Lafrenière J. made the following findings. First, he addressed the appellant's concern regarding the disposition of the respondent's request on the basis of written representations. He concluded that he could address the matter in writing, finding that the respondent's informal application did "not raise complex questions or issues" and that the appellant had not established that fairness required an oral hearing (Order at p. 2-3). Lafrenière J. then turned to the substance of the respondent's request. He observed that while the appellant had raised lack of financial resources to explain his failure to comply with the security for costs Order before the Federal Court of Appeal, he had not raised this argument or provided evidence to support it before the Federal Court (*Ibid*. at p. 3). He noted that instead, the appellant had "take[n] issue with the steps leading to the Security for Costs Order and the Order itself" and that the appellant should have therefore appealed that Order instead of "call[ing] its legitimacy into question in subsequent enforcement proceedings" (*Ibid*. at pp. 3-4). He concluded that since the appellant had not provided "a viable explanation for his non-compliance" or evidence on why his application for judicial review should not be dismissed, nor asked for an extension of time to comply with the security for costs order or indicated whether he could post security, the application for judicial review should be dismissed (*Ibid*. at p. 4).

4 The relevant standard of review is that set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) [*Housen*]. Under the *Housen* framework, questions of law are reviewable for correctness, whereas questions of mixed fact and law as well as questions of fact are reviewable for palpable and overriding error.

5 The appellant raised a number of arguments before our Court. However, I am not convinced that Lafrenière J. committed a reviewable error.

6 I would accordingly dismiss the appeal for the following reasons.

7 First, it is noteworthy that upon deciding to send this matter back for redetermination, our Court mentioned that the Federal Court could dismiss the appellant's judicial review application if the applicant failed to post security for costs. Indeed, Stratas J.A. determined that "[g]iven the litigation history known to the Federal Court, it was certainly open to it in its security for costs Order to provide for summary dismissal for non-compliance" (*Figueroa FCA* at para. 13). Hence, in allowing the appeal of the appellant, our Court did so not because security for costs was an improper reason to dismiss the application for judicial review, but rather because of the time given to the appellant to respond. I also observe that there is no evidence that the security for costs order has been satisfied in the present case.

8 Second, with respect to the argument that it was problematic for Lafrenière J. to consider the motion for dismissal anew, this Court has indicated that it is not generally improper for judges to consider a matter that is remitted to them simply because they heard the matter the first time (*Janssen-Ortho Inc. v. Apotex Inc.*, 2011 FCA 58, 416 N.R. 372 (F.C.A.)). Furthermore, the sections of the *Federal Courts Rules* upon which the appellant relies by analogy do not assist with his argument. There is no evidence that on this matter, Lafrenière J. was involved in a pre-trial or dispute resolution conference, to which Rules 266 and 391 refer and which usually involve settlement discussions between the parties. The appellant's arguments against Lafrenière J. having heard the redetermination have nothing to do with his involvement in settlement discussions between the parties. There is also no evidence in the record to displace the presumption of judicial impartiality in the circumstances. In light of these points, the distinction the appellant draws between a reconsideration and a redetermination is irrelevant.

9 Third, the appellant contends that the wording of the security for costs order demonstrates two opposing stances on the part of Lafrenière J. On the one hand, says the appellant, Lafrenière J. ordered security for costs to be paid "forthwith", and this term usually indicates that a motion should not have been brought or opposed, but, on the other hand, he did not order costs of the motion to be paid forthwith. However, the appellant's argument is based on a misunderstanding of Rule 401, which concerns costs for a motion, not security for costs for an entire proceeding.

10 Fourth, the appellant's suggestion that Lafrenière J. did not properly consider the material before him because he miscounted the number of exhibits and pages of the appellant's submissions is clearly insufficient to displace the presumption that Lafrenière J. considered all the material before him (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, 53 Imm. L.R. (4th) 1 (F.C.A.)).

11 Fifth, while the appellant is correct to mention that Rule 141(5) of the *Federal Courts Rules* holds that to serve a document electronically, a party must have been served with the recipient's consent to such service, Rule 147 indicates that it was open to Lafrenière J. to validate the respondent's service, based on a plain reading of its wording:

> If a document has been served in a manner that is not authorized by these Rules or by an order of the Court, the Court may validate the service if it is satisfied that the document came to the notice of the person to be served or that it would have come to that person's notice except for the person's avoidance of service.

12 Here, the appellant clearly received the respondent's written reply in accordance with Rule 147 such that there is no procedural unfairness at issue (Letter from the appellant to the Court dated February 17, 2019, Appeal Book at 178).

13 Finally, it was open to Lafrenière J. to proceed by way of written representations as I agree that none of the issues were particularly complex or would have benefited from oral argument.

14 For all of these reasons, the appellant has not demonstrated that the February 18, 2019 Order is wrong in law or is based on a palpable and overriding error due to a misapprehension of the facts.

15 I would dismiss the appeal.

***Mary J.L. Gleason J.A.*:**

I agree

***Marianne Rivoalen J.A.*:**

I agree

Appeal dismissed.

2003 FCT 752, 2003 CFPI 752
Federal Court of Canada, Trial Division

Goodman Yachts LLC v. Penguin Boat International Ltd.

2003 CarswellNat 1807, 2003 CarswellNat 2995, 2003 FCT 752, 2003 CFPI 752, [2003] F.C.J. No. 968, 123 A.C.W.S. (3d) 1035, 235 F.T.R. 315

Admiralty Action in Rem against The Ship "Gertrude Oldendorff" and in Personam

Goodman Yachts LLC, Plaintiff and Penguin Boat International Limited, Maritime Claims & Services Pte. Ltd., Richard Howe, New Resolution Shipping Corp., Egon Oldendorff and the Owners and all Others interested in the Ship "Gertrude Oldendorff", Defendants

Hargrave Prothonotary

Heard: February 17, 2003
Judgment: June 16, 2003
Docket: T-283-00

Counsel: *Roger Watts*, for Plaintiff
John W. Bromley, for Defendants, Maritime Claims & Services Pte. Ltd. and Richard Howe
H. Peter Swanson, for Defendant, Egon Oldendorff
Nils E. Daugulis, for Defendant, New Resolution Shipping Corp.
Vincent M. Prager, for Defendants, Penguin Boat International Limited

***Hargrave P.*:**

1 The action underlying this motion involves a loss of the yacht *Paesano*, being carried on the deck of the *Gertrude Oldendorff* from Singapore for delivery at Vancouver, British Columbia.

2 This motion is for a first stage contempt order, pursuant to Rule 467, against the corporate Defendants New Resolution Shipping Corp. ("New Resolution") and Egon Oldendorff. If successful the order would require those corporations to appear before a judge to hear proof of the contempt. While the second stage of the preceding is in a sense analogous to the trial of a criminal offence, one must keep in mind that the proceeding is one for civil contempt, which has a quasi-criminal aspect to it, but is not a hearing involving criminal contempt.

3 The alleged contempt arises out of a loss, at Vancouver, of various items of lashing gear, a portion of the cradle which supported the *Paesano* on the deck of the *Gertrude Oldendorff* and several pieces of the yacht *Paesano* which, at the request of the Plaintiff, the Defendants New Resolution and Egon Oldendorff were ordered by this Court on 22 February 2000 to retain and preserve. Pursuant to that Order counsel for New Resolution and Egon Oldendorff arranged, through their surveyors, to have the remains placed in locked storage by Western Stevedoring. In the present instance the Defendant, Penguin Boat International Ltd. ("Penguin Boat"), has failed to establish a *prima facie* case of the willful and contumacious contempt of the preservation Order which is necessary in order to obtain the order necessary to proceed to the contempt hearing itself.

Additional Background

4 By way of additional background this action was commenced 15 February 2000, naming as a defendant Penguin Shipyard. It was not until 24 November 2001 that an amended statement of claim was issued naming Penguin Boat International Ltd. as a defendant. By that time surveyors for the various other parties had looked at the remains which were ordered to be held in storage at the Western Stevedoring facility at its Lynnterm facility in North Vancouver, had taken photographs and, presumably, had issued reports.

5 From the time of his involvement in about early 2002, counsel for Penguin Boat had been trying to obtain an inspection of the remains which were in storage at Vancouver, but could not get all of the surveyors to agree on a date for the inspection to take place. In the result counsel for Penguin Boat obtained an inspection order on 22 May 2002. Unfortunately that inspection did not take place, for it seems that the remains which were ordered preserved at Vancouver were lost by Western Stevedoring through inadvertence during a regular clean-up of the area conducted by Western Stevedoring which assumed, not having heard anything about the matter for some time, that the material in storage was of no further value.

6 Nothing is known as to when the material being preserved at Vancouver was lost. Counsel for Penguin Boat first received advice of the loss by letter of 8 August 2002 from counsel for Egon Oldendorff.

7 In an effort to put Penguin Boat in the best possible position the parties who had surveyors in attendance to examine the remains in storage in Vancouver provided counsel for Penguin Boat with copies of their surveys, with opinion and recommendation sections deleted. Indeed, counsel for New Resolution Shipping Corp. went a little further and provided copies not just of the photographs attached to their surveyor report, but of all photographs taken by their surveyor.

8 At worst the loss of the opportunity to inspect the material which had been ordered to be stored in Vancouver may well prove critical to Penguin Boat mounting a knowledgeable and effective defence: at best Penguin Boat has been prejudiced. However, this does not provide a *prima facie*

case leading to a contempt proceeding. Before proceeding with an explanation for this conclusion I would add that even were a contempt proceeding to take place, it would neither offer a useful remedy to Penguin Boat nor become a useful precedent.

Analysis

9 The burden placed upon Penguin Boat, in moving against New Resolution Shipping Corp. and Egon Oldendorff, is that that it must by Rule 467(3) satisfy the Court "...that there is a *prima facie* case that contempt had been committed.". A *prima facie* case is the "...establishment of a legally required presumption that may be rebutted;...": *A Dictionary of Modern Legal Usage*, 2nd edition, Garner, Oxford University Press, 1995. Walker, in *The Oxford Companion to the Law*, Oxford: Clarendon Press, 1980, defines a *prima facie* case as one sufficient to call for an answer. *The Oxford Companion to the Law* goes on to point out that:

> *Prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive.

From all of this I take the starting point to be that a *prima facie* case required by Rule 467(3) is one supported by evidence sufficient that it may be taken as established, subject to appropriate evidence to the contrary. However these definitions do not set out the nature of the case to be made.

10 As I set out in a survey of case law in *Telus Mobility v. T.W.U.* (2002), 220 F.T.R. 291 (Fed. T.D.), at 295 and following, the applicant must demonstrate a *prima facie* case of wilful and contumacious contempt of the order in question:

> [10] In order to obtain a show cause order the applicant must demonstrate a prima facie case of wilful and contumacious contempt of the order in question, that being the standard set by Mr. Justice Muldoon in ***Imperial Chemical Industries v. Apotex Inc.*** (1989), 25 F.T.R. 47 at 53. More recently Mr. Justice Pinard, in ***Chic Optic Inc. v. Hakim Optical Laboratory Ltd.*** (2001), 13 C.P.R. (4th) 283, at 286, relying upon ***Imperial Chemical and Frank v. Bottle*** (1994), 68 F.T.R. 242, in which Associate Chief Justice Jerome issued a show cause order on the basis of wilful and contumacious conduct, set the standard as being a wilful refusal to comply with a court order. In effect the test is that of prima facie wilful disobedience. (Page 295)

As I concluded it must be a wilful refusal to comply with a court order, that is a *prima facie* wilful disobedience. In *Telus Mobility* I went on to point out that while the test embodied wilfulness, that element did not automatically imply a need to establish *mens res*. Rather, "[t]he wilfulness aspect is present only to exclude casual or accidental unintentional acts of disobedience: see *Glazer v. Union Contractors Ltd.* (1960), 25 D.L.R. (2d) 653 (B.C. S.C.), at 658 and 676, affirmed (1960),

34 W.W.R. 193 (B.C. C.A.).". Thus there is a burden on Penguin Boat to establish more than mere non-compliance.

11 The concept of non-compliance with a court order as a wilful disobedience of an order was considered in an unreported decision, *Whyte v. "Sandpiper VI" (The)* 16 May 2002, docket T-257-01, 2002 FCT 572 (Fed. T.D.). There Madam Justice Heneghan, dealing with the second stage of a contempt proceeding, pointed out that she was not satisfied that the non-observance of an arrest warrant occurred by reason of a deliberate and conscious intention to disobey in the order. She concluded that a plaintiff, who had brought the contempt proceeding, had not discharge the evidentiary burden. She acknowledged that the subjects of the intended contempt order, who were present, did not and need not give evidence. She reached this conclusion notwithstanding the use of equipment belonging to the dredge which was under arrest.

12 In the present instance counsel for Penguin Boat has certainly established that there was a preservation order in place and that the remains of the cradle, lashing gear and several pieces of the yacht itself are no longer available to be inspected. This stops short of establishing a deliberate flouting of the preservation order, or wilful and contumacious contempt of the order, or a deliberate conscious intention to disobey the order. What happened here was very unfortunate, however Penguin Boat has not established a *prima facie* case that the destruction was wilful or deliberate. Rather, what seems to have happened was an accidental or unintentional act of disobedience, without the necessary factor of wilfulness. I say this largely on the basis of what Penguin Boat has failed to establish, but giving some minimal weight to the present hearsay affidavit evidence of the inadvertent disposal of the remains by Western Stevedoring.

13 Counsel for Penguin Boat makes various points, as rebuttal, several of which I shall deal with. Counsel for Penguin Boat questions whether the subjects of the intended contempt order should be able to take any active part and have input at this preliminary stage. First, that the order may be made *ex parte* under Rule 467(2) at the first stage of the contempt procedure is merely permissive. Indeed, the giving of notice is recommended in that the result may be closure at the conclusion of the first stage proceeding: here I would refer to the comments of Madam Justice Reed in *Nguyen v. Canada (Minister of Citizenship & Immigration)* (1996), 122 F.T.R. 282 (Fed. T.D.), at 290. Second, to merely allow the subjects of the contempt proceeding to observe would not only be frustrating, but also wasteful of time and resources and contrary to natural justice in the sense of affording notice and a hearing, for it is also a principle of natural justice that no one be condemned unheard.

14 Counsel for Penguin Boat submits that, in the face of the Order for preservation, the fact that the items ordered to be preserved no longer exist provides the required *prima facie* evidence. However, this approach overlooks the requirement that there be a deliberate, wilful or contumacious flouting or contempt of the Order, a requirement which has not been demonstrated by Penguin Boat, which has that obligation.

15 The third point made by the counsel for Penguin Boat is that what evidence of destruction or loss of the preserved items was tendered was hearsay in the sense of being a letter from Western Stevedoring attached to an affidavit sworn on behalf of Egon Oldendorff. Certainly hearsay evidence, in substitution for the testimony of a local knowledgeable individual, would not be appropriate during the final stage of a contempt hearing. Indeed, in the present instance, I give only some minimal weight to the advice of Western Stevedoring, nor do I need to give it any weight at all, because it is for the party alleging contempt to do more than merely establish the order, knowledge of the order and a bare result. There must, as I have said, be *prima facie* evidence of a wilful and deliberate flouting of the Court order.

Conclusion

16 What has occurred in this instance is, to say the least, very unfortunate. Penguin Boat, short of some other approach, will have to make do with the existing photographs, survey reports and some gear and remains which are still being preserved in California. To take the other approach, the issuance of an order requiring that New Resolution and Egon Oldendorff appear to hear proof of the contempt and to answer with any defence that they might have, would serve no purpose, for not only is there not a *prima facie* case of deliberate or wilful contumacious flouting or contempt of the Order, a conscious intention to disobey the Order, but also a finding of contempt would serve no purpose.

17 There is finally the matter of costs. Certainly what occurred was serious and deserves recognition in some way. Indeed, one cannot fault Penguin Boat for bringing to the attention of the Court a very unfortunate situation. Had the preservation Order been effective, counsel for Penguin Boat would never have become involved in this excursion. Notwithstanding that Penguin Boat misjudged the strength of its case, this is an instance where it is appropriate to break with the usual practice that costs should follow the event and to exercise discretion, awarding no costs for or against any of the parties.

2007 FC 120, 2007 CF 120
Federal Court

Hyundai Auto Canada v. Cross Canada Auto Body Supply (West) Ltd.

2007 CarswellNat 225, 2007 CarswellNat 3798,
2007 FC 120, 2007 CF 120, 155 A.C.W.S. (3d) 39

Hyundai Auto Canada, a division of Hyundai Motor America, Plaintiff and Cross Canada Auto Body Supply (West) Limited, Cross Canada Auto Body Supply (Windsor) Limited and at Pac West Auto Parts Enterprise Ltd., Defendants

E.R. Dawson J.

Heard: January 15, 2007
Judgment: February 5, 2007
Docket: T-898-05

Counsel: Jeffrey Brown, for Plaintiff
Abigail Browne, for Defendants

***E.R. Dawson J.*:**

1 To a person with a hammer, everything looks like a nail. The relevance of this aphorism to the motion before the Court is that the Court's contempt powers should not be engaged prematurely or for some collateral purpose.

2 The facts before the Court are not in contention. The plaintiff sued the defendants alleging that they are importing and selling automobile parts in Canada that bear the plaintiff's trade-marks but do not originate from the plaintiff. The defendants say that they are "grey marketers" who obtain their parts from the same manufacturing sources as the plaintiff. Thus, they say, they cannot be liable for infringement or passing off because there is no deception as to the source of the parts.

3 The defendants served their affidavit as to documents. The plaintiff, as it was entitled to do pursuant to Rule 228(2) of the *Federal Courts Rules*, SOR/98-106 (Rules), requested copies of the defendants' productions listed in Schedule 1 of the defendants' affidavit as to documents. In response, the defendants forwarded to the plaintiff copies of its productions on February 28, 2006. However, the defendants redacted the name of its supplier of the relevant parts. Meanwhile, the defendants moved for an order returnable on February 27, 2006 relieving them from the obligation to produce documents disclosing the identity of the source of the parts on the ground that the

information is not relevant. In the alternative, the defendants sought an order designating the identity of the parts supplier to be confidential, with access restricted to "counsel's eyes only".

4 By order dated March 6, 2006, Prothonotary Milczynski dismissed the defendants' motion, finding the identity of the source of the parts to be relevant and finding there to be no basis in law for the confidentiality order sought by the defendants.

5 The appeal of that order was dismissed by Mr. Justice Phelan, by order dated September 20, 2006.

6 An appeal of that order to the Federal Court of Appeal was filed on September 29, 2006. On January 9, 2007 Mr. Justice Malone of the Federal Court of Appeal dismissed the defendants' motion for an order staying the order of Justice Phelan. Justice Malone was of the view that the evidence adduced by the defendants did not demonstrate irreparable harm.

7 During this time two notable things did not happen. The defendants did not produce unredacted copies of the documents at issue. The plaintiff did not request such production. Instead on December 1, 2006, plaintiff's counsel wrote to the defendant's counsel stating as follows:

> We are writing to put you on notice that we will be bringing a motion to find your clients in contempt of the order of Justice Phelan, dated September 20, 2006, as your clients have failed to disclose the identity of the source from which your clients obtain parts marked with the plaintiff's trade-mark. That motion shall be returnable Monday, December 11, 2006.
>
> We are also putting you on notice that we intend to advise the Judge hearing our motion for an interlocutory injunction that your clients have failed to comply with Justice Phelan's order. We will request that the Judge draw an adverse inference from your clients' failure to comply with the order, and request that it be taken into account in determining an equitable order.

8 The motion referred to for an injunction was heard on December 5, 2006 and dismissed by reasons dated December 18, 2006.

9 Contempt proceedings were commenced by the plaintiff. A motion was filed on December 4, 2006, returnable on December 11, 2006, seeking an order under Rule 467(1) of the Rules. That Rule provides:

> 467.(1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt
>
> > (a) to appear before a judge at a time and place stipulated in the order;

(b) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and

(c) to be prepared to present any defence that the person may have.

467.(1) Sous réserve de la règle 468, avant qu'une personne puisse être reconnue coupable d'outrage au tribunal, une ordonnance, rendue sur requête d'une personne ayant un intérêt dans l'instance ou sur l'initiative de la Cour, doit lui être signifiée. Cette ordonnance lui enjoint:

a) de comparaître devant un juge aux date, heure et lieu précisés;

b) d'être prête à entendre la preuve de l'acte qui lui est reproché, dont une description suffisamment détaillée est donnée pour lui permettre de connaître la nature des accusations portées contre elle;

c) d'être prête à présenter une défense.

10 The plaintiff's motion was, for reasons that are not wholly clear, adjourned to the first general sitting of the Court following the decision of the Court of Appeal with respect to the defendants' motion for a stay. Ultimately, the motion for an order under Rule 467(1) was returned on Monday, January 15, 2007.

11 It is, with respect, not obvious to me why contempt proceedings were commenced in these circumstances.

12 The legal profession is based upon a long tradition of professional courtesy and etiquette. While I accept the explanation of counsel for the plaintiff that he believed that such a letter would not have had any effect, at the least such a letter would provide comfort to the Court that the defendants' counsel were on clear notice that the plaintiff was not prepared to put the matter on hold while the defendants continued to seek a decision favorable to them. It would also have been, in my respectful view, consistent with professional courtesy.

13 Further, if the plaintiff's goal is to obtain unredacted copies of the documents, the more direct, expeditious and cost-effective way of achieving that result would be by way of a motion seeking production of the documents and a significant award of costs.

14 Instead, pursuit of a contempt remedy requires an initial motion for an order under Rule 467(1). If obtained, it is followed by a second attendance, in all probability at a special sitting of the Court. There, the moving party must prove all of the constituent elements of contempt by way of oral evidence (unless otherwise ordered by the Court) that establishes proof of contempt beyond a reasonable doubt.

15 The Court's powers in respect of contempt are significant, reflecting the need to preserve respect for the proceedings, processes and orders of the Court. That said, those powers are tools, and like a hammer, contempt powers should not be trivialized or invoked when they are premature or not required.

16 As for the defendants, their position does not, in my respectful view, seem to reflect a proper appreciation of their obligations. Their response to the threatened contempt proceeding was to advise that there was no merit in the motion because they had filed a motion seeking a stay of Justice Phelan's order and that there was no "positive" order compelling them "to produce the documents in question or by [a] specific deadline". These responses are not, in my view, well-founded for the following reasons.

17 First, even if the orders of this Court were made in error, and I certainly do not say that they were, unless stayed, those orders must be obeyed. It is well settled law that the ultimate invalidity of an order is no defense to an allegation of contempt (see, for example, *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.) at page 974.

18 Second, the defendants overlook their obligations under Rule 228(2) which reads as follows:

> 228(2) A party who has served an affidavit of documents on another party shall, at the request of the other party, deliver to the other party a copy of any document referred to in subsection (1), if the other party pays the cost of the copies and of their delivery.
>
> 228(2) La partie qui a signifié son affidavit de documents à une autre partie lui remet des copies de tout document visé au paragraphe (1) si celle-ci lui en fait la demande et paie le coût de reproduction et de livraison des copies.

19 As Justice Phelan noted at paragraph 5 of his reasons, cited as 2006 FC 1127 (F.C.), "[t]he rule on production of documents is that the whole of the document is produced". From the time the plaintiff requested delivery of the documents at issue, the defendants were obliged to comply, and their failure to obtain relief from that obligation alters nothing.

20 During oral argument, I inquired of counsel why an order should not issue requiring the defendants to disclose unredacted copies of their productions within a specified period of time, failing which, a show cause order would issue. Counsel for the defendants was not prepared to deal with that issue. Because I had previously refused the defendants' request for an adjournment on the ground that lead counsel was otherwise engaged, I considered it fair to allow the defendants a short period of time in which to provide written submissions on the point. Parenthetically, I note that the adjournment was refused because the matter had already been adjourned once, further delay could well be prejudicial to the plaintiff, the facts and law raised are not in my view difficult,

and the fact that senior counsel was otherwise engaged did not strike me, in the circumstances, as a reason which justified an adjournment.

21 In the supplementary written submissions that were later filed, the defendants submit that such an order should not issue because:

1. It "is not in the interests of justice to compel [the defendants] to produce confidential and commercially-sensitive information and where such information may not be ultimately relevant. This is especially the case where the outcome will result in grave prejudice and irreparable harm" to the defendants.

2. It would be "inappropriate" to grant to the requested production before the appeal of Justice Phelan's order is heard and determined.

3. The disclosure of the identity of the source of the parts is "the very subject of the Appeal. If this Court grants the Request for Production at this juncture, the authority of the Federal Court[s] will be usurped" and the appeal "will be predetermined without an assessment of the merits by the Federal Court of Appeal".

4. The appeal is "nearing the final stages" and the plaintiff will not be prejudiced if production of the documents is considered following the determination of the appeal, given that "the Plaintiff by its own conduct demonstrates that this matter is not urgent."

22 With respect, these arguments are not new. They are the very arguments dismissed variously by Prothonotary Milczynski, Justice Phelan, and Justice Malone. Therefore, an order will issue compelling disclosure by a fixed period of time. On proof of any failure to comply with this order, an order will issue under Rule 467(1).

23 In the light of the above reasons, I believe each party should bear their own costs.

Order

THEREFORE, THIS COURT ORDERS THAT:

1. The defendants are to deliver unredacted copies of the documents listed in Schedule 1 of their affidavit as to documents to counsel for the plaintiff on or before February 12, 2007.

2. Failing which, on proof by affidavit evidence of such a failure to comply, an order will issue under Rule 467(1) in respect of non-compliance with both the order of Mr. Justice Phelan and this order.

3. No costs are awarded.

2007 CAF 127, 2007 FCA 127
Federal Court of Appeal

Canadian Copyright Licensing Agency v. U-Compute

2007 CarswellNat 3017, 2007 CarswellNat 771, 2007 CAF 127, 2007 FCA 127, [2007] A.C.F. No. 479, [2007] F.C.J. No. 479, 156 A.C.W.S. (3d) 1064, 361 N.R. 220, 39 C.P.C. (6th) 361, 56 C.P.R. (4th) 177

Riaz A. Lari, Appellant and The Canadian Copyright Licensing Agency ("Access Copyright"), Respondent

Desjardins, G. Létourneau, Noël JJ.A.

Heard: March 26-28, 2007
Judgment: March 28, 2007
Docket: A-9-06

Proceedings: varying *Canadian Copyright Licensing Agency v. U-Compute* (2005), 2005 CarswellNat 5805, 2005 CF 1644, [2005] F.C.J. No. 2030, 46 C.P.R. (4th) 86, 2005 FC 1644, 2005 CarswellNat 4154, (sub nom. *Canadian Copyright Licensing Agency ("Access Copyright") v. U-Compute)* 284 F.T.R. 116 (Eng.) (F.C.)

Counsel: Dany S. Perras for Appellant
Arthur B. Renaud for Respondent

***G. Létourneau J.A.*:**

1 The appellant was found guilty of contempt of court pursuant to contempt proceedings brought under Rules 466 to 472 of the *Federal Courts Rules*. This is his third conviction for contempt of court.

2 As a result of such conviction, the appellant was sentenced to a six-month term of imprisonment and to pay to the respondent costs of the contempt proceedings on a reasonable solicitor-client scale.

3 However, the sentence of imprisonment was suspended provided the appellant:

> a) obeys at all times the permanent injunctions issued by Harrington J. in July 19, 2004; and

b) performs, over a period of thirteen (13) months, four hundred (400) hours of community service.

4 The appeal was heard on Monday and adjourned to Wednesday for oral judgment. The parties were informed that the written version of the reasons for judgment would include a summary of the facts and the evidence.

Facts and Procedural History of the Case

5 The Federal Court judge who heard the contempt proceedings summarized the procedural history of the case in the following terms:

> [5] On September 29, 2003, Justice Layden-Stevenson issued an Anton Pillar order in support of a copyright infringement action requiring the defendants U-Compute and Mr. Lari to deliver up all unauthorized copies of textbooks within their possession, custody or control. The order applied to the defendants' business premises at 2159 rue MacKay, Montreal. The Anton Pillar order also contained an interim injunction restraining the defendants from directly or indirectly making or selling any copies of any textbooks published by any entity listed in Appendix "A" including any copies of any textbook or parts of textbooks listed in appendices "B" or "C" of the Anton Pillar order. This order was only executed in early January 2004.
>
> [6] On January 19, 2004, Justice Tremblay-Lamer, upon a review of the execution of the Anton Pillar order issued by Justice Layden-Stevenson, continued the interim injunction until judgment in the action or any other final disposition and ordered that all materials delivered up by the defendants shall remain in the custody or control of the supervising solicitor and shall be used only for purposes of the action.
>
> [7] On July 19, 2004, Justice Harrington issued a consent judgment in the action in the following terms:
>
> > (1) "Lari, his employees, partners, agents, affiliates, relatives in collaboration with him, and all those persons under his control, or any one of them, carrying on business at 2159 MacKay Street in Montreal, Quebec, or elsewhere, (hereinafter "Lari") <u>are hereby permanently enjoined from making, distributing, selling, exposing or offering for sale, renting, exhibiting in public or parting with possession of unauthorized copies, in whole or in substantial part, of the works published by any of the entities listed in Schedule A hereto</u>"; [emphasis mine]
> >
> > (2) Mr. Lari is permanently enjoined pursuant to section 39.1 of the Copyright Act;
> >
> > (3) Mr. Lari shall pay the plaintiff the sum of $500,000 as statutory damages for all infringements involved in the proceedings;

(4) Mr. Lari shall pay the plaintiff the sum of $100,000 as punitive damages; and

(5) Mr. Lari shall pay the plaintiff its costs of the action on a solicitor and his own client scale which is fixed at $100,000.

[8] On September 20, 2004, Justice Von Finckenstein of this Court granted, in paragraph 3 of his order, the plaintiff leave to attend at 2144 MacKay Street, the basement premises of 2144 MacKay Street (believed to be 2140 MacKay Street), 2153 and 2155 MacKay Street (the "premises"), without prior notice to Mr. Lari or any other person to:

(1) search for and remove all paper copies of any works published by any entity listed in Schedule "A" to the judgment of July 19, 2004; and

(ii) search for, inspect and remove all hard drives or other machines which, upon inspection, contain copies of the works previously referred to.

[9] Paragraph 8 of that order provided that "Mr. Lari or other persons in charge of the Premises shall permit entry of the Premises to the plaintiff for the purposes referred to in paragraph 3 above".

[10] Prothonotary Milczynski's October 5, 2004 show cause order specified the acts which the defendant Riaz A. Lari is charged with. They were:

(a) that in the period January 8, 2004 to July 19, 2004, he continued to make and sell, and collaborate with other persons who make and sell, unauthorized copies of works published by one or more entities listed in Schedules "A" to "C" of the Order dated September 29, 2003, in breach of paragraph 31 thereof and paragraph 2 of the Order made January 19, 2004;

(b) that in the period July 20, 2004 to September 22, 2004, he continued to make and sell, and collaborate with other persons who make and sell, from 2153 MacKay Street and 2144 MacKay (basement) Street in Montreal, Quebec, unauthorized copies of works published by one or more entities listed in Schedule "A" to the judgment dated July 19, 2004, in breach of paragraphs 1 and 2 thereof; and

(c) on September 22, 2004, he refused access to the basement premises of 2144 MacKay Street as required by paragraph 8 of the Order of September 20, 2004, thereby frustrating the plaintiff's execution of the Order and avoiding the removal of unauthorized copies of textbooks that were observed to be at those premises from at least September 9, 2004 to September 22, 2004. [emphasis mine]

[11] Mr. Lari is the sole defendant in this contempt proceeding, the Court being informed that U-Compute was in bankruptcy.

6 In a nutshell, the appellant was charged with violations of three Court orders (September 29, 2003, January 19, 2004 and September 20, 2004) and a judgment of the Federal Court dated July 19, 2004. The violations consisted in the unauthorized copying and selling of textbooks published by Canadian and foreign book publishers who own copyrights in those textbooks in Canada. One count involved a refusal to give access to premises as ordered, thereby frustrating the execution of the order and avoiding the removal of unauthorized copies of textbooks.

The Evidence Before the Judge of the Federal Court

7 The appellant did not testify in the contempt proceedings. Seven witnesses were heard in support of the contempt allegations. Their evidence can be summarized as follows.

8 The respondent operates under the trade name Access Copyright. It is a reproduction rights organization and a collective society under section 70.1 of the *Copyright Act*. It licences copy shops and others to copy textbooks in exchange of royalties which it collects and distributes to the authors and publishers.

9 At paragraph 18 of his reasons for judgment, the judge gave the following account of the difficulties that the respondent had with the appellant:

> (1) Following a complaint from one of its publisher members of illegal textbook copying, the solicitors to the plaintiff sent a cease and desist letter, dated October 8, 1999, to Mr. Lari as the controlling mind of U-Compute.
>
> (2) Sworn affidavit dated November 5, 1999, by Mr. Lari as President and sole Director of U-Compute undertaking that neither U-Compute nor he personally shall at any time in the future make or have caused to be made, sold or distributed unauthorized copies of copyright works as prohibited under the Canadian Copyright Act.
>
> (3) An October 31, 2000 order issued by Justice Gibson on consent whereby Mr. Lari and U-Compute and all persons under their control are permanently restrained from making, offering for sale, selling, distributing or exposing for sale unauthorized copies, in whole or in substantial part, of nine specific textbooks set out in Appendix "A" of the order.
>
> (4) Upon determining that the permanent injunction was being breached, the plaintiff brought contempt proceedings against Mr. Lari and U-Compute which resulted in Justice O'Keefe's March 19, 2001 order based on Mr. Lari's admission of having breached the October 31, 2000 permanent injunction. Mr. Lari and U-Compute were fined $2,500 by way of penalty and were ordered to pay $10,000 to the applicant by way of compensation for costs. In addition, one representative of the plaintiff was permitted access to U-Compute's premises. Furthermore, the Court ordered that they refrain from doing the acts they were enjoined from doing by the order of October 31, 2000.

(5) Upon further investigation by the plaintiff, a further contempt proceeding was brought before Justice Martineau for breach of the two aforementioned orders which led to an admission of breach by Mr. Lari and U-Compute. They were fined $5,000, ordered to pay solicitor-client costs and ordered to refrain from breaching the two existing orders. Mr. Sheffer told the Court that Access Copyright decided to waive its solicitor-client costs provided Mr. Lari complied with the orders.

(6) It was upon the receipt of further information about infringing activities that Access Copyright sought and was issued an Anton Pillar order issued in September 2003.

10 He then reviewed the evidence adduced before him which can be summarized as follows.

11 In the execution of the Anton Pillar order, over 2000 copies of infringing works were found at U-Compute's premises, as well as an inventory sheet of 468 works in U-Compute's "inventory": see paragraph 20 of the reasons for judgment.

12 After further investigation, the respondent obtained access to the appellant's premises pursuant to an order of Von Finckenstein J. and discovered what the witness referred to as a "large-scale infringing activity" wherein infringing works were being sold at an unmarked location at 2144 Mackay Street, which was across the street from the appellant's main place of business. In this investigation, a new inventory list was found and showed that the respondent's inventory had grown by 288 titles, 181 of which were published by the respondent's affiliates: *ibidem*, paragraph 22.

13 The respondent hired an investigator, King-Reid and Associates. Ms. Elena Wegner, an investigator with that firm, attended at the appellant's main place of business at 2153 Mackay Street on 31 August 2004 and 1 September 2004. She recorded her observations with a video recording device. She identified Mr. Lari as being present on the premises. She also identified two employees who worked as salespeople on the premises: *ibidem*, paragraphs 23 to 27.

14 Two investigators with the firm Chartand, Laframboise captured, with the aid of videorecorders, the presence of Mr. Lari and the same two employees identified by Ms. Wegner. These investigators observed many young people leaving the appellant's main business premises with bound books. They also observed Mr. Lari sweeping the floor at the unmarked location at 2144 Mackay. They saw Mr. Lari on many occasions directing young people from his main premises to the location across the street. They noted that traffic between these two locations was constant on the days of their investigation, 8 and 9 September 2004. These investigators could not see the titles of materials purchased from the appellant: *ibidem*, paragraphs 28 and 29.

15 A third investigator with Chartrand, Laframboise, Ms. Natasha Schwarzl, observed that the respondent had nothing but bound volumes for sale in the unmarked premises. She acknowledged

that she could not see the titles of these volumes. At the unmarked premises, she purchased a copy of *Organization, Development and Change*, published by Thomson-Southwestern. She also left an original copy of the book *Organization Theory* with the respondent's employee, who informed her he would copy it for a fee of $35.00: *ibidem*, at paragraphs 30 to 40.

16 Catherine Bergeon and Alexandra Steele, attorneys with the firm Léger, Robic, Richard, were retained to execute Von Finckenstein J.'s order. Me Bergeron testified to finding three copied books at the premises above the appellant's main premises (2153 Mackay). These two premises were connected by a stairway. Me Steele testified that that she served the order on Mr. Lari, who provided access to his main premises as well as the upstairs premises, but not to the unmarked premises across the street. M[e] Steele also testified to finding an inventory list of 3,350 books on Mr. Lari's computer hard-drive. Most of these books had been scanned in to the computer for printing: *ibidem*, at paragraphs 41 to 50.

The Decision of the Federal Court

17 The judge made a thorough review of the testimony of the seven witnesses called by the respondent. He then discussed the principles applicable to contempt proceedings. He noted that Rule 469 of the *Federal Courts Rules* requires that a finding of contempt be based on proof beyond a reasonable doubt. He undertook an analysis of the concept of reasonable doubt. He noted that circumstantial evidence can be the foundation for a finding of guilt beyond a reasonable doubt: *ibidem*, at paragraph 55.

18 The judge recognized that, in order to be successful in its prosecution, the respondent had to prove beyond reasonable doubt that the appellant continued to make and sell or, in collaboration with other specified categories of persons, to make and sell unauthorized copies of work published by one or more entities listed in the July 19, 2004 judgment issued by Harrington J.

19 Two periods were covered by the order of Prothonotary Milczynski issued on October 5, 2004, i.e. from January 8, 2004 to July 19, 2004 and from July 20, 2004 to September 22, 2004.

20 The judge held that the respondent met its burden for the second, but not for the first period. He came to that conclusion on the basis of a combination of direct evidence and what he called a "massive amount" of circumstantial evidence that was so strong as to be "inconsistent with any other conclusion that the appellant inevitably necessarily breached the injunction against making and selling those unauthorized copies either as the principal or in collaboration with the persons identified as Employees # 2 and #3": see paragraph 69 of the reasons for judgment.

Analysis of the Decision

Failure to prove guilt beyond a reasonable doubt

21 Counsel for the appellant submits that the respondent failed to meet the burden of proof put on it by the *Federal Courts Rules*. While there is direct evidence relating to the sale of infringing material by the appellant, he said, there is no real evidence to prove that the appellant was personally involved in the making of that material. The charge being one of making and selling, there is therefore no evidence on one of the material elements of the offence. An acquittal should have ensued.

22 Furthermore, counsel argued that the circumstantial evidence relied upon by the judge was not consistent with the guilt of the appellant on all charges, especially the charge of denying access to the premises located at 2144 Mackay Street. In this last case, the circumstantial evidence could lead to another rational conclusion, namely that the premises at 2144 Mackay Street were operated by someone else.

23 With respect, we cannot agree with the appellant's contention. We accept the judge's conclusion that the direct evidence on the record proved involvement of the appellant in the unauthorized making of textbooks either through the intermediary of his employees or in cooperation with other persons.

24 As for the circumstantial evidence, counsel for the appellant astutely tried to isolate some of the links in the chain of events and circumstances and, from such elements each considered in isolation, concluded that a finding of guilt cannot be supported.

25 At first blush, the argument may appear attractive. However, this is not how the strength and probative value of circumstantial evidence are to be assessed. The evidence must be evaluated as a whole and this is what the judge did. Such evidence led the judge to make unassailable inferences and findings as to the appellant's participation in the making and selling of unauthorized material as well as the appellant's control of the premises where infringements took place and where buyers were directed to by the appellant.

26 Notwithstanding the efforts of counsel for the appellant, we have not legally been provided with a reason or justification for interfering with the finding of guilt.

The need to review the sentence

27 Counsel for the appellant submits that the sentence of imprisonment is too harsh and ought to be reformed. In addition, he argued that the judge should not have imposed, in the circumstances of this case, more hours of community service that the 300 hours requested by the respondent.

28 It is trite law that a judge imposing a sentence is not bound by the suggestions or recommendations of the parties. His role is to determine a sentence that meets the principles of

sentencing. These principles are expressed in the following terms in sections 718 and 718.1 of the *Criminal Code*:

PURPOSE AND PRINCIPLES OF SENTENCING

Purpose

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

OBJECTIF ET PRINCIPES

Objectif

718. Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants:

a) dénoncer le comportement illégal;

b) dissuader les délinquants, et quiconque, de commettre des infractions;

c) isoler, au besoin, les délinquants du reste de la société;

d) favoriser la réinsertion sociale des délinquants;

e) assurer la réparation des torts causés aux victimes ou à la collectivité;

f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

Principe fondamental

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

29 The appellant cannot help but recognize, as he did, the gravity of the charges. It is his third conviction for contempt of court after having twice before consented to judgment against him. The charges are indeed very serious as they undermine the administration of justice and the authority of the courts.

30 He also acknowledges that deterrence, both individual and general, comes into play in this case. He submits, however, that individual deterrence has been accomplished since he is now out of the impugned business.

31 With respect, the fact that individual deterrence has now been accomplished, as contended by the appellant, is not a reason to vary, after the fact, the sentence that produced that intended result. The appellant benefited on two previous occasions from the clemency of the courts. Indeed, upon his first conviction in 2001 for violation of a permanent injunction, he was fined $2,500 and ordered to pay compensatory costs in the amount of $10,000. That proved to be insufficient. He subsequently, upon further contempt proceedings being brought, was fined $5,000 and ordered to pay solicitor-client costs.

32 Yet, individual deterrence remained an elusive objective. In an action for an injunction and damages, the appellant was condemned, on July 19, 2004, to pay $500,000 as statutory damages for all his infringements, $100,000 as punitive damages and $100,000 as solicitor-client costs.

33 This also proved to be totally insufficient as the appellant immediately carried on with his illicit activities even when warned that a six-month term of imprisonment would be sought if he were to be found guilty of another contempt of court: see in appeal book, vol. III, pages 437-438 a letter to that effect addressed to the appellant.

34 The appellant was operating on a large scale. By his own admission in cross-examination when he testified on sentencing, the illegal activities, which lasted five years, produced "easy and good money": see appeal book, volume XI, at page 1559. Obviously, a denunciation of the behaviour in stronger terms was necessary to deter the appellant and put an end to his activities.

35 The judge who had the benefit of seeing and hearing the appellant saw little remorse in him and no evidence of substantial good faith. He doubted the sincerity of his apology: see paragraph 89 of the reasons for judgment.

36 In these circumstances, we cannot say that a sentence of imprisonment was undeserved and that the sentence imposed was disproportionate to the gravity of the offence and the degree of responsibility of the appellant.

37 As for the length of the community service, it reflects the seriousness of the appellant's defiance of the law and judicial process. The community service was not meant to be an easy alternative to or a way out of imprisonment. It offers the appellant an opportunity to benefit from lessons learned by spending time and effort on more worthy causes: see *R. v. Brand* (1996), 105 C.C.C. (3d) 225 (B.C. S.C.). While it is more than what the appellant expected, it is not a length that requires our intervention in the circumstances of this case.

The imposition of solicitor-client costs

38 It is a customary practice in contempt cases to impose costs on a solicitor-client basis: see *Merck & Co. v. Apotex Inc.* (2003), 25 C.P.R. (4th) 289 (Fed. C.A.), at paragraph 93. In the case of *Pfizer Canada Inc. v. Apotex Inc.* (1998), 86 C.P.R. (3d) 33 (Fed. T.D.), at paragraph 8, Hugessen J. for the Federal Court, Trial Division explained in the following terms the rationale for the practice:

> [8]... It is, of course, customary, in matters of this sort, to require that persons found guilty of contempt pay costs on a solicitor and client basis to the party who has brought the matter to the Court's attention. The policy underlying that jurisprudence is clear: a party who assists the Court in the enforcement of its orders and in the enforcement of respect for its orders should not, as a rule, be put out of pocket for having been put to that trouble.

39 Words to the same effect can be found in *Innovation & Development Partners/IDP Inc. v. R.* (1993), 64 F.T.R. 177 (Fed. T.D.), at page 181 where Cullen J. held that the Court must ensure that a "party acting to support compliance with an order of the court does not bear the costs of proceedings that were necessary to maintain the orderly administration of justice".

40 The judge made no reviewable error in awarding reasonable solicitor-client costs.

The need to amend paragraph 4 of the judge's Order

41 Counsel for the appellant seeks a clarification of paragraph 4 of the judge's Order issued on December 7, 2005. The paragraph authorizes the respondent to seek a warrant of committal in the event that the appellant does not comply with one or more terms set out in the Order. It reads:

> (4) In the event the plaintiff wishes to prove that Mr. Lari has not complied with one or more of the terms set out in this Order, the plaintiff shall be at liberty to seek a warrant of committal from any Federal Court Judge, on an *ex parte* basis or otherwise, as directed by such Judge, and **RIAZ A. LARI** shall, upon the Court finding a breach of one or more of such terms be committed to jail for six months.

[Emphasis added]

42 The payment of costs on a solicitor-client basis is part of the judge's Order. In a loose sense, it is a term of the Order which could result in the imprisonment of the appellant if he failed to comply with it. Counsel for the respondent conceded that this was not what he sought and what was intended. Rather, compliance in paragraph 4 refers to the terms imposed for the suspension of the sentence of imprisonment which are found in paragraph 3 of the Order. We are satisfied that this is what the judge intended to achieve and we will adjust the Order accordingly.

Conclusion

43 For these reasons, the appeal will be allowed for the limited purpose of adding in paragraph 4 of the Order, after the words "the terms set out in", the words "paragraph 3 of". In all other respects, the appeal will be dismissed with solicitor-client costs fixed at $22,000 inclusive of taxes and disbursements.

Order accordingly.

2016 CAF 103, 2016 FCA 103
Federal Court of Appeal

Lukács v. Canadian Transportation Agency

2016 CarswellNat 984, 2016 CarswellNat 9918,
2016 CAF 103, 2016 FCA 103, 265 A.C.W.S. (3d) 553

Dr. Gábor Lukács, Applicant and Canadian Transportation Agency, Respondent

David Stratas J.A.

Judgment: April 5, 2016
Docket: A-39-16

Counsel: Dr. Gábor Lukács, for himself
John Dodsworth, for Respondent

***David Stratas J.A.*:**

1 The parties are working to perfect this application for judicial review. The applicant has requested under Rule 317 that the respondent Agency transmit the record it relied upon when making its decisions that are the subject of the application. In response, the Agency has objected under Rule 318(2) to disclosure of some of the record and has informed the applicant and the Court of the reasons for the objection.

2 Under Rule 318(3), the applicant now requests directions as to the procedure for making submissions on the objection.

3 The Court has read the Agency's reasons for objection. Although unnecessary under Rule 318, the applicant has supplied his responses to the Agency's reasons.

4 A reading of the parties' reasons and responses shows that they may not have a clear idea of the relationship between Rules 317 and 318 and the Court's remedial flexibility in this area. This affects the submissions on the objection that this Court will need. Before giving directions concerning the steps the parties need to take concerning the objection, it is necessary to clarify matters.

A. Rules 317-318 and the Court's remedial flexibility

5 Rules 317-318 do not sit in isolation. Behind them is a common law backdrop and other Rules that describe how the record of the administrative decision-maker can be placed before a reviewing court. This was all explained in *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268 (F.C.A.) at paras. 7-18 and will not be repeated here. On admissibility of evidence before the reviewing court on judicial review, see, most recently, *Bernard v. Canada Revenue Agency*, 2015 FCA 263 (F.C.A.).

6 Under Rule 317, a party can request from the administrative decision-maker material relevant to the application for judicial review. Under Rule 318, the requesting party is entitled to be sent everything that it does not have in its possession and that was before the decision-maker at the time it made the decision under review, unless the decision-maker objects under Rule 318(2): *Access Information Agency Inc. c. Canada (Procureur général)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 (F.C.A.) at para. 7; *1185740 Ontario Ltd. v. Minister of National Revenue* (1999), 247 N.R. 287 (Fed. C.A.). The Saskatchewan Court of Appeal set out the guiding principle on this entitlement rather well:

> In order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question [absent well-founded objection by the tribunal].

(*Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 (Sask. C.A.) at para. 24.)

7 This passage recognizes the relationship between the record before the reviewing court and the reviewing court's ability to review what the administrative decision-maker has done. If the reviewing court does not have evidence of what the tribunal has done or relied upon, the reviewing court may not be able to detect reversible error on the part of the administrative decision-maker. In other words, an inadequate evidentiary record before the reviewing court can immunize the administrative decision-maker from review on certain grounds. Our judge-made law in the area of administrative law develops in a way that furthers the accountability of public decision-makers in their decision-making and avoids immunization, absent the most compelling reasons: *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 (F.C.A.) at paras. 314-15 (dissenting reasons, but not opposed on this point).

8 Now to objections under Rule 318(2). Where the relevant administrative decision-maker, here the Agency, objects under Rule 318(2) to disclosing some or all of the material requested under Rule 317 and the applicant does not dispute the objection, then the material is not transmitted. However, if, as here, the applicant disputes the objection, either the applicant or the administrative decision-maker may ask the Court for directions as to how the objection should be litigated: see Rule 318(3).

9 In response to a request for directions, the Court may determine that the objection cannot succeed solely on the basis of the reasons given by the administrative decision-maker under Rule 318(2). In that case, it may summarily dismiss the objection and require the administrative decision-maker to transmit the material under Rule 318(1) within a particular period of time.

10 In cases where the Rule 318(2) objection might have some merit, the Court can ask for submissions from the parties on a set schedule. But sometimes the Court will need more than submissions: in some cases, there will be real doubt and complexity and sometimes evidence will have to be filed by the parties to support or contest the objection. In cases like these, the Court may require the administrative decision-maker to proceed by way of a written motion under Rule 369. That Rule provides for motion records, responding motion records and replies, and also the deadlines for filing those documents. The motion records require supporting affidavits and written representations.

11 Regardless of the manner in which the Court proceeds, when determining the validity of an objection under Rule 318(2) what standpoint should it adopt? Is the Court reviewing the administrative decision-maker's decision to object?

12 No. When determining the validity of an objection, the Court is tasked with deciding the content of the evidentiary record in the proceeding — the application for judicial review — before it. Like all proceedings before the Court, it must consider what evidence is admissible before it. The Court, regulating its own proceedings, must apply its own standards and not defer to the administrative decision-maker's view. See *Slansky*, above at para. 274. (Much of the discussion that follows is based on *Slansky*.)

13 What can the Court do when determining the validity of an objection? Quite a bit. There is much remedial flexibility. The Court can do more than just accept or reject the administrative decision-maker's objection to disclosure of material. It is not an all-or-nothing proposition.

14 In this regard, Rule 318 should not been seen in isolation. Other rules and powers inform and assist the Court in determining an objection. For example:

- Rules 151 and 152 allow for material before the reviewing court to be sealed where confidentiality interests established on the evidence outweigh the substantial public interest in openness: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.).

- Rule 53 allows terms to be attached to any order and Rule 55 allows the Court to vary a rule or dispense with compliance with a Rule. The exercise of these discretionary powers is informed by the objective in Rule 3 (recently given further impetus by the Supreme Court's decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.)): to "secure the

just, most expeditious and least expensive determination of every proceedings on its merits." It is also informed by s. 18.4 of the *Federal Courts Act*, R.S.C. 1985, c. F-7: "an application shall be heard and determined without delay and in a summary way."

• The Court can draw upon its plenary powers in the area of supervision of tribunals to craft procedures to achieve certain legitimate objectives in specific cases: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 (S.C.C.) at paras. 35-38; *Ministre du Revenu national c. Derakhshani*, 2009 FCA 190, 400 N.R. 311 (F.C.A.) at paras. 10-11; *Minister of National Revenue v. RBC Life Insurance Co.*, 2013 FCA 50, 443 N.R. 378 (F.C.A.) at paras. 35-36.

15 These Rules and powers allow the Court determining a Rule 318 objection to do more than just uphold or reject the administrative decision-maker's objection to disclosure of material. The Court may craft a remedy that furthers and reconciles, as much as possible, three objectives: (1) meaningful review of administrative decisions in accordance with Rule 3 and s. 18.4 of the *Federal Courts Act* and the principles discussed at paras. 6-7 above; (2) procedural fairness; and (3) the protection of any legitimate confidentiality interests while permitting as much openness as possible in accordance with the Supreme Court's principles in *Sierra Club*.

16 Where there is a valid confidentiality interest that could sustain an objection against inclusion of a document into the record, the Court must ask itself, "Confidential from whom?" Perhaps the general public cannot access the confidential material, but the applicant and the Court can, perhaps with conditions attached. Perhaps the only party that can access the confidential material is the Court, but a benign summary of the material might have to be prepared and filed to further meaningful review, as much procedural fairness as possible, and openness. In other cases, the objection may be such that confidentiality must be upheld absolutely against all, including the Court. Legal professional privilege is an example of this.

17 And the fact that part of a document may be confidential does not necessarily mean that the whole document must be excluded from the record. The Court must consider whether deleting or obscuring the confidential parts of a document is enough or whether the entire document should be excluded from the record.

18 In short, the Court's determination of the Rule 318(2) objection — a determination aimed at furthering and reconciling, as much as possible, the three objectives set out in para. 15, above — can result in an order of any shape and size, limited only by the creativity and imagination of counsel and courts: see, for example, the creative and detailed sealing order made in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2002 BCSC 1509, 8 B.C.L.R. (4th) 281 (B.C. S.C. [In Chambers]).

B. The directions to be given in this case

19 In some cases, the Court might be able to determine an administrative decision-maker's Rule 318(2) objection solely on the basis of the reasons the decision-maker has provided under Rule 318(2). This case — a complex one requiring evidence to establish the objection — is not one of those cases. Thus, in the circumstances of this case, the Agency should file a motion record under Rule 369 seeking an order vindicating its objection.

20 Without limiting whatever other relief the Agency might wish to seek, the Agency must address, both in its evidence and in written representations, the requirements for confidentiality and the test set out in *Sierra Club*.

21 The Agency should be specific in its motion record concerning the type of order it wants. In doing so, it should have regard to the above discussion — in particular, the remedial flexibility the Court possesses and the Court's desire to craft a remedy that furthers and reconciles, as much as possible, the three objectives set out in para. 15, above.

22 The Agency shall file its motion under Rule 369 within ten days of today's date and then the times set out under Rule 369 shall follow for the respondent's responding record and the reply. The Registry shall forward the motion to me for determination immediately after the reply has been filed or the time for reply has expired, whichever is first. An order shall go to this effect.

23 To the extent the Agency wishes part of its motion record to be sealed under Rules 151-152, the Agency should request that in its notice of motion and support its request with evidence. Any confidential material may then be included in a confidential volume within a sealed envelope, filed only with the Court. At the time of determining the motion, the Court will review the material and assess whether further submissions on this point are needed from the applicant or whether the claim of confidentiality is made out.

24 The parties have agreed to expedite this matter. The Court agrees that expedition is warranted and, following the motion, will schedule the remaining steps in this application. The parties should immediately discuss an expedited schedule on the footing that the motion will be determined by the end of April at the latest. The parties should also consider whether the application should be heard as soon as possible by videoconference rather than waiting for the Court's next sittings in Halifax after April. The parties shall make their submissions on these matters in their written representations in their motion records.

25 The parties are also encouraged to engage in discussions to try to settle the record that should be placed before this Court in this application. Through their agreement to expedite this matter, the parties now recognize that there is a public interest in expedition. Quick agreement on this issue will speed this matter considerably. One possibility is to agree that the matter proceed with a public record and a sealed disputed record and the admissibility of the disputed record can be argued before the Court hearing the application, if necessary with affidavits filed in the parties'

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respective records for the purpose of resolving the dispute. If the parties truly recognize there is a public interest in expedition, then this is probably the best way to proceed.

Order accordingly.

2003 CAF 234, 2003 FCA 234
Federal Court of Canada — Appeal Division

Merck & Co. v. Apotex Inc.

2003 CarswellNat 1501, 2003 CarswellNat 2713, 2003 CAF 234, 2003 FCA 234, [2003] F.C.J. No. 837, 123 A.C.W.S. (3d) 157, 227 D.L.R. (4th) 106, 241 F.T.R. 160 (note), 25 C.P.R. (4th) 289, 305 N.R. 68

Apotex Inc., Appellant (Defendant) and Dr. Bernard Sherman, Appellant and Merck & Co., Inc. and Merck Frosst Canada & Co., Respondents (Plaintiffs)

Noël J.A., Sexton J.A., Stone J.A.

Heard: April 8-9, 2003
Judgment: May 26, 2003
Docket: A-226-00

Counsel: *Mr. H.B. Radomski*, *Mr. David Scrimger*, *Mr. Brian Greenspan*, *Ms Sharon Lavine*, for Appellant
Mr. Brian Crane, *Mr. G. Alexander Macklin*, *Ms Ritu Gambhir*, for Respondent

***Sexton J.A.*:**

1 This is an appeal and cross-appeal from the Judgment of MacKay J., dated March 7, 2000 [*Merck & Co. v. Apotex Inc.* (2000), 5 C.P.R. (4th) 1 (Fed. T.D.)], which held that both Apotex Inc. and Dr. Bernard Sherman, who at the time was the President and Chief Executive Officer of Apotex Inc., were in contempt of court, and from the Supplementary Judgment of MacKay J. dated June 5, 2001 imposing fines in respect of the contempt and awarding costs in favour of the respondents on a solicitor and client basis.

2 In the 1990s, the leading prescription drug in Canada in sale value was enalapril maleate, for which Merck held a patent. Apotex Inc. ("Apotex") manufactured its generic equivalent. Merck alleged infringement and on December 14, 1994, MacKay J. released Reasons for Judgment in which he found infringement and held *inter alia* that Merck & Co., Inc. ("Merck") was entitled to a permanent injunction restraining further infringement on the part of Apotex. He also directed that counsel for the parties submit, for the Court's consideration, a draft judgment incorporating his findings. On December 15, 1994, before counsel had even commenced to discuss such a draft, Apotex sold $9 million worth of the drug. This equated to a month of normal sales by Apotex. The main issue in this case is whether Apotex's actions amounted to a contempt of court.

Facts

3 The Respondent Merck is a United States corporation organized under the laws of the State of New Jersey, where it has its principal place of business. It is the owner of the Canadian patent for enalapril maleate, issued on October 16, 1990, which was the basis of the patent infringement action initiated by Merck on September 20, 1991. Merck Frosst Canada Inc. ("Merck Frosst") is a corporation organized under the laws of the province of Ontario, a wholly owned subsidiary of Merck. Merck Frosst is the exclusive licensee of Merck, under the patent, in Canada.

4 The patent includes the claimed invention of enalapril maleate which, when combined into tablets or liquid dosage form, provides a product that can be dispensed as a prescription drug to members of the public for treatment of hypertension and congestive heart failure.

5 After enalapril maleate's introduction into the Canadian market in 1987 under the trade name VASOTEC, it became a popular product. In 1993, sales were in excess of $150 million, and it was said to have been the leading prescription product in sales value in Canada. It constituted nearly one-third of total sales by Merck Frosst's pharmaceutical division. On a worldwide basis, it was said to be the second most valuable prescription drug sold.

6 The Appellant, Apotex, is a manufacturer and distributor of generic pharmaceutical products. Apotex has neither sought, nor ever held, a license from Merck to import, manufacture, export or sell enalapril or enalapril maleate for use or consumption in Canada or in any other place. In February 1990, Apotex applied to Health and Welfare Canada for a Notice of Compliance ("NOC") to market in Canada its version of enalapril maleate under the trade name APO-ENALAPRIL. When an NOC was not forthcoming, Apotex applied in late December 1992 for a *mandamus* order to compel the Minister to issue the notice. In turn, Merck applied for an order to prohibit the Minister from issuing an NOC to Apotex. Mr. Justice Dubé ordered that an NOC be issued and dismissed Merck's motion. This decision was upheld on appeal to this Court. Consequently, on September 2, 1993, Apotex received an NOC authorizing sale in Canada of APO-ENALAPRIL in tablet form. The tablets are similar in size, shape, colour, and concentration to Merck Frosst's VASOTEC tablets.

7 Merck then applied for an interim and interlocutory injunction to restrain Apotex from selling its APO-ENALAPRIL product pending trial of the patent infringement action. Even though the injunction was refused on November 4, 1993, Apotex was ordered to maintain accounts of sales and shipments pending disposition of the action. Arrangements were also made for an expedited trial in the matter. The trial occurred in March and April 1994.

8 On December 14, 1994, MacKay J. released his Reasons for Judgment [*Merck & Co. v. Apotex Inc.* (1994), 59 C.P.R. (3d) 133 (Fed. T.D.)]. The Reasons were faxed to the office of counsel for

Apotex, Mr. Radomski, at 2:53 p.m. on the same date. After finding infringement, the Reasons dealt with the relief sought by the plaintiffs, Merck, in the following terms:

> ...On the basis of my findings, they [the plaintiffs] are entitled to
>
> > (a) a declaration that claims 1 to 5 and 8 to 15 of Canadian Letters Patent No. 1,275,349 have been infringed by the defendant;
> >
> > (b) a permanent injunction restraining the defendant by its officers, directors, servants, agents, employees or otherwise from infringing claims 1 to 5 and 8 to 15 of Canadian Letters Patent No. 1,275,349.
> >
> > (c) an order ... for delivery up, or destruction under oath or under supervision of this Court, of all compositions, that is, APO-ENALAPRIL products, not including bulk enalapril maleate held in inventory...
>
> . . . . .
>
> At the conclusion of trial in this matter, counsel suggested that formal judgment might most appropriately be considered after an opportunity for consultation between counsel, and if desirable a further appearance, before the Court, concerning the terms of judgment in light of my findings and conclusions. That seems to me an appropriate course at this stage, in particular since judgment will be rendered after a delay following trial which was unanticipated and for which I express my regret.
>
> In the circumstances, these Reasons are filed with this final direction and an invitation to counsel for the plaintiffs to consult with counsel for the defendant on appropriate terms of the final judgment to be filed in light of my conclusions as set out in these Reasons. Counsel for plaintiffs should prepare a draft judgment, seek approval of counsel for the defendant as to its form and, if possible, its content, and submit the draft for consideration by the Court. If counsel for either or both of the parties wishes to be heard on the matter, a hearing shall be arranged.

9 After receiving the Reasons, Dr. Sherman and Mr. Kay, the Executive Vice-President of Apotex, discussed by telephone with Mr. Radomski on the evening of December 14th their understanding of the Reasons. According to Apotex, the participants all interpreted the Reasons to reflect the Court's intention to permit the continuation of sales activities until the terms of the Judgment were settled. Apotex and Mr. Radomski expected that MacKay J. could have been persuaded to incorporate a term in the Judgment which would have permitted Apotex to sell the remainder of its existing inventory of finished tablets on the same terms as the previous unsuccessful request for an interlocutory injunction.

10 On the evening of December 14, 1994, counsel for Merck sent a letter to Mr. Radomski, urging Apotex to suspend its sales of APO-ENALAPRIL on the basis that the Reasons had already

imposed an injunction. The letter requested confirmation that "Apotex will cease to manufacture, deliver, distribute, sell or offer for sale its Apo-enalapril product", "will do nothing to dispose of its inventory", and "will advise its customers immediately that there is an injunction in place to that effect". Mr. Radomski responded by letter, dated December 14, 1994, and advised that Apotex held a fundamentally different interpretation of the Reasons - Apotex was of the view that the Reasons did not require the company to stop selling, and that business would continue as usual, at least until a formal Judgment and injunction was filed. Mr. Radomski also advised in this letter that they would be appealing the decision of MacKay J. and would be seeking a stay of any permanent injunction ordered pending disposition of the appeal. On December 15, 1994, counsel for Merck sent a letter to Mr. Radomski, which was received at 10:03 a.m., disagreeing with Apotex's position:

> I have just received your letter of December 14, which arrived in our office at 9:39 last evening, in response to mine of the same date, and I have just this moment read it.
>
> I take strong exception to your interpretation of the Reasons for Judgment of Mr. Justice MacKay and the terms of the Judgment which are set out at page 61 of those Reasons.
>
> As I advised you in my letter yesterday, it is clear in my view that an injunction is presently in place and that any action by your client to continue to sell Apo-enalapril at this time would be in breach of that injunction. The point that you raised was considered by the Supreme Court of Canada and found against you. I refer you in particular to, first of all, the trial decision of Mr. Justice Gibson in *Baxter Travenol v. Cutter* (1981), 52 CPR (2d) at page 63, and in which His Lordship expressed in his Reasons for Judgment the terms of judgment which were to be embodied in a formal document thereafter.
>
> That decision of Mr. Justice Gibson was considered by the Supreme Court of Canada in the same case as reported in (1984), 75 C.P.R. (2d), page 2, in which the Court held that the injunction was in place from the moment that the Reasons for Judgment were delivered.
>
> I repeat what I said in my letter yesterday and ask for your immediate confirmation that your client has stopped all activities that would be in breach of the injunction.
>
> I can assure you that this matter is being treated extremely seriously by my client and I expect that you will <u>immediately</u> instruct your client to cease and desist any further infringing activities and obey the injunction of the Court. Any communication your client has made to a provincial authority advising that no injunction is in effect must be immediately retracted. [emphasis in original]

11 On the morning of December 15th, newspapers reported that APO-ENALAPRIL had violated the Merck patent and that MacKay J.'s ruling restrained Apotex from manufacturing and selling the product.

12 At 11:15 a.m., Richard Barbeau, Vice President of Sales and Marketing of Apotex ("Mr. Barbeau"), either personally or through the Apotex sales organization, contacted all of Apotex's customers. These customers were assured that Apotex was still selling APO-ENALAPRIL, but were advised that there was a possibility that Apotex could be enjoined in the future. According to Mr. Kay's testimony, the customers were informed that Apotex was "free to continue to sell" APO-ENALAPRIL. The customers were told that "we could continue to sell, we don't know what the future is going to bring in the product, buy what you want to buy". In addition to the telephone calls, Apotex issued an information circular titled INFO Rx, which was written and signed by Dr. Sherman in the mid-afternoon on December 15th. This circular was sent on-line and by facsimile to all Apotex's customers. Dr. Sherman also prepared a press release in the same terms which was issued simultaneously to the media. The documents advised:

> ...On the other hand, yesterday, in a related litigation, the Federal Court released a decision against Apotex in favour of Merck. Apotex is immediately appealing this decision to the Federal Court of Appeal. We are also applying for a stay of any injunction pending appeal. Apotex and its solicitors are confident that we will prevail upon appeal of this particular decision.
>
> No injunction has been directed against pharmacists, and we are hopeful, as aforesaid, that a stay pending appeal will prevent any disruption of continuing supplies.
>
> The INFO Rx also stated:
>
>> We are concerned that you will again be subjected to pressure from Merck not to dispense APO-ENALAPRIL.
>
> No injunction has been directed against pharmacists, and we are hopeful, as aforesaid, that a stay pending appeal will prevent any disruption of continuing supplies.

13 At 11:30 a.m., Mr. Radomski received Merck's December 15th letter, which made reference to *Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.*, [1983] 2 S.C.R. 388, 75 C.P.R. (2d) 1 (S.C.C.) ["*Baxter v. Cutter*"], by hand-delivery, as he was in court at the time. According to Dr. Sherman's evidence, Mr. Radomski called him around noon advising that he received the December 15th letter from counsel for Merck. Mr. Radomski advised that Apotex should stop selling, and Dr. Sherman testified that he instructed Mr. Kay to "stop selling" as soon as he got off the phone, but gave no direct instructions to Mr. Barbeau and the Apotex sales staff. According to Dr. Sherman, "stop selling" meant that the inventory was frozen on the computer. When inventory is "frozen", invoices are not generated for customer orders. However, invoices already generated continued to be processed, meaning that the product was still picked, packed and shipped. No instructions were given by Dr. Sherman to stop processing the orders already received.

14 Despite this "stop selling" order by Dr. Sherman, oral evidence from Kohlers Distributing Ltd. ("Kohlers"), a distributor of Apotex products, confirms that sales by Apotex continued long into the afternoon on December 15, 1994. MacKay J. found that a sale occurred as late as 4:00 p.m. Apparently, at about 4:00 pm, Mr. Barbeau called Mr. Organ, an employee of Kohlers, and subsequently an APO-ENALAPRIL order exceeding $866,000 was placed.

15 On December 15, 1994, Apotex issued 481 sales invoices totalling $8,213,693.21 in sales of APO-ENALAPRIL to Canadian customers and an additional two invoices totalling $580,130.40 U.S. ($804,640.86 Cdn) to export customers, for a total exceeding $9 million. This single day of sales was the equivalent to more than an average month of sales, 7.5 times greater than the previous highest day of sales, and more than 20 times the daily average of sales.

16 On December 16, 1994, at about 8:26 a.m., Mr. Radomski faxed a letter to the Court:

> Our client respectfully requests that an emergency conference call be convened today between counsel for the parties and the Honourable Mr. Justice MacKay. The purpose of this conference is to seek an interim stay of the implementation of the reasons for Judgment issued by Mr. Justice MacKay pending the return of Apotex' motion to stay the Order of Mr. Justice MacKay pending appeal therefrom. We would seek to schedule the latter motion next week.
>
> Also, at about 10:58 a.m., Mr. Radomski sent a Draft Notice of Motion, unsworn affidavit of Dr. Sherman, and a covering letter to the Court Registrar and to counsel for Merck.

17 Throughout the morning and early afternoon on December 16, 1994, Apotex continued shipping APO-ENALAPRIL that had been invoiced but not yet processed on December 15th.

18 Mid-morning on December 16th, counsel for Merck responded by letter to Apotex's request for an emergency conference:

> I object to a matter as serious as the suspension of a permanent injunction being dealt with by conference call with the trial judge. Mr. Radomski has the obligation to bring a proper motion before the Court for a suspension of the injunction and our client has the right to respond to such a motion and to have an opportunity for a full and proper hearing before the Court on this very serious matter.
>
> Mr. Radomski responded by letter at about 12:43 p.m. the same day, repeating the request for an urgent emergency telephone conference call for the hearing of an interim stay motion. MacKay J. did not speak to counsel but issued directions which were read to Mr. Radomski over the phone by the Court Registry at about 1:45 p.m. MacKay J.'s Direction stated:

1. Judgment in this matter has not been filed, as the Reasons for Judgment now issued indicate, pending opportunity, as requested by counsel at conclusion of the trial, for counsel to make submissions concerning terms of judgment to implement the Reasons.

2. As I understand it there is no formal decision until judgment is filed, and thus nothing to be appealed from and no judgment to be stayed until a judgment is filed.

3. If the parties cannot agree on the terms of judgment and either wishes to be heard on that matter the Court will arrange a hearing at the mutual convenience of counsel at the earliest opportunity.

4. If Apotex applies by motion for a stay of Judgment when it is filed, Merck requests that application be heard by personal appearance of counsel, not by telephone conference. The Court would arrange for a hearing by personal appearance at the earliest opportunity convenient for counsel.

5. Counsel should consider whether a hearing by personal appearance can be arranged by agreement between them to 1) settle terms of judgment in accord with the Reasons now issued, 2) deal with any application to stay implementation of the judgment pending any appeal by Apotex, 3) terms, if any, for a reference as to damages/profits in accord with the earlier consent Order in this action, or any of these matters.

6. The only useful purpose of a telephone conference on an urgent basis would appear to be to seek possible agreement on a date or dates when matters listed in item 5 (above) might be heard. Counsel are requested to consult and advise the Registry if such a telephone conference is desirable. [my emphasis]

19 It should be noted that neither the Draft Notice of Motion, nor correspondence to the Court from Mr. Radomski, referred to the sales activity of APO-ENALAPRIL by Apotex on December 15, 1994, or that Apotex was of the view that they were at liberty to keep selling.

20 According to Dr. Sherman, Mr. Radomski called and advised him that "the court had confirmed [by the Direction] that we were correct, and that there was no injunction in effect and we were free to sell the product". Clearly, MacKay J. had not been asked, nor did he address, whether Apotex was "free to sell the product". Sales of APO-ENALAPRIL resumed by order of Dr. Sherman at that time.

21 Between 4:35 p.m. and 5:40 p.m. on December 16th, a telephone conference was held, during which MacKay J. was advised by Merck of the *Baxter* case and of the fact that Apotex was continuing to sell APO-ENALAPRIL. As a result, MacKay J. issued a further direction, in which he made specific mention of *Baxter v. Cutter*. He later explained this direction in his Reasons on Apotex' stay motion, rendered January 24, 1995 [(1995), 60 C.P.R. (3d) 31 (Fed. T.D.)]:

> ...In the absence of any expressed intention with respect to the effective date of an order in the nature of an injunction as provided by my reasons for judgment, the circumstances were similar to those in *Baxter Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.* (1983), 75 C.P.R. (2d) 1, 2 D.L.R. (4th) 621, [1983] 2 S.C.R. 388.... Yet Dickson J., as he then was, for the Supreme Court of Canada, held that a party to an action, having notice from its reasons for judgment that the court has determined an injunction would issue to preclude actions found to infringe patent rights, is liable for contempt if it continues activities which would be enjoined when the court's formal order is signed and filed.

22 As a result of this telephone conference, Mr. Radomski called Dr. Sherman, advising that Apotex should stop selling. On Dr. Sherman's instructions, Apotex again froze its inventory. However, already generated invoices continued to be processed - shipments and deliveries of APO-ENALAPRIL continued well past December 16th. The full extent of these shipments is not known. However, MacKay J. found that there were at least five deliveries of APO-ENALAPRIL on Saturday, December 17, 1994, 63 deliveries on Monday, December 19, 1994, and one delivery of $87,953 of APO-ENALAPRIL on Tuesday, December 20, 1994.

23 By the close of business on December 16, 1994, Apotex had issued a further 238 invoices for APO-ENALAPRIL to Canadian customers, totalling $362,652.54.

24 Merck's motion to settle the terms of the Judgment on patent infringement and Apotex's motion for a stay of Judgment were argued before MacKay J. on December 21, 1994. The Judgment in the action was issued on December 22, 1994, and included orders for an injunction and a delivery up in the following terms:

> 3. The Defendant, by its officers, directors, servants, agents, employees, or otherwise, is hereby restrained and enjoined from infringing claims 1 to 5 and 8 to 15 inclusive of Canadian Letters Patent No. 1,275,349, and in particular from manufacturing, using, offering for sale and selling, in Canada or elsewhere, APO-ENALAPRIL tablets or any tablets or other dosage forms containing enalapril maleate as an active ingredient, whether such manufacture or sale be from
>
> > (a) bulk enalapril or enalapril maleate acquired prior to the grant of the patent, or
> >
> > (b) any quantities of bulk enalapril maleate acquired after the grant of the patent.
>
> 4. The Defendant shall forthwith deliver up, or destroy under the supervision of this Court all compositions, that is, APO-ENALAPRIL products and any compositions or dosage forms containing enalapril maleate, as well as bulk enalapril maleate manufactured by Delmar Chemicals Inc....

25 On December 23, 1994, MacKay J. issued an interim stay of the injunction, pending further hearing in early January, "insofar as it enjoins the defendant from offering for sale or selling APO-ENALAPRIL tablets in response to *bona fide* orders from pharmacists in the regular course of business". Consequently, sales of APO-ENALAPRIL resumed on December 23, 1994, and substantial sales were made during this period.

26 Following a further hearing, MacKay J. dismissed Apotex' application for a stay of the Judgment on January 9, 1995. This withdrawal of the interim stay order was made effective after ordinary business hours on Monday, January 9, 1995. The Order of January 9, 1995 stated:

> Upon the Court *ex propriu motu* considering that in this case the positions of third parties, engaged in distribution, purchase or sale of drug products at the wholesale or retail level, or health authorities, or institutions not being parties to this action, should be clarified in the interests of orderly marketing:
>
> This court orders that:
>
> . . . . .
>
> 2. The interim stay of the injunction ordered herein on December 23, 1994, pending ultimate determination of the defendant's motion for a stay, is withdrawn and is of no force and effect after the hour ordinarily fixed for close of business by the defendant at its various local office sites, on Monday, January 9, 1995.
>
> 3. Third parties, not having been parties to the action herein, who have acquired in good faith property in APO-ENALAPRIL products made by the defendant, before the close of business on January 9, 1995, shall be deemed not to be in violation or contempt of any order of this Court by their possession, distribution, sale or consumption of those products whether before or after January 9, 1995.
>
> Therefore, the injunction was in full force and effect at the close of business on January 9, 1995.

27 Commencing on January 10, 1995, Dr. Sherman declared a blanket "no returns" policy for APO-ENALAPRIL. This "no returns" policy was a change from Apotex's usual policy to accept returns due to overstock, stale-dating, defect or damage. MacKay J. found that, in order to avoid the consequence of the returns, Mr. Barbeau and his sales force were "imaginative": Apotex sales representatives assisted in arrangements to re-direct APO-ENALAPRIL between customers by offering distribution allowances and discounts and by issuing credits to customers to facilitate sales transactions. For instance, Apotex entered into a commercial arrangement with Kohlers whereby Apotex sales representatives directed returns of APO-ENALAPRIL from its customers to Kohlers. In general, Kohlers was a distributor who purchased pharmaceuticals from manufacturers including Apotex, reselling them to pharmacies. Kohlers was paid a distribution allowance by

the pharmaceutical manufacturers to sustain its business. With respect to sales, Kohlers usually received an allowance of a 6% deduction or credit on its purchases from Apotex. According to the evidence, Mr. Barbeau initiated contact with Kohlers to determine whether Kohlers would be willing to purchase inventory from other sources, including from pharmacies who were not customers of Kohlers, and then sell the returned product to other customers. For this particular arrangement, Kohlers received a 6% distribution allowance, and, in some cases, an additional 4% prompt payment discount from Apotex. The allowances facilitated the transactions and avoided the return of APO-ENALAPRIL to Apotex, which would have resulted in a loss of the product. Gary Timm, Merck's forensic accountant, was of the opinion that the transactions were sales of APO-ENALAPRIL by Apotex to Kohlers. According to the Respondents, the total amount involved in such transactions in the period amounted to about $1,561,170.21, plus additional unknown amounts.

28 On April 19, 1995, the Federal Court of Appeal delivered its Judgment with respect to Apotex's appeal of the judgment of MacKay J. at trial [[1995] 2 F.C. 723 (Fed. C.A.)]. The Court allowed the appeal in part. It indicated that section 56 of the *Patent Act*, R.S.C. c. P-4 allowed an infringer to use or sell an article without being liable to the patentee if the infringer "purchased, constructed or acquired" the article before the patent became open for public inspection. The Court held at para. 16 that "most of the enalapril maleate acquired by the appellant was shipped by the supplier, before the grant of the patent" and, thus, was non-infringing. However, the Court still declared three lots of enalapril maleate to be infringing because these lots were not re-purified until after the issuance of the patent.

29 Being concerned about possible further infringements, counsel for Merck made repeated requests for compliance with earlier production Orders. Apotex produced on March 7, 1995 about 15 boxes of APO-ENALAPRIL invoices for the period October 3, 1994 to January 9, 1995. Relying on the analysis of these invoices, counsel for Merck brought a motion for a show cause order. On April 27, 1995, Pinard J. issued a Show Cause Order, charging Apotex with two acts of contempt, "all so as to defeat and subvert the Court's process herein and render nugatory the permanent injunction" by: (1) selling and causing to be sold APO-ENALAPRIL during the period between December 14 and 22, 1994 ["December sales"]; and, by (2) aiding and abetting in the transfer, distribution and sale by third parties, among themselves, during the period January 9, 1995 to date ["post-January, 1995 aiding and abetting"].

30 Apotex brought a number of preliminary motions with respect to this Show Cause Order between November 27 and December 4, 1995. These motions sought *inter alia*: (1) to dismiss or permanently stay the show cause hearing; (2) to quash *subpoenas duces tecum* issued; (3) to disqualify Gowlings, solicitors for Merck, as prosecutor; and, (4) to prevent use in the show cause hearing of documentation or information obtained from Apotex as a result of a Court order in the patent proceedings. Specifically, the basis of the preliminary motion alleging prosecutorial misconduct and seeking to remove Gowlings as prosecutor of the contempt charge was the idea

that contempt proceedings are criminal in nature. As a result, Apotex argued it had the right to have the alleged contempt prosecuted by the Attorney-General, or at least by a prosecutor independent from counsel for Merck. Apotex alleged that counsel for Merck acted with impropriety because of their "vindictive attitude" and inability to act with "the fair impartial demeanor proper for a prosecutor".

31 MacKay J. issued three orders with respect to these preliminary motions on January 23, 1996. He refused all relief sought by Apotex, except that he quashed the subpoena issued to Mr. Kay. With respect to the motion for a stay and to remove Gowlings as solicitors, he stated:

> I am not persuaded that the proceedings now initiated before the Court demand special arrangements for their prosecution, aside from those already established by jurisprudence of this Court in relation to contempt proceedings under Rule 355, and applicable principles under the *Charter* or the *Canadian Bill of Rights*. It is the responsibility to the Court to ensure that in the proceedings, rules of fundamental justice and due process of law are followed....
>
> I am not persuaded that the conduct complained of can be characterized as abusive of the court's process or as otherwise tainting the process so as to warrant dismissal or a stay of further proceedings, or of an order to disqualify and restrain plaintiffs' solicitors from continuing to act in these proceedings.

32 The orders of MacKay J. on these preliminary motions were appealed by Apotex. The show cause hearing was adjourned *sine die* on consent pending resolution of these appeals. The Court of Appeal dismissed all appeals with costs on October 31, 1996 [(1996), 70 C.P.R. (3d) 309 (Fed. C.A.)]. On May 22, 1997, the applications for leave to appeal were dismissed by the Supreme Court of Canada [(S.C.C.)].

33 The show cause hearing was commenced in July of 1997 and was not completed until February of 1998. At the close of the prosecutor's case, on February 25, 1998, Apotex again moved for an order dismissing or permanently staying the contempt proceedings. Again, Apotex argued that counsel for Merck had conducted the case in a manner fundamentally inconsistent with the obligations of the office of prosecutor, and that, as a consequence, Apotex had been denied its right to be tried in accordance with the principles of fundamental justice. As an alternative to this order for dismissal or permanent stay, Apotex sought an order staying the proceedings until the duties of Merck had been assumed by an impartial and disinterested prosecutor. Apotex argued many of the same allegations of impropriety as in its preliminary motion on this issue. In addition, Apotex argued that it suffered non-disclosure or late disclosure of evidence with respect to testimony, and improperly asserted privilege. MacKay J. dismissed this motion by Order dated June 24, 1998, with Reasons dated July 22, 1998 [T-2408-91]. It should be noted that at no time did Apotex or Dr. Sherman give Notice of a Constitutional challenge under section 57 of the *Federal Court Act*, nor at any time did Apotex or Dr. Sherman ask the Attorney General of Canada to conduct the show cause proceedings.

34 MacKay J. issued his Reasons for Judgment with respect to the contempt proceedings on March 7, 2000, finding that Apotex and Dr. Sherman were both in contempt of court.

Findings of the Trial Judge on Contempt

35 MacKay J. made the following specific findings in his Judgment. He concluded that both Apotex by its officers and Dr. Sherman in his personal capacity committed contempt by carrying out the December sales of APO-ENALAPRIL after Dr. Sherman had read the Reasons for Judgment dated December 14, 1994. "These Reasons indicated that, as of that day, the Court had resolved that Merck was entitled to a permanent injunction prohibiting Apotex by its officers, and others, from infringing upon the valid claims of Merck's patent." Citing *Baxter v. Cutter, supra*, MacKay J. stated that the action taken in the interim period between the Reasons for Judgment being released and the formal Judgment being filed may constitute contempt, if, with knowledge of the Reasons, one acts in a manner that the Court has clearly indicated in its Reasons is prohibited. In this case, MacKay J. found beyond a reasonable doubt that this test had been met, and recited at paragraph 26 Dickson J.'s words at page 8 in *Baxter v. Cutter* as deciding the matter:

> ...Once a judge has rendered his decision by giving reasons, and assuming any prohibitions contained therein are clearly worded, it is not, in my view, open to any person to flout his disposition of the case on the ground that there is no judgment yet in effect. The situation after reasons for decision is very different from a situation in which the defendant acts prior to any court determination. Once reasons for decision have been released, any action which would defeat the purpose of the anticipated injunction undermines that which has already been given judicial approval. Any such action subverts the processes of the court and may amount to contempt of court.

36 MacKay J. concluded that Apotex, but not Dr. Sherman personally, had committed contempt of court by aiding and abetting the third party sales between January 9, 1995 and April 27, 1995. He found at paragraph 57 that "by facilitating sales of its product among third parties, not merely by exchange of information but by its financial involvement in providing distribution allowances and prompt payment allowances, [and by] treating some transactions as if they were sales made directly by Apotex to third party purchasers" Apotex "did interfere with the orderly administration of justice and did impair the authority and dignity of the Court". These transactions "were not transactions exclusively between third parties", and "Apotex' actions in relation to these transactions ... did subvert the Court's process".

37 On the issue of prosecutorial misconduct, MacKay J. stated that he was not persuaded that any of the alleged conduct impaired the opportunity for the moving parties to make full answer and defence.

38 In Supplementary Reasons, MacKay J. imposed a $250,000.00 fine on Apotex and a $4500.00 fine on Dr. Sherman personally [(2001), 12 C.P.R. (4th) 456 (Fed. T.D.)]. He considered the following factors in coming to this decision: (1) the apology of Dr. Sherman, as a mitigating factor; (2) the January facilitating activities of Apotex, which came "close to deliberate flaunting of the Court's Judgment, in spirit at least"; (3) the extraordinary nature and severity of the contempt, as an aggravating factor; (4) the damages suffered by Merck, such that the profits garnered by Apotex through its actions were irrelevant; (5) the past conduct of Apotex, as a mitigating factor, and the future deterrence of similar behaviour as being of insignificant weight; and, (6) the fact that Apotex acted on the advice of counsel, as a mitigating factor.

39 Finally, MacKay J. determined that Merck should be paid costs on a solicitor-client basis in a fixed lump sum in the amount of $1,500,000.00, for which the defendants, Apotex and Dr. Sherman, would be jointly and severally liable [2002 FCT 1210 (Fed. T.D.)]. He stated at paragraph 20 that "the party who assumes that responsibility [on behalf of the public] ought not to be left to bear costs incurred to establish contempt where contempt is found". MacKay J. considered the following factors in making this decision: (1) the result of the proceeding; (2) the importance and complexity of the proceeding; (3) the public interest in having the proceeding litigated; and (4) the fact that the manner in which Apotex and Dr. Sherman defended their positions resulted in increased costs for Merck, especially since Apotex brought a number of unsuccessful motions to stay the proceedings.

Appellants' Arguments

40 With respect to the December sales period of contempt, Apotex argues that the test with respect to the level of intent necessary for proving contempt is different for a breach of a formal order under the first branch of Rule 355(1) than for an interference with the orderly administration of justice with respect to Reasons for Judgment under the second branch of Rule 355(1). With respect to the first branch, where there is a breach of an order that is clear and unambiguous, the mental elements of the offence consist of acting deliberately or wilfully "with full knowledge of the existence and terms of the injunction issued". The intention to commit an act proscribed by that Order is sufficient to prove contempt. However, with respect to the second branch - acting "in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court" - the test requires a demonstration of contumacy, thus obliging the prosecutor to prove beyond a reasonable doubt that the accused engaged in conduct knowing that the Court intended to prohibit it. The prosecution must prove that the accused deliberately acted so as to interfere with the orderly administration of justice. Thus, the Appellants assert that MacKay J. applied the wrong test for intent in this context. Where the contempt finding is based not on a breach of an order but on interfering with the orderly administration of justice, an accused cannot be held in contempt of court when he reasonably and *bona fide* believed that the impugned activity had not been prohibited by the Reasons, and did not intend to otherwise interfere with the orderly

administration of justice. Therefore, according to the Appellants, MacKay J. treated the Reasons as if they were an order, and applied the test for an order to the Reasons. In support of its propositions, the Appellants point to MacKay J.'s statement in paragraph 38 of his reasons that "it may be that subjectively, Dr. Sherman did not intend to violate the injunction provided for in the Reasons, or to subvert the process of the Court".

41 Apotex claims as follows. It did not have this level of intent and, thus, cannot be found in contempt of court. Apotex honestly and reasonably interpreted the Reasons as not immediately instituting an injunction. Considering the Direction made by MacKay J. and the history of events preceding the release of the Court's reasons, including the Court's refusal to grant Merck an interlocutory injunction in this case, Apotex's collective understanding of the Reasons as not immediately implementing an injunction was reasonable. Apotex asserts that if MacKay J. had always intended his Reasons to effectively impose an immediate injunction, then he would not have stated in response to the emergency conference call of December 16, 1994 that there was "nothing to be stayed" until Judgment was filed.

42 Also, with respect to the first period of contempt involving the December sales, the Appellants argue that MacKay J. misapplied *Baxter v. Cutter* because the Reasons by MacKay J. were not clearly worded to truly anticipate an injunction. Unlike in *Baxter v. Cutter* where the Reasons were clear and unambiguous, the fact that Apotex' interpretation of the Reasons was reasonable and the fact that the filed Judgment differed from the Reasons reveals that MacKay J.'s Reasons were unclear and ambiguous. Thus, the Appellants argue that the ruling in *Baxter v. Cutter* should not apply in this context.

43 With respect to the post-January, 1995 period of aiding and abetting, the Appellants argue that no contemptuous actions occurred. Because of the third party clause in the January 9, 1995 Order, the Appellants argue that it did not breach the permanent injunction. Apotex did not itself sell APO-ENALAPRIL to its customers. Neither can it be claimed that Apotex committed contempt by interfering with the orderly administration of justice because "to establish a breach" or other violation of a Court order, the Court must specifically find that the accused engaged in an activity proscribed by that order. The order in question did not actually prohibit Apotex from engaging in activities which could "assist" third parties to transfer APO-ENALAPRIL among themselves. As well, conduct which "assists" activities that the Court has expressly permitted, and which are themselves not in contravention of any order, cannot "interfere" with the administration of justice. A party can certainly assist legal activities.

44 In its factum filed with this Court, Apotex, for the most part, repeats the same arguments and relies on the same evidence for prosecutorial misconduct as was put before MacKay J. in its motion, which was dismissed on June 24, 1998.

45 With respect to the penalty imposed by MacKay J., Apotex asserts that the following mitigating factors, present in this case, justify an appropriate reduction in the penalty:

(a) the act was the contemnor's first offence;

(b) the Order was ultimately found to have been improperly imposed;

(c) the contemnor was acting on the advice of counsel;

(d) the act was not done with the intention of interfering with the administration of justice;

(e) the contemnor attempted to comply with the Order;

(f) a formal apology was tendered to the Court by Dr. Sherman;

(g) the breach was a result of a mistake as to what the Order required.

Apotex argues that the fine imposed by MacKay J. is far outside the range of what has previously been assessed for acts of contempt. A sentence must be proportional to the act committed, and must be similar to that given for similar offences.

46 The Respondents Merck (Appellants by Cross-Appeal) submit that MacKay J. erred in setting the fine too low. In particular, MacKay J. erred by:

1. Failing to give significant weight to the principle of deterrence, in the context of a corporate contemnor.

2. Failing to have sufficient regard to the corporation's financial circumstances, given the need to deter and denounce the conduct.

3. Giving consideration to the fact that Merck's concerns about injury could be recoverable in damages or an accounting of profit.

47 As to costs, the Appellants argue that there is no automatic entitlement to costs following a contempt proceeding, and that the solicitor and client scale should be reserved for particularly scandalous or reprehensible misconduct committed in the course of a proceeding. It was wrong for MacKay J. to assert that the party prosecuting "ought not to be left to bear costs incurred to establish contempt where contempt is found". MacKay J. fettered his discretion in failing to consider that many allegations of contempt were not successfully established at trial, and that the bill of costs was evidentiarily deficient.

Issues

48 This appeal raises five questions:

1. Did MacKay J. err in applying the test for contempt, specifically the level of intent necessary to establish a case of contempt? In other words, did MacKay J. err in finding that Apotex acted in a contemptuous manner, despite concluding that Dr. Sherman may not have subjectively intended to breach the order or interfere with the orderly administration of justice?

2. Did MacKay J. err in finding that Apotex acted in a contemptuous manner by "assisting" its third party customers in transferring APO-ENALAPRIL?

3. Did MacKay J. err in failing to find that Merck committed prosecutorial misconduct during the course of the contempt proceedings, such that a stay of the contempt proceedings ought to have resulted?

4. Should this Court interfere and decrease, or increase, the fine imposed against Apotex and Dr. Sherman?

5. Did MacKay J. err in assessing costs on a solicitor and client basis, without paying heed to the divided success in proving contempt in the contempt proceeedings?

Relevant Statutory Provisions

49 The relevant provisions of the *Federal Court Rules*, C.R.C. 1978, c. 663, as they were when the contempt proceeding was initiated, are as follows:

> 355. (1) Anyone is guilty of contempt of court who disobeys any process or order of the Court of a judge thereof, or who acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court. In particular, any officer of justice who fails to do his duty, and any sheriff or bailiff who does not execute a writ forthwith or does not make a return thereof or, in executing it, infringes any rule the violation whereof renders him liable to a penalty, is guilty of contempt of court.
>
> (2) Except where otherwise provided, anyone who is guilty of contempt of court is liable to a fine, which in the case of an individual shall not exceed $5,000, or to imprisonment for a period not exceeding one year. Imprisonment, and in the case of a corporation, a fine, for refusal to obey any process or order may be repeatedly inflicted until the person condemned obeys.
>
> (4) No one may be condemned for contempt of court committed out of the presence of the judge, unless he has been served with a show cause order ordering him to appear before the Court, on the day and at the hour fixed to hear proof of the acts with which he is charged and to urge any grounds of defence that he may have.... [my emphasis]

The relevant provision of the *Federal Court Rules, 1998* SOR/98-106, as amended, is as follows:

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.	400. (1) La Cour a entière discrétion pour déterminer le montant des dépens, les répartir et désigner les personnes qui doivent les payer.

Analysis

A) Contempt Involving December Sales

1. Level of Intent Necessary Under the Second Branch of Rule 355(1)

50 It is my opinion that there is no logical reason why the character of intent required under the second branch of Rule 355(1) [interfering with the orderly administration of justice] should be different from that under the first branch. In both cases, the issue should be whether the Order (which would fall under the first branch) or the Reasons for Judgment (which would fall, among other actions, under the second branch) was clear. If the Reasons are clear, then an intent to commit the act is sufficient. By this I mean that with respect to the first branch of the Rule, provided that the Order is clear, if the defendant intended to commit the prohibited act, then there is contempt. With respect to the second branch of the Rule, provided that the Reasons are clear, if the defendant intended to commit an act, which results in an interference with the orderly administration of justice or an impairment of the authority or dignity of the Court, then there is contempt.

51 This reasoning is borne out by the jurisprudence. For instance, in the Supreme Court of Canada's decision in *Baxter v. Cutter, supra*, the appellants had similarly become entitled to an injunction against the respondent in a patent infringement action. The Reasons for Judgment were delivered on December 11, 1980, but the formal judgment was not signed and issued until December 18, 1980. In the meantime, the respondent, like Apotex in our case, continued to sell the infringing product. The appellants sought and obtained a Show Cause Order under Rule 355 of the *Federal Court Rules*. The evidence was that the respondent, Cutter, had been legally advised by its solicitor that it was entitled to ship the goods before the issuance of the formal Judgment. The solicitor actually testified at the contempt hearing and stated that he had read the trial judge's reasons upon their release and that he had telephoned Cutter, advising that it should dispose of all the infringing goods in the possession of Cutter in Canada. He did not appear as counsel on the contempt hearing. In contrast, in our case Mr. Radomski, counsel for Apotex, did not give any evidence as to the advice he gave to Apotex about MacKay J.'s Reasons for Judgment; rather, the evidence only came from those to whom he gave such advice, such as Dr. Sherman. However, Mr. Radomski did appear to argue the contempt case before the trial judge and before this Court.

52 The import of the Reasons for Judgment issued by Gibson J. in *Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.* (1980), 52 C.P.R. (2d) 163 (Fed. T.D.) is very similar to the Reasons issued by MacKay J. in our case. Gibson J.'s reasons for decision included the following:

> As a consequence, Bellamy [*sic* Baxter Travenol] is entitled to judgment against Cutter, declaring, ordering and adjudging as follows:
>
> > 1. That as between the parties hereto, Canadian Letters Patent No. 685,439 and Claims 1 to 4 thereof are valid and have been infringed by the defendant [Cutter] in manufacturing and selling to the Canadian Red Cross multiple blood bag sets having valves as exemplified by those of Exhibits P-8 and P-8A to this trial.
> >
> > 2. The defendant, its employees, servants, and any person acting under its directions, are restrained and enjoined from manufacturing, offering for sale, selling or distributing multiple blood bag sets having valves as exemplified by those of Exhibits P-8 and P-8A to this trial.
>
> In the present case, MacKay J. dealt with the relief sought by Merck in the patent infringement action in the following terms:
>
> > ...On the basis of my findings they [the plaintiffs] are entitled to
> >
> > > (a) a declaration that claims 1 to 5 and 8 to 15 of Canadian Letters Patent No 1,275,349 have been infringed by the defendant;
> > >
> > > (b) a permanent injunction restraining the defendant by its officers, directors, servants, agents, employees or otherwise from infringing claims 1 to 5 and 8 to 15 of Canadian Letters Patent No. 1,275,349.
> >
> > . . . . .
> >
> > The only difference between the details of these two sets of reasons is that Gibson J. elaborates on how the patent was infringed (by selling and manufacturing) and on what is enjoined by the injunction (manufacturing and selling). However, it was obvious from MacKay J.'s Reasons that Apotex infringed Merck's patent by its manufacture and sale of APO-ENALAPRIL, and that any workable injunction would have to enjoin manufacturing and selling in order to curb future infringements.

53 In *Baxter v. Cutter*, Baxter requested that, if it was successful, formal judgment be given at the time reasons were issued. Gibson J. indicated that he would not accede to this request, and the final paragraph of his reasons stated:

> Counsel for either the plaintiffs or the defendant may prepare in both official languages an appropriate judgment to implement the foregoing conclusions and may move for judgment in accordance with Rule 337(2)(b). [my emphasis]

In MacKay J.'s Reasons for Judgment, he similarly invited counsel for both sides to consult to draft an "appropriate" judgment, in light of his conclusions:

> At the conclusion of trial in this matter, counsel suggested that formal judgment might most appropriately be considered after an opportunity for consultation between counsel, and if desirable a further appearance, before the Court, concerning the terms of judgment in light of my findings and conclusions. That seems to me an appropriate course at this stage, in particular since judgment will be rendered after a delay following trial which was unanticipated and for which I express my regret.
>
> In the circumstances, these Reasons are filed with this final direction and an invitation to counsel for the plaintiffs to consult with counsel for the defendant on appropriate terms of the final judgment to be filed in light of my conclusions as set out in these Reasons. Counsel for plaintiffs should prepare a draft judgment, seek approval of counsel for the defendant as to its form and, if possible, its content, and submit the draft for consideration by the Court. If counsel for either or both of the parties wishes to be heard on the matter, a hearing shall be arranged. [my emphasis]

I cannot see any significant differences between these two sets of Reasons. The Appellants point to the fact that there were differences between MacKay J.'s Reasons for Judgment and his Judgment to support its method of distinguishing the *Baxter v. Cutter* case. In our case, MacKay J. added the third party clause into the January 9, 1995 Order. However, in *Baxter*, there were also changes from the Reasons for Judgment to the Judgment, relating to the reference to determine damages or an accounting of profits. Therefore, in my opinion, *Baxter v. Cutter*, for all of the above reasons, is indistinguishable from the present case.

54 Dickson J. for the Supreme Court of Canada outlined at pages 395-397 in *Baxter v. Cutter* the applicable principles to adopt in this situation:

> Gibson J. acted under Rule 337(2)(b). Cutter notes, correctly in my view, that Rule 337 draws a clear distinction between reasons for decision or conclusions on the one hand, and a judgment on the other hand. There is no judgment until a document in Form 14 is executed. I agree with Cutter and the Federal Court of Appeal that, by virtue of Rule 337, a judgment in that court only takes effect on the date a document in Form 14 is executed. In the present case there was no injunction, and hence there could be no breach of the injunction, prior to December 18, 1980. If this case had involved an attempt to execute or directly enforce a judgment, the effective date would be decisive of the result. In my view, however, Cutter and the Federal Court were in error in assuming the effective date of the injunction is decisive in a contempt proceeding. The inquiry does not end with a consideration of whether the injunction as such has been breached.
>
> The general purpose of the court's contempt power is to ensure the smooth functioning of the judicial process. Contempt extends well beyond breach of court orders. Subsection (1)

> of Rule 355 of the *Federal Court Rules*, repeated here for ease of reference, provides in part as follows:
>
> > *Rule 355.*(*1*) Anyone is guilty of contempt of court who disobeys any process or order of the Court or a judge thereof, or who acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court. (Emphasis added.)
>
> Paragraph (a) of the show cause order in the present case invoked the first part of Rule 355(1), whereas paragraph (b) invoked the underlined portions. Even if there was no actual breach of an injunction so as to constitute contempt under paragraph (a), it is still necessary to consider paragraph (b).
>
> Contempt in relation to injunctions has always been broader than actual breaches of injunctions. Cattanach J. recognized this in the present case. Thomas Maxwell is named in the show cause order as having committed contempt in his personal capacity although he is not a party to the action. He is not personally bound by the injunction and therefore could not personally be guilty of a breach. Nevertheless, Cattanach J. acknowledged he could still be found in contempt if he, with knowledge of its existence, contravened its terms. Although technically not a breach of an injunction, such an action would constitute contempt because it would tend to obstruct the course of justice; *Kerr on Injunctions*, 6th ed 1927, at p. 675; *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516.
>
> The same kind of analysis applies to the period between reasons for decision and the pronouncement of judgment. Cutter argues, in effect, that this constitutes a period of grace in which the defendant can contravene the prohibitions set out in the reasons for decision with impunity. To accept that argument would be to accede to the proposition that it is open to a party completely to defeat an injunction. That would subvert the whole process of going to court to settle disputes. That is precisely what the contempt power is designed to prevent. [my emphasis]

Nowhere in *Baxter v. Cutter* does the Supreme Court of Canada indicate that it need be shown that the defendant intended to act in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court.

55 Since the Supreme Court merely decided the preliminary objection made by Cutter (that the acts complained of could not be in breach of the judgment of Gibson J., which was not issued until December 18, 1980) a court still had to decide whether Cutter had actually committed the contempt by disobeying the Reasons for Judgment, rendered on December 11. After the Supreme Court of Canada rendered its decision, Cutter applied for directions with respect to the charge under which it was required to show cause. Cattanach J., who heard that motion granted directions, and stated "that the matters which must be proven" are: (1) that Cutter and Maxwell had knowledge of the

prohibitions in Gibson J.'s reasons for judgment dated December 11, 1980; and (2) that there was a contravention of a prohibition therein (436). Dubé J., who decided the case on its merits for the Federal Court, Trial Division [(1984), 1 C.P.R. (3d) 433 (Fed. T.D.)] found that this test was met and stated at page 439:

> I am convinced beyond a reasonable doubt, firstly, that the defendant knew of the existence of the prohibitions contained in the reasons for judgment of Gibson J., and, secondly, that the defendant contravened the prohibitions by failing to destroy the goods, or delivering up the goods to the plaintiff, and most specially by disposing of the goods by sale and otherwise during the relevant period. That ought to settle the issues referred to this court by the Supreme Court of Canada. However, serious points of law were raised and they deserve consideration.
>
> Dubé J. went on to consider whether *mens rea* is required to be proved in a contempt of court case. Following the Supreme Court, Dubé J. concluded at page 440 that it is not necessary to show that the defendant was intentionally contumacious or that he intended to interfere with the administration of justice:
>
>> [The defendant's solicitor] obviously believed that he was legally right. He, therefore, did not possess the ingredient of a "guilty mind" necessary to commit a crime and, in consequence, his principal (the defendant) argues that it ought not to be found guilty of contempt.
>
> The defendant relies in particular on *Koffler Stores Ltd. v. Turner et al.* (1971), 2 C.P.R. (2d) 221 at p. 223, [1971] F.C. 145, wherein Pratte J. (then of the Trial Division) would not "punish the defendants for having, in good faith, given a possibly wrong but not unreasonable interpretation to an order of this Court". The order was an injunction restraining the defendant from infringing the plaintiff's trade mark.
>
> As to the conduct of this defendant in the instant case, Cattanach J. had this to say in his February 3, 1981 judgment (at p. 9 [pp. 151-2]):
>
>> I expressed the view at the hearing, and to which view I adhere, that the conduct of the defendant through its chief executive officer, has the stench of sharp and perhaps even misleading practice and that the defendant and its chief executive officer were devoid of standards of ethics but that in all likelihood such ethics are neither expected nor required in the jungle of the business world and the rewards may be greater to those vested with inherent predatory cunning.
>
> *Borrie and Lowe's Law of Contempt*, 2nd ed. (1983), considers the requirement for *mens rea* in Chapter 13, titled "Civil Contempt". The answer is clearly "that it is not necessary to show that the defendant is intentionally contumacious or that he intends to interfere with the administration of justice". The authors, at p. 400, quote Sachs L.J. in *Knight et al. v. Clifton et al.*, [1971] Ch. 700 at p. 721, [1971] 2 All E.R. 378 at p. 393, as follows:

> when an injunction prohibits an act, that prohibition is absolute and is not to be related to intent unless otherwise stated on the face of the order

> The authors quote Warrington J. In *Stancomb v. Trowbridge Urban District Council* [[1910] 2 Ch. 190 at p. 194], who said that if a person "in fact does the act, and it is no answer to say that the act was not contumacious...". In *Re Agreement of Mileage* [*Conference Group of Tyre Manufacturers' Conference, Ltd.*, [1966] 2 All E.R. 849 at p. 862], contempt was held to have been established even though the acts were done "reasonably and despite all due care and attention, in the belief, based on legal advice, that they were not breaches."

> Finally, the mandate of the Supreme Court of Canada to this court is crystal clear: two matters only are to be established: firstly, was there a knowledge of Gibson J.'s reasons for judgment and, secondly, was there a contravention of that judgment? Neither the good faith of the defendant nor its error in law are factors to be considered. The Supreme Court, of course, was fully aware of the defendant's legal position on contraventions of Gibson J.'s reasons for judgment and yet did not include that factor in its directions to this court. [my emphasis]

Likewise, in the present case, Dr. Sherman and Apotex knew of MacKay J.'s Reasons for Judgment and committed acts in contravention of those Reasons.

56 This Court upheld Dubé J.'s decision in *Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.* [(1987), 14 C.P.R. (3d) 449 (Fed. C.A.)] on intent, although it reduced the penalty imposed from $100,000 to $50,000. Urie J.A. stated at page 454:

> Having said that, counsel conceded, correctly I think, that the presence or absence of good faith on the part of an alleged contemnor is not relevant in the determination of whether or not there was an act of contempt. It is relevant only in considering the penalty to be imposed, as a mitigating factor.

In fact, Urie J.A. went on to approve of Dubé J.'s comments and recited his words at page 456:

> Finally, the mandate of the Supreme Court of Canada to this court is crystal clear: two matters only are to be established: firstly, was there a knowledge of Gibson J.'s reasons for judgment and, secondly, was there a contravention of that judgment? Neither the good faith of the defendant nor its error in law are factors to be considered. The Supreme Court, of course, was fully aware of the defendant's legal position on contraventions of Gibson J.'s reasons for judgment and yet did not include that factor in its directions to this court.

> It is clear from the foregoing that the trial judge was well aware of the unavailability of the defence of lack of contumacity in respect of the contempt *per se*. However, it may be that he did not consider that non-contumacious conduct can be a mitigating factor on the question of penalty. [my emphasis]

Thus, a lack of intent to interfere with the orderly administration of justice or to act with contempt is only relevant to the question of penalty, and the only reason the fine was reduced by Urie J.A. was that the trial judge had failed to appreciate that. Thus, while non-contumacious conduct is not a defence to a finding of contempt *per se*, it can be a mitigating factor in the determination of penalty.

57 The Appellants only cite a few cases in their factum to support the proposition that the prosecutor must show that the alleged contemnor wilfully intended to disobey the Court by doing the act prohibited. While referred to in their factum, the Appellants did not mention these cases in oral argument. First, in *Skipper Fisheries Ltd. v. Thorbourne*, [1997] N.S.J. No. 56 (N.S. C.A.), the Nova Scotia Court of Appeal found that Skipper Fisheries Ltd. ("Skipper"), charged with contempt, did not wilfully flout the Court order by failing to disclose information. However, this case can easily be distinguished on its facts. Skipper was the plaintiff in the main action in which it claimed damages relating to a fishing boat. Skipper was found in breach of the rules for non-disclosure of documents and was found to be in contempt of court for this non-disclosure. The trial judge dismissed Skipper's action as a punishment. The majority of the Court of Appeal found that the order was unclear and ambiguous, as it did not require disclosure by a specific date. As a result, Skipper did not technically disobey its terms. The Court held that in order to actually dismiss the main action for damages as punishment for contempt there must be proof of a deliberate breach. The Court stated at paragraph 89:

> <u>The dismissal of the action</u> is only to be ordered in the case of a willfully disobedient party, not of one who had made a mistake on the advice of counsel or otherwise - and it is done only in the last resort.... In general, another opportunity is given to act properly and answer the questions, even after an order has been made and disobeyed... [my emphasis]

Therefore, this case does not support the Appellants' position. This case should not be taken out of context - it deals with the appropriateness of the dismissal of a main action as a punishment for contempt. It deals primarily with penalty, and not contempt *per se*.

58 Second, the Appellants cite *Canada Games Co. v. Hasbro Canada Inc.*, [1989] F.C.J. No. 500 (Fed. T.D.) to support their position on intent. However, this case, too, can be distinguished on its facts. An order was made against the defendants, Hasbro Canada Inc. ("Hasbro"), requiring them to file with the plaintiff, on a monthly basis, information on the sales figures of a toy allegedly infringing the plaintiff's trade-mark. The defendants appealed the order, arguing that the information was valuable confidential commercial trade information, and applied for a stay of execution of this interim order, pending the appeal. Joyal J. for the Federal Court, Trial Division refused to stay the order, but decided to amend the order to provide for the protection of the information. There was also a motion before the Court, in which the plaintiffs alleged that the defendants had breached the order by failing to provide the sales figures information. Counsel for the defendants said the technical breach was a mistake and was not wilful, in that they thought

that the filing of an appeal in the Quebec courts automatically stayed the execution of the order. Joyal J. dismissed the motion, but gave costs to the plaintiff. Thus, in its very short reasons, the Court dealt with both an application to stay the order and a motion by the plaintiffs to have the defendants show cause for breaching the same order. Considering that the trial judge amended the order to allow for the protection of the information demanded and said to be the cause of the breach, I cannot think that his decision to dismiss the motion for the show cause order was fully based on the lack of "wilfulness" on the part of the defendants. Therefore, this case does not assist the Appellants in demonstrating their point.

59 The Appellants also refer to *Beverley Hills Home Improvements Inc. v. Greenberg* (1993), 47 C.P.R. (3d) 66 (Ont. Gen. Div.) in support of their proposition that the prosecution must prove beyond a reasonable doubt that the accused deliberately acted so as to interfere with the orderly administration of justice, but the Court actually said the exact opposite at page 83:

> It is not necessary to establish that the alleged contemner intended to put himself in contempt; that is, actual intent to interfere with the course of justice is not required. See for example, *R. v. Perkins* (1980), 5 C.C.C. (2d) 369 (B.C.C.A.)...
>
> ...Appellant intended to and did write and publish respectively the impugned article that is the intent, the mens required; actual intent to interfere with [the] course of justice is not required.
>
> Conversely, breach of an injunction is not excused because the person committing it had no direct intention to disobey the order... Neither is it a defence to contempt proceedings that the activities were done reasonably with all due care and attention, in the belief, based on legal advice, that they were not breaches... [my emphasis]

60 Therefore, the jurisprudence establishes that it is not necessary to show that the alleged contemnor intended, by doing the action, to "interfere with the orderly administration of justice or to impair the authority or dignity of the Court". This is too high a level of intent to require in civil contempt cases. Rather, it is sufficient to find that the Court's intention was clear and that the alleged contemnor knowingly committed the prohibited act. For instance, Apotex must have intended to sell APO-ENALAPRIL - the sales must not have occurred accidentally. Good faith just goes to mitigation of sentence.

61 The Supreme Court of Canada case of *U.N.A. v. Alberta (Attorney General)* (1992), 89 D.L.R. (4th) 609 (S.C.C.) provides further support for the proposition that the intent as alleged by the Appellants is not required for civil contempt, such as in a patent case. At pages 636-637 the Court states:

> A person who simply breaches a court order, for example by failing to abide by visiting hours in a child custody order, is viewed as having committed civil contempt. However, when the element of public defiance of the courts's process in a way calculated to lessen societal respect

for the courts is added to the breach, it becomes criminal. This distinction emerges from *Poje v. British Columbia (Attorney General)*, [1953] 1 S.C.R. 516:

> The context in which these incidents occurred, the large numbers of men involved and the public nature of the defiance of the order of the court transfers the conduct here in question from the realm of a mere civil contempt, such as an ordinary breach of injunction with respect to private rights in a patent or trademark, for example, into the realm of a public depreciation of the authority of the court, tending to bring the administration of justice into scorn.
>
> . . . . .
>
> To establish criminal intent the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge, or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea)*.
>
> . . . . .
>
> While publicity is required for the offense, a civil contempt is not converted to a criminal contempt merely because it attracts publicity, ... but rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended, or was reckless as to the fact that the act would publicly bring the court into contempt. [my emphasis]

These statements indicate that the subjective knowledge submitted by the Appellants as a requirement for contempt in this case is in fact the level of subjective intent which sets criminal contempt apart from its civil counterpart. In the present case, which is a civil contempt involving a patent infringement action, this level of intent is just not required.

62 In *R. v. Hill* (1976), 73 D.L.R. (3d) 621 (B.C. C.A.), where a lawyer did not show up for court, the British Columbia Court of Appeal stated at page 629 that "an intent to bring a Court or Judge into contempt is not an essential ingredient of this offence". Likewise, in *Sheppard, Re* (1976), 67 D.L.R. (3d) 592 (Ont. C.A.), where the appellant was held in contempt of an order restraining him from leasing or renewing leases of the matrimonial home, the Ontario Court of Appeal stated at page 595:

> We are all of the view, therefore, that in order to constitute a contempt it is not necessary to prove that the defendant intended to disobey or flout the order of the Court. The offence consists of the intentional doing of an act which is in fact prohibited by the order. The absence of the contumacious intent is a mitigating but not an exculpatory circumstance.

63 It should be pointed out that in their written factum the Appellants did not argue that the *Canadian Charter of Rights and Freedoms* supported their argument *with respect to intention*, nor did the Appellants even bring up the *Charter* in their oral argument in chief during the hearing. Obviously, the Respondents in their argument before this Court also did not mention the *Charter*.

The *Charter* is not mentioned by MacKay J. in his Reasons and it would appear not to have been raised before him. Counsel for Dr. Sherman for the first time devoted a very small part of his self-described five minute reply, to the *Charter* with respect to this issue, where he asserted that the level of intent suggested by the Respondents could never survive a section 7 *Charter* challenge. Clearly, the *Charter* was not an issue on this point, and, consequently, I have not addressed it.

2. Were the Reasons by MacKay J. Clear?

64 Apotex argues that its interpretation of the Reasons and the announced injunction therein was reasonable having regard to the history and context of the proceedings, specifically MacKay J.'s earlier dismissal of Merck's motion for an interim injunction. I do not see that any significance can be attached to this dismissal of the interim injunction motion. The fact that a motion for an interim injunction was dismissed, thus permitting the defendant to continue selling the product in question while the trial proceeded, cannot be used to interpret the Reasons for Judgment issued at the end of that trial. This is especially the case when these Reasons later found that the activity for which the interim injunction was sought to prevent, constituted infringement for which a permanent injunction was granted. Indeed, quite the opposite conclusion should be drawn.

65 The following aspects of the history of the litigation between Merck and Apotex involving enalapril are relied upon by Apotex to buttress its position that its interpretation of the Reasons was reasonable:

(i) that Apotex had been marketing and selling its enalapril maleate products throughout the preceding 14 months;

(ii) that the continued sale of Apotex' enalapril maleate tablets had been shown not to cause irreparable harm to Merck;

(iii) that whatever losses Merck was shown to have suffered as a consequence of Apotex' sale of enalapril maleate tablets would be entirely recovered if Merck succeeded;

(iv) that Apotex was maintaining an accurate record of all sales of its enalapril maleate tablets, and that these documents were available to Merck and the Court in determining any question of damages or the appropriate quantum if Merck elected to seek an accounting of profits;

(v) that the Court had reserved its decision on the merits for eight months, and there was no suggestion that the Court's earlier conclusions on the question of irreparable harm and the adequacy of damages had changed during this time;

(vi) MacKay J. had indicated that he intended to accommodate the parties following the release of his Reasons, allowing them to speak to the question of the relief to be granted, if any, and then stated in the Reasons themselves that it was appropriate to do so, "in particular since judgment will be rendered after a delay following trial...".

In my opinion, these points do not somehow render the Reasons "uncertain". The Reasons are clear. Apotex was enjoined. MacKay J. was fully familiar with this litigation, including the fact that Apotex had been marketing and selling APO-ENALAPRIL for a year and a half and that Merck had failed prior to trial to obtain an interlocutory injunction. It was with this knowledge that he declared that a permanent injunction should issue, in addition to an order for delivery up of all enalapril product held by Apotex. In fact, the Appellants conceded in oral argument that no one was more aware of the context and history of the proceedings than MacKay J., who had been presiding on the matter since its inception as a patent infringement action in 1991.

66 Apotex also points to MacKay J.'s Direction, issued in response to Mr. Radomski's letter to the Court requesting an emergency conference, as demonstrating that no injunction was intended to be immediately effective in the Reasons and as permitting Apotex to continue selling APO-ENALAPRIL during the interim period before the Judgment was filed. However, all that MacKay J. directed on December 16, 1994 was that the judgment had not yet been entered and that therefore there was no judgment in place to which a stay could apply. MacKay J. did not suggest that his Reasons for Judgment would be varied or that Apotex could continue to sell. It is trite law that the Court will not "stay" reasons for judgment. MacKay J. reasonably responded to "a proposed motion to stay implementation of the Reasons pending hearing of a motion to stay an injunction" by simply observing that "there was nothing to be stayed or appealed until judgment was filed". Surprisingly, Mr. Radomski's letter did not even hint that Apotex had been selling, and planned to continue to sell, APO-ENALAPRIL. Therefore, MacKay J.'s response cannot be taken as responding to the notion that continued selling was permitted. In fact, MacKay J. stated at paragraph 8 of his Reasons for Judgment in the contempt proceeding, rendered on March 7, 2000, the following:

> At that stage the Court was not aware of the correspondence between counsel or of the position taken by Apotex that it was free to continue, or that it did continue, selling Apo-Enalapril, which the Reasons had concluded was product infringing upon Merck's patent interests.

67 Apotex further points to the fact that the filed Judgment differed from the Reasons to support the notion that the Reasons were unclear and that Apotex' interpretation of the Reasons as allowing the sale of APO-ENALAPRIL in the interim period was reasonable. However, as discussed above, the Judgment in *Baxter v. Cutter*, *supra* also differed from the Reasons in that case, and the Supreme Court in *Baxter* still considered the Reasons to be clear and unambiguous despite these changes. In any event, in the present case there was no change to the paragraph which provided that a permanent injunction would issue. There was no ambiguity in the Reasons on this point.

68 In light of my conclusion that an intention to subvert the process of the court is not required to prove contempt of court, but only goes to mitigation of sentence, it is unnecessary to analyse MacKay J.'s reasons on the issue of subjective intent. However, because the Appellants focus

so much on the "reasonableness" of their interpretation of the Reasons to support the argument that they lacked any subjective intent to interfere with the orderly administration of justice, I will examine the Reasons to demonstrate that MacKay J. did not find this "reasonableness" credible and did not subscribe to the view that his Reasons were unclear. In my view, MacKay J. concluded that Dr. Sherman, his counsel, and his fellow staff could not have reasonably interpreted the Reasons in the manner in which they did. Indeed, MacKay J. seemed to find the story unbelievable, for at paragraph 35, he stated:

> Dr. Sherman qualified his understanding, when cross-examined, by referring to the paragraphs of the Reasons quoted above in paragraph 6, which referred to delay and asked counsel to consult on appropriate terms of final Judgment, as counsel had requested at the conclusion of trial. Those paragraphs he read as implying, without any expressed indication in the Reasons, that the relief, including presumably the declaration of infringement, the permanent injunction and the order for delivery up were not to be effective until some unspecified date. A determination of this sort, which Dr. Sherman inferred from his reading of the Reasons for Judgment, would be so extraordinary, in my opinion, that the Reasons would only be so understood by persons knowledgeable about the legal process, as Dr. Sherman is by reason of his direction of legal affairs for Apotex, and counsel for Apotex is, if the Court had clearly expressed an intention that its findings and conclusions should be considered to be effective only at some specified time in the future. No such express wording of the application of the findings and conclusions is set out in the Reasons. [my emphasis]

Simply put, MacKay J. expressed the view that no person such as Dr. Sherman, who was responsible of legal affairs for Apotex, and no person such as Mr. Radomski, a very knowledgeable lawyer, could construe the Reasons for Judgment as meaning that the permanent injunction and order for delivery up would only become effective at some unspecified future date. Such a interpretation is not only unreasonable but unbelievable in these circumstances. Thus, in my opinion, MacKay J. did not accept Apotex's explanation for the December sales, and his comments about "subjective intent" in paragraph 38 should be read in this context.

69 In paragraph 38, MacKay J. stated the following:

> It may be that subjectively Dr. Sherman did not intend to violate the injunction provided for in the Reasons, or to subvert the process of the Court. However,
>
> ...in order to constitute a contempt it is not necessary to prove that the defendant intended to disobey or to flout the Order of the Court. The offence consists of the intentional doing of an act which is in fact prohibited by the Order. The absence of the contumacious intent is a mitigating factor but not an exculpatory circumstance.
>
> Apotex did, and so did Dr. Sherman do, just what he intended. Apo-Enalapril product was sold, and sold in quantity, after the Reasons for Judgment specifying Merck's entitlement to

a permanent injunction were read by officers and by counsel of Apotex. By so doing both Apotex and Dr. Sherman, in my opinion, committed contempt. In the words of Dickson J. in *Baxter v. Cutter*:

> ...Once reasons for decision have been released, any action which would defeat the purpose of the anticipated injunction undermines that which has already been given judicial approval. Any such action subverts the processes of the Court and may amount to contempt of court. [my emphasis]

It is clear from the jurisprudence that subjective intent is irrelevant to the issue of the contempt, and only goes to mitigation of sentence. MacKay J. realized and adverted to this. Thus, in my opinion, MacKay J.'s comment about subjective intent in his Reasons for Judgment is not important to his finding of contempt, as it is only relevant to penalty. This comment does not provide any support for the Appellants' argument that their interpretation of the Reasons was reasonable.

70 In my opinion, MacKay J. was correct in saying that the Reasons for Judgment in the patent infringement action were clear and unambiguous, and did not reasonably lend themselves to the interpretation alleged by the Appellants. There was no significant difference between MacKay J.'s Reasons for Judgment and those found to be clear in *Baxter v. Cutter*, *supra*, and the history and context of the litigation in no way supports the position that the Reasons allowed for the Appellants to reasonably interpret the Reasons in the manner they did.

71 If Apotex and Dr. Sherman had wanted to continue selling APO-ENALAPRIL after the Reasons for Judgment were rendered on December 14th, what should they have done? Rather than assuming that the Reasons did not impose an immediate injunction on the basis of the history and context of the proceedings, the Appellants should have applied to the Court to settle the terms of the judgment immediately and should have sought a provision allowing the continuation of sales. The Appellants should have *openly* sought directions as to whether they could continue to sell APO-ENALAPRIL in the interim period before the Judgment was filed. Instead, the Appellants avoided seeking an answer to the real question which they needed answered and simply assumed the risk that its actions would not be found to be contemptuous. The very fact of Appellants' admitted reversals from selling to non-selling indicates that they knew, at a minimum, that they might well be mistaken in their "interpretation" of the Reasons. They should not be rewarded for taking this risk.

72 Federal Court case law supports these propositions. In *Lubrizol Corp. v. Imperial Oil Ltd.* (1994), 58 C.P.R. (3d) 167 (Fed. T.D.); varied on another point relating to exemplary damages [1996] 3 F.C. 40 (Fed. C.A.) "*Lubrizol*"], the defendant was enjoined from manufacturing and selling a product called ECA 10444, but went on to manufacture and sell a product called ECA 10271. In the Reasons for Judgment following trial, it had been held that ECA 10444 and ECA 10271 were the same product. As a result, the defendant was enjoined from such conduct. The

Federal Court, Trial Division found that exemplary damages were appropriate and ordered them in the amount of $15 million with costs on a solicitor-client basis to reflect the indignation of the Court. Despite that this Court varied the judgment on appeal with respect to exemplary damages because Lubrizol had not been given a sufficient opportunity to present evidence on this matter, the Court's statement at page 170 about this "never-ending saga", in which the defendant chose to defy the interlocutory injunction imposed against it rather than lose an important customer, was not overruled in any way on appeal:

> I have also determined that the breach was a deliberate, flagrant and callous disregard of the injunction. If Imperial Oil were of the honestly held view that ECA 10271 did not violate the patent, it would have been an easy process to apply to the court, or, probably more correctly to Reed J., for an order declaring that ECA 10271 was a different product than ECA 10444. This approach would have been the correct one rather than barrelling ahead with manufacturing and eventually selling to Shell their alleged new product. (page 170)
>
> . . . . .
>
> They took that risk, when guidance from the court was available, and must face the consequences. (page 173) [my emphasis]

Likewise, Apotex took the risk in continuing APO-ENALAPRIL sales, when guidance from the Court was readily available, and must now face the consequences. As stated by the Federal Court, Trial Division in *Canada (Attorney General) v. First National Export & Import Co.* (1996), 66 C.P.R. (3d) 1 (Fed. T.D.) at page 2, "obeying court orders is not a game. The defendant in this case treated it as such."

3. Conclusion with Respect to December Sales

73 Therefore, in my opinion, the Appellants' actions meet the proper test for finding contempt. The test to apply asks the following two questions: (1) Did the alleged contemner have the knowledge of the prohibitions in the reasons for judgment?; and, (2) Was there an act that constituted a contravention of a prohibition therein? MacKay J.'s Reasons were clear and unambiguous and the Appellants had read those Reasons - Apotex and Dr. Sherman understood that the Reasons were unfavourable to them, that their product had been found to be infringing Merck's patent, and that a permanent injunction was part of the relief granted. They also knowingly committed the prohibited act - the selling of APO-ENALAPRIL. Therefore, I agree with MacKay J. that Apotex was in contempt of court on this issue.

B) Contempt Involving Post-January 1995 "Aiding and Abetting" of Third Party Sales

74 It is important at this point to review MacKay J.'s reasoning with respect to finding contempt for these actions. He stated at paragraph 50 that "it is unnecessary to determine whether or not these transactions were sales in the traditional sense, by Apotex", but concluded that the actions of Apotex interfered with the orderly administration of justice and impaired the authority and dignity

of this Court. Despite the fact that the Court's Order on January 9, 1995 expressly excluded (from the application of the injunction) sales of APO-ENALAPRIL by third parties who acquired the drug in good faith, MacKay J. concluded that these transactions were unacceptable because Apotex financially committed itself to these third parties and treated some transactions as if they were sales made directly by Apotex to third party purchasers. They were not transactions exclusively between third parties. The Apotex argues that MacKay J. erred in this analysis because third party sales were legally exempted from the injunction, and one cannot be found to be "aiding and abetting" an act when the act assisted was a legal act. I agree with this argument. The provision of assistance by Apotex to such third parties, whether financial or otherwise, does not amount to contempt. If such selling by third parties was not prohibited, then surely there cannot be anything wrong with assisting such legal transactions. This is the simple answer to this charge.

75 The Respondents argued, *inter alia*, that Apotex made sales during this period which were in breach of the injunction. Indeed this may well be the case. For example, there are at least 11 transactions in which Apotex filled out a Returns Form for, and issued a credit for, returned enalapril to its customers. In turn, Kohlers appears to have received the returned goods. Then the goods were sold to another customer. For example, in one such transaction, Apotex filled out a Returns Form, and issued a credit for the return of enalapril to its customer. The amount of the credit issued to this customer for an "overstock" of enalapril corresponds with the amount indicated as the value of the enalapril returned to Kohlers on the Kohlers's Daily Customer Returned Goods Report, dated the day after the Apotex Form was filled out. Kohlers' customer was listed as Apotex, and the product numbers, strengths, sizes, and prices matched with those on the Apotex Returns Form. It would appear that this was a sale by Apotex. All of these transactions suggest that Apotex was actually selling enalapril, despite the Order enjoining them from doing so.

76 However, the Trial Judge found that it was unnecessary to determine whether these transactions were sales. Presumably, this was because the Show Cause Order did not charge Apotex with contempt by making sales during this period. The show cause Order stated:

> (1) an Order pursuant to Rule 355 of the *Federal Court Rules* that Bernard Sherman ..., Jack Kay, ... appear before this Court ... to show cause why they and the defendant herein should not be condemned for contempt of this Court for:
>
> . . . . .
>
> > (b) acting in such a way as to interfere with the orderly administration of justice, and impair the authority and dignity of this Court, by selling and causing to be sold, distributing and removing ... during the period between December 14 and 22, 1994 ... and by aiding and abetting in the transfer, distribution and sale by third party wholesalers, pharmacy chains and pharmacists or [sic] APO-ENALAPRIL tablets among themselves throughout Canada during the period January 9, 1995 to date,
>
> . . . . .

> Rather, the Show Cause Order merely charged Apotex with contempt of court by selling during the period between December 14 to 22, 1994, and with aiding and abetting third party sales during the period January 9, 1995 to April 27, 1995. Thus, even though there may have been sales by Apotex during this latter period, since the Show Cause Order did not make this a charge against Apotex, Apotex cannot be found in contempt.

77 Therefore, the Trial Judge erred in concluding that, by providing assistance to third parties in selling and distributing, Apotex had interfered with the orderly administration of justice. The Order of January 9, 1995 expressly permitted such sales and distributions. Merely providing assistance does not put Apotex in contempt of court.

C) Prosecutorial Misconduct

78 Apotex argued two motions in the Trial Division with respect to this issue. First, Apotex argued a preliminary motion (prior to the contempt hearing). The Order dismissing this motion was appealed to this Court and dismissed. Leave to appeal to the Supreme Court of Canada was also dismissed. Second, Apotex argued the issue in a motion at the close of the prosecutor's case in the contempt hearing. Many of the grounds for disqualifying Gowlings as counsel for Merck in this second motion were also argued in Apotex' first preliminary motion. Primarily, the only new evidence of this "improper behaviour" presented by Apotex in this second motion was provided by complaints about Merck's lack of disclosure and its improper use of privilege. Consequently, this issue has been repeatedly argued, with little alteration in its argument. MacKay J. dismissed Apotex' second motion at the close of prosecution's case in the contempt hearing stating that, while the activities of counsel for Merck were not "above criticism in all respects", he was "not persuaded" that the Court should dismiss or stay the proceedings because there was no abuse of process or manifest unfairness to Apotex to warrant such a stay or dismissal. He was not persuaded that Apotex's right to full answer and defence was prejudiced by the lack of disclosure or by any alleged abuse. With respect to the concern about impartial counsel and the need for a public prosecutor, MacKay J. had this to say at paragraph 33:

> The same theme, then based on the moving parties' concerns before the commencement of these proceedings, underlay their preliminary motion... That earlier motion was dismissed by Order dated January 23, 1996. In Reasons for that Order I commented, at [1996] 2 F.C. pp. 245-6:
>
> > I am not persuaded that the proceedings now initiated before the Court demand special arrangements for their prosecution, aside from those already established by jurisprudence of this Court in relation to contempt proceedings under Rule 355, and applicable principles under the *Charter*... It is the responsibility of the Court to ensure that in the proceedings, rules of fundamental justice and due process of law are followed.

79 I do not see any reason to disturb the findings of MacKay J. on this issue. A dismissal or stay of proceedings for an abuse of process is an extraordinary remedy and one where it is necessary to show that the abuse "must have caused actual prejudice of such magnitude that the public sense of decency and fairness is affected". The test is an onerous one: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.), at para. 133; *R. v. Regan* (2002), 282 N.R. 1 (S.C.C.) at para. 53-57. MacKay J. found that none of the Appellants complaints supported a dismissal or a stay of proceedings, as the Appellants were not prejudiced in their right to make full answer and defence. The Trial Judge was the person in the best position to assess the significance of the conduct in question, and he found no evidence that would have affected the fairness of the trial. In my opinion, this Court cannot intervene in this decision absent a palpable and overriding error affecting the Trial Judge's assessment of the facts, a finding that the Trial Judge misdirected himself, or a finding that the decision is so clearly wrong as to constitute an injustice: *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.), at 427-429. The Appellants have not established any such error.

D) Sentence

80 The Appellants argue that the fines relating to both Apotex and Dr. Sherman are too high. The Respondents assert in their cross-appeal that, while the fine relating to Dr. Sherman is appropriate, the fine relating to Apotex is much too low.

81 In this case, MacKay J. appeared to take the relevant factors relating to sentencing into account. He considered Dr. Sherman's letter of apology; the activities of the contemners; the nature and severity of the contempt (the gravity of the offence); past conduct; deterrence; and the fact that the actions taken were based, at least partially, on the legal advice conferred by Mr. Radomski.

82 There is an area, however, where his reasoning on sentence is suspect, and that area relates to the principle of deterrence. MacKay J. stated at para. 12:

> There is no record of any such failure on the part of Apotex or Dr. Sherman before this. There is no reason to expect that this failure will re-occur. There is Dr. Sherman's assurance to that effect, and he and Apotex will know that it cannot be said hereafter they have not previously been found to be in contempt. In my view, deterrence of Apotex or others, from future similar acts of contempt, is to be considered, but it is not a factor to be given great weight in penalties assessed in this case. [my emphasis]

Although he mentioned the deterrence of "others", he did not seem to focus on this factor. Rather, he seemed to be merely directing his mind to the deterrence factor as applied to Apotex and Dr. Sherman. In my view, in a fact situation such as the present one, deterrence of other corporations is an important consideration, and I have some difficulty with his statement that deterrence is not a factor to be given great weight in this case.

83 Mr. Justice E.G. Ewaschuk's comments in *Criminal Pleadings & Practice in Canada*, 2nd ed., Volume 1 (Aurora: Canada Law Book Inc., 2002) at page 18:0380 support the importance of deterrence in cases involving corporate offenders:

> In sentencing a corporate offender, the trial judge must, keeping in mind that a corporation cannot be imprisoned and that general deterrence of other corporations is the prime consideration especially in relation to commercial crimes, impose a substantial and exemplary monetary penalty designed to prevent the corporation from retaining illegally acquired profits and not so small as to be regarded as a licence fee to be passed on to its customers. To determine a fit penalty, the trial judge should consider, along with other relevant factors, the size, scale and nature of the accused's operations and the premeditation and deliberation involved in committing the offence. [my emphasis]

84 In *Baxter v. Cutter*, *supra*, this Court upheld the sentence imposed by Dubé J. and stated that he had not made an error in law in using as a guide for the determination of the magnitude of the fine a percentage of the value of the sales of the offending product. Thus, to determine a fit penalty, MacKay J. should not have de-emphasized the importance of deterrence considering the value of the infringing sales in the present case, and the fact that a corporation was involved.

85 In addition, deterrence is a particularly important factor in sentencing involving contempt cases. In *Health Care Corp. of St. John's v. N.A.P.E.*, [2001] N.J. No. 17 (Nfld. T.D.), Green C.J. for the Newfoundland Supreme Court outlined the importance of deterrence as a sentencing principle in the contempt context:

> 2. Deterrence, both general and specific, but especially general deterrence, as well as denunciation, are the most important factors to be considered in the imposition of penalties for civil, as well as criminal, contempt.

86 The reasoning of this Newfoundland case was adopted by the Canadian Judicial Council in its May 2001 publication, *Some Guidelines on the Use of Contempt Powers*. At pages 40-41, the Council quoted Green, C.J.'s comments in *Health Care*, *supra*:

> **As Green, C.J. has stated:**
>
> [I]t can be said that no judge relishes the idea of having to initiate proceedings for contempt with the possibility of imposing sometimes severe penalties, including deprivation of liberty and significant financial penalties, on citizens who may often be completely law-abiding and respectful of the law in other respects. No court wants to do that, but it will and must do it if confronted with actions that amount to violations of its lawful orders....

For cases involving failure to obey an injunction, Green C.J. set out the following helpful sentencing principles:

. . . . .

> 2. Deterrence, both general and specific, but especially general deterrence, as well as denunciation, are the most important factors to be considered in the imposition of penalties for civil, as well as criminal, contempt.

87 Interestingly, in a recent Ontario Superior Court of Justice judgment, *West Lincoln (Township) v. Chan*, [2001] O.J. No. 2133 (Ont. S.C.J.), a case involving civil contempt, the Court stated at paragraph 37:

> The primary purpose of contempt proceedings is deterrence both general and specific. The punishment for contempt should serve as a disincentive to those who might be inclined to breach court orders. Our legal system is severely weakened when court orders are ignored. In most cases, I think, deterrence is not achieved merely by the act of getting caught. In other words, the simple purging of the contempt usually is an inadequate punishment. Imagine the societal chaos if, for example, a bank robber could purge his crime supply by returning the money. [my emphasis]

88 Furthermore, deterrence is a factor not to be minimized in the area of intellectual property. As stated by the Federal Court, Trial Division in *Louis Vuitton S.A. v. Tokyo-Do Enterprises Inc.* (1990), 37 C.P.R. (3d) 8 (Fed. T.D.) at page 13, it is important to deter the violation of protective injunctions in intellectual property cases:

> If those who get caught were to get away unscathed that would encourage such activities and consequently destroy the intended effect of the laws that have been passed, especially with respect to the protection of intellectual and industrial property.
>
> Even if Apotex, itself, was unlikely to commit further contempts of court, there is a general deterrent effect to be taken into account in relation to intellectual property matters involving other corporations.

89 Therefore, where a corporation has committed contempt in relation to an intellectual property matter, deterrence is a matter which merits serious consideration. A corporation cannot be imprisoned, so the only penalty that can be imposed is a fine. Where, as here, a corporation has, by its contemptuous act, sought to increase its own profits, the fine must not be so small as to amount to a mere licence fee, which other corporations, in contemplation of similar activity, can simply budget for. In my view, the December sales are a very serious contempt, as demonstrated by the $9 million in sales that occurred on the day the Reasons were released without informing MacKay J. of these actions. A nominal fine in the range suggested by Apotex would be insufficient.

90 While the matter could be remitted to the Trial Judge for reconsideration, it must be remembered that this litigation has been ongoing for more than 10 years. There is no point in extending this litigation unnecessarily, and for this reason I intend to exercise the power given to this Court in subparagraph 52(b)(i) of the *Federal Court Act*, R.S.C. 1985, c. F-7, and deal with the issue of quantifying the sentence.

91 In quantifying the sentence, I consider the following points. MacKay J. imposed a fine of $250,000 on Apotex, but he did not allocate this amount as between the contempt relating to the December activities and the post-January 9th activities. It must also be remembered that he considered there to be mitigating circumstances relating to the December activities which, it might be argued, would have the effect of reducing the fine for that contempt. On the other hand, as I have said, MacKay J. erred in giving little weight to the factor of deterrence, an error that would have the effect of increasing the fine. I must also take into account that the finding of contempt relating to the post-January 9th sales must be set aside.

92 Taking into account all of these various considerations, I would reduce the fine against Apotex Inc., to $125,000.00. I would not change the fine against Dr. Sherman, set at $4,500.00, because this personal fine imposed against Dr. Sherman is only with respect to the December sales and has nothing to do with the second period of contempt. I can find no serious error in the reasoning of the Trial Judge in this respect.

E) Costs

93 I do not think that, as a matter of principle, it was inappropriate for MacKay J. to award costs against the Appellants on a solicitor and client basis. In fact, many authorities indicate that this is the customary practice in contempt cases. In *Pfizer Canada Inc. v. Apotex Inc.* (1998), 86 C.P.R. (3d) 33 (Fed. T.D.) ["*Pfizer*"] for instance, Hugessen J. for the Federal Court, Trial Division stated at page 35:

> It is, of course, customary, in matters of this sort, to require that persons found guilty of contempt pay costs on a solicitor and client basis to the party who has brought the matter to the court's attention. The policy underlying the jurisprudence is clear: a party who assists the court in the enforcement of its orders and in the enforcement of respect for its orders, should not, as a rule, be put out of pocket for having been put to that trouble. [my emphasis]

Also, in *Dimatt Investments Inc. v. Presidio Clothing Inc./Vêtements Presidio Inc.* (1993), 48 C.P.R. (3d) 46 (Fed. T.D.), MacKay J. for the Federal Court, Trial Division stated at pages 53-54:

> I ordered that reasonable costs, on a solicitor-and-client basis be awarded to the plaintiff. This accords with normal practice in a successful application for an order finding contempt,

> ensuring that the role of the party acting to support compliance with an order of the court does not result in undue costs for the applicant.

In addition, in *Innovation & Development Partners/IDP Inc. v. R.* (1993), 64 F.T.R. 177 (Fed. T.D.), Cullen J. for the Federal Court, Trial Division stated at page 181:

> In addition to imposing a fine, I shall order that reasonable costs on a solicitor-and-client basis be awarded to the defendant. In making this order as to costs, I am keeping with the normal practice of awarding costs on a solicitor-and-client basis to parties who have successfully prosecuted contempt proceedings, thereby ensuring that the party acting to support compliance with an order of the court does not bear the costs of proceedings that were necessary to maintain the orderly administration of justice. [my emphasis]

94 However, having regard to the fact that Merck has been unsuccessful with respect to the second period of contempt involving the January facilitation of third party sales, the award of costs must reflect this division of success. I would award solicitor and client costs to the Respondents at trial and on the appeal on all issues, except for the second period of contempt for which no costs will be awarded. The costs should be assessed by an assessment officer.

Conclusion

95 The appeal should be allowed in part by setting aside the finding of contempt relating to the post-January 9, 1995 time period, by reducing the fine for Apotex to $125,000 and by ordering costs as set forth in paragraph 94. The cross-appeal should be dismissed without costs.

***Stone J.A.*:**

I agree.

***Noël J.A.*:**

I agree.

Appeal allowed in part.

2021 FC 289, 2021 CF 289
Federal Court

Northcott v. Canada (Attorney General)

2021 CarswellNat 1050, 2021 CarswellNat 1780,
2021 FC 289, 2021 CF 289, 332 A.C.W.S. (3d) 746

TANYA NORTHCOTT (Applicant) and ATTORNEY GENERAL OF CANADA (Respondent)

Patrick Gleeson J.

Heard: February 1, 2021
Judgment: April 1, 2021
Docket: T-681-20

Counsel: Christopher Rootham, for Applicant
Helene Robertson, Elsa Michel, for Respondent

***Patrick Gleeson J.*:**

I. Overview

1 In 2004, the Applicant, Ms. Tanya Northcott, sought recognition of her status under the Indian Act, RSC 1985, c I-5 [Indian Act] through Indigenous and Northern Affairs Canada [INAC].

2 INAC determined that Ms. Northcott was ineligible for Indian status based on the then applicable registration provisions under the *Indian Act*, a decision that INAC maintained over a period of 15 years. In 2019, following the coming into force of certain amendments to the Indian Act, INAC recognized Ms. Northcott's Indian status (*An Act to amend the Indian Act in response to the Superior Court of Québec decision in Descheneaux c Canada (Procureur général)*, SC 2017, c 25, s 10.1 [Bill S-3]).

3 In 2015, prior to her status being recognized, Ms. Northcott filed a complaint with the Canadian Human Rights Commission [CHRC or Commission] in which she alleged (1) discrimination arising out of the refusal to recognize her status and (2) that the manner in which she was treated by INAC in the processing of her request was discriminatory.

4 In a decision dated April 22, 2020, the CHRC advised Ms. Northcott that it had decided not to deal with her complaint. The CHRC determined the complaint was trivial, a decision it reached

on the basis that section 10.1 of Bill S-3 prevents individuals from seeking compensation from the Crown for a past denial of status. Ms. Northcott now seeks judicial review of the CHRC decision pursuant to section 18 of the Federal Courts Act, RSC, 1985, c F-7.

5 INAC, the responsible department has used various names during the period relevant to this Application. I will refer to the department as INAC throughout these reasons.

6 After careful consideration of the written and oral submissions of the parties, I conclude that the Court's intervention is warranted. The CHRC's decision as it relates to the alleged discriminatory treatment of Ms. Northcott in the processing of her request for status is not reasonable. My reasons follow.

II. Background

A. The Indian Act and Bill S-3

7 Individuals are entitled to registration under the *Indian Act* based on their ancestry and the status, or entitlement to status, of their ancestors (Indian Act, s 6). Historically, status determinations for women who married a non-status man have disadvantageously differed from those applicable where a man married a non-status woman. Many of these provisions in the *Indian Act* have been removed or amended over the years.

8 In this regard, Bill S-3 addresses, in part, circumstances where women and their descendants have lost status due to marriage. The Bill also includes section 10.1, which provides that a right to claim compensation, damages or indemnity does not arise where a person newly entitled to registration as a result of the Bill S-3 amendments had previously not been registered:

> **No liability**
>
> **10.1** For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent of Her Majesty in right of Canada, or a council of a band, for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties, only because
>
> > (a) a person was not registered, or did not have their name entered in a Band List, immediately before the day on which this section comes into force; and
> >
> > (b) that person or one of the person's parents, grandparents or other ancestors is entitled to be registered under paragraph 6(1)(a.1), (a.2) or (a.3) of the *Indian Act*.
>
> **Absence de responsabilité**
>
> **10.1** Il est entendu qu'aucune personne ni aucun organisme ne peut réclamer ou recevoir une compensation, des dommages-intérêts ou une indemnité de l'État, de ses préposés ou

mandataires ou d'un conseil de bande en ce qui concerne les faits — actes ou omissions — accomplis de bonne foi dans l'exercice de leurs attributions, du seul fait qu'une personne n'était pas inscrite — ou que le nom d'une personne n'était pas consigné dans une liste de bande — à la date d'entrée en vigueur du présent article et que la personne ou l'un de ses parents ou un autre de ses ascendants a le droit d'être inscrit en vertu de l'un des alinéas 6(1)a.1), a.2) ou a.3) de la *Loi sur les Indiens*.

9 It was the Bill S-3 amendments that addressed Ms. Northcott's ineligibility allowing her to become eligible for status upon their coming into force in 2019.

B. The CHRA Complaint Process

10 The CHRC administers the complaint process established in the Canadian Human Rights Act, RSC 1985, c H-6 [*CHRA*]. Section 40 of the CHRA provides that any person who believes another party has engaged in a discriminatory practice may file a complaint with the CHRC. In administering the process, the CHRC acts as a screening body in relation to complaints based on the enumerated grounds of discrimination identified in the CHRA (s 3).

11 The CHRA defines discriminatory practices in sections 5 to 14.1. In providing services customarily available to the public, the CHRA provides that it is a discriminatory practice to "differentiate adversely in relation to any individual" on a prohibited ground of discrimination (s 5(b)).

12 The CHRC may designate an investigator to investigate the complaint (CHRA, s 43(1)). Upon the conclusion of the investigation, the investigator must submit a report of the findings of the investigation to the CHRC (CHRA, s 44(1)). This investigation report is referred to as the section 40/41 report.

13 The CHRC may dismiss a complaint if it is satisfied that an inquiry into the complaint is not warranted, (CHRA, s 44). The grounds for dismissal include those circumstances where the Commission finds a complaint to be trivial, frivolous, vexatious or made in bad faith (CHRA, s 41(1)(d)).

14 In performing its screening function and determining whether in response to a complaint an inquiry is warranted, the Commission may rely on the section 40/41 report. Where the Commission follows an investigator's recommendations without providing its own supplementary reasons, the CHRC decision's reasonableness depends mainly upon the rationality of the report's reasoning and the conclusions (Dupuis v Canada (Attorney General), 2010 FC 511 at para 15).

C. Ms. Northcott's Request for Status

15 In April 2004, Ms. Northcott requested that INAC recognize her status under the *Indian Act*. In May 2007 the request was denied — INAC was unable to establish whether either of Ms. Northcott's birth parents were themselves entitled to status and registration under the *Indian Act*.

16 In October 2010, Ms. Northcott protested the initial denial. In September 2011, the protest was refused on two grounds. First, the protest was initiated after the expiry of the three-year protest period identified in the original decision letter and therefore could not be accepted as a valid protest. Second, although changes to the *Indian Act* that came into force in January 2011 might have made her birth mother eligible for registration (Gender Equity in Indian Registration Act, SC 2010, c 18) it was not established that her birth father was eligible. As only one birth parent was entitled to registration under the Indian Act, INAC was unable to establish that Ms. Northcott was entitled to registration.

17 In June 2014, Ms. Northcott asked that her file be reopened and INAC agreed to do so. In April 2015, she filed the human rights complaint that is the subject of this Application.

18 In June 2017, INAC informed Ms. Northcott that she remained ineligible for registration. Following the Bill S-3 amendments to the Indian Act, INAC advised Ms. Northcott to reapply for status. On September 20, 2019, INAC confirmed that Ms. Northcott had become registered under the *Indian Act.*

D. The CHRC Complaint

19 Ms. Northcott's complaint alleges discrimination based on race, sex, and family status. First, she alleges that denial of status under the *Indian Act* based on her parentage is discriminatory. Second, she alleges that the long wait times she experienced in the processing of her request are attributable to inadequate staffing which reflected INAC's view that these were not important services for Indigenous persons, and that this too amounted to discrimination under the CHRA:

> ...I feel that if this was a segment of the Government that catered to the general public that it would not take such an unacceptable extraordinary long time for responding to queries; because it's an Aboriginal issue the Aboriginal Affairs and Northern Development Canada do not hire enough people to handle the case load because it's not considered an important service for Aboriginal people which is discrimination upon a person's Race.

20 The CHRC initially advised Ms. Northcott that the complaint would be held in abeyance as it challenged discriminatory impacts flowing from the wording of federal legislation, an issue that was before the Supreme Court of Canada for final determination. The Supreme Court issued its decision in Canada (Canadian Human Rights Commission) v Canada (Attorney General), 2018 SCC 31 in June 2018. Subsequently, an investigator was appointed and a section 40/41 report was completed.

21 Ms. Northcott suffers from Fetal Alcohol Spectrum Disorder. As a result, it often takes longer for her to comprehend what is being relayed to her, and she does not always understand information properly. Ms. Northcott did not identify this medical condition in her initial complaint, a matter that I address later in these reasons (see paragraph 36).

III. The CHRC Investigation

A. The Section 40/41 Report

22 The investigator found that the complaint raised an issue of whether, if the complaint was successful, a practical remedy was available. The investigator noted that allegations without a practical remedy may be "trivial" within the meaning of the CHRA.

23 The investigator recognized that prior to Bill S-3, the *Indian Act* contained provisions that discriminated against and negatively affected Ms. Northcott. However, the investigator found section 10.1 of Bill S-3 applied to Ms. Northcott's complaint. The investigator also noted that although the complaint alleged undue hardship in the registration process, the underlying issue was INAC's determination that Ms. Northcott was ineligible for status under the *Indian Act*. As such, the investigator found section 10.1 also prevented the Tribunal from ordering any useful remedy in respect of this part of the complaint. Having concluded damages could not be awarded for either claim, the investigator found that "there does not appear to be any practical remedy that the Tribunal could order with respect to the issue of obtaining Indian Status." Without a practical remedy, the investigator concluded all the allegations were trivial as provided for at paragraph 41(1)(d) of the CHRA and recommended that the CHRC not deal with the complaint.

24 The section 40/41 report was provided to the parties for comment. Ms. Northcott provided submissions on the report and counsel for the Respondent provided a response to Ms. Northcott's submissions.

B. Ms. Northcott's Response to the 40/41/Report

25 In responding to the section 40/41 report, Ms. Northcott took the position that section 10.1 of Bill S-3 did not apply to her. She maintained her claim that her Indian Status was denied prior to Bill S-3 because of a discriminatory policy, not because of requirements under the *Indian Act*. She further submitted that Section 10.1 blocks claims for damages against the government related to past denials of Indian Status "for anything done or omitted to be done in good faith." and that the INAC policy requiring that she prove the identity of her birth father coupled with the lengthy processing delays amounted to bad faith conduct.

26 She further alleged that INAC's bad faith conduct continued after the submission of her complaint after her status was recognized in 2019, in the context of her attempts to obtain a Secure

Certificate of Indian Status [Status Card]. She alleged that INAC: (1) was not sensitive to her Fetal Alcohol Spectrum Disorder; (2) she again experienced lengthy process delays; (3) call back practices were unreasonable; and (4) an INAC employee hung up on her and she was left believing that her file would be closed if documents were not submitted by defined dates. She reports this caused her distress because she thought closing her file meant she would lose her status under the *Indian Act*.

C. The Respondent's Response to the 40/41 Report

27 The Respondent submitted the complaint was moot because Ms. Northcott's status had been recognized. The Respondent noted that Ms. Northcott's request for Indian Status was not denied because she could not prove her birth father; this information was known to the Respondent at the time. Instead, the issue was that her birth father was not entitled to registration. The Respondent notes that Ms. Northcott's status request was denied because she did not meet the requirements of section 6 of the Indian Act at the time.

28 In addressing the alleged bad faith, the Respondent submitted there was no evidence that Ms. Northcott's Indian Status registration was deliberately denied or delayed with the intent to harm her. The Respondent also argued that Ms. Northcott's treatment when obtaining a status card and any alleged failure to account for her Fetal Alcohol Spectrum Disorder were new issues not raised in her original complaint.

IV. Decision under Review

29 In dismissing Ms. Northcott's complaint the Commission issued no supplementary reasons, relying on the recommendation of the investigator and the section 40/41 report.

V. Issues and Standard of Review

30 Ms. Northcott argues that the CHRC erred in dismissing the whole of her complaint on the basis that section 10.1 of Bill S-3 prevented the tribunal from ordering any practical remedy because the decision unreasonably:

> A. focuses exclusively on the first part of the complaint and thereby fails to address whether the second part the complaint was barred by section 10.1; and
>
> B. interprets section 10.1 to be a bar to the second part of the complaint.

31 Decisions by the CHRC to dismiss complaints under CHRA section 41(1)(d) are reviewed on a reasonableness standard (Stukanov v Canada (Attorney General), 2021 FC 49 at para 28). A decision maker's interpretation of statute is also to be reviewed against a standard of reasonableness (Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para 115 []). In interpreting legislation "[a]dministrative decision makers are not required to

engage in a formalistic statutory interpretation exercise in every case," although the merits of their interpretation must still accord with the provision's text, context, and purpose (*Vavilov* at para 119-120). "Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements" (*Vavilov* at para 120).

32 A decision will be reasonable if it "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law" (*Vavilov* at paras 85).

VI. Analysis

33 In this Application, Ms. Northcott does not take issue with the conclusion that section 10.1 of Bill S-3 prevents her from claiming any compensation regarding the past denial of her status, the first part of her complaint. This aspect of the decision is reasonable

34 However, the CHRC's decision to dismiss the second part of Ms. Northcott's complaint is unreasonable. The decision, when read as a whole, does not disclose a chain of analysis supporting the conclusion that s 10.1 prevents the ordering of a practical remedy in respect of the second part of the complaint.

A. Failure to Address the Whole of the Complaint Renders the Decision Unreasonable

35 In responding to the section 40/41 report Ms. Northcott notes that section 10.1 of Bill S-3 is of application only if the government has acted in good faith. She takes issue with the conclusion that section 10.1 is of application because she alleges INAC had acted in bad faith in the processing of her request. She points to the lengthy delays, the lack of clear reasons for the refusals, the repeated requests that she supply documents, the difficulties in getting a response to her inquiries, the INAC call back process, and the failure to consider and accommodate her Fetal Alcohol Spectrum Disorder. She further highlights that the process issues were ongoing; she continued to experience them in the processing of her request for a status certificate.

36 The section 40/41 report details both aspects of the complaint. In summarizing the second part of the complaint, it is acknowledged that Ms. Northcott's allegations relating to process were ongoing in that she had experienced similar issues while seeking to obtain a status certificate. In this regard, I note that Ms. Northcott wrote to the Commission in December 2019 (Application Record at page 27) detailing her experience in obtaining a status certificate. She reported a conversation she had with an INAC official where she notified the official that she suffered from a brain injury and described its impact on her. She reported that the INAC official hung up on her and again complains of the INAC call back system. She specifically requests that the investigator include this letter as part of her complaint.

37 Despite Ms. Northcott's bad faith allegations, the section 40/41 report and the Commission's decision are silent on the issue. The report limits its consideration of the process complaint to a single paragraph finding that the underlying issue for this complaint was the ineligibility decision. It appears that the report takes the position that because the first complaint underlies the second, the second complaint should be addressed in the same manner as the first. Why this is so is not readily evident. There is no doubt that had the initial status decision been different Ms. Northcott would not have been exposed to the process issues she now alleges are discriminatory. However, this does not reasonably lead to the conclusion that the second aspect of the complaint cannot stand independently of the first.

38 Ms. Northcott's submissions in response to the section 40/41 report argue that section 10.1 could not apply to the second part of the complaint because INAC had not acted in good faith. The Respondent briefly addresses this submission in its reply to the section 40/41 report. However, neither the section 40/41 report nor the Commission's decision attempts to address or grapple with this issue. The failure to address a fundamental issue or argument may well render an administrative decision unreasonable (Walker v Canada (Attorney General), 2020 FCA 44 at para 9 citing *Vavilov* at paras 96-98, 127-128).

39 Ms. Northcott's bad faith submissions were central and fundamental to her reply to the section 40/41 report. They directly address the applicability of section 10.1 to the process aspect of her complaint.

40 The reasons contained in the section 40/41 report and Commission's decision itself must be considered and read "in light of the history and context of the proceedings" (*Vavilov* at para 94). In the context of the CHRA complaint process, it may be possible to view the submissions of a complainant and respondent in response to a section 40/41 report as informing the Commission's decision and adoption of the section 40/41 report as it reasons. Presuming, without deciding this could be so, I would decline to adopt such an approach in this circumstance. The issue not addressed is central or fundamental to the position advanced by the complaint.

41 The Respondent also takes the position that many of the facts Ms. Northcott cites in support of her bad faith submissions were not included in her original complaint and are not relevant to the issues raised in her complaint. While these issues, including Ms. Northcott's medical conditions, might well have been new to the Respondent, they were placed before the Commission in advance of the completion of the section 40/41 report. They were not new to the Commission and Ms. Northcott had expressly requested they form part of her complaint.

42 Administrative decision makers must grapple with the key issues or central arguments raised (*Vavilov* at para 128). Bad faith was Ms. Northcott's central submission in her reply to the section 40/41 report and it impacted directly upon the application of section 10.1 to her claim. The Commission's failure to address this issue renders the decision unreasonable.

B. The Interpretation of Section 10.1 of Bill S-3 was also unreasonable

43 My conclusion above is determinative of the Application so I will only briefly comment on the issue of the reasonableness of the Commission's interpretation of section 10.1.

44 As I have previously noted, administrative decision makers need not engage in a formal statutory interpretation analysis when considering the meaning of legislation. However, where an issue of interpretation arises the decision maker must demonstrate in its reasons that it was alive to the provision's text, context, and purpose (*Vavilov* at para 119-120). In this instance, an issue of interpretation unquestionably arises.

45 The purpose of section 10.1 of Bill S-3, which at the time was clause 8, was described as follows by the Minister's delegate before the Senate Standing Committee on Aboriginal Peoples:

> ...clause 8 of the bill has the effect of preventing claims by individuals newly entitled to registration under BillS-3 for compensation for benefits that they were not entitled to in the past. That is the policy behind clause 8...That kind or provision actually reflects a common law rule, and it was put in the bill for clarity (Senate, Standing Committee on Aboriginal Peoples, *Evidence*, 41-2, No 14 (30 November 2016)).

46 The Respondent, in its reply to the section 40/41 report, described the purpose of section 10.1 in similar terms:

> This provision merely codifies the general public law that damages will not be awarded for harm suffered as a result of the application of a law subsequently declared invalid, absent bad faith (Certified Tribunal Record at page 26, also see *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13 at para 78).

47 The section 40/41 report, adopted by the CHRC, found that section 10.1 applied to the second part of Ms. Northcott's complaint. This conclusion is, on its face, at odds with the text and purpose of the section. The section 40/41 report does not detail any analysis in support of the conclusion that section 10.1 applies to the second part of the complaint. Instead, the conclusion is explained on the basis that the second part of the complaint is subsumed in the first part of the complaint. I have already found that this determination was unreasonable.

48 I am not satisfied that in concluding section 10.1 was determinative of the second part of Ms. Northcott's complaint, that the investigator considered the meaning of the section in a manner reflective of the text, context, and purpose of section 10.1.

VII. Costs

49 The parties have agreed on costs, proposing the amount of $2750 be ordered payable to the successful party. I am satisfied that the quantum proposed is appropriate.

50 The parties further advised the Court that in the event costs are payable to Ms. Northcott, the Order should provide costs be payable to Ms. Northcott's counsel in trust subject to the following directions:

A. the Applicant is to be reimbursed for all disbursements reasonably and necessarily incurred by her;

B. any amount that remains may be retained by her counsel; and

C. if any dispute arises as to the amount to which the Applicant is entitled a motion may be made to this Court for a resolution.

51 The parties note that where *pro bono* counsel is involved in a matter, the payment of costs to counsel, in trust, is consistent with the decision of the Federal Court of Appeal in Roby v Canada (Attorney General), 2013 FCA 251 [.

52 In *Roby*, the Court of Appeal noted that *pro bono* representation is not a bar to a costs award (para 24). The Court further noted that although costs are normally payable to and by the parties in accordance with Rule 400(7) of the Federal Courts Rules, SOR/98-106, Rule 400(7) also provides that costs may be paid to a party's solicitor in trust (para 26). In turn the jurisprudence has recognized that *pro bono* counsel may enter into fee arrangements with their client allowing a costs award to be payable to counsel and assuring no windfall to a client benefitting from *pro bono* representation (para 25 citing *1465778 Ontario Inc v 1122077 Ontario Ltd*, 2006 CanLII 35819, 82 OR (3d) 757 (Ont CA)).

53 I am satisfied that the quantum of costs proposed, in addition to making costs payable to Applicant's counsel in trust subject to the directions set out above, is appropriate in the circumstances. Absent counsel's *pro bono* involvement, the matter may not have been pursued and the issues raised may have been less effectively defined.

VIII. Conclusion

54 The Application is granted and the CHRC's decision as it relates to Ms. Northcott's treatment is set aside and remitted to the Commission for redetermination in accordance with these Reasons.

JUDGMENT IN T-681-20

THIS COURT'S JUDGMENT is that:

1. The Application is granted.

2. The April 22, 2020 decision of the Canadian Human Rights Commission, is set aside in part and the matter is returned for reconsideration in accordance with these reasons

3. Costs to the Applicant in the amount of $2750 inclusive of all disbursements and taxes payable to Nelligan O'Brien Payne LLP, subject to the following:

a) the Applicant is to be reimbursed for all disbursements reasonably and necessarily incurred by her;

b) any amount that remains may be retained by her counsel; and

c) if any dispute arises as to the amount to which the Applicant is entitled, a motion may be made to this Court for a resolution.

Application granted.

2013 CAF 251, 2013 FCA 251
Federal Court of Appeal

Roby v. Canada (Attorney General)

2013 CarswellNat 3835, 2013 CarswellNat 6982, 2013 CAF 251, 2013 FCA 251, 235 A.C.W.S. (3d) 568, 450 N.R. 159

Jeffery Roby, Applicant and Attorney General of Canada, Respondent

K. Sharlow J.A., Robert M. Mainville J.A., D.G. Near J.A.

Heard: October 3, 2013
Judgment: October 24, 2013
Docket: A-8-13

Counsel: Mark Tonkovich, for Applicant
Jacqueline Wilson, for Respondent

***K. Sharlow J.A.*:**

1 The Employment Insurance Commission concluded that the applicant Jeffery Roby received benefits under the *Employment Insurance Act*, S.C. 1996, c. 23, that exceeded his statutory entitlement by $5,426, and that he must reimburse the Crown for the overpayment. Mr. Roby has consistently taken the opposite position, but he has been unable to persuade the Commission, a Board of Referees and an Umpire that he is correct. He now seeks relief from this Court by way of an application for judicial review of the Umpire's decision. For the reasons that follow, I have concluded that Mr. Roby's application should succeed.

2 In this Court, the Crown conceded that Mr. Roby is entitled to succeed with respect to $701 of the claimed overpayment because the Commission failed to respect a statutory deadline. Therefore, Mr. Roby's application must succeed at least with respect to that $701. The amount now in issue is $4,725.

Statutory framework

3 The following provisions of the *Employment Insurance Act* are the foundation of the Crown's right to require a return or repayment of an amount paid to a claimant in excess of the claimant's entitlement:

43. A claimant is liable to repay an amount paid by the Commission to the claimant as benefits

(a) for any period for which the claimant is disqualified; or

(b) to which the claimant is not entitled.

44. A person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be.

43. La personne qui a touché des prestations en vertu de la présente loi au titre d'une période pour laquelle elle était exclue du bénéfice des prestations ou des prestations auxquelles elle n'est pas admissible est tenue de rembourser la somme versée par la Commission à cet égard.

44. La personne qui a reçu ou obtenu, au titre des prestations, un versement auquel elle n'est pas admissible ou un versement supérieur à celui auquel elle est admissible, doit immédiatement renvoyer le mandat spécial ou en restituer le montant ou la partie excédentaire, selon le cas.

Facts

4 The relevant facts are undisputed and are briefly summarized. Mr. Roby was a police officer in 2001 when he suffered a work related injury. He applied for sickness benefits under the *Employment Insurance Act*. At the same time, he submitted a "direct deposit application" which instructed the Commission to deposit his benefits to his bank account at the Canadian Imperial Bank of Commerce (CIBC).

5 Two important events occurred before the Commission formally advised Mr. Roby that he was entitled to benefits. First, in November of 2002, he made an assignment for the general benefit of his creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The assignment in bankruptcy included an assignment of Mr. Roby's CIBC bank account, which came under the sole control of the trustee in bankruptcy. Second, in December of 2002, Mr. Roby instructed the Commission to disregard his direct deposit application because, in his words, "the CIBC account is no longer valid."

6 By letter dated February 10, 2003, Mr. Roby was informed that his application for sickness benefits had been approved for the maximum 15 week period from May 5, 2002 to August 17, 2002.

7 Unfortunately, in January of 2003, the Commission had already deposited sickness benefits totaling $5,426 to Mr. Roby's CIBC account, contrary to his direction. On January 21, 2003, the Commission acknowledged to Mr. Roby that his benefits had been deposited in error to the CIBC

account and that the Commission would accept full responsibility for not forwarding the funds to him. At that time, the Commission assured Mr. Roby that they would "take care of it from their end", and apologized for the inconvenience. The next day, the Commission sent Mr. Roby a cheque payable to him in the amount of $5,426. Mr. Roby accepted the cheque and cashed it.

8 The record discloses no evidence as to what steps, if any, the Commission took or tried to take to recover the unauthorized deposits from CIBC, either through CIBC or through the trustee in bankruptcy.

9 In April of 2003, CIBC applied the unauthorized deposits to a debt owed by Mr. Roby in respect of another account. The record does not disclose why or on what legal basis that was done, but neither party has suggested that there are grounds for finding any impropriety on the part of CIBC or the trustee in bankruptcy with respect to that transaction.

10 The Commission subsequently took the position that Mr. Roby had received his statutory entitlement twice, and sought to recover what they characterized as an overpayment. It appears that by the date of the hearing of Mr. Roby's application in this Court, the Crown had collected some or all of the purported overpayment.

11 As indicated above, Mr. Roby appealed to the Board, challenging the Commission's determination that there was an overpayment. A hearing was convened to consider the appeal and the appeal was dismissed. However, that decision was set aside by an Umpire because Mr. Roby was not given notice of the hearing (CUB 78195). A second hearing was convened at which Mr. Roby testified. In a decision dated January 17, 2012, the Board concluded that Mr. Roby had received an overpayment. Mr. Roby appealed that decision. His appeal was dismissed (CUB 80197). Mr. Roby now seeks judicial review of the Umpire's decision.

Discussion

12 The decision of the Umpire cannot stand. It is based on the Board's factual finding, confirmed by the Umpire, that the Commission had deposited Mr. Roby's benefits to his CIBC bank account in accordance with Mr. Roby's instructions. That factual finding was not reasonably open to the Board or the Umpire in the face of the uncontradicted evidence that:

(a) Mr. Roby withdrew his direct deposit application before his entitlement was determined;

(b) the Commission did not give effect to Mr. Roby's withdrawal of the direct deposition application;

(c) before issuing the replacement cheque to Mr. Roby, the Commission acknowledged its error in failing to give effect to the withdrawal and informed Mr. Roby that they would "take care of things from their end".

13 In these circumstances, Mr. Roby acted reasonably in accepting the replacement payment offered by the Commission, based on the assurance of the Commission that they would take responsibility for correcting the erroneous misdirection of the previous payments.

14 Having determined that the Umpire's decision cannot stand, it is necessary for this Court to consider whether the issues raised by Mr. Roby should be resolved by this Court on the available record. As there are no facts in dispute, I have concluded that the record is sufficient to enable this Court to reach an appropriate disposition. Given that this matter has been unresolved for almost 10 years, it would be appropriate to do so.

15 It is argued for Mr. Roby that the only reasonable conclusion on the available evidence is that the misdirected payments were not amounts paid to Mr. Roby or from which he benefited, and therefore a fundamental condition for the application of sections 43 and 44 of the *Employment Insurance Act* was not met. The Crown argues the contrary, based on two cases, *Lanuzo v. Canada (Attorney General)*, 2005 FCA 324 (F.C.A.) and CUB 54925 (July 5, 2002). For the following reasons, I am not persuaded that those cases are dispositive.

16 In *Lanuzo*, a claimant for employment insurance benefits was held to be required to repay the amount he had received in excess of his statutory entitlement even though the overpayment was the result of an error on the part of the Commission. I do not doubt the correctness of that decision, but it is based on evidence that the claimant actually received the amounts that comprised the overpayment. In this case, Mr. Roby did not actually receive the amounts that the Commission misdirected to his CIBC bank account. That is sufficient to distinguish *Lanuzo*.

17 CUB 54925 is a decision that is closer on its facts to this one, but it is not identical. The claimant in CUB 54925 initially requested that his benefits be deposited to his bank account with Canada Trust, and subsequently requested that his benefits be deposited to his bank account with the Royal Bank. After the amended request, the Commission mistakenly deposited to the Canada Trust account a payment representing benefits for a certain two week period. When the claimant advised the Commission that he had not received a payment relating to that period, the Commission issued him a replacement payment, and warned him that he was responsible for advising the Commission if the original payment was discovered. The payment that was deposited in error to the Canada Trust bank account was seized by a creditor of the claimant pursuant to a garnishment order. The Board concluded, and the Umpire agreed, that the claimant benefitted from the misdirected payment when it was applied, albeit without the claimant's consent, to reduce a debt he owed to a third party. On that basis, the claimant was held to be liable to repay the amount claimed by the Commission as an overpayment.

18 The difference in this case is that at the time the Commission misdirected the payments in issue to Mr. Roby's CIBC bank account, Mr. Roby was in bankruptcy. Significantly, this was his first bankruptcy, with the result that he was presumptively entitled to an automatic and

absolute discharge from all of his unsecured debts pursuant to section 168.1 of the *Bankruptcy and Insolvency Act* (subject to certain exceptions that, on the available evidence, probably would not have applied to Mr. Roby).

19 The Board and the Umpire should have considered whether, given these circumstances, the misdirected payments actually benefitted Mr. Roby. If they had considered that question, they would have concluded that on a balance of probabilities, the debt reduced by the misdirected payments would have ceased to be a liability of Mr. Roby upon his discharge from bankruptcy. That is sufficient to distinguish the facts in this case from the facts in CUB 54925 and to support the position of Mr. Roby that the misdirected payments did not benefit him.

20 I acknowledge the possibility that Mr. Roby could in fact have benefitted from the misdirected payments. For example, the debt in issue might have been a secured debt which would have been unaffected by the bankruptcy. One may speculate about other possibilities but I am not prepared to do so, given the assurances the Commission gave to Mr. Roby in 2003 that they would "take care of [their mistake] from their end". In these circumstances, it was incumbent on the Commission to take at least the steps required to determine with reasonable certainty what became of the misdirected payments before simply assuming that they benefitted Mr. Roby.

21 The Crown argues that, by virtue of the definition of "total income" in the *Bankruptcy and Insolvency Act*, the amounts deposited to Mr. Roby's CIBC account were income of Mr. Roby. That submission is coupled with a reference to the obligation of the trustee in bankruptcy to determine the amount of income the bankrupt is entitled to retain and the amount he must contribute to the estate. It is not entirely clear how this submission assists the Crown's position, but in any event it is not supported by any evidence as to what, if anything, the trustee in bankruptcy determined or did in relation to the payments in issue. That is not surprising, given that there is no evidence that the Commission made any attempt to investigate those matters.

Conclusion

22 The only reasonable conclusion on the evidence is that Mr. Roby did not benefit from the misdirected payments. Therefore, I would allow the application for judicial review and set aside the decision of the Umpire. I would refer this matter back to the office of the Chief Umpire with a direction that Mr. Roby's appeal to the Umpire is to be allowed, his appeal to the Board is to be allowed, and the Commission is to be directed to cease all attempts to collect the purported overpayment from Mr. Roby, and to reimburse him for any amounts that have already been collected on account of the purported overpayment.

Costs

23 Mr. Roby has also claimed costs in this Court. As the successful party, he would normally be entitled to costs. However, Mr. Roby represented himself until a very short time before the hearing

in this Court. Normally the costs awarded to a self-represented litigant are limited to disbursements. However, that limitation does not apply in this case because the law firm Baker & McKenzie LLP became Mr. Roby's solicitor of record shortly before the hearing. Mr. Tonkovich of that firm appeared at the hearing as counsel for Mr. Roby.

24 Baker & McKenzie LLP acted for Mr. Roby *pro bono*, but that is not a bar to a costs award in Mr. Roby's favour. That is well explained by Feldman J.A., writing for the Ontario Court of Appeal in *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 216 O.A.C. 339, 82 O.R. (3d) 757 (Ont. C.A.), at paragraphs 34 and 35:

> [34] It is clear from the submissions of the *amici* representing the views of the profession, as well as from the developing case law in this area, and I agree, that in the current costs regime, there should be no prohibition on an award of costs in favour of *pro bono* counsel in appropriate cases. Although the original concept of acting on a *pro bono* basis meant that the lawyer was volunteering his or her time with no expectation of any reimbursement, the law now recognizes that costs awards may serve purposes other than indemnity. To be clear, it is neither inappropriate, nor does it derogate from the charitable purpose of volunteerism, for counsel who have agreed to act *pro bono* to receive some reimbursement for their services from the losing party in the litigation.
>
> [35] To the contrary, allowing *pro bono* parties to be subject to the ordinary costs consequences that apply to other parties has two positive consequences: (1) it ensures that both the non-*pro bono* party and the *pro bono* party know that they are not free to abuse the system without fear of the sanction of an award of costs; and (2) it promotes access to justice by enabling and encouraging more lawyers to volunteer to work *pro bono* in deserving cases. Because the potential merit of the case will already factor into whether a lawyer agrees to act *pro bono*, there is no anticipation that the potential for costs awards will cause lawyers to agree to act only in cases where they anticipate a costs award.

25 Mr. Tonkovich also drew our attention to paragraph 36 of *1465778 Ontario*, which confirms the general principle that costs belong to the party to whom they are awarded (and, by necessary implication, not to that party's solicitor):

> [36] Where costs are awarded in favour of a party, the costs belong to that party. See Mark M. Orkin, Q.C., *The Law of Costs*, looseleaf (Aurora: Canada Law Book, 2005) at §204 and *Rules of Civil Procedure*, rule 59.03(6). However, *pro bono* counsel may make fee arrangements with their clients that allow the costs to be paid to the lawyer. This ensures that there will be no windfall to the client who is not paying for legal services.

26 In the Federal Court and in this Court, costs are payable to and by the parties, and not their solicitors, because of Rule 400(7) of the *Federal Courts Rules*, SOR/98-106. However, Rule 400(7) also provides that costs may be paid to a party's solicitor in trust.

27 At the hearing of Mr. Roby's application in this Court, Mr. Tonkovich candidly advised the Court that there was no agreement between himself and Mr. Roby with respect to any sharing of a costs award. However, after the hearing and while this matter was under reserve, Mr. Tonkovich advised the Court by letter that he and Mr. Roby had agreed that the portion of any costs award expressly allocated to the *pro bono* services provided by Baker & McKenzie LLP could be retained by that firm.

28 In my view, this is an appropriate case to award costs for the benefit of *pro bono* counsel. In exemplary fashion, Mr. Tonkovich untangled a confusing body of evidence and argument, discerned the most important legal issues, and effectively presented submissions that were of significant assistance to the Court in the efficient resolution of this case. However, the amount of the award must be modest given the applicable tariff, and will necessarily represent only a fraction of the actual value of the time Mr. Tonkovich must have spent in preparing for the hearing and presenting argument.

29 I would award costs in the amount of $2,500 inclusive of all disbursements and taxes, payable to Baker & McKenzie LLP in trust, subject to the following directions. (1) Mr. Roby is to be reimbursed for all disbursements reasonably and necessarily incurred by him in this matter before Mr. Tonkovich began to act for him, including court fees and the cost of preparing, serving and filing documents. (2) Any amount that remains may be retained by Baker & McKenzie LLP as compensation for their *pro bono* services. (3) If any dispute arises as to the amount to which Mr. Roby is entitled, a motion may be made to this Court for a resolution.

***Robert M. Mainville J.A.*:**

I agree

***D. G. Near J.A.*:**

I agree

Application allowed.

1988 CarswellNat 130
Federal Court of Canada — Appeal Division

Steward v. Canada (Minister of Employment & Immigration)

1988 CarswellNat 130F, 1988 CarswellNat 130, [1988] 3 F.C. 452, [1988] F.C.J. No. 405, 10 A.C.W.S. (3d) 68, 84 N.R. 240

Charles Chadwick Steward (Applicant) v. Minister of Employment and Immigration (Respondent)

Heald, Marceau and Lacombe JJ.

Vancouver: April 15, 1988
Ottawa: May 3, 1988
Docket: A-962-87

Counsel: *Gordon D. Hoffman* for William J. Macintosh.
No one appearing for applicant.
Fred D. Banning for respondent.

The following are the reasons for judgment rendered in English by *Heald J.*:

1 These reasons relate to a motion made by William J. Macintosh, Jr., a barrister and solicitor, of the city of Vancouver, in the province of British Columbia, for an order:

1. pursuant to Rule 1100 of the Federal Court Rules and section 52 of the Federal Court Act quashing the conviction for contempt against William J. Macintosh, Jr.; and/or

2. pursuant to the inherent or implicit authority of this Honourable Court to rehear or reopen the contempt of court proceedings against William J. Macintosh which was originally heard on the 11th day of February, 1988; and

3. for such further and other relief as to this Honourable Court seems just.

2 At the hearing of this motion before us at Vancouver on April 15, 1988, Mr. Macintosh was represented by counsel. The respondent Minister had been served and Mr. Fred Banning, who was counsel of record for the respondent in the Steward section 28 application [[1988] 3 F.C. 452 (C.A.)], did appear before us at the hearing of this motion as a courtesy to the Court. He advised us that he would not be making any representations on the motion before us, but was making himself available in the event the Court wished to address any questions to him.

3 In support of his application, Mr. Macintosh (hereinafter Macintosh) filed an affidavit containing some 58 paragraphs. Attached to the affidavit were some 13 exhibits. The relevant facts as deposed to by Macintosh may be summarized as follows. Macintosh had been employed since September, 1984, with the law firm of John Taylor and Associates of Vancouver (hereinafter the John Taylor firm). From 1985 onwards, he was involved, from time to time, with various legal affairs arising from the immigration problems of Charles Chadwick Steward (hereinafter Steward). Steward is the applicant in the section 28 application which was proceeding before the Court when the situation developed which gave rise to these contempt proceedings.

4 On October 7, 1987, Adjudicator W. Osborne, issued a deportation order against Steward after completing an immigration inquiry. On October 8, 1987, Macintosh filed with this Court the section 28 application to review and set aside the deportation order made against Steward and referred to *supra*. By order dated December 2, 1987, the Judicial Administrator of the Court set the within section 28 application down for hearing at Vancouver, B.C. on February 11, 1988 at 10:00 a.m.

5 On January 5, 1988, Mr. John Taylor, the principal of the John Taylor law firm announced that he was retiring and that all associates, including Macintosh, would be terminated effective January 31, 1988. On February 2, 1988, Macintosh attended some portions of a meeting between Mr. John Taylor and Steward. During that meeting there was a discussion of fees payable to Mr. Taylor for his continued efforts on behalf of Steward. There was disagreement between Mr. Taylor and Steward and, as a consequence, Mr. Taylor advised Steward at the meeting that the John Taylor law firm would no longer represent him. On February 3, 1988, an associate of Steward's asked Macintosh to represent Steward independently of the John Taylor law firm. Macintosh advised this associate that he was going to take several days to think about his future and whether or not he would be returning to the John Taylor law firm. On Sunday, February 7, 1988, Macintosh met with John Taylor for a discussion concerning further employment and, alternatively, the possibility of purchasing the practice. John Taylor invited Macintosh to return to work for the firm. Macintosh returned to work on Monday, February 8, 1988 but the exact terms of employment had not been formalized. On that same day, Steward called Macintosh who informed him that he had been re-employed by the John Taylor firm, and, thus, pursuant to the advice given to Steward by John Taylor at the meeting of February 2, 1988, he, Macintosh, could not act for Steward.

6 On February 9, 1988, an employee agreement was reached between John Taylor and Macintosh whereby Macintosh was to be paid only for those files assigned to him. It was also agreed that Macintosh would not be handling any of his previous files pending review and possible reassignment of those files by Mr. Taylor.

7 On February 10, 1988, Macintosh was required to travel to San Francisco on firm business. He arrived back at his home in Vancouver at approximately 11:30 p.m. on February 10. On the morning

of Thursday, February 11, he went to the office where he revised a notice of discontinuance in another Federal Court of Appeal matter. He then attended at the sittings of the Federal Court of Appeal ungowned. He entered the courtroom, approached the bar and spoke to Mr. Mitchell Taylor, a solicitor with the Department of Justice who was acting in the Federal Court of Appeal matter which was being discontinued and who consented to the notice of discontinuance in that file. Macintosh then deposes (paragraph 35):

> That while I was in the Courtroom I noticed Mr. Steward approaching the counsel area while Mr. Justice Mahoney was reviewing an affidavit provided by Mr. Steward. As Mr. Taylor had conduct of the matter I did not think anything of Mr. Steward's being in Court and assumed that Mr. Taylor had taken care of the matter.

8 Macintosh then deposes that he returned to the office where Mr. John Taylor's secretary showed him a notice which she had prepared indicating that the John Taylor law firm was no longer acting for Steward which notice was going to be filed in the Federal Court Registry.

9 Macintosh further deposes that, at about 11:15 a.m., he was served by Mr. Charles E. Stinson, a Registry Officer of the Federal Court, with an order on "Federal Court Trial Division letterhead." This order is attached as Exhibit H to Macintosh's affidavit. The copy served on Macintosh on February 11, 1988, does, indeed, carry the heading "Federal Court of Canada Trial Division." However, the Coram is shown as The Honourable Mr. Justice Mahoney, The Honourable Mr. Justice Hugessen and the Honourable Madame Justice Desjardins. The original show cause order signed by Mr. Justice Mahoney for the Court was entitled in the Federal Court of Appeal. Macintosh deposes, further, (paragraph 39):

> That at no time was I advised by Mr. Stinson or by any other representative of the Court of my rights to counsel under the Canadian Charter or Rights and Freedoms.

Mr. John Taylor and Macintosh both appeared before the Federal Court of Appeal at 2:30 p.m. on February 11, 1988, in response to the show cause order. Pursuant to the hearing at that time, the Court found that Mr. John Taylor was not in contempt of court. It also found, however, that Macintosh was in contempt of court and he was condemned to pay a fine of $300. The Court further directed the Registry to transmit the record of the contempt proceedings to the Law Society of British Columbia.

10 At the commencement of the oral hearing of this motion before us, the Court raised, as a threshold issue, the question of the Court's jurisdiction to hear the application.

11 Counsel's submission was to the effect that the Court has jurisdiction to reopen any matter where there are breaches of natural justice. In his view, this authority is either expressly or implicitly derived from the provisions of paragraph 52(*a*) of the *Federal Court Act* [R.S.C. 1970 (2nd Supp.), c. 10].[1] Moreover, says he, the decisions of this Court in *New Brunswick Electric*

502 *Power Commission v. Maritime Electric Company Limited*, [1985] 2 F.C. 13 (C.A.) and in *Gill v. Canada (Minister of Employment and Immigration)*, [1987] 2 F.C. 425 (C.A.) support his view that this Court has authority to reopen in the circumstances at bar. It was his submission that the Court breached the principles of natural justice because of the lack of proper notice for the contempt hearing. In his view, the summary manner in which the proceeding was conducted was a breach of natural justice. He said that this was not a case of purported contempt in the face of the Court and, thus, it need not have been dealt with on the same day. He alleged a breach of section 7 of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.)] since Macintosh could have had his liberty deprived of in a manner not in accordance with the principles of fundamental justice. He further submitted that the February 11 contempt proceeding was in breach of section 11 of the Charter since Macintosh was deprived of a fair hearing. Addi tionally, he said that the contempt proceedings were in breach of section 10 of the Charter because of the Court's failure to inform Macintosh of his right to retain and instruct counsel. His submissions also included an allegation that the court contempt proceeding on February 11, 1988 violated paragraphs 1(*a*), 2(*c*)(ii) and 2(*e*) of the *Canadian Bill of Rights* [R.S.C. 1970, Appendix III].

12 I have carefully considered the *Gill* case and the *New Brunswick Electric Power* case and have concluded that neither case supports the view that this panel of the Federal Court of Appeal would have jurisdiction to reopen a matter dealt with and disposed of by another differently constituted panel of the same Court. The *Gill* case was a section 28 application brought against a decision of the Immigration Appeal Board in which the Board refused to reopen an application for redetermination of Convention refugee status. The passage relied on was a quotation from the reasons of Le Dain J. (as he then was) in this Court's decision in *Woldu v. Minister of Manpower and Immigration*, [1978] 2 F.C. 216, at page 219 where he stated:

> Notwithstanding the general principle, affirmed in the *Lugano* case, that an administrative tribunal does not have the power, in the absence of express statutory authority, to set aside its decision, there is judicial opinion to suggest that where a tribunal recognizes that it has failed to observe the rules of natural justice it may treat its decision as a nullity and rehear the case....

Mr. Justice Le Dain cited, *inter alia*, the case of *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), at page 79 and *Posluns v. Toronto Stock Exchange et al.*, [1968] S.C.R. 330, at page 340 in support of this proposition. The *Gill* and *Woldu* cases were both section 28 applications in respect of refusals by the Immigration Appeal Board to reopen and rehear a matter. The House of Lords decision in *Ridge v. Baldwin* related to the powers of a "watch committee" to dismiss a chief constable under the provisions of the *Municipal Corporations Act* [1882 (U.K.) 45 & 46 Vict., c. 50]. The *Posluns* case had to do with the granting of a rehearing of a disciplinary action by the Board of Governors of a stock exchange. All four cases referred to *supra*, dealt with the powers of an administrative or a quasi-judicial tribunal to reopen its own proceedings. In so far as the *New Brunswick Electric*

Power case is concerned, that case is not helpful because it relates to the power of this Court to order a stay of execution of an order of the National Energy Board pending an appeal to this Court.

13 In my view, the situation in the motion now before us is quite different from that in any of the jurisprudence relied upon *supra*. The panel of the Court which heard the contempt matter concerning Macintosh on February 11, 1988, was a duly and properly constituted panel of the Federal Court of Appeal. As such, it had inherent power to deal with alleged contempt. This power is part of the common law and has developed as a part of the inherent jurisdiction of a Superior Court. This principle is enshrined in the common law and was recently restated by McIntyre J. in the *Vermette* case:[2]

> The power to deal with contempt as part of the inherent and essential jurisdiction of the courts has existed, it is said, as long as the courts themselves (see Fox, *The History of Contempt of Court*, 1972, p. 1). This power was necessary, and remains so, to enable the orderly conduct of the court's business and to prevent interference with the court's proceedings.

14 Accepting then the view that the panel sitting on February 11, 1988, had jurisdiction to hear and dispose of the contempt matter relating to Macintosh, is there any possible mechanism under which Macintosh is entitled to ask for a reopening or a review of the contempt order made against him on February 11?

15 A perusal of the Rules of this Court [*Federal Court Rules*, C.R.C., c. 663] reveals the general rule to the effect that an order is final, subject to an appeal, once it is signed by the presiding Judge (Rule 337(4)). Rule 1733 provides an exception to that general rule in cases where a matter arises or is discovered subsequent to the making of the order or on the ground of fraud. Counsel did not rely on Rule 1733 nor was there any possible factual basis shown for the application of that Rule. Rule 337(5) allows the Court to reconsider the terms of a judgment or order to ensure that it accords with the reasons or where there has been an accidental omission. Counsel did not rely, either, on Rule 337(5). In any event, any application under Rule 337(5) must be made to the Court "as constituted at the time of the pronouncement". As noted *supra* this application to reopen was made to an entirely different panel of the Court.

16 Counsel for Macintosh also relied on *R. v. Larsen* (1974), 19 C.C.C. (2d) 574, a decision of the Ontario Court of Appeal. That case does not address the jurisdictional problem because it was an appeal to the Court of Appeal from a finding of contempt by a Trial Judge in a criminal trial pursuant to the *Criminal Code* [R.S.C. 1970, c. C-34]. Likewise, the decision of the Ontario Court of Appeal in *Regina v. Carter* (1975), 28 C.C.C. (2d) 220 is not relevant because it is also a decision of the Court of Appeal in respect of a conviction for contempt of a solicitor who failed to appear to represent a client at a criminal trial before a Provincial Court Judge.

17 In both of those cases, there can be no question of the jurisdiction of the Court of Appeal to set aside a conviction for contempt in a lower court. That situation, however, is a far cry from the circumstances at bar. In this motion, one panel of the Federal Court of Appeal is being asked, in effect, to review and set aside a decision of another panel of the same Court. I know of no basis upon which we could exercise jurisdiction in these circumstances.

18 Counsel for Macintosh also referred to the fact that the copy of the show cause order served upon him was entitled in the Trial Division of this Court. Thus, strictly speaking, the notice given to him to appear was a nullity, the effect of which would be to vitiate all subsequent proceedings. Counsel supported this submission by a reference to the remarks of Riddell J. in *Dalton v. Toronto General Trusts Corporation* (1908), 11 O.W.R. 667 (Weekly Ct.), at page 668. The portion of the reasons relied on reads:

> Sequestration is an extraordinary and a drastic remedy, and the right to it is stricti juris if not strictissimi juris, and no assistance should be given a person desiring to enforce supposed rights in this way. And especially is this so when the applicant states that he is insisting upon his strict rights.

19 The show cause order that was served on Macintosh described the composition of the Court as consisting of three justices of the Federal Court of Appeal. The order requested his appearance before the Court at 7th Floor, 700 West Georgia Street, Vancouver. Macintosh appeared at the proper time and place. I am satisfied that he was not misled in any way by the apparent typographical error in the copy of the show cause order served upon him, which, as noted *supra*, was properly entitled in the Federal Court of Appeal. Thus, if there was a technical defect in the show cause order served on Macintosh, it was not prejudicial in any way and, in any event, such defect was waived by the appearance of Macintosh at the proper time and place and before the panel of this Court that issued the order. For these reasons then, I think this submission to be devoid of merit.

20 The final submission by counsel for Macintosh was to the effect that if this panel of the Court was of the view that it had no jurisdiction to proceed to hear this motion, he would request that he be given leave by this panel to appeal our decision to the Supreme Court of Canada pursuant to the provisions of subsection 31(2) of the *Federal Court Act*. [3]

21 The jurisprudence of this Court has established that this Court will grant such leave in only very narrow circumstances. The general rule was clearly stated by Chief Justice Jackett in *Minister of National Revenue v. Creative Shoes Ltd.*, [1972] F.C. 1425, at page 1428:

> In our opinion, when there is an application for leave to appeal in a case where the question involved is not obviously one that ought to be submitted to the Supreme Court for decision, this Court must resist the temptation to grant leave merely to avoid possible criticism. It must

> not grant leave unless it is positively satisfied that the question involved is one that "ought" to be decided by the ultimate Court of Appeal. Having regard to the extent and the importance of the responsibilities of the Supreme Court of Canada, a lower court should not grant leave to appeal to that court in any but obvious cases, because that court is in a position to make an overall selection of the cases that should be decided by it having regard to its case load and can only do so if lower courts exercise a responsible discretion in deciding when to grant leave to appeal. The Supreme Court of Canada can grant leave in any case even though leave has been refused by the Court of Appeal. The Supreme Court of Canada cannot withdraw leave once it has been granted by the Court of Appeal.

22 In my view, the circumstances at bar do not present such an obvious case as to justify this Court granting leave to appeal. Likewise, I do not think that the jurisdictional question raised herein, while doubtless very important to the applicant, is of such national importance as to warrant the granting of leave by this Court.[4]

23 In any event, as was pointed out in *Creative Shoes*, *supra*, the Supreme Court can grant leave even though this Court has refused such leave.

24 Accordingly and for all of the above reasons, I would dismiss the within motion.

***Marceau J.*:**

25 I concur.

***Lacombe J.*:**

26 I agree.

Solicitors of record:

Webber & Company, Kamloops, British Columbia, for William J. Macintosh.

R. Glen Sherman, Vancouver, for applicant.

Deputy Attorney General of Canada for respondent.

Footnotes

1 Paragraph 52(*a*) reads:

> *52.* The Court of Appeal may
> (*a*) quash proceedings in cases brought before it in which it has no jurisdiction or whenever such proceedings are not taken in good faith;

2 *R. v. Vermette*, [1987] 1 S.C.R. 577, at p. 581.

3 Subsection 31(2) reads:

> *31.* ...

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(2) An appeal to the Supreme Court lies with leave of the Federal Court of Appeal from a final or other judgment or determination of that Court where, in the opinion of the Court of Appeal, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision.

4 Compare *Prassad v. Minister of Employment and Immigration*, [1985] 2 F.C. 81 (C.A.).

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Federal Court of Canada, Trial Division

Telus Mobility v. T.W.U.

2002 CarswellNat 1356, 2002 CarswellNat 6096, 2002 FCT 656, 2002 CFPI 656, [2002] F.C.J. No. 872, 220 F.T.R. 291, 54 W.C.B. (2d) 326

Telus Mobility, (the "Employer") and Telecommunications Workers Union, (the "Union")

Hargrave Prothonotary

Heard: June 3, 2002
Judgment: June 10, 2002
Docket: T-425-02

Counsel: *Mr. Israel Chafetz*, for Telus Mobility
Mr. Donald Richards, for Telus Communications Inc.
Mr. Patrick Lewis, for Individuals, Messrs. Buttler, Triffo
Mr. Morley Shorrt, for Telecommunications Workers Union

***Hargrave P.*:**

1 Since at least 1998 there has been an ongoing labour dispute between Telus Mobility and the Telecommunications Workers Union (the "Union") involving a new system whereby, instead of union members activating new cell phones, that is done electronically with the cell phone sales dealer communicating directly with the Telus Mobility computer system to activate the cell phone without the assistance of union members.

2 The present proceeding arises out of an 11 March 2002 filing, by the Union, with the Federal Court, pursuant to section 66(1) of the *Canada Labour Code*, of an 8 February 2002 formal order of an arbitrator, Stephen Kelleher, Q.C. Mr. Kelleher had made a final and binding decision, on 26 June 2001, that Telus Mobility as an employer was in violation of a labour agreement, specifically a letter agreement of 4 December 1992. A challenge as to the jurisdiction of the arbitrator intervened. The formal order issued on 8 February 2002 sets out that:

> I HEREBY ORDER THAT:
>
> The Employer is in violation of the Letter of Agreement between the Union and the Employer dated December 4, 1992. I direct that the violation of the Letter of Agreement dated December

> 4, 1992 by the Employer come to an end; that Remote Dealer Activation (RDA) and Interactive Voice Response (IVR) not be used in such a way that excludes bargaining unit employees; and that TELUS Mobility computer system remain completely under the control of TELUS Mobility and operated only by TELUS Mobility employees.
>
> This is a clear order. It is also a proper order in that Mr. Kelleher does not dictate to Telus Mobility how to run or reorganize its business, for there may be any number of acceptable solutions by which to rectify the violation.

3 The filing of the arbitrator's order with the Federal Court, pursuant to section 66 of the *Canada Labour Code*, gives such an order the same force and effect as if it were a judgment of this Court.

4 The Union now says that Telus Mobility is in breach of the order. The pertinent date of the breach, for the purpose of this motion, which is to move toward a contempt hearing, is not the 11 March 2002 filing date of the order, but rather the bringing of the filed order to the attention of Telus Mobility and those individuals named by the Union in its contempt motion, for personal knowledge of an order is a precondition to a finding of contempt: see for example *Bhatnager v. Canada (Minister of Employment & Immigration)*, [1990] 2 S.C.R. 217 (S.C.C.), at 224 - 225.

5 The 11 March 2002 order was served on counsel for Telus Mobility on 25 March 2002. Service or notice was given to various Officers and Directors of Telus Mobility between 12 and 26 April 2002, either personally, or by posting it to their doors, or in the case of George Cope, a director of Telus Communications Inc. and President and Chief Executive Officer of Telus Mobility, by leaving a copy of it with the General Council for Telus Mobility on 26 April 2002. Here I would note that because of the serious and indeed quasi-criminal dimension of contempt of court, knowledge of the order in question has always been carefully tested. Either personal service of the order, or actual personal knowledge, is a precondition to contempt, with the proviso that knowledge may, on occasion, be inferred from advice to a relevant solicitor: see *Bhatnager* , supra, at 224 through 226 and particularly the passage from *Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada) Ltd.*, [1983] 2 S.C.R. 388 (S.C.C.) , at 396 - 97, quoted in *Bhatnager* at page 226, in which Mr. Justice Dickson refers to knowledge inferred from the fact that the relevant solicitor was informed.

6 I am satisfied, both from the direct steps which the Union has taken to bring the order to the attention of those involved and from a 12 April 2002 internal memo to both Telus Communications Inc. and Telus Mobility employees in British Columbia and Alberta that Telus Communications Inc., Telus Mobility and the seven Officers and Directors who are now involved, became appropriately aware of the filed order at least as early as 12 April 2002 and not later than 26 April 2002. This brings us to the present motion.

7 While the Federal Court may have an implied, essential or necessary power to deal with contempt, the *Federal Court Rules* set out the contempt procedure in Rules 466 through 472. These

Rules, subject to Rule 468 which does not apply here, contemplate a two-step procedure. The first step, being dealt with now, is a hearing pursuant to Rule 467 which, if the party alleging contempt establishes a *prima facie* case, leaves the judge or prothonotary no option but to issue an order requiring the person alleged to be in contempt to appear before a judge at a stipulated time and place to hear proof of the act of contempt and to be prepared to answer. Here I will touch upon two procedural matters.

8 First, while the motion for a show cause order may, under Rule 467(2), be made *ex parte*, Madam Justice Reed observed, in *Nguyen v. Canada (Minister of Citizenship & Immigration)* (1996), 122 F.T.R. 282 (Fed. T.D.), at 290 , the giving of notice is to be commended. This is particularly so in that a contempt proceeding is a most serious and extreme procedure and indeed a quasi-criminal matter. Where it will cause no prejudice to the party seeking the show cause order, notice ought to be given. In this instance I directed that notice of this motion be given to counsel for Telus Mobility.

9 Second, counsel for the Union touched upon but did not press the issue of whether a prothonotary may issue a show cause order. Counsel may have in mind *Nintendo of America Inc. v. 798824 Ontario Inc.* (1995), 94 F.T.R. 138 (Fed. T.D.), which was decided under the old Rules which, depending upon whether one read the operative portion of the Rule conjunctively or disjunctively would, in the first instance, prevent a prothonotary from issuing a show cause order. The 1998 Rules no longer make any reference, in Rule 467, to the involvement of a judge in the issuance of a show cause hearing. Moreover, Rule 50(1)(a) makes it doubly clear that, the right to issue a show cause order not being reserved to a judge in Rule 467, a prothonotary may issue a show cause order. I now turn to some applicable case law dealing with the merits of the motion itself.

10 In order to obtain a show cause order the applicant must demonstrate a *prima facie* case of wilful and contumacious contempt of the order in question, that being the standard set by Mr. Justice Muldoon in *Imperial Chemical Industries plc v. Apotex Inc.* (1989), 26 F.T.R. 47 (Fed. T.D.), at 53. More recently Mr. Justice Pinard, in *Chic Optic Inc. v. Hakim Optical Laboratory Ltd.* (2001), 13 C.P.R. (4th) 283 (Fed. T.D.), at 286, relying upon *Imperial Chemical* and *Frank v. Bottle* (1993), 68 F.T.R. 242 (Fed. T.D.) , in which Associate Chief Justice Jerome issued a show cause order on the basis of wilful and contumacious conduct, set the standard as being a wilful refusal to comply with a court order. In effect the test is that of *prima facie* wilful disobedience.

11 A point of contention on the present motion is the part which *mens rea* plays in contempt, for counsel for Telus Mobility submits there is nothing in the material, since the date of knowledge of the filed order, to show a guilty mind, but rather there is some indication of an attempt to comply. Here I would note that while the test for contempt embodies wilfulness, that element does not automatically equate to a need to establish *mens rea*. The wilfulness aspect is present only to exclude casual or accidental and unintentional acts of disobedience: see *Glazer v. Union*

Contractors Ltd. (1960), 25 D.L.R. (2d) 653 (B.C. S.C.), at 658 and 676, affirmed (1960), 34 W.W.R. 193 (B.C. C.A.). Moreover, attempted compliance and the presence or absence of a guilty mind might better go to the severity of any penalty. However counsel for Telus Mobility goes on to refer *Lyons Partnership, L.P. v. MacGregor* (2000), 186 F.T.R. 241 (Fed. T.D.), at 245 in Mr. Justice Lemieux refers to the constituent elements of contempt as including "... the required degree of *mens rea*.". In *Lyons* Mr. Justice Lemieux does not go on to refer to *mens rea*. It may well be that Mr. Justice Lemieux had in mind not civil contempt, but rather criminal contempt, in which both *actus reus* and *mens rea* must be present: see for example the *Fourth Edition of Halsbury*, Volume 9(1) at paragraph 405. More specifically, in the case of civil contempt, not withstanding that it has a quasi-criminal aspect to it, *mens rea* is not an element that must be proven. This was set out by Mr. Justice Teitelbaum in *Cartier Inc. v. Cartier Men's Shops Ltd.* (1988), 20 F.T.R. 15 (Fed. T.D.), at 30 - 31:

> [95] Although the evidence required to prove a contempt of court is equivalent to a criminal case and proof must be beyond a reasonable doubt, intention "mens rea", is not an element that must be proven. In the case of

12 *Baxter Travenol Laboratories v. Cutter (Canada) Ltd.* (1984), 1 C.P.R. (3d) 433 (Fed. T.D.), at 440 , Mr. Justice Dubé states:

> Barrie and Lowe's **Law of Contempt**, (2nd Ed. 1983) considers the requirement for mens rea in chapter 13 titled "Civil Contempt". The answer is clearly 'that it is not necessary to show that the defendant is intentionally contumacious or that he intends to interfere with the administration of justice.'

13 Here is a clear statement, based upon the substantial authorities of *Barrie and Lowe on Contempt* and upon *Baxter Travenol*, that while the evidence to prove contempt in a civil context is equivalent to that in a criminal case, *mens rea* is not an element that must be proven. Mr. Justice Teitelbaum in *Cartier* was upheld by the Court of Appeal, without comment upon that point, (1990), 111 N.R. 152 (Fed. C.A.). However, when the Court of Appeal dealt with Mr. Justice Dubé's decision in *Baxter Travenol* (1987), 14 C.P.R. (3d) 449 (Fed. C.A.), it specifically referred to the passage quoted by Mr. Justice Teitelbaum in *Cartier* from the decision of Mr. Justice Dubé, at trial in *Baxter Travenol*, noting that *mens rea* was not necessary in the case of civil contempt. The Court of Appeal went on to consider, as an aspect of *mens rea*, the lack of contumacity, which was discussed at length by Mr. Justice Dubé at the trial level and by *Barrie and Lowe on Contempt* in dealing with *mens rea*, noting that non-contumacious conduct can be a mitigating factor when it comes to a penalty: see the Court of Appeal decision at pages 455 and 456. In summary, the present matter involves civil contempt and therefore *mens rea* is not a factor.

14 Similarly, counsel for Telus Mobility makes too much of the supposed absence in the present instance of any affront to the dignity of the Court. Certainly, in *Deprenyl Research Ltd. v.*

Canguard Health Technologies Inc. (1992), 41 C.P.R. (3d) 368 (Fed. T.D.), referred to by counsel for Telus Mobility, Madam Justice Reed, in denying the contempt motion, commented that a press release neither engaged the order in question nor impaired the dignity and authority of the Court. However, impairing the dignity and authority of the Court is only one of a number of alternate factors bearing on contempt. It is certainly not an essential element. This has been made clear in a number of instances, perhaps most eloquently by Lord Justice Salmon in *Morris v. Crown Office*, [1970] 2 Q.B. 114 (Eng. C.A.) at page 129:

> The archaic description of these proceedings as "contempt of court" is in my view unfortunate and misleading. It suggests that they are designed to buttress the dignity of the judges and to protect them from insult. Nothing could be further from the truth. No such protection is needed. The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented: ...

Contempt of court is a power which exists to ensure that justice be done both as to litigants and as to the public. While contempt may involve an attack on the Court, that is just one of many possible forms. In the present instance the lack of impairment of dignity of the Court is not a factor.

15 Of more relevance is the law relating to the individuals against whom contempt orders are sought. In examining this aspect of the law I must keep in mind that the order of the arbitrator, now filed with the Court, is against Telus Mobility. The Federal Court of Appeal in *Canada Post Corp. v. C.U.P.W.* (1986), [1987] 3 F.C. 654 (Fed. C.A.) teaches us that one cannot make a broad claim of contempt against directors, but rather must establish some personal involvement in the dispute: see pages 667 - 668.

16 Basic is the proposition that where a company is found to be in contempt, aiding abetting officers and directors may also be found in contempt: see for example *Dimatt Investments Inc. v. Presidio Clothing Inc./Vêtements Presidio Inc.* (1993), 48 C.P.R. (3d) 46 (Fed. T.D.), at 47, 49 and 50 through 52, a decision recently followed by Mr. Justice Dubé in *Manufacturers Life Insurance Co. v. Guaranteed Estate Bond Corp.*[2000 CarswellNat 198 (Fed. T.D.)] an unreported 8 February 2000 decision. Another aspect of this proposition is that directors and officers may not be punished for the contempt of their corporation, where the conduct giving rise to the contempt occurred not only without their fault, but where they did everything possible to ensure that the order at issue was respected: see *Long Shong Pictures (H.K.) Ltd. v. NTC Entertainment Ltd.* (2000), 6 C.P.R. (4th) 509 (F.C.T.D.) at 515 and following. In *Long Shong Pictures* the order was against the defendant company, however the plaintiff relied upon the fact that the individual against who a finding of contempt was sought was the sole Ontario director and officer of the defendant company. Mr. Justice O'Keefe relied upon a passage from *Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1974), 48 D.L.R. (3d) 641 (Ont. H.C.), at 660 - 661 for the proposition that, while officers and directors may be committed for contempt when they have taken a passive role or perhaps

when a presumption arises that an officer or director did or failed to do something giving rise to the breach, generally it must be demonstrated that the officer or director aided and abetted the contempt:]

> The applicants have submitted that where a corporation violates an injunction, the directors and officers of the corporation can be held in contempt of Court and can be attached or otherwise punished for the contempt, without any proof that the particular directors or officers proceeded against did or failed to do anything that was responsible for the said violation. I am unable to agree with that submission. I am not saying that before an officer or director can be committed for a contempt committed by the corporation that it must be shown that the officer aided or abetted the contempt. It may well be that the director or officer could be held in contempt, even though his role in the matter was purely passive: see *Biba Ltd. v. Stratford Investments Ltd.*, [1972] 3 All E.R. 1041 (Eng. Ch. Div.), and *Glazer v. Union Contractors Ltd.* (1960), 129 C.C.C. 150, 26 D.L.R. (2d) 349 (B.C. C.A.). Further, the violation of the injunction may give rise in some cases to a presumption that the director or officer did or failed to do something that caused the breach, and may put that officer or director on his defence. Where, however, it is clear on the evidence that the director or officer did all he could to ensure that the injunction would be abided by and, where the breach occurred without fault on the part of the director or officer, then I am unable to see how that director or officer can be punished for contempt of Court. [*Canada Metal* at 660 - 661, varied as to a different aspect by the Ontario Court of Appeal (1976) 59 D.L.R. (4th) 430 (Ont. C.A.)]

17 The concept of the passive director or officer, or of the director or officer who failed to do something which gave rise to the breach, was a key point in the ongoing saga of *Glazer v. Union Contractors Ltd.* (1960), 26 D.L.R. (2d) 349 (B.C. C.A.) , a decision of the B.C. Court of Appeal. There Mr. Justice O'Halloran rejected the concept that because a director had done nothing, he did not wilfully disobey the order of the court. Rather, the director ought to have done whatever he could in order to comply with the court order in question: see pages 352 and 353.

18 The gist of the *Canada Metal*, the *Long Shong Pictures* and the *Glazer* cases is that individuals, as officers and directors of a company which has been held in contempt, may not be held in contempt merely because they hold such positions, but rather there must be either an aiding and abetting, a standing idly by, or a failure to take steps which failure was causative of the breach. Conversely, where an officer or a director does what she or he can to avoid the breach, yet the breach occurred without fault on the part of the officer or director, there can be no individual liability for contempt.

19 There are a number of entities against which the Union seeks a show cause order for contempt and to which to apply the above general propositions. The entities are Telus Mobility, Telus Communications Inc. and the seven officers and directors.

Telus Mobility

20 The Union's case against Telus Mobility is that, in the face of the order determining a violation of their labour agreement, by reason of the automated cell phone validation system, Telus Mobility has to date failed to rectify the problem. The Union's position is that while there may be a complex long term solution, perhaps involving the creation of a buffer in the automated system, a solution which Telus Mobility says it may be able to install as soon as early July, there is a simple, short term and immediate means of compliance. Here the Union refers to a memorandum circulated by Telus Mobility on 28 February 2002 to all of its cell phone dealers. The memorandum sets out three options for validation of cell phones: first, a Web connection; second, an activations voice menu system; and third, a call to a union member at Telus Mobility. The memo suggests the use of the Web. The Union points out that all that is needed in order that Telus Mobility do its immediate best to comply would be a direction to dealers to telephone a union activations representative.

21 Telus Mobility agrees that the present system which it uses to activate cell phones cuts out union employees. However it submits that there is no *prima facie* case for contempt, relying upon various propositions. I have already shown the failures, at law, in the submissions of Telus Mobility as to both *mens rea* and the lack of impingement on the dignity of the Court. As I pointed out the order is not vague, but rather as specific as it can be, without telling Telus Mobility what system it ought to use or how to organize its business.

22 Telus Mobility goes on to submit that there were negotiations to try to solve the problem. Those negotiations seem to have come to an end by 25 March 2002. At best those negotiations would estop the Union from claiming contempt going back before that date.

23 Telus Mobility urges that they are in the process of compliance. While that is not an answer to contempt, it may well go to mitigation of any penalty.

24 Telus Mobility says that the present use of the automated system is not an easy one to correct merely as to activating cell phones, for the system has other aspects, but requires that a buffer be designed and installed. They are working on the problem and thus are in the process of compliance. Here Telus Mobility are attempting to comply and thus say that there is no breach. I do not follow this argument for not only is there a *prima facie* breach at this point, but also Telus Mobility has failed to take the immediate step of directing its dealers to call a union activations representative, rather than to use the Web or the activations voice menu system.

25 While the Union will not necessarily succeed at the second stage of this proceeding, when it will face the burden of proof of contempt to a criminal law standard, the Union has certainly, at this first stage, demonstrated a *prima facie* case for contempt against Telus Mobility.

Telus Communications Inc.

26 The Union's position, that Telus Communications Inc., which is neither a party to this litigation nor referred to in the order of Mr. Kelleher, is in contempt, is based on the assertion that Telus Mobility is a subsidiary of Telus Communications Inc. This is the affidavit evidence of Hope Cumming, business agent for the Union:

> 2. TELUS Mobility is a division of TELUS Communications Inc. (the "Company") and is party to a collective agreement with the Telecommunications Workers Union (the "TWU").

This position is bolstered by the fact that a Canadian Industrial Relations Board decision of 19 December 2001 refers, at page 15, to Telus Mobility as a division of Telus Communications Inc., there in the context of determining a bargaining unit. I do not place any weight on an interlock of boards between Telus Communications Inc. and Telus Mobility, specifically that of George Cope, an Officer of Telus Communications Inc. and the President and Chief Executive Officer of Telus Mobility.

27 To the contrary, counsel for Telus Communications Inc. submits that Telus Mobility is the name under which Tele-Mobile Inc. operates and indeed that Telus Mobility is a trademark for Tele-Mobile Inc. Tele-Mobile Inc. is said to be the owner of a Canada-wide cellular telephone service operation. Here counsel for Telus Communications Inc. refers to the 21 May 2002 B.C. Supreme Court decision of Mr. Justice Paris in *Tele-Mobile Inc. v. T.W.U.*[2002 CarswellBC 1168 (B.C. S.C.)] Docket L013351, Vancouver Registry. In that decision Mr. Justice Paris sets out that Tele-Mobile Inc. owns the cellular telephone system. However that decision does not establish the relationship of Telus Mobility to anyone.

28 Ms. Cumming has not been tested on her affidavit, for there is no cross-examination on affidavits at this point, even when notice of an otherwise *ex parte* application for a show cause order has been given: see *Imperial Chemical* (supra) at page 48. Therefore it may be that the Union will be unable to establish, when it brings to bear all of its evidence at the second stage of this proceeding, that Telus Mobility is a subsidiary of Telus Communications Inc., however the Union has established a *prima facie* case for the connection of the unincorporated Telus Mobility with Telus Communications Inc. In coming to this conclusion I have taken a *prima facie* case to mean one for which there is sufficient evidence that, in the absence of adequate contrary evidence, it is taken as proven.

29 In this instance part of the Union's *prima facie* case must also establish that there is in fact a *prima facie* case for contempt against Telus Communications Inc., the parent of the unincorporated subsidiary, Telus Mobility. As I have found, there is a *prima facie* case against Telus Mobility. Telus Mobility has its own executive: there is no evidence that it is hampered or supervised in the making of day-to-day decisions. I therefore proceed on the basis that Telus Communications Inc., being aware of the nature of the order, may not be punished for contempt committed by the subsidiary, where the conduct of that subsidiary, Telus Mobility, occurred without the fault

of Telus Communications Inc. and with Telus Communications Inc. in turn doing everything reasonably to be expected and possible, given the relationship between Telus Mobility and Telus Communications Inc., to ensure the order was respected. The Union either served or brought the order to the attention of Messrs. Canfield, Entwistle, Harris and Triffo, all of whom are Directors of Telus Communications Inc. The Union has established that George Cope, President and Chief Executive Officer of Telus Mobility, is a director of Telus Communications Inc. and that Robert McFarlane appears on both the company search list of Officer and Directors of Telus Communications Inc. and on the organizational chart for Telus Mobility: both of these individuals were aware of the order. The Union has also produced an internal memo of 12 April 2002, going to all Telus and Telus Mobility employees. The reference to Telus refers to Telus Communications Inc., taking this abbreviation as common knowledge from the form of telephone bill issued to subscribers in British Columbia. That memo went to all employees in British Columbia and Alberta. The memo indicates that Telus Mobility was aware not only of the order, the effect of the order and the nature of the default, but also that the Union had stated that it would file charges of contempt. The memo goes on to refer to negotiations with the Union (although, despite an ongoing and somewhat acrimonious exchange of correspondence, negotiations had been abandoned by about 25 March 2002), to a pending judicial review of the order (which was decided against Telus Mobility) and to an intention to obtain a stay (which was never applied for). Finally, there is a paragraph in the memo indicating that Telus Mobility has been actively implementing the order. Telus Communications Inc., through its personnel, would be aware of all of this. However, such awareness does not necessarily mean contempt on the part of Telus Communications Inc.

30 Taking into consideration the evidence of the Union, the fact that Telus Mobility has directing minds of its own and that the labour agreement and order are between Telus Mobility and the Union, I do not find that the Union has established *prima facie* fault on the part of Telus Communications Inc., or that Telus Communications Inc. failed to do something which was possible and reasonable to avoid the default for, after all, Telus Communications Inc., as a parent, has every expectation that its subsidiary, Telus Mobility, would deal properly with its own day-to-day operating matters. In summary, there is not a *prima facie* case of contempt against Telus Communications Inc. I now turn to the position of the individuals.

Show Cause Order Against the Named Individuals

31 As I have already pointed out, the *Canada Post Corporation, Long Shong Pictures, Canada Metal* and *Glazer* decisions establish that merely being an officer or director of a company which is in contempt does not attract a finding of *prima facie* contempt. Rather, there must be an aiding and abetting, a standing idly by, or a failure to act, where it is possible to do so, so as to avoid the contempt.

32 Among the named individuals, against whom the Union seeks a show cause order for contempt, are Messrs. Entwistle, Butler, Triffo, Harris and Canfield. Those individuals are

Directors of Telus Communications Inc., but are not said to have any employment with or responsibility within Telus Mobility. There is no *prima facie* case against them for, even if they did nothing they, as merely Directors and Officers of the parent company, had no responsibility for or authority over the day-to-day operation of Telus Mobility and surely could rely upon Telus Mobility executives to do what was proper.

33 The position of Messrs. Cope and Wells is different from that of the five Telus Communications Inc. directors. Mr. Cope is the President and Chief Executive Officer of Telus Mobility and Mr. Wells an Executive Vice-President of Telus Mobility. From the material Mr. Wells appears to have had day-to-day conduct of this dispute with the Union and authority as to compliance with the order. Mr. Wells also advised the dealers, by memo of 28 February 2002, to use a Web connection to activate new cell phones: this occurred before Mr. Kelleher's order was filed with the Court and thus is not directly relevant to the contempt, but it does illustrate that Mr. Wells had the ability to direct use of the Web, cutting out union members and breaking the arbitrator's order, by directing dealers away from using union members to activate new cell phones. This shows that Mr. Wells also had the ability to direct dealers to call an "activation representative", a union member, to activate cell phones: the Union submits all that needed to be done to comply with the order as filed with the Court was to issue a memo to dealers to that effect, a quick and easy method of compliance. The submission to the contrary is that the Union wishes to take a retrograde step, but that is something which was for Mr. Kelleher to consider when he construed the labour agreement. Telus Mobility submits that they are working toward compliance: that is a plea which goes to mitigation of any penalty, not to undercut a *prima facie* case of contempt.

34 Mr. Wells did not do all that he might reasonably have done either initially to avoid the breach or subsequently to rectify the breach by means of a memo to dealers immediately that Mr. Kelleher's order was filed with the Court. This does not necessarily lead to a conclusion that Mr. Wells actively aided and abetting Telus Mobility, but it certainly establishes a *prima facie* case for contempt within the principles referred to in *Long Shong Pictures* (supra) and *Canada Metal Co.* (supra), and idle standing by and a failing to act in a reasonable way, in an area in which he had *de facto* authority, which lead to the breach. There is a *prima facie* case for contempt against Mr. Wells.

35 As I noted earlier, the courts have resisted the idea that directors and officers are automatically in contempt when their company violates an order. However the Union goes farther: as I understand it the Union submits that because Mr. Cope stood by and did nothing to prevent or rectify the breach, a show cause order ought to issue against him. Certainly Mr. Cope was the President and Chief Executive Officer of Telus, but to say, without more, that because he did nothing ought to result in a show cause order against him goes too far. Not only is this akin to saying that an officer or a director automatically shares his or her company's contempt, but also, the Union fails to establish what Mr. Cope might have done in exercise of the role that he played in Telus Mobility. This concept of an action, or lack of an action, arising out of the usual or *de facto* role played by

an officer or a director in his or her company, was central in Mr. Justice O'Halloran's decision in *Glazer* (supra). There is nothing in the evidence of the Union which establishes the role, if any, played in the present instance by Mr. Cope. I can find no indication in the Union's evidence of any aiding and abetting of Mr. Cope. The Union has not established a *prima facie* case that a show cause order ought to issue against Mr. Cope.

Conclusion

36 The standard which must be established in order to obtain a show cause order, leading to a hearing to deal with the merits of a claim of contempt, that of a *prima facie* case, is not a high standard. Neither ought a show cause order be easily given, for to have to defend against a claim of contempt is a very serious matter which may have ramifications far beyond any penalty imposed by the Court. Having said this I can also sympathize with the frustration of the Union, which has an order, but nothing to show for it.

37 The Union has established *prima facie* cases against Telus Mobility and David Wells, but not against Telus Communications Inc. or the other named officers and directors.

38 Costs will be in the cause. However, on this motion for a show cause order there will be no costs for or against any of those who became involved, but are not parties.

2020 FC 675, 2020 CF 675
Federal Court

Wachsberg v. Canada (Public Safety and Emergency Preparedness)

2020 CarswellNat 2657, 2020 CarswellNat 3284, 2020 FC 675, 2020 CF 675, 165 W.C.B. (2d) 180, 321 A.C.W.S. (3d) 266

CHARLES WACHSBERG (Plaintiff) and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE ATTORNEY GENERAL OF CANADA (Defendants)

Richard G. Mosley J.

Heard: March 10, 2020
Judgment: June 8, 2020
Docket: T-386-18

Counsel: Stephen W. Green, Alexandra Cole, for Plaintiff
Eric Peterson, for Defendants

***Richard G. Mosley J.*:**

I. Introduction

1 This is an appeal of an Order made on January 28, 2020 by a prothonotary dismissing a motion brought by the Plaintiff. The Plaintiff sought an Order to compel the Defendants to appear and to show cause as to why they should not be found in contempt of an Order made on March 12, 2019 by Justice Barnes in the underlying action. The action appeals findings that the Plaintiff had contravened the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* S.C. 2000, c.17 (PCMLTFA or the Act) and seeks other substantive and declaratory relief. The Defendants' motion to dismiss the action, considered at the same time by the Prothonotary, was also dismissed. That decision is not under appeal in this proceeding.

2 The Plaintiff seeks an Order pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 (FCRs) to set aside the Prothonotary's decision and a show cause order, pursuant to Rule 467(1). Before a show cause hearing under Rule 467(1) can be ordered, a *prima facie* case of contempt must be made out. The grounds of the appeal are, essentially, that the Prothonotary erred in law by holding that a *prima facie* finding of contempt requires "willful and contumacious conduct" on the part of the Defendants and also that the Prothonotary erred by finding that a *prima facie* finding of contempt cannot be made where a court order has been frustrated by a third party.

3 The Defendants concede that the Prothonotary did not apply the correct test for a show cause order. However, the Defendants contend that the Prothonotary correctly found that the settlement agreement between the parties which led to the Court's Order of March 12, 2019 had become frustrated by a "supervening event" that resulted in the discharge of their obligation to comply with the Order. They, therefore, seek dismissal of the appeal with costs.

II. Background

4 The Plaintiff is a resident of Toronto, Ontario. He is in the business of importing and distributing retail products and for that purpose frequently travels to the United States and abroad. Most of his sales are in the U.S. To facilitate his travels he relies on membership in the NEXUS trusted traveller program and has done so since it was launched in 2007. He was a member of the predecessor program. NEXUS is jointly administered by the Canada Border Services Agency (CBSA) and the United States Customs and Border Protection agency (US CBP). The Plaintiff's minor children are also members of the program and often travel with him.

5 On March 6, 2017 the Plaintiff and a minor daughter returned to Toronto from Paris, France following a brief vacation. Upon arrival at Pearson International Airport, they presented a joint customs declaration card and were referred for a secondary inspection. During that inspection, a CBSA officer found a quantity of money in the Plaintiff's hand baggage. The total amount, in several different currencies, exceeded the threshold in Canadian dollars ($10,000) requiring reporting under the Act. The Plaintiff's explanation was that he believed that the threshold was not met as the total value of the funds in Canadian dollars did not exceed the amount that he and his daughter could together bring into the country under the Act without making a declaration. As family members travelling together, one declaration had been submitted. This explanation was not accepted by the CBSA officer.

6 As there had been no attempt to conceal the money, the funds were returned to the Plaintiff. However, the officer undertook an enforcement action, imposed an administrative penalty of $250 and seized the Plaintiff's NEXUS card. The Plaintiff's membership in the NEXUS program was subsequently revoked for failure to meet the terms and conditions. At the time of the enforcement action, the Plaintiff's NEXUS membership was valid until July 25, 2017.

7 The Plaintiff sought Ministerial review of the enforcement action, the imposition of the penalty, the seizure of his NEXUS card and revocation of his membership. In a decision letter dated November 30, 2017, the Minister's delegate upheld the administrative penalty, seizure of the NEXUS card and declaration of ineligibility for membership in the program under the *Presentation of Persons (2003) Regulations*, SOR/2003-323 (the Regulations). One of the requirements for eligibility, the letter stated, was that applicants "must be of good character". In defining that term for the purposes of the CBSA trusted traveller programs, the delegate wrote, factors such as whether there had been a serious infraction of the laws of Canada and the U.S. were taken into

account. Since the enforcement action taken on March 6, 2017 "remains in CBSA records", the delegate determined the Plaintiff was ineligible for membership. He was informed that he could reapply after the retention period for the records expired, six years later.

8 The plaintiff reapplied for a NEXUS membership on December 14, 2017. In doing so, he answered affirmatively to the question of whether or not he had been found in violation of any customs or other federal import laws. That question was contained in the online re-application form used by both the CBSA and US CBP. The Plaintiff's re-application was refused in January 2018 because of the March 6, 2017 enforcement action.

9 On February 28, 2018, the Plaintiff filed and served a Statement of Claim on the Defendants to set aside the finding that the Plaintiff had contravened the PCMLTFA and for other declaratory and substantive relief. Among other claims, the Plaintiff sought a declaration that several provisions of the Act and Regulations and actions by the CBSA contravened the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (Charter).

10 Following the service and filing of the pleadings, and multiple exchanges between counsel, a Pre-Trial Conference was convened by Prothonotary Aalto on February 13, 2019. During that conference, the parties agreed to a settlement wherein the CBSA would return the Plaintiff's NEXUS card, reinstate his membership in the program and set aside the enforcement action. A draft settlement order in those terms was prepared by the Plaintiff's counsel and was sent to the Defendant's counsel on February 15, 2019.

11 It appears from the record that CBSA attempted to renege on the settlement when it became known that the Plaintiff's NEXUS card had expired prior to the agreement. Nonetheless, after some further exchanges, counsel for the Defendants prepared a draft order which included deadlines for the CBSA's compliance. This was accepted by the Plaintiff and submitted to the Court for approval. The Order was issued by Justice Barnes on March 12, 2019.

12 The March 12, 2019 Order set aside the finding in the Ministerial Decision that the Plaintiff had contravened the PCMLTFA and the related finding that the Plaintiff does not meet the "good character" requirement under s 6 (b) of the Regulations. The Court ordered further that the CBSA expunge all records that it held relating to the enforcement action and the cancellation of the Plaintiff's membership in the NEXUS program. The CBSA was ordered to reinstate Mr. Wachsberg's membership and his NEXUS card was to be returned to him forthwith and in any event within ten days of the date of the Order.

13 On March 21, 2019, counsel for the Defendants confirmed that the enforcement action had been canceled and requested an extension until April 1, 2019 to allow the CBSA to coordinate with US CBP to waive the usual risk assessment required to reinstate the Plaintiff's membership in the NEXUS program. The Plaintiff consented to this extension but was then required to attend an

interview with US CBP on April 24, 2019. During that interview, according to Mr. Wachsberg's uncontested evidence, a CBSA officer was present and referred to the enforcement action in the presence of the US CBP official contrary to an express understanding between the parties.

14 The Plaintiff received written notice on May 16, 2019 that his application for renewal of his NEXUS membership had not been approved by US CBP for "failure to meet the program eligibility requirements". In light of this, a Case Management Conference was convened on May 30, 2019. Following the conference, Justice Barnes issued a Direction to the Defendants requiring them to communicate with the appropriate United States authority responsible for the administration of the NEXUS program to determine the basis for the refusal to reinstate the Plaintiff's membership and to use their best efforts to have the Plaintiff's NEXUS membership reinstated by that authority.

15 On July 25, 2019, counsel for the Defendants provided the Plaintiff with a letter from the Executive Director of Admissibility and Passenger Programs at the Office of Field Operations of US CBP which provided a list of reasons as to why the Plaintiff may not qualify for the NEXUS program including the revocation of the Plaintiff's membership by the CBSA. The following month, the Plaintiff filed a Motion for an Order to Show Cause which was set down for a Case Management Conference on October 7, 2019.

16 At the October 7, 2019 conference, counsel for the Defendants claimed that US CBP's refusal to reinstate Mr. Wachsberg's membership was unrelated to the CBSA's enforcement action and was instead connected to an unspecified 2005 incident involving the Plaintiff. This was based on information counsel had received in a telephone call with an American official. Justice Barnes then issued a further Direction to the Defendants requiring that an appropriate representative of the CBSA write to the Executive Director of the United States Trusted Traveler Program seeking further and better information as to the reasons for the denial of the Plaintiff's NEXUS application with particular reference to the alleged event dating back to 2005.

17 It should be noted that the 2005 alleged event predated the start of the NEXUS program and the screening of the Plaintiff that would have been conducted by both CBSA and US CBP prior to the approval of his membership application.

18 Mr. John Ommanney, Director General of the Travelers Program at CBSA, wrote to officials of the US CBP on October 12, 2019 advising that, in order for the CBSA to fulfill its legal obligation to the Court, it would need to request that the reason(s) for the US CBP's denial be provided directly to Mr. Wachsberg.

19 No response having been received by December 9, 2019, the Plaintiff refiled his motion for an order to compel the Defendants to appear and show cause as to why they should not be found in contempt of the Order made by Mr. Justice Barnes on March 12, 2019. On the same date, the Plaintiff received correspondence from US CBP advising that the Plaintiff's NEXUS application was denied "due to failure to declare commercial merchandise on April 1, 2015." This was the first

time that any reference had been made to an allegation relating to any event in 2015. And in the subsequent two years, the Plaintiff had entered the United States on multiple occasions without difficulty.

20 The show cause motion came before Prothonotary Milczynski on January 28, 2020, together with the motion filed by the Defendants to dismiss the Plaintiff's action. The same date, Prothonotary Milczynski made an order dismissing both motions.

III. Decision under Appeal

21 Prothonotary Milczynski determined that the relief sought by both Plaintiff and Defendants should not be granted. With respect to the Defendants' motion, the Prothonotary held that the Plaintiff was entitled to pursue his action and, in the event he is successful, to whatever remedy the Court deemed appropriate. She considered that it would be appropriate for the action to be case managed and ordered that it be referred to the office of the Chief Justice for the appointment of a Case Management Judge.

22 Regarding the Plaintiff's motion, Prothonotary Milczynski held that despite the parties' intentions, as evidenced by the proposals sent by the Plaintiff, and the terms agreed to by the Defendants, the settlement had been frustrated. It could not be found to have been fulfilled or completed as the Plaintiff had not been reinstated in the NEXUS program and had not received his membership card as had been required. However, the Prothonotary found that neither the agreement of the parties nor this Court could compel the U.S. authorities to do anything regarding the Plaintiff's participation in the NEXUS program. She was not prepared to issue the show cause order in an effort to have the Defendants make further and better efforts to persuade the American authorities to relent. That option remained open to the parties to discuss at any time, she stated.

23 The Prothonotary held that "there was no *flouting* of a court order or *wilful and contumacious conduct*" [emphasis added] on the part of the Defendants that would warrant the issuance of a show cause order.

IV. Legislative Framework

24 Rule 51 (1) of the *Federal Courts Rules* provides that orders of prothonotaries may be appealed by a motion to a judge of the Federal Court.

> **Appeal**
>
> **51 (1)** An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.
>
> **Appel**

51 (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour.

25 The Rules define who may be found in contempt:

Contempt

466 Subject to rule 467, a person is guilty of contempt of Court who

. . .

b) disobeys a process or order of the Court;

. . .

Right to a hearing

467 (1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt

(a) to appear before a judge at a time and place stipulated in the order;

(b) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and

(c) to be prepared to present any defence that the person may have.

. . .

Burden of Proof

(3) An order may be made under subsection (1) if the Court is satisfied that there is a prima facie case that contempt has been committed.

Outrage

466 Sous réserve de la règle 467, est coupable d'outrage au tribunal quiconque:

. . .

b) désobéit à un moyen de contrainte ou à une ordonnance de la Cour;

. . .

Droit à une audience

467 (1) Sous réserve de la règle 468, avant qu'une personne puisse être reconnue coupable d'outrage au tribunal, une ordonnance, rendue sur requête d'une personne ayant un intérêt dans l'instance ou sur l'initiative de la Cour, doit lui être signifiée. Cette ordonnance lui enjoint:

a) de comparaître devant un juge aux date, heure et lieu précisés;

b) d'être prête à entendre la preuve de l'acte qui lui est reproché, dont une description suffisamment détaillée est donnée pour lui permettre de connaître la nature des accusations portées contre elle;

c) d'être prête à présenter une défense.

Fardeau de preuve

(3) La Cour peut rendre l'ordonnance visée au paragraphe (1) si elle est d'avis qu'il existe une preuve prima facie de l'outrage reproché.

V. Standard of Review on Appeal

26 The general principle is that appeals from orders of prothonotaries are to be decided on the basis of the material that was before the prothonotary: *Shaw v. R.*, 2010 FC 577 (F.C.). The Rules do not prescribe a Standard of Review on appeal from decisions of prothonotaries. However, since the Federal Court of Appeal's decision in *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215 (F.C.A.) (*Hospira Healthcare Corp.*), it is well-established that the Court may only interfere with a decision of a prothonotary if the prothonotary made an error of law or a palpable and overriding error regarding a question of fact or mixed fact and law: *Hospira Healthcare Corp.* at paras 64-65, 79. This is the standard enunciated by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) (*Housen*) for appellate review of decisions by trial judges.

27 An extricable error in principle, such as applying the wrong test for a civil contempt finding, constitutes an error of law invoking the correctness standard: *Housen* para 33. If the prothonotary has made an error of law, the reviewing court is entitled to intervene and substitute its own decision. No deference is required. With respect to factual conclusions, the reviewing court must defer unless the prothonotary has failed to give sufficient weight to the relevant circumstances or has misapprehended the facts.

VI. Issues

28 As noted in the introduction, the parties are in agreement that the Prothonotary erred in requiring proof that the Defendants intended to disobey Justice Barnes' March 12, 2019 Order.

They further agree that it is open to the Court to set aside the Prothonotary's dismissal of the show cause motion and direct the Prothonotary to reconsider the matter having regard to the correct test. Rather than do so, however, they are also in agreement that this Court should intervene and substitute its own decision on the motion. They disagree on what that decision should be.

VII. Analysis

29 In *Carey v. Laiken*, 2015 SCC 17 (S.C.C.) (*Carey*) the Supreme Court of Canada held that requiring proof that the alleged contemnor intended to disobey a court order imposed too high a test. At paragraphs 32 to 35, the Supreme Court set out the requirements:

> [32] Civil contempt has three elements which must be established beyond a reasonable doubt:... These three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases...
>
> [33] The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done"... This requirement of clarity ensures that a party will not be found in contempt where an order is unclear... An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning...
>
> [34] The second element is that the party alleged to have breached the order must've had actual knowledge of it... It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
>
> [35] Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels...
>
> [Citations and some text omitted]

30 It is clear from the record that the first two elements of the test have been met. It is not suggested that the Order is unclear or that the Defendants had no knowledge of it. Indeed, the evidence is that they drafted its terms and included time limits that the Plaintiff had not requested. The difficulty is with the third element. Did the Defendants intentionally fail to do the acts that the order compels? The Plaintiff contends he has clearly demonstrated a *prima facie* case to prove this. Not only did the Defendants delay in expunging the records of the enforcement action, his membership has not been restored and his NEXUS card has not been returned.

31 The Plaintiff argues that in addition to imposing an overly burdensome requirement that there be "willful and contumacious conduct" in order to warrant a *prima facie* contempt finding against the Defendants, the decision under appeal incorporates factors that are only relevant in the second stage of the process i.e. at the show cause hearing. Chief among these is the alleged

unenforceability of the Order. The Plaintiff submits that the objective impossibility of compliance is a defence that the alleged contemnor may pursue in the show cause hearing but does not factor into the test for getting to that stage. Had the matter solely concerned deletion of the records, the Defendants could argue that they had purged their contempt, albeit beyond the time period fixed by the Order. But they have no answer, the Plaintiff argues, to the failure to comply with the remainder of the Order.

32 In this instance, the Plaintiff contends the role of the US authorities has no bearing on whether the Defendants are *prima facie* in contempt of the Order and that the test has been met by the "numerous and flagrant refusals of the Defendants to take affirmative action in fulfilling the Court Order" and their failure to fulfill the Order to date.

33 Among the failures of the Defendants to comply with the Order, the Plaintiff points to CBSA's initial refusal to expunge all of its records relating to the enforcement action and their contention that the plain terms of the Order did not apply to their "internal records". This questionable interpretation of the Order was only abandoned two months after the Court-imposed deadline was passed and just prior to a further Case Management Conference where it was to have been a key issue. Belated compliance with this aspect of the Order may well have jeopardized the Plaintiff's eligibility for re-entry into the NEXUS program, the Plaintiff argues.

34 Further, a CBSA officer attended the Plaintiff's interview with US CBP and brought up the fact of the enforcement action contrary to the agreement of the parties and the clear intent of the Order. The CBSA officer's knowledge of the enforcement action could be interpreted as a "record", and as such disclosure of that fact was a clear breach. Whether this was done deliberately or was a blunder by the officer, the result was that US CBP was made aware, if it was not already, of the enforcement action prior to its assessment of the Plaintiff's re-application to the NEXUS program.

35 The Plaintiff argues the Defendants' assertion that the bi-lateral nature of the program prevented the CBSA from reinstating the Plaintiff's membership is incongruous with the Defendants' drafting of the consent order and their committing to an unconditional reinstatement of the membership.

36 While the Defendants concede the Prothonotary's error with respect to the test, they argue that intentional failure to comply must still be demonstrated in order to establish a *prima facie* case of contempt. The bare fact of a breach is insufficient. The moving party must demonstrate the intent to do the act or omission that has resulted in the breach. Here, they contend there is no evidence that the Defendants intended not to return the NEXUS Card to the Plaintiff or to effect his reinstatement in the program. The Order was frustrated not by their actions but by reason of the position taken by the U.S. authorities.

37 In support of their position, the Defendants rely on the doctrine of frustration as enunciated by the Supreme Court of Canada in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 (S.C.C.) at paras 53-56 [*Naylor Group Inc.*].

38 *Naylor Group Inc.* is a contract law case. The Appellant in that case argued that even if it was bound by the contract, it was relieved of any obligation to fulfill it by the supervening effect of a tribunal decision. At para 53, the Supreme Court stated that "[f]rustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract"". In such instances, the court is asked to intervene because a supervening event has occurred without the fault of either party: *Naylor Group Inc.* at para 55.

39 In my view, there was no supervening event that frustrated compliance with the March 12, 2019 Order. The Order was incapable of execution from the outset without the agreement of a third party who was not involved in the proceedings and did not consent to the settlement. The fatal flaw in the settlement agreement was that it ignored the fact that the Plaintiff's membership had expired by the date of the Order and could not be reactivated without a fresh application and acceptance by both agencies. Counsel for the Defendants acknowledged this in an email to the Plaintiff on March 26, 2019. This should have been considered and resolved before the consent order was placed before the Court for approval.

40 There appears to be no basis for the allegation, conveyed to the Court by counsel for the Defendants, that the Plaintiff had committed some transgression in 2005. His NEXUS application had been granted at the outset of the program in 2007 and renewed at least once. The subsequent explanation that he was denied "due to failure to declare commercial merchandise on April 1, 2015" is, in the circumstances, hard to credit. The Plaintiff appears to have had no difficulty using his NEXUS membership in the months prior to March 2017. But that explanation, even if spurious, is not reviewable by this Court. Nor does the refusal by the American authorities constitute an intentional act or omission by the Defendants amounting to a *prima facie* case of contempt for failing to comply with the Court's Order.

41 Thus I am unable to find that the prerequisites for a show cause hearing have been met. As much as I think it might be instructive to require the Defendants to appear before the Court to explain why they were unable to persuade their American counterparts to comply with the Order, I doubt that it would have any practical effect. Even if this Court were to agree that the Plaintiff had met the test to demonstrate that he had a *prima facie* case of civil contempt, the US CBP is a foreign agency which controls its own practices and procedures and has exercised its sovereign right to deny his application. For that reason I would not issue the requested Order.

VIII. Costs

42 In his motion record before the Prothonotary, the Plaintiff requested costs. While that request was not repeated in the appeal motion, I assume this was a simple oversight. The Defendants have requested costs on this appeal, which I would refuse to award them given the history described above.

43 The Court has considerable discretion under Rule 400 to award costs. In the ordinary course, the losing party is unlikely to receive a costs award; however, the "cardinal principle" is the full discretion of the trial judge (*Whalen v. Fort McMurray No. 468 First Nation*, 2019 FC 1119 (F.C.) at para 6). In making a costs determination, the Court will consider multiple factors under Rule 400(3), not only the result of the proceeding. This Court recently awarded costs to an Applicant who was unsuccessful in his judicial review, on the basis that the respondent failed to provide a timely or reasonable explanation for delay (*Cumming v. Canada (Royal Mounted Police)*, 2020 FC 271 (F.C.) at paras 34-36). In the present circumstances, although the main relief sought by the Plaintiff is not practicable, the Defendants' errors caused the problem which led to the proceedings below and on this appeal. That in my view justifies awarding costs to the Plaintiff both for this appeal and the motion before Prothonotary Milczynski payable in any event of the cause.

ORDER IN T-386-18

THIS COURT ORDERS that:

1. The Plaintiff's appeal of Prothonotary Milczynski's Order of January 28, 2020 is dismissed; and

2. The Plaintiff is awarded costs on the normal scale for this appeal and the motion below in any event of the cause.

Appeal dismissed.

2010 FC 1198, 2010 CF 1198
Federal Court

Warman v. Tremaine

2010 CarswellNat 4440, 2010 CarswellNat 4818, 2010 FC 1198,
2010 CF 1198, [2010] A.C.F. No. 1376, [2010] F.C.J. No. 1376,
195 A.C.W.S. (3d) 998, 378 F.T.R. 299 (Eng.), 91 W.C.B. (2d) 363

Richard Warman, Complainant and Canadian Human Rights Commission, Commission and Terry Tremaine, Respondent

Sean Harrington J.

Heard: November 8-12, 2010
Judgment: November 29, 2010
Docket: T-293-07

Counsel: Richard Warman, Complainant, for himself
Daniel Poulin, for Commission
Douglas H. Christie, for Respondent

***Sean Harrington J.*:**

1 The Canadian Human Rights Commission has proven beyond a reasonable doubt that Terry Tremaine has deliberately flaunted an order of the Canadian Human Rights Tribunal to cease communicating matters that are likely to expose persons to hatred or contempt on prohibited grounds. He is in contempt of the order of the Tribunal — indeed, he brags about it and admitted it before me. The issue, however, is whether he is in contempt of this Court. I reluctantly conclude he is not. The only reason he is not is that the Commission failed to bring to his attention the fact that it had registered the Tribunal's order with this Court.

2 Mr. Tremaine thinks (or perhaps just wishes) he is better than others because of the colour of his skin. He is a white supremacist. Although his dislike of others based on the colour of their skin knows no bounds, he has particular enmity for blacks and Canada's aboriginal peoples.

3 He is also a neo-Nazi. He is virulently anti-Jewish. He draws no distinction between Jewishness and Zionism. According to him, Jews are parasites who will take over the world unless they are stopped. The blacks are their stupid lackeys and the First Nations are in league with them. He is fond of Adolph Hitler; who got it right - even though the holocaust is a hoax.

4 Not content to keep his thoughts to himself, he has used the Internet to place them where they can be found. He claims to be the leader of an unregistered political party, the National Socialist Party of Canada (NSP Canada), and in connection therewith has personally set up a website. He has also regularly posted messages on Stormfront, an American website. Stormfront's motto is "White Pride-World Wide." Richard Warman, who has made it a practice for 20 years to search the Internet for what he considers hate messages, complained about Mr. Tremaine to the Canadian Human Rights Commission. The Commission investigated and determined the complaint should be referred to the Tribunal.

5 After the hearing, at which both Mr. Warman and Mr. Tremaine testified, and a number of entries from the NSP Canada website and his postings on Stormfront were exhibited, the Tribunal issued a cease-and-desist order and fined Mr. Tremaine $4,000.

6 The decision and order were issued 2 February 2007 and are reported at 2007 CHRT 2, 59 C.H.R.R. D/391 (Can. Human Rights Trib.). Section 57 of the *Canadian Human Rights Act* provides that an order of the Tribunal may be made an order of the Federal Court for the purpose of enforcement by filing a certified copy with the Federal Court Registry. That was done on 13 February 2007. Neither the Act, the *Federal Courts Act*, nor the *Federal Courts Rules* specifically require that a copy of the Federal Court certificate be served upon the respondent, and it must be kept in mind that it was not obligatory for the order to be registered with the Federal Court in the first place.

7 Mr. Tremaine was obviously aware of the Tribunal's decision, as he sought judicial review thereof from this Court. In *Warman v. Tremaine*, 2008 FC 1032, 334 F.T.R. 78 (Eng.) (F.C.), Madam Justice Snider dismissed his application. To the extent there were legal issues involved, such as there being no defence of fair comment, she held that the Tribunal was correct. Otherwise the applicable standard of review was reasonableness. She found the decision to be reasonable. Mr. Tremaine did not appeal.

8 In March 2009, the Commission moved this Court for a show cause order that Mr. Tremaine ultimately be found in contempt of court. Included in the motion material served on Mr. Tremaine was a copy of the certificate from the Federal Court evidencing that the Tribunal's decision and order had been registered with the Court on 13 February 2007. The motion was supported by an affidavit from Mr. Warman exhibiting Internet downloads in 2007, after the order had been registered. These downloads were from Mr. Tremaine's website NSP Canada and from Stormfront. For various reasons, the motion for show cause was only heard on 17 June 2010. By then, the record had been bolstered by a second affidavit from Mr. Warman. Satisfied that a *prima face* case had been made out, I issued a show cause order, on 22 June 2010, reported as *Warman v. Tremaine*, 2010 FC 680, [2010] F.C.J. No. 1002 (F.C.).

Contempt of Court: A Three-Step Process

9 By way of introduction, distinctions must be drawn between criminal contempt and civil contempt; between contempt in the face of the Court (*in facie curiae)* or not (*ex facie curiae*) and between tribunals which are courts of record, and those which are not. There are a great many cases on point. It is not necessary to cite them all. In *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.), the Supreme Court distinguished "criminal contempt" from "civil contempt" on the basis that there is an element of public defiance that accompanies "criminal contempt." It must be proven beyond a reasonable doubt that the contemptor defied an order in a public way, with intent, knowledge or at least reckless to the fact that the public disobedience would tend to depreciate the authority of the Court. The Commission does not submit that Mr. Tremaine is guilty of criminal intent. I agree that this is a "civil contempt" case.

10 The distinction between *in facie* contempt and *ex facie* contempt is that inferior courts only have inherent jurisdiction with respect to *in facie* contempt, while other bodies, such as the Canadian Human Rights Tribunal, only have such powers as conferred upon them by statute. This is a case of *ex facie* contempt.

11 This brings us to the third preliminary point, the status of the body whose orders have been defied. It was held by the Supreme Court in *Canadian Broadcasting Corp. v. Quebec (Police Commission)*, [1979] 2 S.C.R. 618 (S.C.C.), that the Commission had no power to punish the CBC for violating a publication ban. That is the rule applicable to bodies which are not courts of record, absent specific legislation (*Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394 (S.C.C.)) and the rule applicable here. However the court of record with which a decision is registered for enforcement purposes, including this Court, may cite for contempt of that decision (*Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.)).

12 For a general analysis of the law of contempt, see Miller, *The Law of Contempt in Canada* (Carswell: Toronto, 1997).

13 Rule 466 and following of the *Federal Courts Rules* reflect the common law. They provide, among other things, that a person who disobeys a process or order of the Court, or acts in such a way as to interfere with the orderly administration of justice or to impair the authority or dignity of the Court is guilty of contempt of court.

14 The first step, which may be made *ex parte* if the Court so wishes (*Canada (Human Rights Commission) v. Winnicki*, 2006 FC 350 (F.C.)), is a motion for a show cause order. As aforesaid, that order will be issued if the Court is satisfied that a *prima face* case has been made. If a show cause order is not issued, that is the end of the matter, subject to appeal. If issued, the person alleged to be in contempt is served with the order requiring him to appear and to be prepared to hear proof of the act with which he is charged, which must be described with sufficient particulars. He should be prepared to present any defence he may have. Unless otherwise directed, the evidence is oral. The person alleged to be in contempt need not testify, and a finding of contempt must be based

on proof beyond a reasonable doubt. If, as in this case, there is no finding of contempt, that is the end of the matter, subject again to the right of appeal.

15 If a finding of contempt is made, then the third stage deals with the appropriate sentence (*Canada (Human Rights Commission) v. Winnicki*, 2007 FCA 52, 359 N.R. 101 (F.C.A.)). A person found in contempt may be imprisoned for up to five years, less a day, or until he or she complies with the order.

The Case Against Mr. Tremaine

16 The case against Mr. Tremaine was set out as follows in the show cause order:

> Mr. Tremaine is to be prepared to hear proof of the Act of contempt with which he is charged, namely failing to cease and desist as ordered in the decision of the Canadian Human Rights Tribunal, dated 2 February 2007, the particulars of such failure being found in the affidavits of Richard Warman, dated 12 February 2009 and 19 March 2010, and to be prepared to present any defence that he may have.

17 The three pronged test for civil contempt was summarized by the Ontario Court of Appeal in *G. (N.) c. Services aux enfants & adultes de Prescott-Russell* (2006), 82 O.R. (3d) 686 (Ont. C.A.), at paragraph 27:

> The criteria applicable to a contempt of court conclusion are settled law. A three-pronged test is required. First, the order that was breached must state clearly and unequivocally what should and should not be done. Secondly, the party who disobeys the order must do so deliberately and wilfully. Thirdly, the evidence must show contempt beyond a reasonable doubt. Any doubt must clearly be resolved in favour of the person or entity alleged to have breached the order. [Citations omitted.]

That case was applied by the same Court in *Bell ExpressVu Ltd. Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614 (Ont. C.A.), and in *Hobbs v. Hobbs*, 2008 ONCA 598, 54 R.F.L. (6th) 1 (Ont. C.A.), which states it must be clear to a party exactly what must be done to be in compliance with the terms of an order. These cases were all favourably referred to by Mr. Justice Martineau, of this Court, in *Canadian Private Copying Collective v. Fuzion Technology Corp.*, 2009 FC 800, 349 F.T.R. 303 (Eng.) (F.C.).

18 What was actually ordered in this case? The order of the Tribunal reads:

> [169] For the foregoing reasons, the Tribunal finds that the complaint against Terry Tremaine is substantiated and orders that:
>
> > Terry Tremaine, and any other individuals who act in concert with Mr. Tremaine, cease the discriminatory practice of communicating telephonically or causing to

be communicated telephonically by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, material of the type that was found to violate section 13(1) in the present case, or any other messages of a substantially similar content, that are likely to expose a person or persons to hatred or contempt by reason of the fact that that person or persons are identifiable on the basis of a prohibited ground of discrimination, contrary to section 13(1) of the *Canadian Human Rights Act*.

19 The Commission submitted that Mr. Tremaine was in contempt of the Tribunal's order in two respects. The first is that he allowed the hate messages identified in the Tribunal's reasons to remain on the Internet. The second is that he continued to post fresh material of the type that was found to violate section 13(1) of the *Canadian Human Rights Act*.

20 On the first point, it was established that Mr. Tremaine was, and is, the webmaster of the NSP Canada website and was, and is, technically able to remove the messages specifically identified by the Tribunal.

21 Although not Stormfront's webmaster, at the very least, it was submitted, he could have requested them to remove his own postings, which formed part of conversation "threads". Stormfront may or may not have agreed. It is open to this Court to order someone within the jurisdiction to request someone outside the jurisdiction to do or not do something. Consider the case of *Smith v. Canada (Attorney General)*, 2009 FC 228, [2010] 1 F.C.R. 3 (F.C.), where Mr. Smith was, and still is, on death row in Montana. Mr. Justice Barnes declared that the respondent's decision to withdraw diplomatic support for his claim to clemency was unlawful and ordered him to renew all reasonable steps to support his case before the Government of Montana. The intercessions have not been successful to date. An order to make submissions has also been at the heart of the various *Khadr* decisions (*Khadr v. Canada (Prime Minister)*, 2010 SCC 3, [2010] 1 S.C.R. 44 (S.C.C.)).

Mr. Tremaine's Defence

22 Mr. Tremaine does not defend himself on the basis that the postings subsequent to the Tribunal's order and registration thereof with this Court were not of the type found to violate section 13(1) of the *Canadian Human Rights Act*. Indeed, it is beyond any doubt that the messages are of the same type. Nor does he take the position that there is insufficient connection with Canada to try him for contempt. Rather he has defended himself on the bases that:

a. he was not served with the certificate that the Tribunal's order had been registered with this Court until after the alleged infractions thereof were committed;

b. in any event, he was not ordered to delete existing messages from his website and was not ordered to request Stormfront to do likewise;

c. he did not violate section 13(1) of the *Canadian Human Rights Act* because:

i. he did not "communicate"; or

ii. if he did, it was not telephonically or by means of a federal telecommunication undertaking;

d. he was under order of the Court of Queens' Bench of Saskatchewan not to access the Internet; and

e. he is being persecuted by Mr. Warman.

23 Mr. Tremaine's overriding defence is that he did not know the Tribunal's order had been registered with this Court until August 2010, when he was specifically so served. He had no intention of defying this Court. However, the certificate formed part of the show cause material served upon him in March 2009. He may not have appreciated that the material included the Federal Court certificate, but he was certainly aware of the show cause motion as he personally attended at the hearing originally scheduled for July 2009, a hearing which was postponed. The only change of circumstances between those two dates is one posting on Stormfront's site on 22 July 2009, a posting which was not identified in Mr. Warman's material which formed the basis of the show cause order. Consequently, it is not necessary to determine precisely when Mr. Tremaine was imparted with knowledge, as that posting does not form part of the case against him.

24 The applicant must always establish that the alleged contemptor had knowledge of the order alleged to have been breached. In *Bhatnager v. Canada (Minister of Employment & Immigration)*, [1990] 2 S.C.R. 217 (S.C.C.), Mr. Justice Sopinka, speaking for the Court, stated at paragraph 16:

> On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a precondition to liability in contempt. Almost two centuries ago, in *Kimpton v. Eve* (1813), 2 V. & B. 349, 35 E.R. 352, Lord Chancellor Eldon held that a party could not be held liable in contempt in the face of uncontradicted evidence that he or she had no knowledge of the order. In *Ex parte Langley* (1879), 13 Ch. D. 110 (C.A.), Thesiger L.J. stated the principle as follows, at p. 119:
>
>> ... the question in each case, and depending upon the particular circumstances of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which had been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.

25 The Commission has established beyond a reasonable doubt that Mr. Tremaine had early knowledge of the order of the Tribunal. However, it has not established that he had knowledge

that the order had been registered with this Court until March 2009 at the earliest. As mentioned above, there is one posting in issue between March and August 2009, a posting on the Stormfront site which was not part of the case Mr. Tremaine was called upon to meet. All that need be said at this time is that in that posting Mr. Tremaine expressed dissatisfaction with the decision of Madam Justice Snider in which she dismissed his application for judicial review of the Tribunal's decision.

26 Mr. Poulin, on behalf of the Commission, submits that the distinction between the Tribunal's order, and the registration thereof with this Court, is artificial. While I agree that it would not be necessary to serve or otherwise provide notice of the certificate of registration before enforcing an order, say a money order, the Canadian Human Rights Tribunal itself has no inherent jurisdiction to enforce its orders, by way of injunction or otherwise, or to find someone in contempt. The lynchpin has to be the registration of the order with this Court, and in cases of contempt knowledge thereof.

27 In *Taylor*, above, which upheld the constitutional validity of section 13(1) of the Act, Chief Justice Dickson stated at paragraph 72:

> ...Indeed, the risk that incarceration will follow the unknowing transmission of discriminatory messages is further reduced by the requirement that a contempt order be based upon a finding that an individual has wilfully engaged in action prohibited by a court order (*Re Sheppard and Sheppard* (1976), 67 D.L.R. (3d) 592 (Ont. C.A.), at pp. 595-96). In short, a term of imprisonment is only possible where the respondent intentionally communicates messages which he or she knows have been found likely to cause the harm described in s. 13(1), and I therefore cannot agree that the possibility of a contempt order issuing against an individual unduly chills the freedom of expression.
>
> [My Emphasis.]

In that case, like this one, the Tribunal's order had been registered with this Court. It was violation of the Court order, not the Tribunal order, which led to contempt.

28 The charges of contempt, as set out in the show cause order, must be dismissed since all of the events occurred before Mr. Tremaine had knowledge of court registration.

29 I also accept Mr. Tremaine's defence that the order did not make it sufficiently clear that he was ordered to remove, or at least exercise his best efforts to have removed, from the Internet the material found hateful by the Tribunal, and material of like nature posted up to that time. The order was with respect to "material of the type which was found to violate section 13(1)", not the material which was actually found to violate section 13(1). "Material of the type" is not the same material.

30 Mr. Tremaine also submitted that he did not "communicate" within the meaning of section 13(1) of the Act. What Mr. Tremaine did was "upload" from his computer in Canada to websites located in the United States. He was the only person involved in that process. Mr.

Warman "downloaded" from those American websites to his computer in Canada. Without Mr. Warman's intervention there was no completed communication, and so it was Mr. Warman who communicated, not Mr. Tremaine.

31 The submission that the communication was not done telephonically or by means of a federal telecommunication undertaking is based on section 13(2) of the Act which reads:

> (2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.
>
> (2) Il demeure entendu que le paragraphe (1) s'applique à l'utilisation d'un ordinateur, d'un ensemble d'ordinateurs connectés ou reliés les uns aux autres, notamment d'Internet, ou de tout autre moyen de communication semblable mais qu'il ne s'applique pas dans les cas où les services d'une entreprise de radiodiffusion sont utilisés.

32 This amendment was made after 9-11. It obviously postdates *Taylor*, and its constitutionality has not been finally determined. In any event, the submission is that the order did not prohibit Mr. Tremaine from using the Internet.

33 It is far too late to make these arguments in this case. No constitutional question was ever submitted as required by section 57 of the *Federal Courts Ac*t and it has been held time and time again, including in *Taylor*, that the alleged invalidity of a court order cannot serve as an excuse to disobey it. The order itself must be set aside.

34 Furthermore, section 13(2) of the Act is merely declaratory. As the order itself refers specifically to the reasons which preceded it, and since those reasons dealt at length with both "communication" and the "Internet", it was not necessary to refer to the Internet in the order itself.

35 Mr. Tremaine was not represented by legal counsel before the Tribunal or in the application for judicial review before Madam Justice Snider. That does not permit his present counsel, Mr. Christie, to raise these points now. When the right case comes along, he will have to deal with the decision of the Federal Court of Appeal in *Bell Canada v. Society of Composers, Authors & Music Publishers of Canada*, 2010 FCA 220, 323 D.L.R. (4th) 42 (F.C.A.), a case which dealt with downloading music from the Internet. At paragraph 39, Mr. Justice Pelletier stated:

> In my view, there is authority to support the proposition that whether or not a communication is a communication to the public is a function of two factors: the intention of the communicator, and the reception of the communication by at least one member of the public. If those two conditions are met, then there has been a communication to the public.

36 The material posted by Mr. Tremaine on the Internet also led to charges being laid in Saskatchewan under section 319(2) of the *Criminal Code* that he had communicated statements wilfully promoting hatred against an identifiable group. One of his bail conditions was that he not access the Internet. However that condition was only issued in January 2008, and has no bearing on his contemptuous behaviour during 2007. His bail conditions were subsequently relaxed somewhat, again a matter not relevant to the present case.

37 Finally, Mr. Warman's character was called into question during cross-examination. He wrote a letter to the University of Saskatchewan where Mr. Tremaine was a part-time lecturer. Shortly after his contract was not renewed. It was suggested this led to his impecuniosity so that he could not retain counsel to represent him before the Tribunal and at the judicial review. He has sued over 50 entities for defamation. He has been awarded damages and costs and has built a reputation based on his complaints to the Canadian Human Rights Commission, where he once worked. He was criticized by one of the Tribunal's panels. I stated during the hearing, and I repeat now, that none of this is relevant to the case at bar. Mr. Warman did not participate in any Stormfront conversation thread and cannot be said to have entrapped Mr. Tremaine in any way.

Costs

38 There is no reason to depart from the normal practice that costs follow the event. However since the motion for contempt is being dismissed because the moving party, the Commission, failed to take steps to inform Mr. Tremaine that the Tribunal's order had been registered with this Court, costs shall be against it only.

Order

UPON A SHOW CAUSE HEARING that Mr. Tremaine be found in contempt of court;

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The motion is dismissed, with costs against the Canadian Human Rights Commission.

2. Mr. Warman shall neither benefit from nor be burdened with costs.